안정성 vs. 유연성: 국제투자기준과 기후변화조치 간의 조화를 통한 지속가능한 발전의 도모*
- 타지키스탄 사례를 중심으로 -

【초 록】

타지키스탄 정부는 앞으로 100년 동안 기후변화의 영향이 심각할 것으로 보고, 지속가능한 발전과 기후변화에 대응하기 위해 강력한 지도력을 발휘하기 시작했다. 그리고 적응 및 완화에 있어 의욕적인 조치들을 취할 것을 UNFCCC에 서약해왔다. 한편, 일부 외국인 투자자들은 기후변화의 문제의 심각성 뿐 아니라 높은 사업성을 근거로 그들의 투자를 '갈색'에서 '녹색'으로 전환하기 시작했고 타지키스탄의 주요 환경 프로젝트에 투자를 고려하고 있다. 그런데 UNFCCC에 의거한 타지키스탄 정부의 의무는 국제투자협정 (International Investment Agreements)에 따르는 의무와 규범적인 충돌을 야기할 수 있으며, 정부가 수행하는 기후변화 관련 조치가 투자자 국가 분쟁해결 (Investor State Dispute Settlement)를 통해 제소될 수 있는 위험이 있다. 실제로 타지키스탄의 국제투자

* 이 논문은 2016년 대한민국 교육부와 한국연구재단의 지원을 받아 수행된 연구임.
(NRF-2016S1A3A292530)
법의 대부분은 환경보호에 대한 규범이 미비하다. 본 논문은 이러한 미비점을 해소하기 위한 목적으로 타지키스탄의 사례에서 국제환경보호법과 국제투자보호기준을 조화시키는 방법에 대해서 논의하고자 한다.

주제어: 투자보호기준, 투자자 국가 분쟁해결, 기후 변화 관련 조치, 타지키스탄
【차 례】

I. Introduction

Tajikistan has been taking a strong leadership in combating climate change by pledging to take ambitious steps in adopting climate mitigation and adaptation strategies.1) Tajikistan supplies almost 100% of its energy needs from renewable sources as well as works on to generate more energy from renewable natural resources in order to increase energy exports to Central and South Asia towards sustainable development.2) These countries may become a transit corridor for clean energy supply to leading greenhouse gas (GHG) emitters as China and India. In meantime, some investors have started shifting their investments from ‘brown’ to ‘green’ due to both strong impacts of climate change and business opportunities, and have been considering to invest in major economic

1) H.E. Mr. President Emomali Rahmon, Speech of 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.
2) The CASA-1000 project, available at http://www.casa-1000.org/MainPages/CASAAbout.php., Sources for this project can be also supplied from Rogun Hydropower Plant, which has been building by government and with the assistance from foreign investors. See Italy’s Salini Impregilo Wins $3.9 Bin Tajikistan Contract, Reuters, 01.07.2016, available at https://www.salini-impregilo.com/static/upload/201/0002/20160701-tajik-reuters-update.pdf., The first lot worth $1.95 billion set to begin Rogun, the tallest dam in the world, Salini Impregilo, Press Release, 01.07.2016, available at https://www.salini-impregilo.com/en/press/press-releases/salini-impregilo-framework-agreement-for-3-9-billion-in-tajikistan.html.
projects in Tajikistan.\textsuperscript{3)

A framework for international investment agreements with goals and binding rules towards sustainable development and environmental protection is needed in order to meet climate change related policies. Otherwise, obligations induced from multilateral environmental agreements, including the United Nations Framework Convention on Climate Change (UNFCCC), Paris Agreement, as well as unilateral domestic climate change related measures may result in a normative conflict with investment protection obligations envisaged in International Investment Agreements (IIAs), and thus create a threat of government’s liability for measures undertaken to address climate change.

‘Climate change related measures’\textsuperscript{4)} has yet to constitute as an operative phrase. This research arguably attempts to give a definition to this phrase in order to increase awareness to the urgency of climatic changes, as well as provide a clear methodological approach towards interdependent norms deriving from separate fields of international law. By far, climate change law has been defined as part of broader international environmental law, yet the former has been undergoing synergies with the latter’s specific fields due to the institutional and normative inter-linkages. Climate change law is mainly comprised from the UNFCCC, Kyoto Protocol, and the Paris Agreement, their related decisions, and other predecessor and subsequent instruments, whereas there have been a number of separate international environmental agreements under the broader international environmental law. However, certain international environmental agreements, particularly instruments on air pollutions, protection and conservation of freshwaters, protection and conservation of biological diversity as well as disaster risk reduction have acknowledged the inter-linkages with climate change regime, and their state parties have been called to integrate environmental norms with climate change norms, and vise versa.\textsuperscript{5)}

\begin{flushleft}
3) Climate Transparency G20 Report 2016, Brown to Green, 21.09.2016, available at http://www.climate-transparency.org/g20-brown-to-green.

4) The term “measure” in many investment treaties defined to include “any law, regulation, procedure, requirement, or practice”. e.g. North American Free Trade Agreement, Article 201; Canada-European Union Comprehensive Economic and Trade Agreement, Article X.01.

5) Atieno Mboya, Human Rights and the Global Climate Change Regime, \textit{Natural Resources Journal} 58, no. 1, Winter 2018, pp.55-59. About the normative conflicts between environment and
\end{flushleft}
Hence, norms directly derived from climate change regime and those from broader international environmental law, including norms on air pollutions, protection and conservation of freshwaters, protection and conservation of biological diversity as well as disaster risk management that may have a contextual relationship to climate change adaptation and mitigation measures, as well as unilateral countries domestic climate action measures, are defined in this article as a Climate Change Related Measures (CCRM).

Accordingly, this research revisits and scrutinizes relevant ISDS case laws, where elements of CCRM were at issue before the arbitral tribunals, in order to illustrate and resolve potential normative conflicts between CCRM and investment protection standards. CCRMs being at their infancy, from the perspective of substance, are vulnerable to Investor State Dispute Settlement mechanism (ISDS). For instance, CCRM on mitigation such as emission reduction through increase of taxes to mitigate GHG emissions, policies towards carbon intensive industries to install environmentally sound technologies, as well as adaptation measures for instance on managed setbacks in potential disastrous areas limiting investors on property use may potentially jeopardize investor’s protections under the applicable IIAs.

IIAs aim to encourage foreign investment through the development of a legal scheme that protects foreign investors from certain government actions that can encroach with investment norms see Jorge E. Viñuelas, Foreign Investment and the Environment in International Law, Cambridge Studies in International and Comparative Law, Cambridge University Press, 2012, pp. 40, 131-33; About the linkages between climate change and international environmental norms see Interlinkages between Biological Diversity and Climate Change and Advice on the Integration of Biodiversity Considerations into the Implementation of the United Nations Framework Convention on Climate Change and its Kyoto Protocol, Report prepared by the Ad Hoc Technical Expert Group on Biodiversity and Climate Change established under the Convention on Biological Diversity Draft, Executive Summary, available at https://unfccc.int/sites/default/files/execsum.pdf; Also, at the Basel Conference of the Parties, parties were encouraged to participate in JI, CDM and facilitate transfer of Environmentally Sound Technologies as they further Convention’s objectives. See Conference of the parties to the Basel convention on the control of transboundary movements of hazardous wastes and their disposal Ninth meeting. Implementation of the decisions adopted by the Conference of the Parties at its eighth meeting: resource mobilization and sustainable financing, UNFCCC Bali Action Plan and the Basel Convention: technology transfer, CDM and JI. UNEP/CHW.9/INF/32. (June 23-27, 2008).

6) P. 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, March 1, 2017, pp. 293-308, available at http://ilslaw.yonsei.ac.kr/.
their rights. Most of the IIAs envisage means of dispute settlement through ISDS mechanism, where investors can initiate arbitration in ad hoc international tribunals for damages occurred from the host state’s alleged violation of the investment protection provisions.\(^7\) Introduction of CCRM’s by host states can actually affect foreign investors’ rights and become cause of action. Therefore, there is a need to reconcile CCRM’s with investment protection standards in order to avoid risks of liabilities. These can happen through the insertion of climate-related provisions into IIAs. Otherwise, CCRM’s may result in financial repercussion of ISDS mechanism which can deter timely action to combat climate change.

Tajikistan has been taking a path of sustainable development consistent with its National Development Strategy.\(^8\) Inclusion of sustainability-related performance requirements for investors in IIAs, based on sustainable development principles and international environmental law can create a mutually favourable condition, benefiting Tajikistan as host state, foreign investors, whilst protecting environment. In this sense, this article attempts to broadly study and illustrate potential conflicts between Tajikistan CCRM’s and investment protection standards under the IIAs, as such interactions in Tajikistan case has not been studied yet. First, Tajikistan CCRM’s is studied in order to redefine relevant environmental norms that can encroach with investment protection standards.

\[\text{II. Tajikistan CCRM’s}\]

1. Mitigation measures

According to the 2004-2010 inventory of GHG emission, the level of absolute and per

\(^7\) R. Dolzer & Ch. Schreuer, *Principles of International Investment Law*, 2nd edition, Oxford University Press, 2012, p. 238.

\(^8\) See Statement by President of the Republic of Tajikistan H.E. Mr. Emomali Rahmon at the United Nation Sustainable Development Summit 2015, available at https://sustainabledevelopment.un.org/cont
capita emissions in Tajikistan remains one of the lowest in the world with about 1 tonne CO2-eqv per person, or less than 0.02% from total world GHG emissions.9) 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 its Nationally Determined Contribution (NDC) and Nationally Appropriate Mitigation Actions (NAMA) to the UNFCCC.10)

Tajikistan targets 80 - 90% reduction of 1990 emissions levels without external financial assistance, and 65 - 75% reduction subject to substantial international funding by 2030.11) 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, reduction and limitation of GHG emissions, promotion of sustainable forest management practices and reforestation, promotion of sustainable forms of agriculture.12) Hence, although GHG emissions are comparably low in Tajikistan, government aims at zero emission. 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 GHG.13)

There is a high possibility for introduction the emissions taxes in Tajikistan, which would require individual emitters to pay a fee, charge or tax for GHG released into the atmosphere. In 2012 the Law on the Security of Atmospheric Air was enacted.14) In this law government requires its incumbent to entities develop and introduce necessary

9) See 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, reporting 0.01% in 2004-2010 available at http://www4.unfccc.int/, and Climate Analysis Indicators Tool Version 2.0., Washington, DC : World Resources Institute, (2014), reports 0.02%
10) Tajikistan Forestry NAMA Support Project, the Nationally Appropriate Mitigation Actions Facility, 2015, available at http://www.nama-facility.org/projects/tajikistan.html.
11) D-Y. Park, P. Odilov, Central Asian Legal and Policy Responses to Climate Change, Yonsei Law Review 26.2, 2016, p. 200 available at http://ils.yonsei.ac.kr/.
12) Tajikistan Forestry NAMA Support Project, the Nationally Appropriate Mitigation Actions Facility, 2015, available at http://www.nama-facility.org/projects/tajikistan.html.
13) IPCC, "Summary for Policymakers", Climate Change 2007: Working Group III: Mitigation of Climate Change, Table Spm3. 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.
14) The Law of the Republic of Tajikistan “On the Security of Atmospheric Air” 2012 <available only in Tajik and Russian> at mmk.tj.
measures, details of which has yet to be set, to preserve clean air based on good practices.\textsuperscript{15)} Most air pollutants come from manufacturing industries, vehicles and burning oil, gas and coal.\textsuperscript{16)} In 2015 the Law on Ecological Security of Road Transportation was adopted.\textsuperscript{17)} Accordingly, to preserve clean air and secure ecology government mandated state entities to develop measures that can limit GHG emissions from automobile transportation.\textsuperscript{18)}

Hence, the enactment of these two laws indicates that government has already developed a legal basis for climate change mitigation measures, particularly in transportation sector thus far. Regulatory measures on limiting GHG emission can be assumed in the nearest future.

2. Adaptation measures

It is projected that in a global 2°C warming, the monthly summer temperature distribution in Tajikistan would shift to a 2 - 3°C warmer and in a global 4°C to 6 - 7°C.\textsuperscript{19)} 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 can result in changes of snow cover, earlier snow melt, and glacial melt. Early temperature rise can result in earlier ice and snow melt, which may shift the timing of river flow, from summer to spring, within the next few decades. These shifts may have an adverse impact for agricultural water during critical crop growing periods.

\textsuperscript{15)} Id. at Section Three.
\textsuperscript{16)} 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/.
\textsuperscript{17)} The Law of the Republic of Tajikistan “On Ecological Security of Road Transportation”, 2015, available only in Tajik and Russian at mmk.tj.
\textsuperscript{18)} Ib. at Article 6.
\textsuperscript{19)} D-Y. Park, P. Odilov, supra note 11, at 186.
It is projected that 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% reduction in grape production with 71% of affected people to have a loss in income.20 Due to such strong impacts of climate change, Tajikistan has adopted policies on adaptation and has been further working on secondary measures. Adaptation measures are part of the main state policy the National Development Strategy of the Republic of Tajikistan for 2030 (NDS).21 This strategy mandates 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. Also, government has adopted sectors specific measures for increased adaptive capacity, such as conservation and disaster risk management measures on glaciers and freshwater resources.22 At international level, particularly under the Paris Agreement Tajikistan has also committed that it will mainstream full-scale of the climate resilience and adaptation measures into the planning and development of, inter alia the freshwater protection, biodiversity protection and conservation, disaster risk reduction spheres in order to minimize vulnerability to the impacts of climate change.23 Doing so, it is most likely that adaptation measures will become an integrated part of state development laws and policies.24 This may result in country wide adoption of related regulatory measures. To this end, there is a high possibility for passing obligatory adaptation measures on freshwater regulation, protection and conservation of biological and cultural diversity, disaster risk managements and setbacks adaptation measures in potentially dangerous areas.

20) Ibid at 184-7.
21) See supra note 9.
22) D-Y. Park, P. Odilov, supra note 11, at 189-196.
23) Ibid.
24) J. E. Viñuales, The Paris Climate Agreement: An Initial Examination, C-EENRG Working Papers, Cambridge Centre for Environment, Energy and Natural Resource Governance, University of Cambridge, 2015-3, 2015. p. 14.
In the midst of climatic changes, notwithstanding economic difficulties after the long-lasting and catastrophic non-international armed conflict in 1992-1997, Tajikistan has been taking strong leadership actions towards sustainable development. Such actions include strong commitment of adopting necessary regulatory measures on adaptation and mitigation measures for the purpose of compliance with the UNFCCC. Tajikistan energy generation is strongly vulnerable to the impacts of climate change, and therefore adaptation measures in the field of energy, such as, *inter alia*, strengthening energy efficiency has become top national development priority. Tajikistan produces more than 95% of its energy from renewable energy sources, such as hydropower plants. Tajikistan has also significant capacity for other types of renewable energy generation such as solar and wind energy. To overcome energy deficit, the development of renewable energy mix for energy enhancement has become a government priority.

In 2015 the Law on the Use of Energy from Renewable Energy Sources was enacted. 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 by providing certain privileges. 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,

25) M. Olimov, Civil war in Tajikistan, *Himalayan and Central Asian Studies*, Apr-Sep 2016, 20.2/3, pp. 44-57, available at http://www.himalayanresearch.org/journal-2016.html.

26) D-Y. Park, P. Odilov, *supra* note 11, at 189.

27) D-Y. Park, P. Odilov, *supra* note 11, at 184-87.

28) R. Zakhidov, Central Asian Countries Energy System and Role of Renewable Energy Sources, *Appl. Sol. Energy* 44, 2008, p. 218, available at https://link.springer.com/article/10.3103/S0003701X08030201.

29) For 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, pp.215-216 available at https://link.springer.com/article/10.3103/S0003701X15030056.

30) The Law of the Republic of Tajikistan “On the Use of Energy from Renewable Energy Sources”, 2015 <available only in Tajik and Russian> at mmk.tj.

31) *Id*
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.\(^{32}\) Hence, 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 the energy generation sector. Perhaps Tajikistan government has been working on the development of feed-in tariffs (FIT) to encourage more investments in the sector. Information about the privileges for energy generators from renewable energy sources has yet to be found from publically available sources during the writings of this article. The law is new, and secondary regulatory measures perhaps are under the development. Thus, based on current development of legislation in the field of renewable energy, as well as strong commitment of Tajikistan government towards sustainable development, the introduction of FIT is foreseeable.

These measures, however, may introduce regulatory changes in Tajikistan, which can affect foreign investors’ economic activities, and thus contravene investment protection standards under the respective IIAs and be subject for investors’ claims before the ISDS mechanism, which is scrutinized in the next section.

III. Conflicts between IIAs obligations and CCRMs

1. Tajikistan obligations under IIAs

Tajikistan has developed pertinent legislation protecting foreign investors without discriminations, prohibitions, limitations, or conditioning their investments in any economic sectors.\(^{33}\) The government has been strongly encouraging increased foreign investments, particularly in the field of energy and transport infrastructure, by providing

\(^{32}\) *Id*

\(^{33}\) *The Law of the Republic of Tajikistan “On investments” and the Law of the Republic of Tajikistan “On investment contracts” available at mmk.tj.*
certain incentives and privileges, which is, however, not covered by this research.\textsuperscript{34)}

Early foreign investments and commercial transactions in Tajikistan backs to Samanid Dynasty (819 - 999 AD), also referred as “Era of Renaissance”, a first official Tajik State that stretched from the present Central Asia to India. Dynasty had concluded various commercial treaty relations with close and far partners, re-established roads of Silk Route, as well as formed stable legislations that encouraged flow of commerce and the arts from all over the world to Samarqand and Bukhara, the Samanid capital cities. At present, part of those treaties has been named as International Investment Agreements (IIAs). As of June 2018, Tajikistan has concluded 37 IIAs, out of which 23 entered into force, among them there are two types of instruments: treaties with investment provisions, and Bilateral Investment Treaties (BIT).\textsuperscript{35)} Tajikistan IIAs common to many IIAs, envisage National Treatment, Most Favoured Nation treatment, Fair and Equitable Treatment, Full Protection and Security, as well as Expropriation protection standard, whose definitions are briefly revisited at the length of this research.

Also, all Tajikistan IIAs 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 (ICSID), the London Court of International Arbitration, the International Chamber of Commerce, the Hong Kong International Arbitration Centre or the UNCITRAL. Tajikistan has not become a member to ICSID, yet a case can be processed under the ICSID Additional Facility.\textsuperscript{36)} Between 2007 and 2017, the main investments have been coming from China, Russia, Kazakhstan, the United Kingdom (UK) 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.\textsuperscript{37)} Economy of Tajikistan due to the change from planed economy under

\textsuperscript{34)} 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”

\textsuperscript{35)} Nourzhanov, K., & Bleuer, C., Tajikistan: A Political and Social History, ANU Press, 2013, pp. 11-25 available at http://www.jstor.org/stable/j.ctt5hgxx8. See also Tajikistan, Database of International Investment Agreements, United Nation Conference on Trade and Development, available at http://investmentpolicyhub.unctad.org/IIA/CountryBIts/206#iaInnerMenu.

\textsuperscript{36)} ICSID Member States Database available at https://icsid.worldbank.org/en/Pages/about/Member-States.aspx.
the Soviet Union to market oriented economy after gaining independence is in transition period.\textsuperscript{38}) This could be a reason that there is no Model BIT by far.

Currently, Tajikistan has been negotiating membership in the Eurasian Economic Union (EEU), an international organization for regional economic integration which is composed of a common market with a customs union and investment protection standards.\textsuperscript{39}) EEU in its Annex 16 in the form of Protocol has a multilateral investment agreement (EEU MIA) on the protection and promotion of investment and investors of the union’s state members.\textsuperscript{40}) For the purpose of this research, the two sources of IIAs, the EEU MIA and Tajikistan-Netherlands BIT are applied to the CCRMs.\textsuperscript{41}) EEU MIA is a major IIA that Tajikistan has been negotiating. EEU MIA parties are home countries to major foreign investors that are operating economic activities in Tajikistan. The reason for selecting the latter IIA is that at the time of this writing the treaties with other home countries for major FDI, as China and the USA were not publicly available, if they ever exist.\textsuperscript{42}) Hence, these two major IIAs will serve as a reference point for potential investor-state disputes. This research will broadly scrutinize investment protection standards derived from these IIAs', namely Expropriation, National Treatment and Most Favoured Nation treatment, and Fair and Equitable Treatment, with broadly redefining

\textsuperscript{37}) For further data see Information about Foreign Direct Investment into Tajikistan economy [unofficial translation from Tajik], 2017, State Committee on Investments and State Property Management of the Republic of Tajikistan, available at http://gki.tj/tahlil_tj.pdf.; See also 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.

\textsuperscript{38}) See 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.

\textsuperscript{39}) 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.

\textsuperscript{40}) ANNEX 16 to the Treaty on the Eurasian Economic Union, Protocol on Trade in Services, Incorporation, Activities and Investments available at https://docs.eaeunion.org.

\textsuperscript{41}) 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, (hereinafter Tajikistan-Netherlands BIT) available at http://investmentpolicyhub.unctad.org/Download/TreatyFile/2086.

\textsuperscript{42}) 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.
their meanings, against the Tajikistan CCRMs. In doing so, it is illustrated how Tajikistan’s CCRMs may encroach with such investment protection standards, based on the legacy of ISDS case laws involving CCRMs of host states.

2. Potential conflicts of IIAs’ obligations with CCRMs

CCRMs and investment protection standards have evolved as two different, separate specialist regimes within broader public international law. They have distinctively different from each other objectives and divergent rights and obligations. Given such differences these two specialist regimes can conflict once reciprocal considerations are not included within them.

Tajikistan, as it was alluded above, has been taking strong leadership in multilateral environmental agreement negotiations, as well as has liberated its economy before foreign investors. As the Paris Agreement entered into force, Tajikistan is obliged to pursue stringent domestic climate change mitigation and adaptation measures which may have regulatory affect to foreign investors with risks of economic losses from such measures.

Affected foreign investors for protection under the respective IIAs may seek remedies through ISDS mechanism. Firstly, expropriation provisions may require host countries to compensate investors for the taking a private property. Tajikistan-Netherlands BIT Article 4 as well as the EEU MIA prohibits a Party from expropriating a foreign investor’s property unless the action is in the public interest, taken place in accordance

43) J. E. Víñuales, supra note 5 at 134.
44) M. Hirsch, Interactions between Investment and Non-investment Obligations, in Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., The Oxford Handbook of International Investment Law, Oxford University Press, 2008, p. 154.
45) Annual Address of the H.E. President of Tajikistan to Parliament 2016 <available only in Tajik and Russian> at http://mfa.tj/?l=tj&cat=10&art=1331.
46) 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.
47) R. Dolzer & Ch. Schreuer, supra note 7 at 238.
48) Ibid at 95-100.
to the due process of the law of the Contracting Party, and adequately compensated without delay.\textsuperscript{49}

Expropriation may be direct or indirect. The difference between direct and indirect expropriation is on whether the property rights of the owner are affected by the measures in question. Currently, 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 a regulatory measure tantamount to an expropriation without depriving investor’s property rights, rather depriving investors of the possibility of utilizing the investment.\textsuperscript{50} Hence, when a government action constitutes an expropriation, foreign investor may be entitled to compensation equivalent to the fair market value of the expropriated investment immediately before the expropriation took place. CCRMs are at risk of constituting an indirect expropriation once they affect foreign investments.\textsuperscript{51}

Tajikistan pledged in its NDC a target of 60 to 90% reduction of the 1990 level by 2030. Following that, the laws on the Security of Atmospheric Air and on Ecological Security of Road Transportation have been adopted, where government was mandated

\textsuperscript{49} ANNEX 16 to the Treaty on the Eurasian Economic Union, Protocol on Trade in Services, Incorporation, Activities and Investments at VII, 4, 79 “Investments of investors of a Member State made on the territory of another Member State shall not be subject to direct or indirect expropriation, nationalisation and other measures with consequences equivalent to those of expropriation or nationalisation (hereinafter “expropriation”), except in cases where such measures are taken for the public benefit in the procedure determined by the legislation of the recipient state, are not discriminatory and involve prompt and adequate compensation.” available at https://docs.eaeunion.org/. Article 6 of the 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: “Neither Contracting Party shall take any measures depriving, directly or indirectly, nationals of the other Contracting Party of their investments unless the following conditions are complied with: a) the measures are taken in the public interest and under due process of law; b) the measures are not discriminatory or contrary to any undertaking which the Contracting Party which takes such measures may have given; c) the measures are taken against just compensation. Such compensation shall represent the genuine value of the investments affected, shall include interest at a normal commercial rate until the date of payment and shall, in order to be effective for the claimants, be paid and made transferable, without delay, to the country designated by the claimants concerned and in the currency of the country of which the claimants are nationals or in any freely convertible currency accepted by the claimants.”

\textsuperscript{50} \textit{Ibid} at 101.

\textsuperscript{51} J. E. Vivasales, \textit{supra} note 5 at 293-316.
to introduce measures to limit automobile transportation in order to preserve clean air and secure ecology, and necessary regulatory measures to preserve clean air.\textsuperscript{52)} Regulatory measures on GHG emission mitigation, such as carbon taxes and increase of existed taxes have been become commonly practicing among the countries.\textsuperscript{53)} Once Tajikistan in compliance to internationally induced obligations, and/or unilateral actions pursuant to 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 out most importance. As it was illustrated above, consistent with its NDC, Tajikistan plans for adaptation measures on freshwater regulation, protection and conservation of biological and cultural diversity, disaster risk managements and setback adaptation measures in dangerous areas. At present time, we are not aware of any conflicts between these measures and expropriation. Nevertheless, hypothetically, expropriation may occur when national governments based on precautionary and risk management measures conduct a managed retreat of people and their properties from dangerous areas. Foreign investors' properties in certain areas may 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. For instance, once 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 may initiate arbitration seeking damages, including lost profits. Tribunals have found that the impacts of CCRMs can constitute expropriation in a number of disputes.\textsuperscript{54)}

\textsuperscript{52)} See supra note 15.

\textsuperscript{53)} About carbon taxes see J.Ph. Barde and O. Godard, The Legal Authority to Enact Environmental Taxation Instruments, \textit{Handbook of research on environmental taxation}, Edward Elgar, 2012, pp. 33-59.

\textsuperscript{54)} Notable ISDS cases dealt with indirect expropriation and environmental measures: Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1 Award (30 August 2000); S.D. Myers v. The Government of Canada, UNCITRAL, Partial Award, (November 13, 2000); Pope & Talbot Inc. v. The Government of Canada, UNCITRAL, Award on the Merits of Phase 2, (June 26, 2000); Técnicas Medioambientales Tecmed v. United Mexican States, ICSID Case No. ARB (AF)/00/2, Award, (29 May 2003); Methanex Corporation v. United
possibility of such finding in the context of CCRMs 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 risks of liability.\(^{55}\)

Second, investor protection provisions adopted in Tajikistan-Netherlands BIT\(^{56}\) and EEU MIA\(^{57}\) require Parties to ensure Fair and Equitable Treatment of the investments of nationals of the other Contracting Party (FET). Although FET standard is the most frequently invoked standard in ISDS, defining the content of the standard has proven to be difficult.\(^{58}\) This standard has been applied in range of forms, such as infringement of legitimate expectations, arbitrariness, denial of justice and due process, discrimination and abusive treatment, as well as lack of reasonableness or proportionality.\(^{59}\) Given its complex nature of interpreting, the FET standard has been described as “maddeningly vague, frustratingly general, and treacherously elastic.”\(^{60}\) Under this standard investor may virtually claim against any host state action that in some way may affect its rights.\(^{61}\)

Also, in addition to variation of application of the standard, the language of the FET provisions are different from treaty to treaty. Majority of IIAs have tied the FET obligation to the minimum standard of treatment under customary international law (CIL), some to

\begin{footnotesize}
\footnotesize
\begin{itemize}
\item[(55)] Meredith Wilensky, *Potential Liability for Climate-Related Measures under the Trans-Pacific Partnership*, 45 *Environmental Law Reporter News & Analysis*, p. 8, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2564781.
\item[(56)] Article 3 (1) of Tajikistan-Netherlands BIT “Each Contracting Party shall ensure fair and equitable treatment of the investments of nationals of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those nationals. Each Contracting Party shall accord to such investments full physical security and protection.” available at http://investmentpolicyhub.unctad.org/Download/TreatyFile/2086
\item[(57)] See supra note 49 at VII, 2, 68. “Each Member State shall ensure on its territory fair and equitable treatment to investments and investment-related activities conducted by investors of other Member States.”
\item[(58)] R. Dolzer & Ch. Schreuer, *supra* note 7 at 130-160.
\item[(59)] UNCTAD, *Fair and Equitable Treatment*, Unctad Series On Issues In International Investment Agreements II, U.N. Doc No. UNCTAD/DIAE/IA/2011/5, 2012, pp. 61-85, available at http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf.
\item[(60)] J.W. Salacuse, *The Law of Investment Treaties*, Oxford University Press, 2010, p. 221.
\item[(61)] R. Klager, *Fair and Equitable Treatment in International Investment Law*, Cambridge University Press, 2012, pp. 1-7.
\end{itemize}
\end{footnotesize}

international law, or providing exhaustive list of contents of the standard in order to limit the scope of host states' obligation. Few states have left FET standard unqualified or untied to any particular source of law at present.62) Neither of Tajikistan-Netherlands BIT nor EEU MIA limits the language of the FET standard, which creates a risk of broad interpretations.63)

Following the legacy of case law, the unlimited nature of the FET poses a great risk of liability for the host states adopting CCRM. Law on the Use of Energy from Renewable Energy Sources envisages privileges for energy generated, as well as NDC 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.64) Tajikistan government is well advised to plan ahead the methods of FIT policy management, as any changes in adopted policy may violate legitimate expectations of investors under the FET standard.

Indeed, such possibility is fairly possible from the legacy of the Spanish government's revocation of its FIT program. There were more than 20 ISDS cases challenging this policy shift. Also, in Mesa Power Group LLC v. Government of Canada65) and Windstream Energy LLC v. Government of Canada66), claimants challenged the measures implemented by the Government of Ontario regarding its FIT program. As well as in Lone Fine

---

62) R. Dolzer & Ch. Schreuer, supra note 7, at Chapter 2, J.W. Salacuse, supra note 60, at 222 - 227, I. A. Laird, Betrayal, Shock and Outrage—Recent Developments in NAFTA Article 1105, in Todd Weller (ed), NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects, Transnational Publisher, Inc., New York, 2004, pp. 49, 51 - 54, UNCTAD, supra note 7, at 3, M. Fiona, Fair and Equitable Treatment in International Investment Agreements, Issues in International Investment Law, Background Papers for the Developing Country Investment Negotiators' Forum Singapore, 1 - 2 October 2007, International Institute for Sustainable Development, 4 - 5 available at http://www.iisd.org/pdf/2007/inv_fair_treatment.pdf.

63) Supra note 56 and 57.

64) D-Y. Park and T. 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 Anton Ming-Zhi Gao and Chien Te Fan eds., Legal Issues Of Renewable Energy In The Asia Region: Recent Developments In A Post Fukushima And Post-Kyoto Protocol Era, Kluser Law International, 2014, pp. 29 and 33.

65) 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.

66) 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.
Resources, Inc. v. Government of Canada\(^7\) challenged a Quebec law that revoked 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 evidences of protectionist motives.\(^6\)

In case of *Windstream Energy LLC v. Government of Canada*, for neither cancelling the project nor conducting further scientific studies with regard to investor’s economic activities in environmentally sensitive area, tribunal found that investor was left in a “legal and contractual limbo”, and ultimately, the government’s “fail[ure] to clarify the situation […] was unfair and inequitable within the meaning of Article 1105(1) of NAFTA.”\(^6\)

The next standard to be scrutinized is National Treatment (NT), which intends to prevent host countries from favouring domestic investors.\(^7\) According to the Article 3.2 of Tajikistan-Netherlands BIT and EEU MIA parties must accord treatment to foreign investors no less favourable than that provided to domestic investors.\(^7\) NT provisions apply to actions that a Party implements in the operation, management, maintenance, use, enjoyment or disposal thereof by investors in its territory.\(^7\) 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 GHG emissions from automobile transportation in order to preserve clean air and secure ecology.\(^7\)

Arguably foreign gasoline supply can be limited once norms purport to introduce

---

\(^6\) 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.

\(^7\) S.D. Myers Inc. v. Canada, UNCITRAL, Partial Award, Nov. 13, 2000, paras. 258-269, *available at* http://www.italaw.com/sites/default/files/case-documents/ita0747.pdf.

\(^9\) Windstream Energy LLC v. Government of Canada, PCA Case No. 2013-22, Award, 16.02.2016, para. 380 *available at* https://www.italaw.com/sites/default/files/case-documents/italaw7875.pdf.

\(^7\) R. Dolzer & Ch. Schreuer, *supra* note 7 at 198.

\(^7\) Tajikistan-Netherland BIT Article 3.2 “...each Contracting Party shall accord to such investments treatment which in any case shall not be less favourable than that accorded either to investments of its own nationals.” ANNEX, *supra* note 49 at VII, 3, 69 “These investors shall be accorded treatment no less favourable than that accorded by the recipient state to its domestic investors...”.

\(^7\) R. Dolzer & Ch. Schreuer, *supra* note 7 at 198-206.

\(^7\) *Supra* note 14 at Article 3.
measures on default carbon intensity figures. By ways of illustration, in the State of California, the US, under the California’s Low Carbon Fuel Standard there was established a market mechanism that obliges providers of petroleum-based transportation fuels to reduce the carbon intensity of their products. In this regard, there have been assigned default intensity figures for different fuels based on their place of origin, in order to accurately reveal the lifecycle GHG emissions of the fuel.\(^{74}\) Once Tajikistan would adopt a similar law which disfavours foreign fuels based on associated emissions, foreign fuel producers and trading investors from IIAs partner countries could argue that taking the origin of a fuel into account violates NT. Tajikistan NT obligations may be invoked to challenge CCRMs that limit the import or export of carbon-intensive fuels based on the rules of origin, or favour domestic energy sources due to their lower associated GHG emissions.\(^{75}\) It is suggested that the probability of such outcome could be reduced if laws would be based on mileage rather than on national boundaries.\(^{76}\) 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.\(^{77}\) This case has created a legacy that although for environmental purposes, certain host state’s restrictive measures, such as an import or export ban, can be found unreasonable and discriminatory.

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 illegitimate discriminatory measure, when Latvian government had paid the double tariff to other domestic investors subject to the same laws.\(^{78}\)

\(^{74}\) *Supra* note 51 at 10692.

\(^{75}\) Daniel M. Firger & Michael B. Gerrard, *Harmonizing Climate Change Policy and International Investment Law: Threats, Challenges and Opportunities*, in Karl P. Sauvant ed., *Yearbook on International Investment Law And Policy*, 2012, pp. 30-31; M. Wilensky, *Supra* note 55 at 15-16.

\(^{76}\) *Ibid* M. Wilensky, *Supra* note 55 at 15-16.

\(^{77}\) *Supra* note 68 at para. 301.

\(^{78}\) Nykomb Synergetic Technology Holding AB v. The Republic of Latvia, SCC Case No. 118/2001, Award, Dec. 16, 2003, available at http://www.italaw.com/sites/default/files/casedocuments/ita6570.pdf.
The fourth standard is the Most Favoured Nation (MFN) treatment obligation which prohibits preferential treatment of investors from one Party to the agreement over another.⁷⁹) In requiring equitable treatment of investors from all Member States, both Tajikistan-Netherlands BIT and EEU MIA utilize the “same circumstances” language as the NT provision.⁸⁰) Hence, the risks of liability characterize that of the national treatment obligation, with one more 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 state’s other IIAs under the raison d’être that IIAs themselves can be discriminatory if they give certain foreign investors access to more favourable ISDS rules.⁸¹)

Tajikistan-Netherlands BIT and EEU MAI 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 IIAs to the extent that “prevail over the present” BIT.⁸²) It is important for Tajikistan to clarify that the MFN provision in its BIT and EEU MAI may not be used to import any provision from other IIAs which can hinder implementations of CCRMs adopted. There is a risk of liability for CCRMs under the both Tajikistan-Netherlands BIT and EEU MAI, as extends of investment protection obligations are left open and do not consider such CCRMs, which can impede Tajikistan’s path towards implementation the measures to secure environment and to combat climate change under pledged obligations before the UNFCCC.⁸³)

---

⁷⁹) Supra note 7 at 198.
⁸⁰) Article 3.2 of Tajikistan-Netherlands BIT “… each Contracting Party shall accord to such investments treatment which in any case shall not be less favourable than that accorded either to … investments of nationals of any third State, whichever is more favourable to the national concerned.”, EEU MIA VII, 2, 70. “The treatment accorded by each Member State, under the same (similar) circumstances, to investors of any other Member State, their investments and investment-related activities shall be no less favourable than the treatment accorded to investors of any third state, their investments and activities related to such investments.”.
⁸¹) Impregilo v. Argentina, Award, ICSID Case No. ARB/07/17, June 21, 2011, para. 108 available at http://www.italaw.com/sites/default/files/case-documents/ita0418.pdf. White Indus. v. India, UNICTRAL, Final Award, Nov. 30, 2011, para. 11.2 available at http://www.italaw.com/cases/documents/1170.
⁸²) Supra note 49.
⁸³) See Paris Agreement, Depositary Notification, C.N.735.2016.TREATIES-XXVII.7.d available at https://treaties.un.org/doc/Publication/CN/2016/CN.735.2016-Eng.pdf.
all the rights to bring suits to inhibit implementation of CCRMs or obtain settlements, with high possibility of a favourable outcome.\textsuperscript{84)

3. Challenges of systemic integration of CCRMs into IIAs by means of Article 31(3)(c) of the Vienna Convention on the Law of Treaties

There is an argument that tribunals may favourably consider host state’s CCRMs, as measures undertaken for the compliance of obligations under other treaties of international law, by the means of treaty interpretation, namely by interpreting IIAs provisions, upon which the investors’ claims are based, in the light of the international instruments on CCRMs.\textsuperscript{85) This means that for complying to pledged contributions under the Paris Agreement, Tajikistan may avoid risks of liability in possible conflict of norms between CCRMs and IIAs.

In this sense, investment protection standards have been perceived as a systemic part of general international law, which can incorporate CCRMs as well, thereby these two different specialists regimes may be taken into account in coherence whilst interpreting IIAs in accordance with the Vienna Convention on the Law of Treaties (VCLT) Article 31. Mechanism embodied in VCLT, particularly in Article 31(3)(c) requires systemic intergration: “[t]here shall be taken into account, together with the context: […] any relevant rules of international law applicable in the relations between the parties.”\textsuperscript{86) This approach aims to systematically integrate other relevant rules, in present case international instruments on CCRMs, into IIAs upon interpretation, and thus eliminate the risks of fragmentation of international law.\textsuperscript{87)

\textsuperscript{84) S. Di Benedetto, International Investment Law And The Environment, Edward Elgar, 2013, pp. 83-134.  
\textsuperscript{85) Ibid. at 22-53.  
\textsuperscript{86) Article 31 of the Vienna Convention on the Law of Treaties, available at https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf.  
\textsuperscript{87) International Law Commission, Fragmentation of International Law Difficulties Arising from the Diversification and Expansion of International Law - Report of the Study Group of the International Law Commission, 58th Session, May 1-June 9, July 3-Aug. 11, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006), as corrected U.N. Doc. A/CN.4/L.682/Corr.1, Aug. 11, 2006.
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 international instruments on CCRMs 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.\(^88\)

This is because the parties to the dispute can be argued to be not identical with the parties to the BIT being interpreted, as one party to the dispute will always be the investor.\(^89\) This means that it would be very difficult for host states to successfully defend their both unilateral and internationally induced CCRMs in order to avoid the risks of liabilities under the IIAs. Arguably, if applicable IIA does not have climate savvy provisions, host state could defense that current decade’s signed IIAs envisage exceptions and carve out provisions for environmental regulatory measures, and thus establish justification of its claimed measures. However, it has certain complexities as well. First, there is no basis in Article 31 of the VCLT for reaching such a conclusion, since recent IIAs 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 are too many variations in the structure and content of IIAs to support interpretations based on trends in the international practice of IIAs designs.\(^90\) International investment standards are perceived as a self-contained regime,

88) M.Feigerlova and A.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?, \textit{Trade and Investment Law Clinic Papers}, Centre for Trade and Economic Integration, Graduate Institute of International and Development Studies, Geneva, 2012, pp. 28-31 available at http://graduateinstitute.ch/files/live/sites/iheid/files/sites/ctei/shared/CTEI/Law%20Clinic/memoranda2012/UNESCO%20Final%20version.pdf.

89) Yet, it must be noted that “applicable in the relations between the parties” does not mean between investor and host state, instead, according to the Article 2(1)(g) of the VCLT it means between host state and home state of investors. UNCTAD, \textit{Taking Stock of IIA Reform} IIA ISSUE NOTE NO. 1, 01.03.2016, available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2016d1_en.pdf.

90) B.J. Condon, Climate Change and International Investment Agreements, \textit{Chinese Journal of International Law}, 2015, pp. 33-35, available at https://chinesejil.oxfordjournals.org/content/early
which can be regarded as a strong form of lex specialis, and thus may leave a little room for investment tribunals to consider other non-economic interests such as obligations arising from internationally induced CCRMs.91)

ISDS case law shows that tribunals have been unwilling to find that obligations under non-investment treaties relieve a host country from liability.92) For instance, in S.D. Myers, Canada sustained that it had implemented its export ban on PCB pursuant to its obligations under the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention).93) Under the Basel Convention it is prohibited to export of hazardous wastes, including PCBs, to non-parties without a bilateral agreement, and requires Parties to ensure the availability of adequate disposal facilities for the environmentally sound management of hazardous wastes.94) After revising the Basel Convention provisions, the tribunal, however, found Canada’s ban had no legitimate environmental reason, and rather it had protectionist intend. International environmental obligations were also at issue in 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 had also refused to take into account conservation obligations in determining the land value for compensation purposes.95)

Thus, the above precedent can suggest the importance of inclusion of separate

---

91) For more discussion about the interactions between Lex specialis and environmental norms see Alessandra Asteriti, “Climate change policies and foreign investment: some salient legal issues” in Yulia Levashova and Tineke Lambooy Ige Dekker (Eds.), Bridging The Gap Between International Investment Law And The Environment, Eleven International Publishing, (September 2016), pp. 167-170. See also ILC Report, Rep. of the Int’l Law Comm’n, 53rd Sess., Apr. 23 – June 1, pp.39 and 135.

92) M. Wilensky, supra note 55 at 20-30.

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

94) Article 4 of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal 1673 UNTS 57/ [1992] ATS 7/ 28 ILM 657. available at http://www.basel.int/Portals/4/Basel%20Convention/docs/text/BaselConventionText-e.pdf.

95) Compañía del Desarrollo de Santa Elena SA v. Republic of Costa Rica, ICSID Case No. ARB/96/1, Award, Feb. 17, 2000, para. 201, available at http://www.italaw.com/sites/default/files/casedocuments/italaw6540.pdf.
provisions on competing international obligations in Tajikistan IIAs in order to avoid unintended violation of those agreements, which is studied in the next section.

IV. Reconciling CCRMs with IIAs towards sustainable development

1. Preamble and specific carve-out provisions

Tajikistan IIAs, including Tajikistan-Netherlands BIT and EEUMAI, can preserve flexibility for CCRMs by including climate savvy provisions. First, it may be done through the inclusion of environmental and climate-related specific preambles and carve out provisions. Second, treaty may 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 with its domestic policies, IIAs could include sustainability-related Performance requirement (SPR), under the principles of sustainable development and international environmental law.96

Tribunals tend to interpret IIAs referring not only to their protection standards, but also to object and purpose of parties provided in preambles of IIAs when interpreting treaty texts in general. Case law shows that tribunals whilst interpreting IIAs tend to favour investment protection over the host state’s right to regulate environmental laws and policies, as goals and objectives of IIAs merely protects foreign investments.97

Thus far, there is climate and environmental savvy preamble only in Tajikistan-Austria BIT.98 The rest of existed and negotiating IIAs could be inspired by Tajikistan-Austria

---

96) The Rio Declaration on Environment and Development fleshes out the definition by listing 18 principles of sustainability. Available at http://www.unec.org/training/programmes/Instructor%20Version/Part_1/readings/Principles_of_Sustainable_Development.pdf.
97) William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada, UNCITRAL, PCA Case No. 2009-04, para. 435 available at https://www.italaw.com/sites/default/files/case-documents/italaw4212.pdf.
98) Agreement for the Promotion and Protection of Investment between the Republic of Austria and the Republic of Tajikistan from January, (hereinafter Tajikistan-Austria BIT) 2012 available
BIT to add such norms in their preambles. Also, from the perspective of substance, Tajikistan government can refer its IIAs 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.\(^{99}\) Tribunals interpreting future IIAs with such preambles can take into account domestic CCRMs, as well as host state’s obligations under international instruments conferred to their parties.

As it was alluded above, FET standard is the broadest as well as the most invoked host state obligation among the other standards. Once this standard is neither defined nor referred to the minimum standard of treatment under CIL, the tribunals may subject Tajikistan’s CCRMs to strong scrutiny and review, and take stances of pro-investor, particularly in interpreting goals and objectives of applicable IIAs, and thus undermine implementation of CCRMs.\(^{100}\) Tajikistan is well advised to limit the scope of obligation under the FET standard, by listing its components and adding carve-out provisions.

For instance, the EU-Canada Comprehensive Economic and Trade Agreement has envisaged an exclusive list of FET contents. Contracting parties by drafting such FET noted that they have clearly defined investment protection standards, including FET, in a ‘closed list’, and that this would offer a clear guidance to arbitral tribunals on the methods of their application.\(^{101}\) Also, threshold for certain obligations under the FET

\(^{99}\) J. E. Vicuñas, Supra note 5 at 217, 275-6.

\(^{100}\) Y. Levashova, Fair and Equitable Treatment and the Protection of the Environment: Recent Trends in Investment Treaties and Investment Cases, in Y. Levashova, T. Lambooy, and E. J. Overwater eds., *Bridging the Gap between International Investment Law and the Environment*, Eleven International Publishing, 2015, pp. 53-73.

\(^{101}\) Article 8.10(2) of the Comprehensive Economic and Trade Agreement between Canada and the European Union and its Member States, (hereinafter CETA) "A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if a measure or series of measures constitutes: (a) denial of justice in criminal, civil or administrative proceedings; (b) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings; (c) manifest arbitrariness; (d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; (e) abusive treatment of investors, such as coercion, duress and harassment; or (f) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article.

4. When applying the above fair and equitable treatment obligation, a Tribunal may take into account whether a Party made a specific representation
was set high, by juxtaposing obligations with adjectives and phrases of “manifest”, “fundamental”, “complete lack”, in a sense that a mere malpractice in governments’ function would not be actionable. Although this article has defined a pre-size content of FET standard, it is not comprehensive from the perspective of balancing host state regulatory right to adopt CCRMs. Indeed, legitimate host state’s public policy regulatory measures can justify deviation from this obligation, yet arbitral tribunals’ decisions have not been uniform and consistent over this issue. Therefore, one may be well advised to include carve-out provisions into FET same as Expropriation provision, which is discussed soon below.102) By way of illustration, Article 3.2 of the China-Madagascar BIT stipulates that “[m]easures taken for security, public order and public health or morality and the protection of the environment, will not be considered breaches” of FET standard.103) This provision attempts to add carve-out into FET standard, yet has two issues for its successful and intended operation. It states aspects of CCRMs such as protection of public health and environment as justification for deviation, however, further it empowers such deviation with controversial verb of “will” which in some instances have been considered to be ‘softer’ than verb “shall”.104) Second, this provision is broad without clarity about the scope of legitimacy of such measures. Arguably, it could become clearer if the provision would be formulated as follows: “Legitimate measures taken for security, public order and public health or morality and the protection of the environment, shall not be considered breaches”. Thus, creating a hybrid provision from

---

102) A. Asteriti, supra note 91 at 145-155.
103) Unofficial translation, originally provided only in French language as follows: “Les mesures prises pour des raisons de sécurité, d’ordre public et de santé publique au de moralité et de protection de l’ environnement ne seront pas considérées comme des entraves.” available at http://investmentpolicyhub.unctad.org/IIA/mappedContent/treaty/933.
104) See The U.S. State Department, Guidance on Non-Binding Documents, Emphasizing that the term “will” may lead to confusion as to the intention of the participants. available at https://www.state.gov/s/l/treaty/guidance/.
CETA FET standard with exhaustive list of obligations and China-Madagascar BIT carve-out provision with two modifications can bring certainty into expansive FET obligation. Same drafting technique can be employed with Expropriation, MFN and NT obligations.

2. Climate change related general and specific 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. Article XX on General Exceptions of the General Agreement on Tariffs and Trade (GATT) provides an exception clause for measures that, among other things, are “necessary to protect human, animal or plant life or health”. Accordingly, World Trade Organization (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. Moreover, reference to the protection of human, animal or plant life or health can be also applicable to justify CCRMs. 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.” Article XX provisions provide a strong framework of climate and environment exception clause to be considered in IIAs as well. For instance, Canada included WTO-like general exceptions for investment obligations in its Model BIT, with certain modifications. Further, it has also envisaged similar

105) _Supra_ note 73 at 214.
106) The General Agreement on Tariffs and Trade 1867 UNTS 187; 33 ILM 1153, 1994
107) Panel Report, United States – Standards for Reformulated and Conventional Gasoline, WT/DS2/R, Jan. 29, 1996, para. 637; Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS88/AB/R, Oct. 12, 1998, para. 129.
108) Canada Foreign Investment Protection and Promotion Agreement (hereinafter Canada Model BIT), Negotiating Programme (2004). This Model BIT was revised in 2014, but the text is not
provisions in a number of its IIAs.110) Likewise in WTO jurisprudence and Canada Model BIT, host states can draft similar general exceptions in order to justify their purported legitimate CCRMs.

Nevertheless, there is an argument that transplanting and applying WTO-style general exceptions into IIAs may not necessarily achieve aimed host states’ regulatory autonomy. This is because the operation of the general exceptions in IIAs will depend on the host state’s treaty obligations to which it applies and the scope of these obligations. As well, the impact of general exceptions clause will depend on the extends of arbitral tribunals’ approach towards WTO jurisprudence, and methods of imploring rules of interpretation provided by articles 31 and 32 of the VCLT, which may limit the scope of interpreting general exceptions by referencing them to the investment protection standards within the same treaty. In turn, it can be challenging to achieve the purposes of general exceptions vis-à-vis investment protection standards, for example FET obligation, because the latter does not include non-economic principles in its nature.111)

Moreover, WTO jurisprudence has been more flexible than ISDS system. Generally, in latter arbitral tribunals tend to review host states’ measures based on three-tier proportionality test, such as suitability, necessity, and proportionality stricto sensu or

---

109) A. Mitchell, Importing WTO General Exceptions into International Investment Agreements: Proportionality, Myths and Risks, Yearbook of International Investment Law and Policy, 2016-2017, Oxford University Press, 2018, pp. 38-41, available at https://papers.ssrn.com/sol3/papers.cfm? abstract_id=3084663.

110) Agreement between Canada and Ecuador for the Promotion and Reciprocal Protection of Investments, Art XVII:3; Agreement between Canada and the Slovak Republic for the Promotion and Protection of Investments, signed 20 July 2010 (entered into force 14 March 2012) Art IX:1; Agreement between Canada and the Republic of Peru for the Promotion and Protection of Investments, Art 10.1.

111) A. Mitchell, supra note 108 at 30-8
cost-benefit analysis, whereas in the WTO law the third step test does not take place. Thus far, Appellate Body of WTO has repented from proportionality *stricto sensu* test of member state measures, explicitly emphasizing that they have the right to determine for themselves the preferred level of protection. Arguably, exceptions should be combined with investment standards of protection in order to ensure that treaty parties achieve what they intend, as it was suggested above, in the form of carve-out provisions within the FET standard.

Notwithstanding, at present neither of mentioned Tajikistan IIAs include environmental exception clause, except in Tajikistan-Austria BIT where in Article 4 “[c]ontracting Parties recognise that it is inappropriate to encourage an investment by weakening domestic environmental laws”, which is the only one among ratified IIAs. Whilst this provision aims to prioritize environmental concerns, however it does not function as an environmental exception for all standards of investment protection under the treaty, neither it has a binding power as parties merely “recognise”. This provision constitutes a ‘best effort’ principle with uncertain implications in ISDS. IEU MIA provides in rather binding language that “[t]he 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”, which is the only provision in treaty with respect to the party states’ regulatory power to adopt CCRMs. NAFTA contains almost alike text, nevertheless

---

112) *Ibid*

113) Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef, Appellate Body Reports WT/DS161/AB/R and WT/DS169/AB/R, circulated 11 December 2000, adopted 10 January 2001, para. 176. For a more skeptical assessment see F. Fontanelli, Necessity Killed the GATT - Art XX GATT and the Misleading Rhetoric about “Weighing and Balancing”, 2012/2013, 5 European Journal of Legal Studies, p. 36; F. Ortino, Investment Treaties, Sustainable Development and Reasonableness Review: A Case Against Strict Proportionality Balancing, *Leiden Journal of International Law*, 30(1), 2017, p.91, available at doi:10.1017/S0922156516000595.

114) *Supra* note 98.

115) A. Van Duzer, Sustainable Development Provisions in International Trade Treaties: What Lessons for International Investment Agreements?, in Steffen Hindelang and Markus Krajewski eds, *Shifting Paradigms in International Investment Law - More Balanced, Less Isolated, Increasingly Diversified*, Oxford University Press, 2016, pp.162-163.

116) *Supra* note 49 at 15
such approaches against the ‘race to the bottom’ problem has not prevented the *Tecmed* and *Metalclad* tribunals from finding that government measures intended to protect the environment violate investor protection provisions,\(^{118}\) and thus its legal strength is uncertain.\(^{119}\)

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”.\(^{120}\) 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 still found liable for implementing CCRMIs, most probably under the FET standard.

Nevertheless, positive operation of such expropriation exception can be observed in *Berkowitz v. Costa Rica* case brought under the CAFTA-DR Agreement contains a Paragraph 4(b) in Annex 10-C shielding environmental indirect expropriation claims.\(^{121}\) Investors’ claims were on the alleged direct and indirect expropriation of claimant’s property to create an ecological park. Tribunal after finding no breach of obligation of prohibition of indirect expropriation in host state’s actions,\(^{122}\) in *dictum* noted that Paragraph 4(b) in Annex 10-C is “carve-out” provision, not as an exception. This means that if otherwise, host state would have been burdened to justify adopted CCRMIs, which in turn would have become subject to scrutiny under restrictive interpretations and tests by the tribunal.\(^{123}\) WTO case law had shown that Article XX of the GATT on General

\(^{117}\) North American Free Trade Agreement, chapter 11, art. 1114(1) 32 ILM 289, 605, 1993.
\(^{118}\) *Metalclad v. Mexico*, NAFTA ICSID Case No. ARB(AF)/97/1, 2000, available at http://www.italaw.com/cases/671.
\(^{119}\) A. Van Duzer, *Supra* note 114 at 163
\(^{120}\) *Supra* note 98.
\(^{121}\) Paragraph 4(b) in Annex 10-C of the CAFTA-DR (chapter 10) provides that: “Except in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.”
\(^{122}\) Aaron C. Berkowitz, Brett E. Berkowitz, Trevor B. Berkowitz v. Republic of Costa Rica, ICSID Case No. UNCT/13/2, Oct. 25, 2016 Interim Award, para. 271, available at https://www.italaw.com/sites/default/files/case-documents/italaw7692_0.pdf.
Exceptions encompasses a narrow mechanism of state actions justification for adopting environmental measures.124)

3. ‘Safe haven’ provisions

Another option to a general exception is that Tajikistan IIAs 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 haven’ 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 reasons”.125)

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.126) Such provisions can empower Tajikistan to raise a defence that the measures in question are intended to regulate mitigation or adaptation measures, 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 is in good faith and pursues 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

123) J.E. Virtuales, Foreign Investment and the Environment in International Law: The Current State of Play’, in Kate Miles ed., Research Handbook on Environment and Investment Law, Cheltenham: Edward Elgar, 2016, p. 19.
124) S. Zleptnig, Non-Economic Objectives in WTO Law, Justification Provisions of GATT, GATS, SPS and TBT Agreements, Kluwer, 2010, pp. 123 - 224.
125) United States Model BIT Art. 20 (2012) “no party shall be prevented from adopting or maintaining measures relating to financial services for prudential reasons…” , M. Wilensky, supra note 55 at 23.
126) Ibid at 24.
kinds of provisions, perhaps, can be stronger in legal terms in addition to 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. Sustainability related Performance requirements\(^{127}\)

In general, performance requirements (PRs) have been often described as a barrier to 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 PRs provisions extensively at a certain period of time in their history.\(^{128}\) PRs can have a negative effect to the flow of FDI once it was applied improperly, without reflecting a fair balance between host state and foreign investments interactions, jeopardizing the economic viability of investments.\(^{129}\)

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 PRs, 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 PRs successfully. For instance, R&D requirements are often futile, as their effectiveness depend on state’s capacity to use the technology received, and cover their associated costs.\(^{130}\)

\(^{127}\) 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.

\(^{128}\) 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 Photovoltaic system 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.

\(^{129}\) S.H. Nikiema, ISID Best Practices Series: Performance Requirements in Investment Treaties, *ISID publications* 2014, p. 4, available at http://www.iisd.org/sites/default/files/publications/best-practices-performance-requirements-investment-treaties-en.pdf.

\(^{130}\) *Ibid* at 4.
PRs are not prohibited under the CIL. Legality of PRs in IIAs depend 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 IIAs that prohibit PRs, but vast majority make no reference to PRs. Tajikistan consistent with its sustainable development principle of economic development, can employ Sustainability related performance requirements (SPRs) in its IIAs based on principles of sustainable development and international environmental law.

Tajikistan may adopt SPRs in several, but not limited to, options into IIAs, also these options can be cumulatively included based on particular preferences of the government. First, SPRs should not be prohibited or limited in IIAs, as inclusion of SPRs is not illegal under CIL. These provisions would avail Tajikistan to retain flexibility to sustainably progress economic, environment and social policy spheres, as well as limit extends of treaty obligations.

Second approach can be to explicitly include a clause that expressly authorizes SPRs. The clause can be limited to exclusively before the investment has been made. Doing so, Tajikistan based on its market needs and investors' capabilities can negotiate investments to be made and SPRs to be met. This would result in well negotiated and placed investments, which can benefit both Tajikistan and foreign investors, as well as achieve sustainable development goals.

Also, limited SPRs should be excluded from the scope of the NT and MFN clauses. Because the pre-establishment SPRs could be imposed on domestic investors, and the MFN clause would not enable foreign investors to import 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 SPRs in IIAs.  

131) 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.
The International Institute for Sustainable Development (IISD) having experienced expertise in the field of sustainable investments, suggests that PRs in general could be made in various stipulations, in cumulative ways as follows: “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 requires Tajikistan to conduct a prior analysis of sensitive and priority sectors. IISD further goes to suggest that it is important to grandfather and maintain already existed PRs and nonconforming measures, as well as safeguard upcoming amendments in order to avoid nonconformity with IIAs. These proposed options yet need to be comprehensively studied based on CCRM specific preferences of Tajikistan. Well formulated and applied SPR can be an effective tool to maximize the economic, climate, environmental and social benefits of foreign investments.

V. Conclusion

Above all, strong impacts of climate change require countries, including Tajikistan to implement a broad range of laws and policies on adaptation and mitigation. Obligations under the ratified IIAs and under negotiating EEU MIA can obstruct enforcement of CCRM by creating a risk of liability for measures that can affect foreign investments. Case law alluded above shows that tribunals have rendered awards with broad interpretations of investor protections standards, where host states were held liable for their regulatory changes.

132) Supra note 129 at 16.
133) Ibid
134) Ibid
To avoid liability, Tajikistan may be well advised to structure its IIAs to prevent investor protection standards to hinder legitimate laws and policies on climate change mitigation and adaptation measures. IIAs can be structured by including environmental and climate-specific preambles and exception that expand to the entire text of respective IIAs. Based on the legacy of the WTO GATT Article XX on General Exceptions and Canada Model BIT, Tajikistan government can include general exception provisions. Nevertheless, associated issues shall not be underestimated. Next, Tajikistan may develop interpretive guidance and carve-outs for investor protection standards, particularly exempting environmental and CCRMs from investment protection standards of FET, MFN, NT and Expropriation.

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 to implement CCRMs. 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 CCRMs as public interest regulations do not violated an investor’s legitimate expectations before a tribunal can find that public interest regulations violated investor’s legitimate expectations.

For the obligations under the NT and MFN standards, the interpretive guidance can be included in the text of IIAs 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 shall attempt to prioritize the host state interest over the foreign investors. Lastly, well formulated and applied SPRs in IIAs can be an effective tool to maximize the economic, climate, environmental and social benefits of foreign investment. These suggestions attempt to eliminate conflicts between the two specialist regimes of broader international law, and thus ensure regulatory stability for foreign investors, whilst not obscure Tajikistan’s implementation of bona fide CCRMs towards sustainable development.
■ 참고문헌

1. Books

Jorge E. Viñuales, *Foreign Investment and the Environment in International Law*, Cambridge Studies in International and Comparative Law, Cambridge University Press, 2012

R. Dolzer & Ch. Schreuer, *Principles of International Investment Law*, 2nd edition, Oxford University Press, 2012

M. Hirsch, Interactions between Investment and Non-investment Obligations, in Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., *the Oxford Handbook of International Investment Law*, Oxford University Press, 2008

J.P. Barde and O. Godard, The Legal Authority to Enact Environmental Taxation Instruments, *Handbook of research on environmental taxation*, Edward Elgar, 2012

J.W. Salacuse, *The Law of Investment Treaties*, Oxford University Press, 2010

R. Klager, *Fair and Equitable Treatment* in *International Investment Law*, Cambridge University Press, 2012

I. A. Laird, Betrayal, Shock and Outrage—Recent Developments in NAFTA Article 1105, in Todd Weiler (ed), *NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects*, Transnational Publisher, Inc., New York, 2004

D-Y. Park and T. 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 Anton Ming-Zhi Gao and Chien Te Fan eds., *Legal Issues Of Renewable Energy In The Asia Region: Recent Developments In A Post-fukushima And Post-Kyoto Protocol Era*, Kluwer Law International, 2014

Daniel M. Firger & Michael B. Gerrard, *Harmonizing Climate Change Policy and International Investment Law: Threats, Challenges and Opportunities*, in Karl P. Sauvant ed., *Yearbook on International Investment Law And Policy*, 2012

A. Asteriti, Climate Change Policies and Foreign Investment: Some Salient Legal Issues, in Y. Levashova, T. Lambooy, and E.J. Overwater eds., *Bridging the Gap between International Investment Law and the Environment*, Eleven International Publishing, 2015

S. Di Benedetto, *International Investment Law And The Environment*, Edward Elgar, 2013

A. Mitchell, Importing WTO General Exceptions into International Investment Agreements: Proportionality, Myths and Risks, *Yearbook of International Investment Law and Policy*, 2016-2017, Oxford University Press, 2018

Y. Levashova, Fair and Equitable Treatment and the Protection of the Environment: Recent Trends in Investment Treaties and Investment Cases, in Y. Levashova, T. Lambooy, and E.J. Overwater eds., *Bridging the Gap between International Investment Law and the Environment*, Eleven International Publishing, 2015

A. Van Duzer, Sustainable Development Provisions in International Trade Treaties: What Lessons for International Investment Agreements?, in Steffen Hindelang and Markus Krajewski eds, *Shifting Paradigms in International Investment Law - More Balanced, Less Isolated*. 

Electronic copy available at: https://ssrn.com/abstract=3220225
Increasingly Diversified, Oxford University Press, 2016
S. Zleptnig, Non-Economic Objectives in WTO Law, Justification Provisions of GATT, GATS, SPS and TBT Agreements, Kluwer, 2010

2. Journals
Atieno Mboya, "Human Rights and the Global Climate Change Regime," Natural Resources Journal 58, no.1, Winter 2018
P. 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, March 1, 2017
D-Y. Park, P. Odilov, Central Asian Legal and Policy Responses to Climate Change; Yonsei Law Review, 26.2, 2016
J. E. Viñuales, The Paris Climate Agreement: An Initial Examination, C-EENRG Working Papers, Cambridge Centre for Environment, Energy and Natural Resource Governance, University of Cambridge, 2015-3, 2015
M. Olimov, Civil war in Tajikistan, Himalayan and Central Asian Studies, 20.2/3, Apr-Sep 2016
R. Zakhidov, Central Asian Countries Energy System and Role of Renewable Energy Sources, Appl. Sol. Energy 44, 2008
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
Nourzhanov, K., & Bleuer, C, Tajikistan: A Political and Social History, ANU Press, Australia, 2013
M. Fiona, Fair and Equitable Treatment in International Investment Agreements, Issues in International Investment Law, Background Papers for the Developing Country Investment Negotiators’ Forum Singapore, International Institute for Sustainable Development, 1 - 2 October 2007
M. Wilensky, Potential Liability for Climate-Related Measures under the Trans-Pacific Partnership, The Columbia Centre for Climate Change Law; White Paper, 8.7.2014
UNCTAD, Fair and Equitable Treatment, Unctad Series On Issues In International Investment Agreements II, U.N. Doc No. UNCTAD/DIAE/IA/2011/5, 2012
International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law - Report of the Study Group of the International Law Commission, 58th Session, May 1-June 9, July 3-Aug. 11, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006), as corrected U.N. Doc. A/CN.4/L.682/Corr.1, Aug. 11, 2006.
M. Feigerlova and A.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, 2012
UNCTAD, *Taking Stock of IIA Reform* IIA ISSUE NOTE NO. 1, 01.03.2016
BJ. Condon, *Climate Change and International Investment Agreements*, *Chinese Journal of International Law*, 2015.
Rep. of the Int'l Law Comm'n, 53rd Sess., Apr. 23 - June 1.
F. Fontanelli, *Necessity Killed the GATT - Art XX GATT and the Misleading Rhetoric about “Weighing and Balancing”*, 2012/2013, 5 European Journal of Legal Studies
F. Ortino, *Investment Treaties, Sustainable Development and Reasonableness Review: A Case Against Strict Proportionality Balancing*, *Leiden Journal of International Law*, 30(1), 2017
J.E. Viñuales, *Foreign Investment and the Environment in International Law: The Current State of Play*, in Kate Miles ed., *Research Handbook on Environment and Investment Law*, Cheltenham: Edward Elgar, 2016
S.H. Nikièma, *IISD Best Practices Series: Performance Requirements in Investment Treaties*, *IISD publications 2014*

3. Laws
The Law of the Republic of Tajikistan “On the Security of Atmospheric Air”, 2012
The Law of the Republic of Tajikistan “On Ecological Security of Road Transportation”, 2015
The Law of the Republic of Tajikistan “On the Use of Energy from Renewable Energy Sources”, 2015
The Law of the Republic of Tajikistan “On investments”
The Law of the Republic of Tajikistan “On investment contracts”
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”

4. Agreements
Eurasian Economic Union Agreement
ANNEX 16 to the Treaty on the Eurasian Economic Union, Protocol on Trade in Services, Incorporation, Activities and Investments
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
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.
Paris Agreement, Depositary Notification, C.N.735.2016.TREATIES-XXVII.7.d
*Vienna Convention* on the Law of Treaties
*Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal* 1673 UNTS 57/ [1992] ATS 7/ 28 ILM 657
The Rio Declaration on Environment and Development
Agreement for the Promotion and Protection of Investment between the Republic of Austria and
the Republic of Tajikistan from January, 2012
Comprehensive Economic and Trade Agreement between Canada and the European Union and its
Member States,
Agreement for the Promotion and Protection of Investment between China and Madagascar, 2007
The General Agreement on Tariffs and Trade 1867 UNTS 187; 33 ILM 1153, 1994
Agreement between Canada and Ecuador for the Promotion and Reciprocal Protection of
Investments, 1997
Agreement between Canada and the Slovak Republic for the Promotion and Protection of
Investments, 2012
Agreement between Canada and the Republic of Peru for the Promotion and Protection of
Investments, 2007
North American Free Trade Agreement, 1114(1) 32 ILM 289, 605, 1993
Dominican Republic - Central America Free Trade Agreement, 2004
United States Model Bilateral Investment Treaty, 2012

5. Cases
   Pope & Talbot Inc. v. The Government of Canada, UNCTRAL, Award on the Merits of
   Phase 2, June 26, 2000
   Técnicas Medioambientales Tecmed v. United Mexican States, ICSID Case No. ARB (AF)/00/2,
   Award, 29 May 2003
   Methanex Corporation v. United States of America, UNCTRAL, Final Award of the Tribunal on
   Jurisdiction and Merits, 3 August 2005,
   Azurix v. Argentina, ICSID Case No. ARB/01/12, Award, 4 July 2006
   Mesa Power Group, LLC v. Government of Canada, UNCTRAL, PCA Case No. 2012-17, Award,
   24 Mar 2016.
   Windstream Energy LLC v. Government of Canada, UNCTRAL, PCA Case No. 2013-22, Claimant
   Memorial, Aug. 19, 2014.
   Lone Pine Resources, Inc. v. Government of Canada, ICSID Case No. UNCT/15/2, Claimant’s
   Memorial, Apr. 10, 2015
   S.D. Myers Inc. v. Canada, UNCTRAL, Partial Award, Nov. 13, 2000
   Windstream Energy LLC v. Government of Canada, PCA Case No. 2013-22, Award, 16.02.2016
   Nykomb Synergetic Technology Holding AB v. The Republic of Latvia, SCC Case No. 118/2001,
   Award, Dec. 16, 2003
   Impregilo v. Argentina, Award, ICSID Case No. ARB/07/17, June 21, 2011
   White Indus. v. India, UNICTRAL, Final Award, Nov. 30, 2011
   Compañía del Desarrollo de Santa Elena SA v. Republic of Costa Rica, ICSID Case No.ARB/96/1,
   Award, Feb. 17, 2000
   William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of
   Delaware Inc. v. Government of Canada, UNICTRAL, PCA Case No. 2009-04
Panel Report, United States - Standards for Reformulated and Conventional Gasoline, WT/DS2/R, Jan. 29, 1996
Appellate Body Report, United States - Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, Oct. 12, 1998
Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef, Appellate Body Reports WT/DS161/AB/R and WT/DS169/AB/R, circulated 11 December 2000, adopted 10 January 2001
Metalclad v. Mexico, NAFTA ICSID Case No. ARB(AF)/97/1, 2000,
Aaron C. Berkowitz, Brett E. Berkowitz, Trevor B. Berkowitz v. Republic of Costa Rica, ICSID Case No. UNCT/13/2, Interim Award, Oct. 25, 2016

6. Other sources
H.E. Mr. President Emomali Rahmon, Speech of Tajikistan at the 21st Conference of Parties of UNFCCC in Paris, Publications of the Ministry of Foreign Affairs of the Republic of Tajikistan
The CASA-1000 project
Italy's Salini Impregilo Wins $3.9 Bln Tajikistan Contract, Reuters, 01.07.2016
The first lot worth $1.95 billion set to begin: Rogun, the tallest dam in the world, Salini Impregilo, Press Release, 01.07.2016
Climate Transparency G20 Report 2016 - Brown To Green
Canada-European Union Comprehensive Economic and Trade Agreement
Statement by President of the Republic of Tajikistan H.E. Mr. Emomali Rahmon at the United Nation Sustainable Development Summit, 2015
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
Tajikistan Forestry NAMA Support Project, the Nationally Appropriate Mitigation Actions Facility, 2015 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
The U.S. State Department, “Guidance on Non-Binding Documents”
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
Tajikistan, Database of International Investment Agreements, United Nation Conference on Trade and Development
The International Centre for Settlement of Investment Disputes, Member States Database
Foreign Direct Investment into Tajikistan economy, 2017, State Committee on Investments and State Property Management of the Republic of Tajikistan
Key Macroeconomic Indicators in 2012, Publications of the Ministry of Foreign Affairs of the Republic of Tajikistan, 2012
Transition Economies: An IMF Perspective on Progress and Prospects, IMF, 11.03.2000
Annual Address of the H.E. President of Tajikistan to Parliament, 2016
【ABSTRACT】

Stability vs. Flexibility: Reconciling climate change related measures with international investment protection standards towards sustainable development - case of Tajikistan*

Odilov Parviz**
Deok-Young Park ***

Tajikistan government has started taking a 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 adaptation and mitigation measures. In meantime, some foreign investors have started shifting their investments from ‘brown’ to ‘green’ due to both strong impacts of climate change, as well as business opportunities, and have

* This paper won in the 2017 KEI International Paper & Idea Competition. This research was supported by the Ministry of Education of the Republic of Korea and the National Research Foundation of Korea (NRF-2016S1A3A2925230).
** PhD in Law Candidate at the Yonsei University
*** Professor at the Yonsei Law School. We would like to express gratitude for the feedback we received when presenting this research at the 3rd International Conference on Public Policy, which took place at the Lee Kuan Yew School of Public Policy, National University of Singapore, 28th-30th, June 2017, and at the 7th UACES Workshop – European and Asian Perspectives on China’s Belt and Road Initiative, which took place at the Nazarbayev University, 24th-26th, April 2018. We would like to thank Hongik Law Review peer reviewers and Research Professor Kyu Youn Choi of the Yonsei Law School and Dr. Seung-Min Kim for insightful comments and suggestions to improve tremendously the quality of the manuscript.
been considering to invest in major economic projects in Tajikistan. Nevertheless, Tajikistan obligation under the UNFCCC may result in a normative conflict with its obligations deriving from 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 international investment legislation actually lacks norms on environmental protection. This research attempts to fill this gap by discussing the possible ways of reconciling international environmental norms law with international investment protection standards in case of Tajikistan.

**Key Words**: Investment protection standards, investor state dispute settlement, climate change related measures, Tajikistan.