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Conditions of Sustainable Development Policy

Title of the paper

*Reconciling International Environmental Laws and Policies with
International Investment Law towards Sustainable Development -
case of Tajikistan**

Author

*Parviz, Odilov, Yonsei University, Graduate School of Law,
Tajikistan, parviz@yonsei.ac.kr***

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**PhD in Law Candidate at Yonsei University, Korea.

Abstract

Tajikistan government has started taking strong leadership towards sustainable development and combating climate change, as it will be very strongly affected by the impacts of climatic changes in the next one hundred years. It has pledged before the UNFCCC to take ambitious steps in climate adaptation and mitigation measures. In meantime, international investors has started been acknowledging the strong impacts of climate change, and started shifting major part of their investments from hydro carbon source to renewable sources. Nevertheless, Tajikistan obligation under the UNFCCC may result in a normative conflict with its International Investment Agreements, and create a threat of government's liability for measures undertaken to address climate change under the Investor State Dispute Settlement mechanism. Majority of Tajikistan national and international investment legislation actually lacks norms on environmental protection. This research attempts to fill this gap by reconciling international environmental law with international investment law.

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1. Introduction

Tajikistan has been taking a strong leadership in combating climate change impacts through development of climate mitigation and adaptation strategies.¹ It has pledged to take ambitious steps by using its natural resource potential to combat climate change through generating energy from renewable natural resources and supplying with clean energy to its domestic needs, as well as energy needs in Afghanistan and Pakistan.² These countries may become a transit corridor for supplying clean energy to leading greenhouse gas (GHG) emitters as China and India, towards sustainable development. In meantime, international investors acknowledging the strong impacts of climate change have been shifting their investments from hydro carbon source of energy generation to renewable sources of energy generation. A framework of international investment agreements with goals towards sustainable development and environmental protection is needed in order to meet climate policies. Otherwise, obligation under the multilateral environmental agreement such as The United Nations Framework Convention on Climate Change (UNFCCC or MEA) may have a normative conflict with its International Investment Agreements (IIA), creating a threat of its government's liability for measures undertaken to address climate change.³ Climate change and environment regulations due to being at their infancy stage of development, from the perspective of substance, are vulnerable to Investor State Dispute Settlement mechanism (ISDS). For instance, climate related policies and laws on mitigation such as emission reduction through increase of taxes to mitigate greenhouse gases (GHG) emissions, policies

¹ H.E. Mr. President Emomali Rahmon, *Speech of the Tajikistan at the 21st Conference of Parties of UNFCCC in Paris*, Publications of the Ministry of Foreign Affairs of the Republic of Tajikistan, available in Tajik and Russian languages at <http://mfa.tj/?l=en&cat=10&art=1271> (last visited on March 10.2017)

² The CASA-1000 project, available at <http://www.casa-1000.org/MainPages/CASAAbout.php>. (last visited on March 10.2017)

³J. E. Viñuales, *Foreign Investment And The Environment In International Law* 134 (2015)

towards carbon intensive industries to install environmentally sound technologies⁴, as well as adaptation measures on managed setbacks in potential disastrous areas limiting investors on property use may potentially jeopardize investor's protections under the respective IIA between foreign investor and host stat. IIA aim to encourage foreign investment through the development of a legal scheme that protects foreign investors from certain government actions that may negatively affect their investments. IIA oblige host countries by establishing an ISDS mechanism, where damaged investors can initiate arbitration in *ad hoc* international tribunals for compensation of losses that arose from the host country's violation of the investor protection provisions⁵ There is a need to reconcile international environmental law with international investment laws in order to avoid risks of liabilities. These can happen through the insertion of environmental and climate-related provisions into IIA. Environmental and climate-related laws and policies may result in financial repercussion of ISDS mechanism further deter timely action to combat climate change. Tajikistan has been taking a path of sustainable economy development consistent to its National Development Strategy.⁶ Inclusion of sustainability-related performance requirements for investors in IIAs, based on sustainable development principles and environmental laws would create a win-win-win solution, benefiting Tajikistan as host state, foreign investors, whilst protecting environment respectively.

2. Potential Tajikistan environmental and climate-related laws and policies to conflict with IIAs

⁴ Parviz Odilov, *Are Developed and Developing Countries in a Legal Stalemate over the WTO TRIPS Agreement?-A Study on Whether the TRIPS Agreement Impedes the Transfer of Environmentally Sound Technologies to Developing Countries*, Yonsei Law Review, 27.1 1-15 (2017), (forthcoming) available at <http://ils.yonsei.ac.kr/>

⁵ R. DOLZER & CH. SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW*, (p. 238) (2nd ed. 2012)

⁶ *Statement by President of the Republic of Tajikistan H.E. Mr. Emomali Rahmon United Nation Sustainable Development Summit 2015*, available at <https://sustainabledevelopment.un.org/content/documents/20828tajikistan.pdf>. (last visited on March 10.2017)

2.1. The Law on the use of energy from renewable energy sources

In the midst of climatic changes, notwithstanding difficulties in economic development after long lasting non-international armed conflict (1992-1997)⁷, Tajikistan has been taking strong leadership actions towards sustainable development.⁸ Such actions include strong commitment of legislation development on adaptation and mitigation measures for the purpose of compliance with the UNFCCC. I mentioned elsewhere that Tajikistan energy generation is strongly vulnerable to the impacts of climate change, and therefore adaptation measures in the field of energy developing by renewable energy generation, strengthening energy efficiency among other measures, have become top national development priorities.⁹ Tajikistan produces 95% of its energy from renewable energy sources, out of which almost 100% energy generation sources are from hydropower plants.¹⁰ Tajikistan has also significant capacity for other types of renewable energy generation such as solar and wind.¹¹ To overcome energy deficit the development of renewable energy mix was prioritized as a government goal of renewable energy enhancement, and in 2015 the Law On the Use of Energy from Renewable Energy Sources was incanted.¹² This law aims to regulate legal relationships arising from state entities, and private sector on the use of renewable energy sources. The Law sets legal and financial measures in order to increase energy efficiency, and decrease the anthropogenic effects to environment and climate. One of the main features of the law is that it motivates private sector to generate energy from renewable energy sources

⁷ Olimov, Muzaffar, *Civil war in Tajikistan*, Himalayan and Central Asian Studies, [20.2/3 44-57](#). (Apr-Sep 2016) available at <http://www.himalayanresearch.org/journal-2016.html> (last visited on March 10.2017)

⁸ *Supra* note 4, at 189.

⁹ *Id.* at 184-87,

¹⁰ Rah, Zakhidov, *Central Asian Countries Energy System and Role of Renewable Energy Sources*, Appl. Sol. Energy 44, 218, (2008) available at <https://link.springer.com/article/10.3103/S0003701X08030201>. (last visited on March 10.2017)

¹¹ S. V. Kiseleva, Yu. G. Kolomiets, and O. S. Popel, *Assessment of Solar Energy Resources in Central Asia* Joint Institute for High Temperatures, Russian Academy of Sciences 60-5 (2015) available at <https://link.springer.com/article/10.3103/S0003701X15030056> (last visited on March 10.2017)

¹² The Law of the Rrepublic of Tajikistan (RT) “On the Use of Energy from Renewable Energy Sources” 2015 <available only in Tajik and Russian> at mmk.tj. (last visited on February 15.2017)

by providing certain privileges.¹³ In article 11 paragraph 2 it is envisaged that energy generated from renewable energy sources shall be connected to energy networks based on privileges in accordance to the legislation of Tajikistan. In the next paragraphs of the same article, state energy operators are obliged to purchase the energy generated from renewable energy sources, given that the balance and quality will not have been disturbed.¹⁴ This means government encourages private sector to generate energy from renewable energy sources based on advantaged conditions. Such provisions can attract new domestic and foreign investments in energy field. Perhaps, Tajikistan government has been working on the development of feed-in tariffs (FIT). Detailed information about the privileges for energy generators from renewable energy sources has not yet been found from publically available sources during the writings of this article. The law is new, and secondary regulatory measures seem to be under the development. Thus, based on current development of legislation in the field of renewable energy and strong commitment of Tajikistan government towards sustainable development, the introduction of FIT is foreseeable.

2.2. Mitigation measures

According to the 2004-2010 inventory of GHG emission, the level of absolute and per capita emissions in Tajikistan remains one of the lowest in world with about 1 tonne CO₂-eqv per person, or 0.01% from total world GHG emissions.¹⁵ Notwithstanding the low national GHG emission profile, in 2003 Tajikistan has adopted the National Action Plan for Climate Change Mitigation (NAPCCM), as well as submitted it's Intended Nationally Determined

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Government of the Republic of Tajikistan, *Intended Nationally Determined Contribution towards the Achievement of the Global Goal of the UN Framework Convention on Climate Change by the Republic of Tajikistan*, 2015 available at <http://www4.unfccc.int/> (last visited on January 10 2016)

Contribution and Nationally Appropriate Mitigation Actions (NAMA) to the UNFCCC.¹⁶ Tajikistan targets of a reduction to 80 - 90% of 1990 emissions levels without external financial assistance, and a reduction to 65 - 75% subject to substantial international funding by 2030.¹⁷ NAMA targets the forestry sector, and aims for a forest renewal, conservation, and sustainable management, contributing to climate change mitigation. NAPCCM aims *inter alia* on the Enhancement of energy efficiency, reduce or limit greenhouse gas emissions, promote sustainable forest management practices and reforestation, promote sustainable forms of agriculture.¹⁸ Hence, although GHG emissions are low in Tajikistan, the government, among other measures, aims in significant emission reductions. Climate change mitigation consists of actions to limit the magnitude or rate of long-term climate change, which generally involves reductions in anthropogenic emissions of greenhouse gases.¹⁹ In Tajikistan the introduction of emissions taxes requiring individual emitters to pay a fee, charge or tax for GHG released into the atmosphere, based on good practices is highly possible. In 2012 there was enacted the Law On the Security of Atmospheric Air.²⁰ Government requires its incumbent entities based on good practices to develop and introduce necessary regulatory measures in order to preserve clean air.²¹ Most air pollutants come from manufacturing industries, vehicles and burning oil, gas and coal.²² In 2015 there was adopted the Law on Ecological Security of Road

¹⁶Tajikistan Forestry NAMA Support Project, The Nationally Appropriate Mitigation Actions Facility, 2015, available at <http://www.nama-facility.org/projects/tajikistan.html>. (last visited on January 10 2016)

¹⁷ Deok Young Park, Odilov Parviz, *Central Asian Legal and Policy Responses to Climate Change*, Yonsei Law Review, 26.2 200 (2016) available at <http://ils.yonsei.ac.kr/>. (last visited on January 10 2016)

¹⁸ Tajikistan Forestry NAMA Support Project, The Nationally Appropriate Mitigation Actions Facility, 2015, <http://www.nama-facility.org/projects/tajikistan.html> (last visited on February 10 2016)

¹⁹ IPCC, "Summary for policymakers", *Climate Change 2007: Working Group III: Mitigation of Climate Change, Table SPM.3, C. Mitigation in the short and medium term (until 2030)*, in IPCC AR4 WG3 2007 available at https://www.ipcc.ch/pdf/assessment-report/ar4/wg3/ar4_wg3_full_report.pdf (last visited on December 8 2016)

²⁰ The Law of the RT "On the Security of Atmospheric Air" 2012 <available only in Tajik and Russian> at mmk.tj. (last visited on February 15.2017)

²¹ *Id.* at Part Three

²² Government of the Republic of Tajikistan, *Intended Nationally Determined Contribution towards the Achievement of the Global Goal of the UN Framework Convention on Climate Change by the Republic of Tajikistan*, 2015 available at <http://www4.unfccc.int/>. (last visited on February 15, 2016)

Transportation.²³ The government mandated state entities, among other things, to develop measures to limit automobile transportation in order to preserve clean air and secure ecology.²⁴ The enactment of these two laws indicates that government has already developed a legal basis for climate change mitigation measures, particularly in transportation sector by far. Regulatory measures on limiting GHG emission can be assumed in the nearest future.

2.3. Adaptation measures

It is projected that in a global 2°C warming, the monthly summer temperature distribution in Tajikistan would shift to 2–3°C warmer and in a global 4°C to 6–7°C.²⁵ Such shift entails that the summer temperatures in the southern part of Central Asia would change to a new climatic conditions by the end of the twenty first century. Climate change may severely affect the development of main socio-economic sectors such as water, land, agriculture, energy, and health. Freshwater resources in the region are highly sensitive to climate change. Warming temperature would results in changes in snow cover, earlier snow melt, and glacial melt. Early temperature rise would result in earlier ice and snow melt, which could shift the timing of river flow, from summer to spring, within the next few decades. These shifts could have an adverse impact for agricultural water during critical crop growing periods. It is projected the intensification of runoff in all river basins in the region, increases the risk of extreme events. Floods, mudslides, and droughts have already impacted socio-economic sectors in the region. Flooding has been occurring almost every year in Tajikistan, and only in 2005 it led to 70 % reduction in grain production and 95 percent reduction in grape production with 71 % of

²³ The Law of the RT “The Law on Ecological Security of Road Transportation” 2015 <available only in Tajik and Russian> at mmk.tj. (last visited on February 15, 2017)

²⁴*Ib.* at Article 6

²⁵ *Supra* note 17, at 183-87

affected people to have a loss in income.²⁶ Due to such strong impact of climate change Tajikistan has adopted policies on adaptation and has been further working on. Adaptation measures are part of main state policy of National Development Strategy of the Republic of Tajikistan for 2030 (NDS).²⁷ This strategy mandated the resolution of problems associated with natural disasters through their prevention and the effective management of natural resource, as well as promotion of conservation and proper management of biodiversity and ecosystems. It foresees the adoption of National Climate Change Adaptation Strategy. Sectors specific measures for increased adaptive capacity, such as conservation and disaster risk management measures on glaciers and freshwater resources, has been adopted.²⁸ Adaptation measures have been defined in INDC as well. It envisages that “the reduction of vulnerability to the impacts of climate change by means of full-scale integration of the climate resilience and adaptation measures into the planning and development of the green infrastructure in the following sectors: agriculture, irrigation and water systems, power engineering and industrial facilities, transport and housing infrastructures, as well as resilience to the hydro meteorological hazards and climate changes; disaster risk reduction; promotion of adaptation of globally significant biological species and natural ecosystems to climate change; monitoring and preservation of the glaciers and water resources in the runoff formation zones under the conditions of climate warming; improvement of occupational safety, life-sustaining activity and health of the population, maternity and childhood protection in the context of climate warming”.²⁹ This implies that there is a high possibility for passing compulsory adaptation measures on freshwater regulation, protection of biological and cultural diversity, conservation, and disaster risk managements and setbacks adaptation measures in potentially to become dangerous areas. These measures may affect foreign investors on property and

²⁶*Ib.* at 184-87.

²⁷ *Supra* note 6.

²⁸ *Supra* note 17, at 189-96.

²⁹ *Supra* note 22.

potentially jeopardize investor's protections under the respective IIA. Public interest environmental protection and adaptation measures are exposed to investor claims of violations of Standard of Treatments as they are not limited in IIA.

3. Tajikistan obligations under the IIA and their potential conflicts with environment and climate-related laws and policies

3.1. Tajikistan obligations under the IIA

Tajikistan protects foreign investors without discriminating, prohibiting, limiting, or conditioning their investment in any economic sectors by adopting pertinent legislation.³⁰ The government has publicly advocated for increased foreign investment, particularly in the field of energy and transport infrastructure, and provides certain incentives and privileges.³¹ As of February 2017, Tajikistan has concluded 38 IIA, out of which 18 are ratified, among them 5 are treaties with investment provisions, the rest are Bilateral Investment Treaties (BIT).³² Tajikistan IIA common to many others, envisage National Treatment, Most-Favourite-National treatment, Full Protection and Security, Fair and Equitable Treatment, as well as properties of investors are protected from Expropriation. Also, Tajikistan IIA include ISDS mechanism under the international arbitral tribunals governed by different rules or institutions, such as rules of the [International Centre for Settlement of Investment Disputes](#), the [London Court of International Arbitration](#), the [International Chamber of Commerce](#),

³⁰ The Law of the RT "On investments" and The Law of the RT "On investment contracts" *available at* mmk.tj. (last visited on February 15, 2017)

³¹ Decree of the Government of the Republic of Tajikistan, 29 December 2012, No. 755 "[On the Concept of State Policy for Attraction and Protection of Investment of the Republic of Tajikistan](#)"

³² *Tajikistan*, Database of international investment agreements, United Nation Conference on Trade and Development, *available at* <http://investmentpolicyhub.unctad.org/IIA/CountryBits/206#iiaInnerMenu>. (last visited on February 20, 2017)

the [Hong Kong International Arbitration Centre](#) or the [UNCITRAL](#). Tajikistan has not become a member to ICSID yet, nevertheless a case can be processed under the *ICSID Additional Facility*.³³ Between 2007 and 2015, the main investments have been coming from the China, Russia, Kazakhstan, the United Kingdom, and the United States (US), notably in the construction of infrastructure, construction of medium capacity hydroelectric central power plants, mining and in the banking sector.³⁴ The economy of Tajikistan due to the change from planed economy under the Soviet Union to market oriented economy after gaining independence is in transition period.³⁵ This could be a reason that there is no Model BIT by far, and all of its signed and ratified BITs could have been proposed by other contracting parties without Tajikistan's substantial modification of agreements' provisions. Currently, Tajikistan has been negotiating membership in the Eurasian Economic Union (EAEU), a [trade union](#) which is composed of a [common market](#) with a [customs union](#) and investment protection standards.³⁶ In Annex 16 to the Treaty on the EAEU there is a Protocol on Trade in Services, Incorporation, Activities and Investments. This Protocol determines the legal basis for regulating trade in services, incorporation, activities and investments in the Member States, which applies to all measures taken by the Member States with regard to the supply and receipt of services, as well as incorporation, activities and investments.³⁷ Chapter VII of this Protocol EAEU Investment Chapter envisages protection and promotion of

³³ICSID Member States database available at <https://icsid.worldbank.org/en/Pages/about/Member-States.aspx>. (last visited on February 20, 2017)

³⁴ *Key macroeconomic indicators in 2012*, Publications of the Ministry of Foreign Affairs of the Republic of Tajikistan 2012 available at <http://mfa.tj/?l=tj&cat=25&art=203>. (last visited on February 20, 2017)

³⁵ *Transition Economies: An IMF Perspective on Progress and Prospects*, IMF (11 03 2000) available at <https://www.imf.org/external/np/exr/ib/2000/110300.htm>. (last visited on February 21, 2017)

³⁶ Article 1 of the Eurasian Economic Union Agreement state that "The EAEU provides for free movement of goods, services, capital and labor, pursues coordinated, harmonized and single policy in the sectors determined by the Treaty and international agreements within the Union" available at www.eaeunion.org/files/history/2014/2014_2.pdf. (last visited on February 21, 2017)

³⁷ Annex 16 to the Treaty of the EAEU, Protocol on Trade in Services, Incorporation, Activities and Investments, ¶ 1-2. available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2997>. (last visited on February 21, 2017)

investment and investors of the union's state members.³⁸ For the purpose of this research, the two major sources of IIAs, the EAEU Investment Chapter and Tajikistan-Netherlands BIT will be applied to the environmental policies discussed in previous paragraphs.³⁹ EAEU Investment Chapter is a major IIA to be joined by Tajikistan, where Tajikistan's major host countries for investors are members. Significant amount of direct investments also flow from the Netherland, therefore Tajikistan-Netherlands BIT will be applied to the environmental and climate-related laws and policies.⁴⁰ Hence, these two major IIA will serve as a reference point for potential investor-State disputes. This article will scrutinize these investment treaties on four investment principles of IIA – Expropriation, National Treatment and MFN treatment, and Fair and Equitable Treatment and will conclude how Tajikistan's environmental and climate-related laws and policies may violate such principles, based on the legacy of case law involving environmental and climate-related measures of host states.

3.2. Potential conflicts of the IIA obligation with environment and climate related laws and policies with IIA

International environmental law and international investment law have evolved as two different, separate specialist regimes within international law. They have distinctively different from each other objectives and divergent rights and obligations.⁴¹ Given such differences these two specialist regimes can conflict with each other if reciprocal

³⁸ Chapter VII, Investment, Annex 16 to the Treaty of the EAEU, Protocol on Trade in Services, Incorporation, Activities and Investments *available at* <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2997>. (last visited on February 21, 2017)

³⁹ Agreement on encouragement and reciprocal protection of investments between the Government of the Republic of Tajikistan and the Government of the Kingdom of the Netherlands *available at* <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2086>.

⁴⁰ The text of Tajikistan-China BIT is not publically available, therefore Tajikistan-China BIT falls out of the analysis of this article. Also significant investments flow from the United Kingdom, yet the BIT has to be adopted and ratified.

⁴¹ *Supra* note 3 at 134.

considerations are not included with respective laws.⁴² Tajikistan knowing strong impacts of climate change has been taking strong leadership in MEA negotiations, as well as liberating its economy before foreign investors.⁴³ As the Paris Agreement entered into force, Tajikistan is obliged to pursue domestic climate change mitigation and adaptation measures which may have regulatory effect to foreign investors with risks of economic losses from such measures.⁴⁴ Effected foreign investors would seek protection under the respective IIA and seek remedies through ISDS mechanism provided in IIAs.⁴⁵ First, expropriation provisions require host countries to compensate investors for the taking of private property.⁴⁶ Tajikistan-Netherland BIT Article 4 as well as paragraph 6 of EAEU Investment Chapter prohibits a Party from expropriating a foreign investor's property unless the action is in the public interest, take place in accordance to the due process of the law of the Contracting Party, and adequately compensated without delay. Case law shows that expropriation may be direct or indirect. The difference between direct and indirect expropriation is on whether the property rights of the owner is affected by the measures in question. At the present time direct expropriations have become a rare measure as all states are interested in attracting foreign investors. Nevertheless, indirect expropriations have become common in practice. Indirect expropriation is regulatory measures tantamount to an expropriation without depriving investor's property rights, rather depriving investors of the possibility of utilizing the investment.⁴⁷ Hence, when a government action constitutes an expropriation, a foreign

⁴² Moshe Hirsch, Interactions between Investment and Non-investment Obligations, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 154 (Peter Muchlinkski, Federico Ortino & Christoph Schreuer eds. 2008).

⁴³ Annual address of the H.E. President of Tajikistan to Parliament 2016 <available only in Tajik and Russian> at <http://mfaj.tj/?l=tj&cat=10&art=1331>. (last visited on February 22, 2017)

⁴⁴ Article 4 of the Paris Agreement includes binding procedural commitments – such as the requirements to maintain successive NDCs and to report on progress in implementing them *available at* http://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf. (last visited on February 22, 2017)

⁴⁵ *Supra* note 5 at 238.

⁴⁶ *Id.* at 95-100.

⁴⁷ *Id.* at 101.

investor is entitled to compensation equivalent to the fair market value of the expropriated investment immediately before the expropriation took place. Environmental and climate-related measures are at risk of constituting an indirect expropriation if they effect foreign investments.⁴⁸ Tajikistan pledged in its INDC a target of 60 to 90% reduction of the 1990 level by 2030. Following that, the Law on the security of atmospheric air and the Law on Ecological Security of Road Transportation has been adopted where government was mandated to introduce measures to limit automobile transportation in order to preserve clean air and secure ecology, and necessary regulatory measures in order to preserve clean air.⁴⁹ Regulatory measures on GHG emission mitigation, such as carbon taxes and increase of existed taxes have been become commonly practicing among the countries.⁵⁰ Once Tajikistan in compliance to international obligations, and national laws, should introduce commonly practiced regulatory measures on GHG emission mitigation, such measures could arguably constitute an indirect expropriation. Also due to the strong impacts of climate change, to introduce specific adaptation measures in Tajikistan are of outmost important. Consistent to its INDC, Tajikistan plans for adaptation measures on freshwater regulation, protection of biological and cultural diversity, and conservation and disaster risk managements and setbacks adaptation measures in dangerous areas. Expropriation could occur in the context of managed retreat from dangerous to human life areas. Foreign investors' properties in certain areas could be vulnerable to the damage from flooding or river level rises. Government may bar most of the use of areas to obviate the need for repetitive government disaster relief. If a foreign investor purchases riverside property for the purpose of erecting a resort hotel, and subsequently the government decides to ban constructions due to river level rise, investors

⁴⁸ *Supra* note 3 at 9-22.

⁴⁹ *Supra* note 23.

⁵⁰ About carbon taxes *see* Jean Philippe Barde and Olivier Godard, *The Legal Authority to Enact Environmental Taxation Instruments*, Handbook of research on environmental taxation 33-59 (2012)

could initiate arbitration seeking damages, including lost profits. Tribunals have found that the impacts of environmental and health regulations constitute an expropriation in a number of disputes.⁵¹ The possibility of such finding in the context of climate change and environmental measures depends on the test approached to determine what constitutes an indirect expropriation. Tribunals have not been bound by principle of *stare decisis*, and have adopted different approaches to their rulings, which mean uncertainties exist in the states' risks of liability.⁵²

Second, investor protection provision adopted in Tajikistan-Netherlands BIT and EAEU Investment Chapter require Parties to ensure Fair and Equitable Treatment of the investments of nationals of the other Contracting Party (FET). Although the FET standard is the most frequently invoked standard in investment disputes, defining the content of the standard has proven difficult.⁵³ This standard has been applied in a range of forms such as infringement of legitimate expectations, manifest arbitrariness, denial of justice and due process, discrimination and abusive treatment.⁵⁴ Given its complex nature of interpreting, the FET standard has been described the term as “maddeningly vague, frustratingly general, and treacherously elastic.”⁵⁵ Also, in addition to variation of application of the standard, the language of the FET provisions themselves are different from treaty to treaty. Some IIA tie the FET obligation to the minimum standard of treatment under customary international law (CIL), whereas others do not. Neither of Tajikistan BIT nor EAEU Investment Chapter limits the language of the FET standard, which create an additional issue of broad interpretations of

⁵¹ Notable ISDS cases dealt with indirect expropriation for environmental measures: *Metalclad, S.D. Myers, Pope & Talbot, Tecmed, Methanex* and *Azurix*.

⁵² Meredith Wilensky, *Potential Liability for Climate-Related Measures under the Trans-Pacific Partnership*, The Columbia Center for Climate Change Law White Paper 10686 (8.7.2014) available at http://web.law.columbia.edu/sites/default/files/microsites/climate-change/wilenskytranspacificpartnership8-7-14_-_revised.pdf. (last visited on December 15, 2016)

⁵³ *Supra* note 5 at 130-160.

⁵⁴ UNCTAD, *Fair and Equitable Treatment*, UNCTAD SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS II, 61-83, U.N. Doc No. UNCTAD/DIAE/IA/2011/5 (2012). Available at [http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf] [hereinafter].

⁵⁵ *Supra* note 51 at 10688.

it in the future disputes. Following the legacy of case law, an unlimited nature of the FET poses a great risk of liability for the host states development of climate change and environmental regulations. Law On the Use of Energy from Renewable Energy Sources envisages privileges for energy generated, as well as INDC further pursues the developments in energy efficiency. Following the good practices of the other countries in energy efficiency and to attract the flow of foreign investments, there is a high possibility of introduction of FIT.⁵⁶ It is important for Tajikistan government to plan ahead the methods of FIT policy management, as any changes in adopted policy may violate legitimate expectations of investors with the FET standard. Indeed, such possibility is fairly possible from the legacy of the Spanish government's revocation of its FIT program. There were 27 ISDS cases challenging this policy shift. Also, in *Mesa Power Group, LLC v. Government of Canada*⁵⁷ and *Windstream Energy LLC v. Government of Canada*⁵⁸, the claimants challenged the measures implemented by the Government of Ontario regarding its FIT program. As well as in *Lone Pine Resources, Inc. v. Government of Canada*⁵⁹, the claimant challenged a Quebec law revoking its exploration license. Also, in *S.D. Myers v. Canada* the tribunal found that Canada's environmental policy's ban on the export of polychlorinated biphenyls violated the FET standard as there was also an evidence of protectionist motives.⁶⁰ Tajikistan should be

⁵⁶ Deok-Young Park & Taehwa Lee, From FIT to RPS under the Low-Carbon Green Growth Initiative: Moving Forward or Backward for the Expansion of Renewable Energy in Korea?, in LEGAL ISSUES OF RENEWABLE ENERGY IN THE ASIA REGION: RECENT DEVELOPMENTS IN A POSTFUKUSHIMA AND POST-KYOTO PROTOCOL ERA 29, 33 (Anton Ming-Zhi Gao & Chien Te Fan eds. 2014).

⁵⁷ *Mesa Power Group, LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, Award 24 Mar 2016. available at <http://www.italaw.com/cases/1619>. (last visited on December 15, 2016)

⁵⁸ *Windstream Energy LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2013-22, Claimant Memorial (Aug. 19, 2014), available at <http://www.italaw.com/sites/default/files/casedocuments/italaw4287.pdf>. (last visited on December 16, 2016)

⁵⁹ *Lone Pine Resources, Inc. v. Government of Canada*, ICSID Case. No. UNCT/15/2, Claimant's Memorial (Apr. 10, 2015), available at <http://www.italaw.com/sites/default/files/case-documents/italaw4259.pdf>. (last visited on December 15, 2016)

⁶⁰ *S.D. Myers Inc. v. Canada*, UNCITRAL, Partial Award (Nov. 13, 2000), available at <http://www.italaw.com/sites/default/files/case-documents/ita0747.pdf> (last visited on December 15, 2016)

sure to design regulations to minimize discrimination against foreign investors where it is not necessary to serve environmental and climate change laws and policies.

The next standard to be scrutinized is National Treatment (NT), which intends to prevent host countries from favouring domestic investors.⁶¹ According to article 3.2 of Tajikistan-Netherlands BIT and paragraph 4.2 of EAEU Investment Chapter parties must accord treatment to foreign investors no less favourable than that provided to domestic investors. The NT provisions apply to actions that a Party implements in the operation, management, maintenance, use, enjoyment or disposal thereof by investors in its territory.⁶² The Law On the Security of Atmospheric Air advocates development of measures to preserve the clean air, as well as the Law On the Ecological Security of Road Transportation aims to limit automobile transportation in order to preserve clean air and secure ecology.⁶³ Tajikistan may limit international gasoline supply once it introduces measure on default carbon intensity figures. For instance, in the US as part of the carbon intensity determination, the California Air Resources Board (CARB) assigned default intensity figures for different fuels based on their place of origin, given that the place of origin was part of CARB's effort to accurately reflect the fuels' life-cycle GHG emissions, since GHG are generated in transporting the fuel from where it is produced to the filling stations where it is sold.⁶⁴ If Tajikistan would adopt similar law that disfavoured sellers of foreign fuels because of associated emissions, the foreign fuel producers could argue that taking the origin of a fuel into account violated national treatment provisions. Tajikistan NT obligations may be invoked to challenge climate and environmental related measures that limit the import or export of carbon-intensive fuels

⁶¹ *Supra* note 5 at 198.

⁶² *Ib.* at 198-206.

⁶³ *Supra* note 23 at Article 3.

⁶⁴ *Supra* note 51 at 10692.

or favour domestic energy sources due to their lower associated GHG emissions.⁶⁵ Nevertheless, it is suggested that the probability of such an outcome could be reduced if the laws would be based on mileage rather than on national boundaries.⁶⁶ Tajikistan could adopt laws that would treat fuel that is transported 2,000 kilometres the same regardless of whether it was produced in the Tajikistan, or in EAEU Members, an argument based on the NT obligation would have little force. Otherwise, investors would claim violations of NT along with other standards and initiate international arbitration. In *S.D. Myers*, the tribunal found that although Canada's aim of maintaining the ability to process PCB within the country was legitimate, the ban was not a permissible way to achieve it.⁶⁷ This case give a dangerous legacy that restrictive measures for environmental purposes such as an import or export ban, is more likely to be deemed unreasonable and unjustifiable. Also in the other case, Nykomb Synergetics Technology Holding AB sued the Latvia for its refusal to fulfil its contractual obligation of the minimum purchase price guaranteed through payment of double tariff for low-carbon electricity generation violating the Energy Charter Treaty. Tribunal rendered that investor had been subject to a discriminatory measure and the Latvian government failed to justify its refusal based on legitimate public policy objectives, where it paid the double tariff to other domestic investors subject to the same laws.⁶⁸ In ongoing case of *Windstream Energy LLC v. Government of Canada*, investor claims US\$522.10 million for that the Government of Ontario treated them less favourably than TransCanada, a Canadian local investor, and Samsung, a third party foreign investor, alleging that Ontario kept TransCanada whole by

⁶⁵ Daniel M. Firger & Michael B. Gerrard, *Harmonizing Climate Change Policy and International Investment Law: Threats, Challenges and Opportunities*, in *Yearbook On International Investment Law And Policy* 30-1. (Karl P. Sauvant ed. 2012),

⁶⁶ *Supra* note 51 at 10692.

⁶⁷ *Supra* note 59 at ¶ 301.

⁶⁸ *Nykomb Synergetic Technology Holding AB v. The Republic of Latvia*, SCC Case No. 118/2001, Arbitral Award, Dec. 16, 2003 available at <http://www.italaw.com/sites/default/files/casedocuments/ita0570.pdf>. (last visited on December 15, 2016)

awarding this company a new project and granted Samsung the solar plant which Windstream initially proposed to build, thus violating North Atlantic Free Trade Agreement's (NAFTA) NT provisions in Investment Chapter .⁶⁹

The fourth standard is the MFN treatment obligation which prohibits preferential treatment of investors from one Party to the agreement over another.⁷⁰ In requiring equitable treatment of investors from all Member States, to article 3.2 of Tajikistan-Netherlands BIT and paragraph 4.2 of EAEU Investment Chapter utilizes the "in same investments" language as the NT provision. Hence, the risks of liability characterize that of the national treatment obligation, with one added concern. But the issue rises where the tribunals have almost commonly interpreted MFN provisions to allow foreign investors to import more favourable provisions from the host country's other IIA under the *raison d'être* that IIA themselves can be discriminatory if they give certain foreign investors access to more favourable ISDS rules.⁷¹ The Tajikistan-Netherlands BIT and EAEU Investment Chapter have not anticipated this issue and left MFN provision without any limits. Moreover, article 3.5 of the BIT obliges parties to import more favourable provisions from the host country's other IIA to the extent that "prevail over the present" BIT.⁷² It is important for Tajikistan to clarify that the MFN provision in its BIT and EAEU Investment Chapter may not be used to import any provision from another IIA which can hinder implementations of environmental and climate related measures adopted.

There is a risk of liability for climate and environment regulations under the both Tajikistan-Netherlands BIT and EAEU Investment Chapter, as there is no any provision

⁶⁹*Supra* note 57 at ¶ 542.

⁷⁰*Supra* note 5 at 198.

⁷¹ *Impregilo v. Argentina*, Award, ICSID Case No. ARB/07/17, ¶108 (June 21, 2011) available at <http://www.italaw.com/sites/default/files/case-documents/ita0418.pdf>. *White Indus. v. India*, UNICTRAL, Final Award, §11.2 (Nov. 30, 2011) available at <http://www.italaw.com/cases/documents/1170>. (last visited on December 16, 2016)

⁷² *Supra* note 38 at Article 3.5.

preserving Parties' rights to implement climate related policies and/or environmental protection measures.⁷³ Only, under paragraph 5 of the EAEU Investment Chapter its required that "The Member States shall not use mitigation of any requirements provided by their legislation for the protection of human life and health, the environment, and national security, as well as labour standards, as a mechanism to attract persons of other Member States and third states to incorporate on the territories of Member States."⁷⁴ This paragraph obliges parties merely to do not water-down already in-force environmental regulations. Investors have all the rights to bring suits to inhibit implementation of climate-related measures or obtain settlements, with high possibility of a favourable outcome.⁷⁵

3.3. Myth of systemic integration of environment and climate related norms into IIAs by means of Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT)

There is an argument that tribunals may favourably consider host state's environmental and climate-related laws and policies, as measures undertaken for the compliance of obligations under other treaties of international law, by the means of treaty interpretation, namely by interpreting IIA provisions, upon which the investors' claims are based, in the light of the MEA.⁷⁶ This means that, if any obligatory MEA should be adopted pursuant to the UNFCCC, such as legally binding Paris Agreement, and if Tajikistan will has to compliance to its pledged INDC, Tajikistan could avoid the risk of liability for the possible conflict of norms between MEA and IIA. International investment law is perceived as a systemic part of general international law, general international law incorporates the sphere of international

⁷³ C.N.735.2016.TREATIES-XXVII.7.d (Depositary Notification) *available at* <https://treaties.un.org/doc/Publication/CN/2016/CN.735.2016-Eng.pdf>. (last visited on December 16, 2016)

⁷⁴ Protocol on Trade in Services, Incorporation, Activities and Investments, ¶ 5.

⁷⁵ S. Di Benedetto, *International Investment Law And The Environment* 83-134 (2013)

⁷⁶ *Id.* at 22-53.

environmental law as well, therefore, these but two different specialists regimes may be taken into account in coherence while interpreting IIA in accordance with VCLT Article 31. Mechanism embodied in VCLT, particularly in Article 31(3)(c) require systemic interpretation and that in the interpretation of a treaty “[t]here shall be taken into account, together with the context: [...] any relevant rules of international law applicable in the relations between the parties.”⁷⁷ This approach aims to systematically integrate IIA, the primary rule for the investment dispute yet not self-contained regime, within the international legal system, thus eliminating the risk of fragmentation of international law. This approach does not authorize the tribunal interpreting a treaty to place it in relation to any kind of other international law rule. In order to systematically integrate IIA with other external obligations, first, the scope of the extent needs to be considered to which it should be taken into account when interpreting rules established by the IIA. Next, the external rule must bear a substantial legal relationship with the IIA provision being interpreted. Hence, according to Article 31(3)(c) three elements that an external rule must meet in order to qualify for consideration: (i) the rule must be a “rule”, (ii) the rule must be “relevant”, and (iii) the rule must be “applicable in the relations between the parties”. Indeed all MEA are “rules of international law”, and most of them will be “relevant”, when considered with the proper degree of abstraction. The question of whether a rule is “applicable in the relations between State parties to a particular treaty” is, however, complex.⁷⁸ Because the parties to the dispute will never be identical with the parties to the BIT being interpreted, as one party to the dispute will always be the investor. This means that it would be very difficult for host states to successfully

⁷⁷ VCLT art.31.

⁷⁸ Monika Feigerlova and Alexandre L. Maltais, *Obligations Undertaken by States under International Conventions for the Protection of Cultural Rights and the Environment, to What Extent they Constitute a Limitation to Investor’s Rights under Bilateral or Multilateral Investment Treaties and Investment Contracts?*, Trade and Investment Law Clinic Papers, Centre for Trade and Economic Integration, Graduate Institute of International and Development Studies, Geneva 28-31 (2012) available at http://graduateinstitute.ch/files/live/sites/iheid/files/sites/ctei/shared/CTEI/Law%20Clinic/memoranda2012/UNE_SCO%20Final%20version.pdf. (last visited on December 17, 2016)

defence their environmental and climate-related laws and policies deriving under MEA in order to avoid the risks of liabilities under the IIA. There is an argument that inclusion of environmental exceptions in IIA have become a trend among the states and investors, thus tribunals may interpret IIA and domestic environmental and climate-related laws and policies in light of trending MEA.⁷⁹ However, it has certain complexities as well. First, there is no basis in Article 31 of the VCLT for reaching such a conclusion, since the later IIA are not part of the circumstances surrounding the conclusion of the earlier IIAs and would not qualify under VCLT Article 31(3)(c) either, since the parties likely are not the same. Next, there is too much variation in the structure and content of IIA to support interpretations based on trends in the international practice of IIA designs.⁸⁰ International investment law is perceived as a self-contained regime clinically isolated from general international law, which can be regarded as a strong form of *lex specialis*, which leaves little room for investment tribunals to consider other non-economic interests such as obligations arising from MEA.⁸¹ ISDS case law shows that tribunals have been unwilling to find that obligations under non-investment treaties relieve a host country from liability under investor protection provisions.⁸² In *S.D. Myers*, Canada sustained that it had implemented its export ban on PCB pursuant to its obligations under the The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention).⁸³ Under the Basel Convention it is prohibited to export of hazardous wastes, including PCBs, to non-parties without a bilateral

⁷⁹ UNCTAD, *Taking Stock of IIA Reform*, IIA ISSUE NOTE NO. 1, (Mar. 1, 2016) available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2016d1_en.pdf. (last visited on December 17, 2016)

⁸⁰ B.J. Condon, Climate Change and International Investment Agreements, *Chinese Journal of International Law* 33-35 (2015) available at <https://chinesejil.oxfordjournals.org/content/early/2015/06/12/chinesejil.jmv023.full.pdf+html>. (last visited on December 17, 2016)

⁸¹ For more in-depth discussion on its character as *lex specialis* to general international law, see ILC Report, *supra* note 19, ¶¶ 123-37; Rep. of the Int'l Law Comm'n, 53rd Sess., Apr. 23–June 1.

⁸² *Supra* note 51 at 10694.

⁸³ The overarching objective of this *Convention* is to protect human health and the environment against the adverse effects of hazardous wastes.

agreement, and requires Parties to ensure the availability of adequate disposal facilities for the environmentally sound management of hazardous wastes.⁸⁴ After revising the Basel Convention provisions, the tribunal, however, found Canada's ban had no legitimate environmental reason, and rather it had protectionist intent. International environmental obligations were also at issue *Santa Elena v. Costa Rica* case. Host government expropriated foreign investor property to preserve a unique ecological site under international environmental agreements, including the Convention Concerning the Protection of the World Cultural and Natural Heritage. The tribunal in this case too refused to take into account conservation obligations in determining the land value for compensation purposes.⁸⁵ Thus, above precedent can suggest the importance of inclusion of separate provisions on competing international obligations in Tajikistan IIA in order to avoid unintended violation of those agreements.

4. Reconciling environmental and climate-related laws and policies with IIAs towards sustainable development

4.1 Preamble and specific general exceptions

Tajikistan IIA, including Tajikistan-Netherlands BIT and EAEU Investment Chapter, could preserve flexibility from environmental and climate-related laws and policies by including climate savvy provisions. First, it may be done through the inclusion of environmental and climate-related specific preambles and exception clause. Second, the treaty

⁸⁴ *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal* art. 4 1673 UNTS 57/ [1992] ATS 7/ 28 ILM 657

⁸⁵ *Compañía del Desarrollo de Santa Elena SA v. Republic of Costa Rica*, ICSID Case No.ARB/96/1, Award (Feb. 17, 2000), available at <http://www.italaw.com/sites/default/files/casedocuments/italaw6340.pdf> (last visited on December 17, 2016)

could include a provision that protects measures adopted in compliance with other international obligations, particularly referring to the UNFCCC. Third, since Tajikistan advocates sustainable development path of economic growth consistent to its NDC, IIA could include sustainability-related Performance requirement (SPR), under the principles of sustainable development and international environmental law.⁸⁶ Tribunals tend to interpret IIA referring not only to their protection standards, but also to object and purpose of parties provided in preambles of IIA when interpreting treaty texts in general. Case law shows that tribunals whilst interpreting IIA favour investment protection over host state's environmental laws and policies, since goals and objectives of IIA merely protects foreign investments. For, instance the FET standard is the broadest standard of protection among the other standards. If the FET standard neither defined nor referred to the minimum standard of treatment under CIL, the tribunals may take into account pro investor goal and objective of the IIA, and undermine climate and environment related laws and policies of the host state. There is climate and environmental savvy preamble only in Tajikistan-Austria BIT by far.⁸⁷ The rest of existed BIT and to be negotiated IIA could be inspired by Tajikistan-Austria BIT and add such norms in their preambles. Also, for the purpose of substance, Tajikistan government can refer its IIA to the UNFCCC and Paris Agreement or even add certain provisions of the Paris Agreement in their preambles so as to put special importance on the weight of pursuing climate change policies and environmental protections at domestic level. Tribunals interpreting the future IIA with such preambles will take into account domestic environmental and climate-related laws and policies, as well as host state's obligations under MEA conferred to its parties.

⁸⁶ The Rio Declaration on Environment and Development fleshes out the definition by listing 18 principles of sustainability. *available at* http://www.unep.org/training/programmes/Instructor%20Version/Part_1/readings/Principles_%20of_Sustainable_Development.pdf.

⁸⁷ Agreement for the Promotion and Protection of Investment between the Republic of Austria and the Republic of Tajikistan from January, 2012 *available at* <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3308>.

4.2. An environmental and climate-related exception clauses

An environmental and climate-related exception clause is a general provision that can excuse host state from treaty obligation where the challenged measures were taken for environmental and climate purposes.⁸⁸ Indeed, World Trade Organization (WTO) General Agreement on Tariffs and Trade (GATT) Article XX on General Exception provides an exception clause for measures that, among other things, are “necessary to protect human, animal or plant life or health”, in a effect of which WTO state members are able to justify environment related regulatory measures which aim to protect human, animal or plant life or health once their measures would be challenged before the Dispute Settlement Understanding (DSU) for inconsistency with GATT provisions.⁸⁹ Moreover, reference to the protection of human, animal or plant life or health can be also applicable to justify climate change related policies. WTO Panel ruled that a policy to reduce depletion of clean air could constitute a policy to conserve a natural resource within the meaning of GATT Article XX, and the WTO Appellate Body also ruled that “exhaustible natural resources” must be interpreted “in the light of contemporary concerns of the community of nations about the protection and conservation of the environment.”⁹⁰ WTO GATT provisions provide a strong framework of climate and environment exception clause to be considered in IIA as well. Likewise in WTO DSU, host states can justify their measures in question before the ISDS tribunals by making specific reference to that particular phrase, thus achieving legitimate climate and environment

⁸⁸ *Supra* note 73 at 214.

⁸⁹ The General Agreement on Tariffs and Trade 1867 UNTS 187; 33 ILM 1153 (1994)

⁹⁰ Panel Report, *United States–Standards for Reformulated and Conventional Gasoline*, ¶ 6.37, WT/DS2/R (Jan. 29, 1996). Appellate Body Report, *United States–Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 129, WT/DS58/AB/R (Oct. 12, 1998).

related laws and policies. Currently, neither of mentioned Tajikistan IIA includes environmental exception clause, except in Tajikistan-Austria BIT where in Article 4 “Contracting Parties recognise that it is inappropriate to encourage an investment by weakening domestic environmental laws”, which is the only one among seventeen ratified.⁹¹ Whilst this provision aims to prioritize environmental concerns, it, however, does not function as an environmental exception for all standards of investment protection under the treaty. NAFTA contains almost alike text,⁹² and it has not prevented the *Tecmed* and *Metalclad* tribunals from finding that government measures intended to protect the environment violate investor protection provisions.⁹³ Tajikistan-Austria BIT explicitly mentions environmental exception in case of expropriation envisaging in Article 7.4. that “...non-discriminatory measures of a Contracting Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation”.⁹⁴ Whilst this provision rhetorically supports environmental concerns in case of expropriation, it does not extend to the FET, MFN, and NT standards of treatment, where Tajikistan can be found liable for implementing environment and climate-related adaptation and mitigation measures. Another option to a general exception is that Tajikistan IIA could provide ‘safe haven’ provisions. These provisions would permit dismissal of the claims by investors where parties establish that a challenged measure is a good-faith environment and climate-related adaptation and mitigation measures. For instance, from the legacy of the US Model BIT, which includes ‘safe heaven’ provision for financial services, Tajikistan can add into text of IIAs that “no party shall be prevented from adopting or maintaining measures relating to environment and climate-related adaptation and mitigation measures for prudential

⁹¹ *Supra* note 85.

⁹² North Agreement Free Trade Agreement, chapter 11, art. 1114(1) 32 ILM 289, 605 (1993).

⁹³ *Metalclad v. Mexico*, NAFTA ICSID Case No. ARB(AF)/97/1 (2000) available at <http://www.italaw.com/cases/671>. (last visited on December 19, 2016)

⁹⁴ *Supra* note 85.

reasons”.⁹⁵ Also, further without leaving it to the discretion of the tribunal to determine, based on the US Model BIT the text can go on to establish a mechanism by which the competent climate or environment related authorities of both parties of a treaty are given 120 days to address the issue. Once the issue is unresolved within the designated time period, the case proceeds to arbitration.⁹⁶ Such provisions can empower Tajikistan to raise a defence that the measures in question are intended to mitigate or adapt to climate change, and give a certain period of time for the relevant environmental authorities of the host state and the investor’s home state to determine whether the measure was in good faith and pursue legitimate public purpose objectives. If the parties come to an agreement, then the claim cannot proceed, or if there is no agreement, the tribunal cannot raise any negative inference for the failure to reach an agreement. These kinds of provisions, perhaps, can be stronger in legal terms than mere exception provision, as they permit parties to retain authority to prioritize climate and environment related measures, than being subject to unpredictable decisions of the tribunals.

4.3. Sustainability related Performance requirements⁹⁷

Performance requirements in general sense (PR) have been often described as a barrier on the flow of Foreign Direct Investment (FDI). Nevertheless, empirical data shows that many countries benefited as well as attracted significant flow of FDI from using PR provisions extensively at a certain time in their history.⁹⁸ PR can affect negatively flow of FDI if applied not properly without reflecting a fair balance between host state and foreign investments,

⁹⁵ *Supra* note 51 at 10693-94.

⁹⁶ *Id.* at 10694.

⁹⁷ The scope of Performance requirements discussed in this research is of mere international investment agreements, and does not include international trade related performance requirement measures.

⁹⁸ Successful use of industrial policy in the economic rise of post-war Japan and modern Korea, Singapore and Taiwan; China’s successful efforts to alter the pattern of its export trade, and successful push to develop solar PV and wind power sectors specifically with extensive use of local content and technology-transfer requirements; Indian government policy in fostering a competitive domestic automobile sector; successful efforts of Botswana in fostering a domestic diamond processing industry.

jeopardizing the economic viability of investments. The imposition of a high quota for the supply of local goods and services will be ineffective in a context characterized by the absence of supporting policies for capacity building or access to finance. Likewise, the unsuccessful creation of joint venture requirements may lead to failed PR, given that parties do not share objectives, trust and complementary capabilities. Host states should develop local human resources to be able to manage and monitor PR successfully.⁹⁹ For instance, R&D requirements are often futile, as its effectiveness depends on state's capacity to use the technology received, and cover its associated costs.¹⁰⁰ PR are not prohibited under the CIL. Legality of PR in IIA depends on the language of the agreement in question, as every state has the right to set the conditions under which it admits national and foreign investments in its territory. There are some IIA that prohibit PR,¹⁰¹ but vast majority make no reference to PR. Consistent to its sustainable development principle of economic development, Tajikistan for sustainable use of FDI can employ Sustainability-related Performance requirements (SPR) in its IIA based on principles of sustainable development and international environmental law. Tajikistan may adopt SPR in several, but not limited to, options into IIA, also these options can be cumulatively included based on particular preferences of the government. First, SPR to not prohibit or limit in IIA, as it is not illegal under customary international law to inclusion of SPR. This inclusion would avail Tajikistan to retain the flexibility needed in the sphere of economic, environment and social policy, whilst avoid risk of uncertain formulations and unpredictable interpretations of tribunals. Second approach could be

⁹⁹ *Supra* note 4 at 20-1.

¹⁰⁰ Suzy H. Nikièma, *IISD Best Practices Series: Performance Requirements in Investment Treaties*, IISD publications 16 (2014) available at <http://www.iisd.org/sites/default/files/publications/best-practices-performance-requirements-investment-treaties-en.pdf>. (last visited on December 19, 2016)

¹⁰¹ NAFTA and the free trade agreements concluded by the United States, Canada and Japan; also Some old BIT simply encourage the parties not to apply PR. This is the case of Article II.7 of the DRC–U.S. BIT (1984): Within the context of its national economic policies and goals, each Party shall endeavour to avoid imposing on the investments of nationals or companies of the other Party conditions which require the export of goods produced or the purchase of goods or services locally. This provision shall not preclude the right of either Party to impose restrictions on the importation of goods into their respective territories.

explicitly including a clause expressly authorizing SPR. The clause could be limited its use exclusively before the investment has been made. Doing so, Tajikistan based on its market needs and investor's capability would negotiate investments to be made and SPR to be met. This would result in well negotiated and placed investments benefiting and Tajikistan and foreign investors, without harming the environment. Also, limited SPR should be excluded from the scope of the NT and MFN clauses. Because that pre-establishment SPR could be imposed on domestic investors, and the MFN clause would not enable foreign investors to import the more favourable provisions from other treaties, thus resulting in disturbance of conditions of sustainably negotiated investments. The third option is where Tajikistan chooses to limit its choice of industrial and economic policies through limited SPR in IIA. The International Institute for Sustainable Development having experienced expertise in the field of sustainable investments, suggests that PR in general could be made in various stipulations, in cumulative ways, such as: "Restrict mandatory PR only (but not non-mandatory PR), or restrict only PR prohibited by the WTO, by means of a reference to the TRIMs Agreement; Expressly exclude NT and MFN treatment from the scope of the prohibition on PR, for the same reasons described below; Create a list of sectors to which the prohibition on PR applies or does not apply (a positive or negative list). This exercise requires prior analysis of sensitive and priority sectors for the host state; Grandfather existing PR and existing nonconforming measures in order to be able to maintain them. It is also important to safeguard any future amendments made to existing measures, on condition that they do not expand non-conformity with the treaty. In every case, it is more appropriate to grandfather all existing measures than to create a list, which would be difficult to make and would risk having important omissions; expressly exclude certain categories of performance requirements from the scope of the prohibition. It is for each state to determine its list according to its needs and realities; Exclude the prohibition on PR from the investor-state dispute settlement mechanism. This

does not preclude submission to the mechanism for settling state–state disputes.”¹⁰² These proposed options yet need to be comprehensively studied based on environmental laws and strategies of Tajikistan, and economic sectoral preferences of Tajikistan. Well formulated and applied SPR can be effective tool to maximize the economic, climate, environmental and social benefits of foreign investment.

5. Conclusion

Strong impacts of climate change require Tajikistan to implement a broad range of laws and policies on adaptation and mitigation. Obligations under the ratified IIA and under the ongoing EAEU Investment Chapter can obstruct enforcement of environmental and climate-related laws and policies by creating a risk of liability for measures that negatively affect foreign investments. Case law shows that tribunals have rendered awards with broad interpretations of investor protections standards where host state held liable for their environmental and climate-related laws and policies. To avoid liability Tajikistan may structure its IIA to prevent investor protection standards to hinder legitimate laws and policies on climate change mitigation and adaptation measures. IIA can be structured by including environmental and climate-specific preambles and exception that expand to the entire text of respective IIA. Based on the legacy of the WTO GATT Article XX on General Exceptions, Tajikistan government can include general exception provisions. Next, Tajikistan may develop interpretive guidance for investor protection standards, particularly exempting environmental and climate-related measures from expropriation like it is envisaged in Tajikistan-Austria BIT. For the FET obligation the text may provide that legitimate expectations are not an element under the FET obligation that can obscure Tajikistan right’s

¹⁰²*Supra* note 98 at 16.

to implement environmental and climate- related measures. For the purpose of substance, the text could also require that for Indirect Expropriation and the FET obligation, Tajikistan is obligated to prove in written form that environmental and climate-related measures as public interest regulations did not violated an investor's legitimate expectations before a tribunal can find that public interest regulations violated an investor's legitimate expectations. For the obligations under the NT and MFN standards the interpretive guidance can be included in the text of IIA that investments with differing impacts on climate change are not "same investments". The proposed suggestions shall not attempt to restrict investor protection provisions and nor it attempts to prioritize the host state interest over the foreign investors. These suggestions shall attempt to eliminate conflicts between the two specialist regimes of international law towards sustainable development benefiting Tajikistan as host state, foreign investors, whilst not obscuring implementation of *bona fide* environmental and climate-related measures towards sustainable development, thus creating a win-win-win condition.