



## Foreign Ownership Control and the Bilateral Investment Treaties in South Asian Countries

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

**Keywords:** Bilateral Investment Treaties, Foreign Ownership Control, Foreign Direct Investment, Legal Protections, World Trade Organization

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**Abstrak.** Dalam ketiadaan perjanjian global tertentu, Perjanjian Investasi Bilateral memainkan peran penting dalam mengatur investasi asing di negara tuan rumah. Menurut Konferensi Perserikatan Bangsa-Bangsa tentang Perdagangan dan Pembangunan, saat ini terdapat 2361 perjanjian investasi bilateral yang berlaku, dan seperti anggota lain Organisasi Perdagangan Dunia, Bangladesh juga telah menandatangani perjanjian investasi bilateral untuk memfasilitasi perdagangan. Tujuan utama dari globalisasi ekonomi adalah pengembangan ekonomi bagi negara-negara berkembang dan yang paling kurang berkembang serta memfasilitasi manfaat bagi negara asal. Hukum investasi asing dan perjanjian investasi bilateral Bangladesh pada dasarnya melindungi investor asing, namun keduanya tidak memiliki ketentuan khusus untuk mengendalikan kepemilikan asing. Makalah ini mengangkat dua pertanyaan: (a) Apakah perjanjian investasi bilateral Bangladesh memungkinkan negara tuan rumah mengendalikan kepemilikan asing? (b) Haruskah kepemilikan asing dikendalikan selama masuknya investasi langsung asing di Bangladesh? Dengan menggunakan metode penelitian doktrinal, kami secara kritis menganalisis 15 perjanjian investasi bilateral untuk mengeksplorasi apakah terdapat referensi pengendalian kepemilikan asing di Bangladesh. Kami menemukan bahwa perjanjian investasi bilateral Bangladesh yang ada memiliki ketentuan untuk mempromosikan dan melindungi investasi asing tetapi tidak memiliki referensi pengendalian kepemilikan asing. Oleh karena itu, pemerintah Bangladesh sebaiknya mempertimbangkan faktor penting ini saat menandatangani perjanjian investasi bilateral di masa depan.

**Kata kunci:** Perjanjian investasi bilateral, Pengendalian kepemilikan asing, Investasi langsung asing, Perlindungan hukum, Organisasi Perdagangan Dunia

## 1. Introduction

The Bilateral Investment Treaties (BITs) are a kind of mutual agreement between two capital importing and exporting states, which regulates the foreign investment in host state.<sup>1</sup> Bilateral Investment Treaties (BITs) play a significant role in facilitating international trade and investment by providing a legal framework that promotes and protects foreign investment between two countries. These treaties are agreements between two nations aimed at promoting and protecting foreign investments made by individuals, companies, or entities from one country in the territory of the other.<sup>2</sup>

The key objective is to safeguard the foreign investment against nationalisation or expropriation and in case any of them occurs, obtain compensation as per international minimum standard.<sup>3</sup> One of the key concerns for foreign investors is the risk of nationalization or expropriation by the host country's government. Nationalization refers to the government taking over private assets or industries and bringing them under state control.<sup>4</sup> Expropriation involves the government seizing foreign-owned assets without consent, usually for public purposes, and providing compensation. To safeguard foreign investments against nationalization or expropriation, BITs typically include provisions that offer certain protections to investors.<sup>5</sup> These provisions may include the principle of Non-Discrimination. BITs often contain provisions that ensure foreign investors are treated fairly and equally in comparison to domestic investors and other foreign investors.<sup>6</sup> This principle is known as national treatment and most-favored-nation treatment. National treatment ensures that foreign investors receive the same treatment as domestic investors in similar circumstances. Most-favored-nation treatment

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<sup>1</sup> Rudolf Dolzer and Margrete Stevens, *Bilateral investment treaties* (Leiden: Martinus Nijhoff Publishers, 1995), 14.

<sup>2</sup> Kenneth J. Vandevelde, "The political economy of a bilateral investment treaty," *American Journal of International Law* 92, no. 4 (1998): 621. See also, Eric Neumayer and Laura Spess, "Do bilateral investment treaties increase foreign direct investment to developing countries?," *World development* 33, no. 10 (2005): 1567.

<sup>3</sup> Mary Hallward-Driemeier, "Do Bilateral Investment Treaties Attract Foreign Direct Investment? Only a Bit ... and They Could Bite," *Policy Research Working Papers*, No. 3121, The World Bank, 2003, 4.

<sup>4</sup> Paul E. Comeaux and N. Stephan Kinsella, "Reducing Political Risk in Developing Countries: Bilateral Investment Treaties, Stabilization Clauses, And Miga & Opic Investment Insurance," *NYLS Journal of International and Comparative Law* 15, no. 1 (1994): 2.

<sup>5</sup> Jeswald W. Salacuse, "BIT by BIT: The growth of bilateral investment treaties and their impact on foreign investment in developing countries," *The International Lawyer* 24, no. (1990): 656.

<sup>6</sup> Kenneth J. Vandevelde, "The Economics of Bilateral Investment Treaties," *Harvard international law journal* 41, no. 2 (2000): 469.

ensures that foreign investors are treated no less favorably than investors from any other country.

The next principle adhered is Fair and Equitable Treatment (FET).<sup>7</sup> This provision requires the host country to treat foreign investors in a manner that is fair, equitable, and transparent. It prevents the host country from taking actions that could harm the investments or frustrate the investor's legitimate expectations. Regarding expropriation and compensation, BITs often include provisions that outline the conditions under which expropriation can occur.<sup>8</sup> If expropriation does happen, the host country is usually required to provide prompt and adequate compensation to the affected investor. This compensation should generally be equivalent to the market value of the expropriated investment. BITs also cover the repatriation of profits and capital. Many BITs grant foreign investors the right to repatriate their profits, dividends, and other earnings back to their home country without unreasonable restrictions.<sup>9</sup> Regarding dispute resolution, BITs often establish mechanisms for resolving disputes between investors and host countries.<sup>10</sup> This can include negotiation, mediation, and arbitration. The inclusion of investor-state arbitration allows investors to directly bring claims against host countries, bypassing domestic courts.<sup>11</sup> It's important to note that while BITs aim to protect foreign investments, they can also be a subject of debate and controversy. Some argue that overly investor-friendly provisions might limit the regulatory sovereignty of host countries and can lead to a situation where investors have undue influence. On the other hand, proponents of BITs highlight the importance of providing a stable and predictable environment for foreign investments, which can contribute to economic growth and development. The balance between investor protection and host country sovereignty is a complex

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<sup>7</sup> Graham Mayeda, "Playing Fair: The Meaning of Fair and Equitable Treatment in Bilateral Investment Treaties," *Journal of World Trade* 41, no. 2 (2007): 274.

<sup>8</sup> Tom Ginsburg, "International substitutes for domestic institutions: Bilateral investment treaties and governance," *International Review of Law and Economics* 25, no. 1 (2005): 107.

<sup>9</sup> Jennifer Tobin and Susan Rose-Ackerman, "Foreign direct investment and the business environment in developing countries: The impact of bilateral investment treaties," *Research Paper No. 293*, Center for Law, Economics and Public Policy, Yale Law School, 4. See also, Matthias Busse, Jens Körner, and Peter Nunnenkamp, "FDI promotion through bilateral investment treaties: more than a bit?," *Review of World Economics* 146 (2010): 147.

<sup>10</sup> Michael Frenkel and Benedikt Walter, "Do bilateral investment treaties attract foreign direct investment? The role of international dispute settlement provisions," *The World Economy* 42, no. 5 (2019): 1316.

<sup>11</sup> Gaetan Verhoosel, "The use of investor-state arbitration under bilateral investment treaties to seek relief for breaches of WTO law," *Journal of International Economic Law* 6, no. 2 (2003): 493. See also, Stephen E. Blythe, "The Advantages of Investor-State Arbitration as a Dispute Resolution Mechanism in Bilateral Investment Treaties," *The International Lawyer* (2013): 273.

issue that continues to be discussed and renegotiated in international investment law and policy.<sup>12</sup>

Depending on the individual investment concerned, the negotiators of both countries determine the terms and conditions of the BITs. Thus, there may be many BITs between the same countries but each of them may have different terms and conditions to determine their obligations.<sup>13</sup> When a BIT is concluded, is applicable to nationals and companies in both countries under the local foreign direct investment (FDI) laws and policies. Each country has its own set of regulations and policies governing foreign direct investment (FDI) within its borders. BITs do not replace these local frameworks but can complement them by offering additional protections and mechanisms for dispute resolution.<sup>14</sup> The local FDI framework outlines the rules and regulations foreign investors must follow when entering the host country's market, and BITs provide an extra layer of security for those investments. As BITs are mainly created by the negotiation of the two countries and by nature, differ from each other, therefore, till to date there is no global treaty which could regulate all BITs in the world.<sup>15</sup> BITs play a pivotal role in facilitating foreign investments between two countries, benefiting both nationals and companies operating under the local foreign direct investment framework. These treaties provide legal protections and mechanisms for dispute resolution that can contribute to a more predictable and stable investment environment. However, the negotiation and interpretation of BITs require careful consideration of the interests of both host countries and foreign investors.<sup>16</sup>

Bangladesh has signed BITs with countries from different regions, including both developed and developing nations.<sup>17</sup> Since independence, Bangladesh has

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<sup>12</sup> Jennifer Bird-Pollan, "The sovereign right to tax: How bilateral investment treaties threaten sovereignty," *Notre Dame Journal of Law, Ethics & Public Policy* 32 (2018): 107. See also, Adaeze Agatha Aniodoh, "Host States' Monetary Sovereignty Within the Construct of Bilateral Investment Treaties," *Journal of African Law* 65, no. 1 (2021): 23; Jan Kleinheisterkamp, "Investment treaty law and the fear for sovereignty: transnational challenges and solutions," *The Modern Law Review* 78, no. 5 (2015): 793.

<sup>13</sup> Bernard Kishoiyian, "The utility of bilateral investment treaties in the formulation of customary international law," *Northwestern Journal of International Law & Business* 14, no. 2 (1994): 327.

<sup>14</sup> Tarcisio Gazzini, "Bilateral investment treaties and sustainable development," *The Journal of World Investment & Trade* 15, no. 5-6 (2014): 930. See also, Jeswald W. Salacuse and Nicholas P. Sullivan, "Do BIT's Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain," *Harvard international law journal* 46, no. 1 (2005): 67-130.

<sup>15</sup> Mohammad Belayet Hossain and Saida Talukder Rahi, "International Economic Law and Policy: A Comprehensive and Critical Analysis of the Historical Development," *Beijing Law Review* 9, no. 04 (2018): 524.

<sup>16</sup> Andrew Kerner, "Why should I believe you? The costs and consequences of bilateral investment treaties," *International Studies Quarterly* 53, no. 1 (2009): 73.

<sup>17</sup> Prabhash Ranjan, "Definition of Investment in Bilateral Investment Treaties of South Asian Countries and Regulatory Discretion," *Journal of International Arbitration* 26, no. 2 (2009): 117.

signed 30 BITs with different countries in the world and has signed its first BIT with United Kingdom in 1980. The BITs cover a wide range of sectors, including trade, services, technology transfer, and more. In recent years, there has been a global reevaluation of the terms and conditions of BITs. Some countries have sought to revise or renegotiate their treaties to address concerns about the balance between investor protection and the host country's regulatory sovereignty. Many BITs include investor-state dispute settlement (ISDS) mechanisms that allow foreign investors to bring claims against the host country's government. This provides an alternative route for dispute resolution outside of domestic courts.<sup>18</sup> However, the ISDS mechanism has also been a subject of debate due to concerns about sovereignty and the potential for investor-state claims to impact policy decisions.<sup>19</sup> This has led to discussions about the inclusion of more balanced provisions and the potential exclusion of the ISDS mechanism. While BITs provide additional protections for foreign investors, Bangladesh's domestic legal framework also plays a significant role in regulating foreign investments. This includes laws and regulations related to investment, taxation, labor, environmental protection, and other areas that may impact business operations. BITs typically include provisions that protect foreign investors against arbitrary or discriminatory actions by the host country's government. These protections extend to matters of foreign ownership and control. Foreign investors are generally assured that their investments will not be subject to unfair or unjust treatment that could impact their ownership and control over those investments. This paper analysed the BITs signed by Bangladesh with 15 countries in order to find out if they cover (fully or partly) foreign ownership control.

## 2. Research Methods

The aim of this study was to identify whether bilateral investment treaties have any provision of controlling foreign ownership in Bangladesh. The questions of this study are:

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<sup>18</sup> Jeswald W. Salacuse, "Is There a Better Way? Alternative Methods of Treaty-Based, Investor-State Dispute Resolution," *Fordham International Law Journal* 31, no. 1 (2007): 139.

<sup>19</sup> August Reinisch, "The scope of investor-state dispute settlement in international investment agreements," *Asia Pacific Law Review* 21, no. 1 (2013): 3. See also, Emma Aisbett, Matthias Busse, and Peter Nunnenkamp. "Bilateral investment treaties as deterrents of host-country discretion: the impact of investor-state disputes on foreign direct investment in developing countries," *Review of World Economics* 154 (2018): 119. See also, Matthew C. Porterfield, "Exhaustion of Local Remedies in Investor-State Dispute Settlement: An Idea Whose Time Has Come?," *Yale Journal of International Law Online* 41 (2015): 1-12.

- a. Do the bilateral investment treaties of Bangladesh allow the host state to control foreign ownership?
- b. Should the foreign ownership be controlled during the entry of FDI in Bangladesh?

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

### **3. Results and Discussion**

#### **3.1. Foreign Direct Investment and Bilateral Trade Agreements**

Dunning's so-called OLI (Ownership- Location- Internalization) model states that FDI is undertaken if ownership-specific advantages ("O") like proprietary technology be existent concurrently with location-specific advantages ("L") in host countries, *e.g.*, low factor costs, and potential benefits from internalisation ("I") of the production process overseas.<sup>20</sup> Since 1990s due to the growth of multinational enterprises, the world witnessed a rapid proliferation of BITs. As such, the number of BITs in the world reached to 2971 as of January 2019, up from 385 at the end of the 1980s. Therefore, the analytical focus of empirical models on the factors determining FDI has shifted from conventional determinants of locational advantages to policy-oriented issues, like exchange rate and openness as well as to the governance and human development areas and lately to liberalization under BITs, bilateral trade agreements (BTAs) and regional trade agreements (RTAs).<sup>21</sup>

Basically, there is inadequate and alternate indication of the FDI effects of BITs, especially in the perspective of developing and least-developed host states. Egger and Pfaffermayr analysed OECD data and found that due to the signing of BITs by the developing host states, it encourages the foreign investors to choose to invest in the developing states.<sup>22</sup> Busse also concluded the same as Egger and

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<sup>20</sup> John H. Dunning, "Trade, location of economic activity and the MNE: A search for an eclectic approach," in *The international allocation of economic activity: proceedings of a Nobel Symposium held at Stockholm*, ed. Bertil Ohlin, Per-Ove Hesselborn, and Per Magnus Wijkman (London: Palgrave Macmillan UK, 1977), 395.

<sup>21</sup> Muhammad Shariat Ullah and Kazuo Inaba, "Liberalization and FDI Performance: evidence from ASEAN and SAFTA member countries," *Journal of Economic Structures* 3, no. 1 (2014): 1.

<sup>22</sup> Peter Egger and Michael Pfaffermayr, "The impact of bilateral investment treaties on foreign direct investment," *Journal of comparative economics* 32, no. 4 (2004): 788.

Pfaffermayr.<sup>23</sup> Plummer and Cheong<sup>24</sup> reveals that BITs signed by the ASEAN states exert affirmative but trivial effects on inward FDI but Ullah<sup>25</sup> found a negative important effect for the complete example of 34 home and 74 host states. Mina asserts that FDI-seeking host states may perhaps make an effort to sign BITs in tandem with improving their institutional functions.<sup>26</sup> Hallward-Driemeier finds modest proof that BITs have encouraged FDI flows from the OECD countries to the least-developed and developing states.<sup>27</sup>

Blonigen and Wang contend that in the least-developed and developing states the factors determining the location of FDI differ steadily in a way that is not captured by the present experimental models of FDI.<sup>28</sup> Chantarasawat analysed Asian host states of both major FDI-making countries (e.g., the Republic of Korea, Malaysia, and Singapore) and major FDI-seeking countries (e.g., Indonesia and Thailand) and found that countries' performances in hosting FDI differ significantly.<sup>29</sup> Plummer and Cheong<sup>30</sup> and Vogiatzoglou<sup>31</sup> also concluded that the FDI effects of BITs and of institutional characteristics are quite insufficient in the perspective of states that are principally FDI-receiving, instead of FDI-making. Therefore, it is noticeable that the literature lacks consensus on the relationship between FDI and BITs.

The FDI is seen as producing unequal income distribution, which in turn may result in less growth. It is said that FDI creates a foreign dominated local high income-group or elite who formulate policies and enact laws that protect foreign interest and ignore the needs of the people. The result is smaller income shares and lower standard of living for majority of the people in the host country.<sup>32</sup> In other cases, foreign investment is prohibited or discouraged from areas or activities

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<sup>23</sup> Busse, Königer, and Nunnerkamp, "FDI promotion," 148.

<sup>24</sup> Michael G. Plummer and David Cheong, "FDI effects of ASEAN integration," *Region et Developpement* 29 (2009): 49.

<sup>25</sup> Ullah and Inaba, "Liberalization and FDI," 2.

<sup>26</sup> Wassem Michel Mina, "The institutional reforms debate and FDI flows to the MENA region: The "best" ensemble," *World Development* 40, no. 9 (2012): 1798.

<sup>27</sup> Hallward-Driemeier, "Do Bilateral Investmen," 21.

<sup>28</sup> Blonigen Bruce and Miaojun Wang, "Inappropriate pooling of wealthy and poor countries in empirical FDI studies," *NBER Working Paper No. 10378*. National Bureau of Economic Research, Cambridge, 2004, 3.

<sup>29</sup> Busakorn Chantarasawat, K. C. Fung, Hitomi Iizaka, and Alan Siu, "FDI flows to Latin America, East and Southeast Asia, and China: substitutes or complements?," *Review of Development Economics* 14, no. 3 (2010): 534.

<sup>30</sup> Plummer and Cheong, "FDI effects of ASEAN integration," 50.

<sup>31</sup> Klimis Vogiatzoglou, "Vertical specialization and new determinants of FDI: evidence from South and East Asia," *Global economic review* 36, no. 3 (2007): 245.

<sup>32</sup> John M. Rothgeb Jr, "Developing Countries: A Comparative Regional Analysis," in *Foreign Direct Investment in a Changing Global Political Economy*, ed. Steve Chan (London: Palgrave Macmillan, 1996), 189.

where the host country believes domestic entrepreneurship and capability is adequate or can be developed, either because such activities do not require much capital investment or because they are relatively less complex.<sup>33</sup> Proponents of state intervention argue that protection of infant industries in developing countries from the competition of industries in already developed countries is essential for national development. This view is opposed by neoclassical economists on the ground that resources should be allocated according to comparative or relative advantage.<sup>34</sup>

There is a plethora of studies on firm ownership structure (e.g., foreign ownership versus domestic ownership) and its impact on performance goals such as productivity, profitability or export orientation.<sup>35</sup> For example, Manova, Wei, and Zhang observed that foreign subsidiaries and joint ventures in China demonstrate superior export performance in financially vulnerable sectors in comparison with private domestic firms.<sup>36</sup> This finding corroborates previous literature on multinational companies' affiliates being less credit constrained due to their guaranteed available resources abroad in countries where their parent companies operate. In Europe, Gelübcke used enterprise-level data from 2007 to 2008 and reported that on average, foreign owned firms (FOF) are larger and more productive, offer higher wages, more often are involved in exports and invest more in research and development (R&D) relative to domestic German firms.<sup>37</sup> Wagner and Gelübcke further argued that foreign owned firms (FOF) may have access to superior technologies belonging to their parent companies that might increase their efficiency and assist in outperforming locally or domestically owned counterparts.<sup>38</sup> Bhutta noted that ownership characteristic such as educational level, habits and numbers of partners impact the financial health of family-owned businesses in Pakistan. Some of these characteristics might impact decisions on the types of relationships to develop with suppliers.<sup>39</sup> At the same time, business firms that are family-owned are not only prone to less planning but also do invest fewer assets back into the firm. This can be partly due to the lower education levels of owners

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<sup>33</sup> Sherif Seid, *Global regulation of foreign direct investment* (London: Routledge, 2018), 22.

<sup>34</sup> Richard Grabowski, "The successful developmental state: Where does it come from?," *World Development* 22, no. 3 (1994): 413.

<sup>35</sup> Laura Alfaro and Maggie Xiaoyang Chen, "Surviving the global financial crisis: Foreign ownership and establishment performance," *American Economic Journal: Economic Policy* 4, no. 3 (2012): 30.

<sup>36</sup> Kalina Manova, Shang-Jin Wei, and Zhiwei Zhang, "Firm exports and multinational activity under credit constraints," *Review of economics and statistics* 97, no. 3 (2015): 574.

<sup>37</sup> John P. Weche Gelübcke, "Ownership patterns and enterprise groups in German structural business statistics," *Journal of Contextual Economics–Schmollers Jahrbuch* 4 (2011): 635.

<sup>38</sup> Joachim Wagner, and John Philipp Weche Gelübcke, "Foreign ownership and firm survival: First evidence for enterprises in Germany," *International Economics* 132 (2012): 117.

<sup>39</sup> M. Khurram S. Bhutta, Arif I. Rana, and Usman Asad, "Owner characteristics and health of SMEs in Pakistan," *Journal of Small Business and Enterprise Development* 15, no. 1 (2008): 131.

leading to inability to gather information needed to make informed decisions. Such lower levels of internal investments might dictate the need for reliance on suppliers for critical resources.<sup>40</sup> Further, Girma and Görg concluded that foreign owned firms are more likely to outsource than domestic owned firms and productivity gains from outsourcing for foreign owned firms were found to be less compared to those of domestic owned firms.<sup>41</sup>

The foreign firms, which are in most instances part of multinational companies, usually use higher levels of technology compared to pure domestic or locally owned firms, due to their access to firm specific assets of their parent companies.<sup>42</sup> The use of high technology may engender contracting out of activities, specifically low technology activities. Outsourcing is likely to occur within the vertically linked plants in the same multinational if there is specialization of activities. On the other hand, such specialization and outsourcing of activities may be less for domestically or locally owned firms.<sup>43</sup> Similarly, Alfaro and Chen observed that foreign owned firms tend to outperform domestic owned firms in periods of economic crises, particularly for foreign firms that are more vertically integrated. A plausible argument for these performance differences, which forms part of the motivation of our study, was to ascertain if the linkages that foreign owned firms have with their parent organizations facilitate the transfer of managerial know-how to their subsidiaries, diminishing the need for strengthened supplier relationships.<sup>44</sup> From the discussions, it appears that the existing literatures do not adequately cover the factor of controlling foreign ownership in relation to FDI or BITs. Hence, the present study attempts to contribute to FDI and BIT research by analysing the BITs signed by Bangladesh with different countries in relation to foreign ownership.

### **3.2. Foreign Ownership Control and Bilateral Investment Treaties of Bangladesh**

When World Trade Organization (WTO) came into existence in 1995, replacing General Agreement on Tariffs and Trade (GATT), provided guidelines on how to regulate FDI in host countries. The main objective of General Agreement on Tariffs and Trade (GATT) was the liberalisation of international

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<sup>40</sup> Attahir Yusuf and Kojo Saffu, "Planning and performance of small and medium enterprise operators in a country in transition," *Journal of small business management* 43, no. 4 (2005): 480.

<sup>41</sup> Sourafel Girma and Holger Görg, "Outsourcing, foreign ownership, and productivity: evidence from UK establishment-level data," *Review of International Economics* 12, no. 5 (2004): 817.

<sup>42</sup> Girma and Görg, "Outsourcing, foreign ownership," 818.

<sup>43</sup> James R. Markusen, "The boundaries of multinational enterprises and the theory of international trade," *Journal of Economic perspectives* 9, no. 2 (1995): 169.

<sup>44</sup> Alfaro and Chen, "Surviving the global financial crisis," 31.

trade, and that remains the main objective of the World Trade Organization (WTO) regime. The system aims to achieve the liberalisation of trade by these principles: (a) most-favoured nation treatment (MFN); (b) national treatment (NT); (c) reciprocity; (d) non-discrimination and (e) dispute settlement mechanism.<sup>45</sup> On the one hand, following the World Trade Organization (WTO) principles, the developing countries are liberalizing their national laws and policies on FDI but on the other hand, many developed countries (who are also members of World Trade Organization) imposing restrictions on the flow and activities of FDI. The various laws and policies of the developed and other countries most commonly cover foreign ownership control (Table 1).<sup>46</sup>

**Table 1.** Factor covered by different jurisdictions

<b>Factor</b>	<b>Countries</b>	<b>Statutes</b>
Foreign ownership control	Australia	Article 11A of the Air Navigation Act 1920, Section 7 of the Qantas Sale Act 1992, article 4 of the Airports Act 1996
	Canada	Section 26(1)(a)–(d) of the Investment Canada Act (ICA) 1985
	China	Article 18 of the Foreign Investment Law of the People's Republic of China 2015
	Vietnam	Article 29 of the Law on Investment (LOI) 2014
	Zimbabwe	Policy of the Government of the Republic of Zimbabwe 1991
	Malaysia	New Economic Policy of Malaysia 1976

*Source: Researcher's own findings.*

Foreign ownership control is an area, which is carried out by many developed and other host countries by imposing ownership restrictions on foreign ownership in certain investments or sectors. For example, in Australia, as per Broadcasting and Services Act 1992 foreign ownership in commercial television broadcasting services is limited to 15% for individuals and 20% aggregate. Many Eastern European countries allowed FDI in selected areas only in joint ventures with a state entity or with local investors. In China, for a long time, joint ventures were the principal method of FDI entry, even though wholly owned subsidiaries are permitted now but subject to certain conditions. The similar situation also exists in other socialist states such as Vietnam, Laos and Cambodia.<sup>47</sup> The Malaysian New Economic Policy 1976 required foreign investors to participate in the economy

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<sup>45</sup> Mohammad Belayet Hossain, "Fleshing out the provisions for protecting foreign investment," *Yustisia Jurnal Hukum* 7, no. 3 (2018): 406.

<sup>46</sup> Muthucumaraswamy Sornarajah, *The international law on foreign investment* (Cambridge: Cambridge University Press, 2010), 104.

<sup>47</sup> Sornarajah, *The international law*, 107

only as a minority shareholder to give the disadvantaged indigenous people some priority in the ownership of the means of production.

The host states impose ownership control constraint on foreign investors to give priority to local investors who are capable to invest in the specific sector as well as to increase national participation. Another reason is where the host country like Tanzania believes that domestic entrepreneurship and capability is adequate or can be developed, either because such activities do not require much capital investment or because they are relatively less complex.<sup>48</sup> The National Investment (Promotion and Protection) Act 1990 of Tanzania (Schedule C) exclusively reserve the following areas: 1) retail or wholesale trade, 2) product brokerage, 3) business representation for foreign companies, 4) operation of public relations business, 5) operation of taxis, 6) barber shops, hairdressing, and beauty salons, 7) butcheries, and 8) ice-cream making and parlours.

There are more examples – in Australia, an aggregate foreign ownership in an Australian international airline is limited to 49 per cent and article 4 of the Airports Act 1996 limits foreign ownership of some airports to 49 per cent. The Investment Canada Act (ICA) 1985 requires an entity must be under Canadian control through voting rights in certain industries<sup>49</sup>. In China, under article 18 of the Foreign Investment Law of the People's Republic of China (PRC) law 2015, foreign investment vehicles in certain sections such as medical institutions are limited to joint ventures (JVs). There are other projects such as operation of nuclear power plants, printing of publications, selection and breeding of new varieties of wheat and corn in seed production, construction, where the Chinese JV partner must hold the controlling equity interest in the JV. In Vietnam, as per article 29 of the Law on Investment (LOI) 2014, in advertising, a foreign investor may theoretically hold up to 99 per cent of the investment, but for container-handling services, the foreign ownership may not exceed 50 per cent. In banking sector, the maximum is currently not more than 20 per cent for one foreign strategic investor and not more than 30 per cent for all foreign strategic investors combined.

The requirement of joint venture association between foreign and local investors has various advantages to the foreign investor: diversification of risks, providing a local partner who could be an effective mediator with the local government and its ability to pool larger resources and technology. It also has advantages to the host country. Less profit would be repatriated abroad, the government can have direct or indirect control over the venture and a local entrepreneurial class will emerge through the acquisition of managerial and business skills from the foreign investor.<sup>50</sup>

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<sup>48</sup> Seid, *Global regulation*, 22.

<sup>49</sup> § 26(1)(a)–(d) of ICA 1985.

<sup>50</sup> Seid, *Global regulation*, 37.

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

Bangladesh signed the BIT with the Belgo-Luxembourg Economic Union (BLEU) in 1981 at Dhaka, which is still in force. The Preamble of the BIT desires to create favourable conditions for greater economic cooperation and recognises the reciprocal encouragement and protection under international agreements to promote investments for the mutual prosperity of the Contracting States. This BIT provides at all times fair and equitable treatment, full protection and security, most-favoured nation treatment, national treatment, as well as other benefits to the investors of the home state. Article 6 and 7 of the BIT has provisions to settle the dispute between the Contracting Parties or any of its investor through International Centre for Settlement of Investment Disputes (ICSID). The BIT has no specific reference to foreign ownership control.

Bangladesh signed the BIT with the Kingdom of Denmark at Dhaka in 2009, which is still in force. The Preamble of the BIT desires to create favourable conditions for investments and recognises a fair and equitable treatment of investment on a reciprocal basis. Article 2(2) of the BIT states that investment objectives should be achieved without relaxing health, safety and environmental measures, and the Party who suffers any loss or damages, shall be accorded adequate and effective compensation as per its laws and regulations and if necessary, as per international law. This BIT provides full protection and security, most-favoured nation treatment, national treatment, as well as other benefits to the investors of the home state. Article 9 and 10 of the BIT has provisions to settle the dispute between the Contracting Parties or any of its investor. The BIT has no specific reference to foreign ownership control.

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

Bangladesh signed the BIT with the Government of the Republic of India in 2009, which is still in force. The Preamble of the BIT desires to create conditions favourable for fostering greater investment by recognising the encouragement and reciprocal protection under international agreement for such investment. This BIT provides protection in accordance with the local laws and policy, fair and equitable treatment, most-favoured nation treatment, national treatment, as well as other benefits to the investors of the home state. Article 9 and 10 of the BITS has provisions to settle the dispute between the Contracting Parties or any of its investor. The BIT has no specific reference to foreign ownership control.

Bangladesh signed the BIT with the Democratic People's Republic of Korea at Dhaka in 1999. The Preamble of the BIT desires to intensify economic co-operation to the mutual benefits of both States and intends to create and maintain favourable conditions for investments by recognising to promote and protect foreign investment. This BIT provides protection in accordance with the local laws and regulations, fair and equitable treatment, most-favoured nation treatment, national treatment, as well as other benefits to the investors of the home state. Article 7 and 8 of the BIT has provisions to settle the dispute between the Contracting Parties or any of its investor. The BIT has no specific reference to foreign ownership control.

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

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

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

Bangladesh signed the BIT with the Government of the Republic of Turkey at Ankara in 2012, which replaced earlier BIT of 1987. The Preamble of the BIT desires to promote greater economic cooperation and recognises the treatment to be accorded to such investments. In the Preamble, both Parties desires fair and equitable treatment of investments without relaxing health, safety and environmental measures of general application as well as internationally recognised labour rights. There is separate provision under article 4 for protection of public health and environment. This BIT also provides full protection and security in accordance with the local laws and regulations, minimum standard of treatment under international law, fair and equitable treatment, most-favoured nation treatment, national treatment, as well as other benefits to the investors of the home state. Article 10 and 11 of the BIT has provisions to settle the dispute between the Contracting Parties or any of its investor. The BIT has no specific reference to foreign ownership control.

With United Arab Emirates (UAE), Bangladesh signed the BIT with the Government of the United Arab Emirates at Abu Dhabi in 2011. The Preamble of the BIT desires to expand and strengthen economic and industrial cooperation on a long-term basis and in particular, to create favourable conditions for investments by recognising the need to protect such investment. Article 4(5) states that 'Investor of a Contracting Party as far as possible shall comply with the international laws and regulations of the other Contracting Party in relation to public health and/or environmental policies. This BIT also provides full and adequate protection and security in accordance with the local laws and regulations, fair and equitable treatment, most-favoured nation treatment, national treatment, as well as other benefits to the investors of the home state. Article 9 and 10 of the BIT has provisions to settle the dispute between the Contracting Parties or any of its investor. The BIT has no specific reference to foreign ownership control.

Moreover, with United Kingdom (UK), Bangladesh signed the first BIT with the Government of the United Kingdom of Great Britain and Northern Ireland at London in 1980. The Preamble of the BIT desires to create favourable conditions for greater investment by recognising the encouragement and reciprocal protection

of such investment. This BIT also provides full protection and security in accordance with the local laws, fair and equitable treatment, most-favoured nation treatment, national treatment, as well as other benefits to the investors of the home state. Article 8 and 9 of the BIT has provisions to settle the dispute between the Contracting Parties or any of its investor. The BIT has no specific reference to foreign ownership control. Furthermore, Bangladesh signed the BIT with the Government of the Republic of Uzbekistan at Tashkent in 2000, which is still in force. The Preamble of the BIT desires to promote more extensive economic cooperation for mutual benefit by recognising the necessity of encouragement and protection of such investment. This BIT also provides protection in accordance with the local laws, fair and equitable treatment, most-favoured nation treatment, national treatment, as well as other benefits to the investors of the home state. Article 9 and 10 of the BIT has provisions to settle the dispute between the Contracting Parties or any of its investor. The BIT has no specific reference to foreign ownership control.

In Asia Pacific domain, Bangladesh signed the BIT with the Government of the Socialist Republic of Vietnam at Hanoi in 2005. The Preamble of the BIT desires to expand and deepen economic and industrial cooperation on a long-term basis and in particular to create and maintain favourable conditions for investments by recognizing the need to promote and protect such investments. This BIT also provides full protection and security in accordance with the local laws, fair and equitable treatment, most-favoured nation treatment, as well as other benefits to the investors of the home state. Article 7 and 8 of the BIT has provisions to settle the dispute between the Contracting Parties or any of its investor. The BIT has no specific reference to foreign ownership control. Bangladesh signed the BIT with the Government of Malaysia at Kuala Lumpur in 1994, which is still in force. The Preamble of the BIT desires to expand and strengthen economic and industrial cooperation on a long-term basis and in particular to create favourable conditions for investments by recognising the need to protect such investments. This BIT provides full and adequate protection and security in accordance with local laws, regulations and national policies, equitable treatment, most-favoured nation treatment, as well as other benefits to the investors of the home state. Article 6 and 7 of the BIT has provisions to settle the dispute between the Contracting Parties or any of its investor. The BIT has no specific reference to foreign ownership control. Table 2 is the summary of the Bangladesh BITs with 15 different countries in relation to foreign ownership control.

From the above discussion and Table 2, it can be seen that Bangladesh BITs has no specific reference to foreign ownership control. All the BITs mainly cover dispute settlement mechanism and only few BITs cover areas such as environment, human (labour) rights, and sustainable development. From the Bangladesh BITs, it also appears that all of them have specific provisions for full and adequate

protection and security, fair and equitable treatment, most-favoured nation treatment, national treatment, compensation for expropriation and nationalization as well as other benefits for the foreign investors.

**Table 2.** Bangladesh BITs with other countries.

Country	Signing date & present status	Foreign ownership control	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	MFN, FET	Yes
Denmark	05/11/2009 In force	No	NT, MFN, FET	Yes
Germany	06/05/1981 In force	No	NT, MFN, FET	Yes
India	09/02/2009 In force	No	NT, 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	Yes
Switzerland	14/10/2000 In force	No	NT, MFN, FET	Yes
Turkey	12/04/2012 Signed	No	NT, MFN, FET	Yes
UAE	17/01/2011 Signed	No	NT, MFN, FET	Yes
UK	19/06/1980 In force	No	NT, MFN, FET	Yes
Uzbekistan	18/07/2000 In force	No	FET	Yes
Vietnam	01/05/2005 Signed	No	MFN, FET	Yes
Malaysia	20/10/1994 In force	No	MFN, FET	Yes

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

As per section 3 of the Foreign Private Investment (Promotion and Protection) Act (FPIA) 1980, the government allows foreign investment in any industrial establishment that is considered to be supportive of economic development or otherwise desirable. The National Industrial Policy (NIP) 2016 has no limitation

on equity participation and allows foreign participation up to 100 percent without any condition. There are many multinational enterprises in Bangladesh who has 100 percent equity participation and enjoys local incentives as export-oriented companies but their products are not restricted in the local markets, thus affecting local produces in the domestic market.<sup>51</sup> The domestic industries (small and medium) are not capable to compete with the mighty multinational companies in the local market, as a result, fails to contribute to the economy.<sup>52</sup>

#### **4. Conclusion**

The FDI laws of Bangladesh have provisions only to promote the inflow of FDI and after post-entry, provide different incentives and protections to the foreign investors. In the absence of a global treaty or specific Act, regulating the FDI in Bangladesh is mainly depended upon the BITs. Based on the WTO principle of 'reciprocity' both countries should design their BITs in such a way that all parties interest are preserved equally, thus the economic relations will sustain for a long time between them. Moreover, it is necessary to insert foreign ownership control through legal or policy regime or BITs to control foreign investment in sensitive fields by setting conditions and FDI must satisfy for the purpose of national interest, fulfill social and economic development objectives, free from exploitation - a society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social, will be secured for all citizens. As can be seen from the findings that Bangladesh BITs lacks to cover foreign ownership control. In absence of any global treaty, the BITs at present regulating the FDI in Bangladesh.

The FDI related laws are scattered and, in most cases, not adequate to regulate the FDI. There are evidences which shows that only liberalisation does not necessarily result in the increased inflow of FDI in the host states. For example, according to the United Nations Conference on Trade and Development (UNCTAD) report in 1999, there are many African states that have a very liberal investment regulation but failed to attract the inflow of FDI. In contrast, China has a restrictive investment regime; even then it has been the largest recipient of FDI amongst the developing world since 1992. Similarly, Thailand, Vietnam have more strict regulation comparing to the Latin American states but they are receiving more FDI than the latter.

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<sup>51</sup> Mohammad Omar Faruk, "The effect of FDI to accelerate the economic growth of Bangladesh and some problems & prospects of FDI," *Asian Business Review* 2, no. 4 (2013): 37;

<sup>52</sup> Mohammad Belayet Hossain, "International efforts to regulate foreign investment and Multinational Enterprises (MNEs)," *Lex-Warrier: Online Law Journal* 9, no. 9, (2018): 401.

In practice, both liberalisation and restrictive regulation could have positive and negative effects in Bangladesh, so it should design its BITs in a balanced way to meet its peculiar needs at any particular time. Bangladesh should consider foreign ownership control to insert into the BITs in order to protect its legitimate interest and at the same time protecting the foreign investors interest as per WTO principles. Therefore, a well-balanced BITs need to be struck between liberalisation and restrictive regulation to ensure sustainable development of both countries.

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

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