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A National Mineral Policy As an International Investment Law Stratagem: The Case of Tajikistan's Gold Reserves

Nadia B. Ahmad
Pace Law School, nahmad@barry.edu

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A National Mineral Policy as an International Investment Law Stratagem: The Case of Tajikistan’s Gold Reserves

Nadia B. Ahmad*

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I. INTRODUCTION

This Article proposes that a national mineral policy (“NMP”) can be crafted to generate foreign direct investment (“FDI”) and strengthen sustainable development goals. Less-developed countries (“LDCs”) typically overlook or underestimate this federal policy imperative while seeking to harness mineral resources.¹ Creation of a NMP and complementary changes to federal mining investment laws can provide host countries increased opportunities as well as autonomy to profit from their own natural resources and, at the same time,

* Nadia B. Ahmad, Legal Fellow, Sustainable Development Strategies Group, LL.M. University of Denver; J.D. University of Florida; B.A. University of California at Berkeley. A debt of gratitude to Professors Luke Danielson and Cecilia Dalupan of the University of Denver and Dr. Ana Elizabeth Bastida of the University of Dundee for their comments and encouragement. Special thanks to Diane Burkhardt, Joan Policastri, Jane Dugger, and the staff of the Westminster Law Library. Sincere appreciation to Akmal and Senan as well as my parents and my siblings for their love and support.

1. See *infra* Parts I-IV.

investor nations can benefit from a NMP because of further mining prospects.² This Article goes on to discuss how the formulation and implementation of a NMP can work to actualize sustainable development goals for LDCs.³ Typically, even a well-intentioned NMP may afford only superficial sustenance to subsurface investment projects because of the presently inadequate investment regime for extractive industries. If, however, LDCs develop and implement NMPs with investment safeguards for trade and export with foreign investors and multinational enterprises, then the countries can begin to more fully reap the rewards of previously stalled mining enterprise ventures.⁴

By way of example, I will explore how the world's second largest known gold reserves, located in the Central Asian state of Tajikistan, remain unearthed because of a precautionary and highly administrative approach to international investment law. With a NMP, Tajikistan can improve its national standing in the World Trade Organization ("WTO") as a member nation. The development of a NMP in Tajikistan can be effectuated by contextualizing historical happenings of nation building and conflict to advance macro-level international investment law and policy.⁵ Part I will provide an economic and political snapshot to natural resource development in Tajikistan. Part II will coalesce overlapping goals of mining enterprises and international investment for sustainable development. Finally, Part III will show how to create a framework for international investment law and policy to facilitate an advantageous NMP for host countries. The case of Tajikistan's unearthed gold reserves will demonstrate why the making of a NMP is crucial not only in the case of Tajikistan, but other mineral-rich LDCs, to augment FDI for mining enterprises.

II. TAJIKISTAN: AN ECONOMIC AND POLITICAL SNAPSHOT

This section will provide an overview of economic and political happenings that limit mineral exploration and production in Tajikistan. The rugged terrain and the complications in communication have historically impeded the development of a Tajik national identity because different parts of the country rarely interacted.⁶ Its rapid escalation to independence also prevented national leadership from preparing for the country's future.⁷ In the late 1980s, the openness of the Soviet regime of Mikhail S. Gorbachev sparked a nationalist

2. *See infra* Part I.

3. *See infra* Part II.

4. *See infra* Part II.

5. *See infra* Part III.

6. Anna Matveeva, *The Perils of Emerging Statehood: Civil War and State Reconstruction in Tajikistan*, in CRISIS STATES WORKING PAPER SERIES NO. 2 1, 4 (2009), available at <http://www.isn.ethz.ch/isn/Digital-Library/Publications/Detail/?ots591=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233&lng=en&id=98292>.

7. *Id.* at 16.

movement in Tajikistan, forcing Tajik leaders to declare sovereignty in 1991 with the invariable dissolution of the Soviet Union.⁸ Tensions between the Russian government, reform-minded Tajiks, and extremists still run deep.⁹ An authoritative NMP for Tajikistan would account for these elements as well for volatile economic considerations.

A. Regional Instability and Power Struggles in Tajikistan

Economic activity in Tajikistan increased at an average rate of 8.6% from the period of 2000-2008 according to figures from the World Bank,¹⁰ but the gross domestic product (“GDP”) fell to 6.5% in 2010,¹¹ 7.4% in 2011,¹² and 6.0% in 2012.¹³ To continue a more distinct upward trend in GDP, Tajikistan needs to balance its national goal of prosperity with an aim at sustainable development in light of its accession to the WTO.¹⁴ Following its independence in 1991 and the ensuing civil war, the nation building process and development goals moved forward with the help of foreign aid, FDI, non-governmental organizations (“NGOs”), relief agencies, missionary groups, and the country’s own development efforts for the past two decades.¹⁵ Tajikistan is carving a place for itself on the global market, but continues to be the poorest in the former Soviet sphere.¹⁶ Economic development and security assistance have been expanding from the international community since the beginning of the NATO intervention in Afghanistan, creating jobs and strengthening long-term stability.¹⁷

In LDCs, like Tajikistan, the political institutions are actually part of the development problem, and they “are usually only partially, and to differing

8. LIBRARY OF CONGRESS, FEDERAL RESEARCH DIVISION, COUNTRY PROFILE: TAJIKISTAN 8 (Jan. 2007), available at <http://lcweb2.loc.gov/frd/cs/profiles/Tajikistan.pdf>.

9. See, e.g., Daniel Tovrov, *Russia Departs 300 Tajiks; Political Tensions Stew*, INTERNATIONAL BUSINESS TIMES (Nov. 15, 2011), available at <http://www.ibtimes.com/russia-departs-300-tajiks-political-tensions-stew-370240>.

10. *Tajikistan: Country Brief 2011*, WORLD BANK, <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/ECAEXT/TAJIKISTANEXTN/0,contentMDK:20630697~menuPK:287255~pagePK:141137~piPK:141127~theSitePK:258744,00.html> (last visited Aug. 28, 2013).

11. The U.S. Department of State, Bureau of Central and South Asian States, collects data on GDP for purposes of foreign diplomacy. *Background Note: Tajikistan*, U.S. DEP’T OF STATE (Nov. 16, 2012), <http://www.state.gov/r/pa/ei/bgn/5775.htm>.

12. *Tajikistan Country Report*, GLOBAL FIN., <http://www.gfmag.com/gdp-data-country-reports/165-tajikistan-gdp-country-report.html#axzz2AYMMvi4L> (last visited Aug. 28, 2013).

13. *Id.* Figures for 2012 represent an estimate by Global Finance.

14. See *Tajikistan Moves One More Step Towards Membership*, WTO (July 5, 2011), http://www.wto.org/english/news_e/news11_e/acc_tjk_05jul11_e.htm.

15. Environmental Performance Review: Tajikistan, U.N. Econ. Comm. For Europe: Comm. on Environmental Policy 11 (2004), available at http://www.unece.org/fileadmin/DAM/env/epr/epr_studies/tajikistan.pdf.

16. *Introduction: Tajikistan*, CIA, https://www.cia.gov/library/publications/the-world-factbook/geos/countrytemplate_ti.html (last updated Aug. 23, 2011).

17. *Id.*

degrees, capable of analyzing, evaluating and solving the economic, socio-cultural and foreign-policy problems faced by these nations.”¹⁸ A lack of institutionalization of the political system contributes to the overarching development problem.¹⁹ Social contradictions also weaken existing political institutions, because “class differences, ethnic diversity and cultural dualism” impede “the mineral cohesion that is a precondition for the functioning of such political institutions.”²⁰ International investment laws must account for these social obstacles in formulating mineral policies.

B. Accession to WTO Membership

Tajikistan has reached a critical juncture through its WTO membership, and its government officials remain committed to integrating the world economy and the WTO.²¹ Tajikistan has undertaken major institutional and structural reforms, notably in its finance and banking system, so that it now trades with ninety different countries.²² However, no institutional changes have occurred to account for sustainable development strategies in the mining sector. Over the past two years, the International Monetary Fund (“IMF”) continues its assistance to the government of Tajikistan to implement policies geared to maintaining ongoing economic improvements.²³ The IMF Extended Credit Facility (“ECF”) program along with grants from the Asian Development Bank, the European Union, and the World Bank have provided support to Tajikistan so that it can satisfy its external financing needs.²⁴ Even still, compared to other Central Asian countries and international benchmarks, foreign exchange reserves in Tajikistan remain relatively low.²⁵

Meanwhile, Tajikistan’s mountainous regions are suitable for the mining and exploration of untapped precious metals, particularly gold. An accurate assessment of the resource base may encourage the national government to allow greater autonomy and a larger share of resource revenues, depending on whether resources are relatively small compared to those of the nation as a whole or if

18. CHRISTIAN KIRCHNER ET AL., *MINING VENTURES IN DEVELOPING COUNTRIES—PART 1: INTERESTS, BARGAINING PROCESS, LEGAL CONCEPTS* 41 (1979).

19. *Id.* at 42.

20. *Id.*

21. WTO, *supra* note 14.

22. *Id.*

23. IMF, *Tajikistan: Memorandum of Economic and Financial Policies (MEFP) for 2011-12* 39 (2012), available at <http://www.imf.org/external/pubs/ft/scr/2012/cr1232.pdf>.

24. WORLD BANK, *THE WORLD BANK GROUP—PROGRAM PARTNERSHIP SNAPSHOT* 27 (Apr. 2013), available at <http://www.worldbank.org/content/dam/Worldbank/document/Tajikistan-Snapshot.pdf>.

25. IMF, *REGIONAL ECONOMIC OUTLOOK: MIDDLE EAST AND CENTRAL ASIA* 60 (Apr. 2011), available at <http://www.imf.org/external/pubs/ft/reo/2011/mcd/eng/pdf/mreo0411.pdf>.

resources are already seriously depleted.²⁶ A realistic assessment of resource reserves shows that resource extraction alone is not a viable basis for the entire regional economy.²⁷ An initial step critical to the process of attracting foreign investment for mineral extraction is to begin a modern geological survey with funding, perhaps by the World Bank, to establish a solid general geologic and geophysical database that identifies areas of mineral potential.²⁸ The most common way for a country to promote its mineral wealth and positive investment climate is to have a large, significant mineral deposit developed by a foreign company.²⁹ This first development of a major mining operation is crucial because it proves to the global mining industry that a foreign company in the country can mine a deposit.³⁰

III. SUSTAINABLE DEVELOPMENT, FDI, AND MINING

Increasing numbers of large mining companies are seeking to incorporate sustainable development principles in their corporate practices.³¹ Sustainable development, as defined in *Our Common Future*, also known as the Brundtland Report, “is development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”³² Despite the consensus of FDI for sustainable development, there is a gap between the existing regulatory framework for international investment laws and norms that advocate sustainability.³³ International investment agreements have great

26. Siri Aas Rustad et al., *Building or Spoiling Peace? Lessons from the Management of High-Value Natural Resources*, 42 ENVTL. L. REP. NEWS & ANALYSIS 10546, 10547 (2012). “During the 2005 peace negotiations between Aceh and the Indonesian government, for example, the depletion of Aceh’s reserves made wealth-sharing between the government of Indonesia and Aceh less relevant—which probably contributed to the Indonesian government’s willingness to grant Aceh better terms, with respect to revenue-sharing from oil and gas exploitation in Aceh.” *Id.*

27. *Id.* “[E]ven the central government may have inaccurate perceptions of resource reserves and of what can be achieved with them, and may therefore fail to develop other sectors of the economy. The government budget of Southern Sudan (now South Sudan), for example, has been financed almost entirely by oil revenues; unless the country is able to develop the non-oil sectors of its economy, a decline in those revenues would jeopardize its economic viability as an independent state.” *Id.*

28. E-mail from Mark T. Nesbitt, Of Counsel, Fognani & Faight, PLLC to Nadia B. Ahmad, Legal Fellow, Sustainable Development Strategies Group, (Aug. 1, 2011, 08:16 A.M.) (on file with author).

29. *Id.*; Tony Killick, *The Benefits of Foreign Direct Investment and its Alternatives: An Empirical Exploration*, 9 J. OF DEV. STUD. 301, 301-02 (1973) (discussing the benefits derived in mineral activities by the host economy from the activities and investment of foreign-owned companies).

30. Nesbitt, *supra* note 28.

31. Heledd Jenkins & Natalia Yakovleva, *Corporate Social Responsibility in the Mining Industry: Exploring Trends in Social and Environmental Disclosure*, 14 J. OF CLEANER PRODUCTION 271, 273 (2006), available at http://www.academia.edu/3375037/Corporate_social_responsibility_in_the_mining_industry_exploring_trends_in_social_and_environmental_disclosure.

32. Brundtland Report, Report of the World Commission on Environmental & Development: *Our Common Future*, U.N. Doc. A/42/427 (Oct. 1987).

33. Markus Gehring & Andrew Newcombe, *An Introduction to Sustainable Development in World*

potential to promote sustainable development norms and fulfill their ultimate objective to protect international investment regimes.³⁴ The United Nations Conference on Trade and Development (“UNCTAD”) was established in 1964 to support the development-friendly integration of developing countries into the world economy.³⁵ UNCTAD has progressively evolved into an authoritative knowledge-based institution to help shape current policy debates and thinking on development, with an acute focus on ensuring that domestic policies and international action are mutually supportive in bringing about sustainable development.³⁶ The efficient use of natural resources along with the protection of health and the environment requires a wide array of policies and regulations.³⁷ International and regional norms work with national and sub-national laws to establish a broad set of legal rules.³⁸ Broadly speaking, interstitial modifying norms are used to regulate government conduct, but do not provide an objective measure for accountability mechanisms for mining enterprises.³⁹ A NMP would provide a conceptual framework for legal norms governing mineral enterprises.

London-based Kryso Resources PLC (“Kryso”) is an AIM-listed mineral exploration and development company that focuses on projects in Tajikistan.⁴⁰ It is the only foreign company that has been granted permits at the time of this publication to explore Tajikistan’s gold reserves.⁴¹ Since Kryso is the first major foreign investor in the Tajikistan gold mining sector, its investment presents opportunities and challenges. Developing, exploring, and extracting Tajikistan’s gold reserves can incorporate sustainable development to attract investors both

Investment Law, in *SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW* 1, 9 (Marie-Claire Cordonier Segger et al. eds., 2011).

34. *Id.* at 9-10.

35. *About UNCTAD*, UNCTAD, <http://unctad.org/en/Pages/AboutUs.aspx> (last visited Aug. 30, 2013). UNCTAD functions as a forum for intergovernmental deliberations for consensus building. It also undertakes research, policy analysis and data collection for the debates of government representatives and experts and offers technical assistance tailored to the specific requirements of developing countries with special attention to the needs of the least developed countries and of economies in transition. *Id.*

36. *Id.*

37. Asa Romson, *International Investment Law and the Environment*, in *SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW*, *supra* note 33, at 43.

38. *See id.* Civil and criminal laws interact to play a significant role in the development of the country’s administrative laws. A common way to arrange administrative components of health and environmental laws is to divide the instruments into three major categories: direct regulation or “command and control,” economic incentives, and information-based or voluntary approaches. *Id.*

39. Ulrich Beyerlin, *Sustainable Development*, *MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW*, para. 16, (2009), available at http://www.mpepil.com/sample_article?id=/epil/entries/law-9780199231690-e1609&recno=9&.

40. *About Us*, KRYSO, <http://www.kryso.com/About%20Us.html> (last visited Aug. 30, 2013). AIM is the London Stock Exchange’s market for smaller and growing companies.

41. Dilafruz Nabiyeva, *Britain’s Kryso Resources Starts Developing Pakrut Gold Deposit in Tajikistan*, *CENTRAL ASIA ONLINE* (May 9, 2012), available at http://centralasiaonline.com/en_GB/articles/caii/features/main/2012/05/09/feature-02.

foreign and domestic. While stakeholder engagement and education are imperative, having an authoritative NMP would be critical for sustainable international investment in the mining sector.⁴² A revamped geological study would be the next critical step for attracting FDI.⁴³ The World Bank could provide initial funding for this study.⁴⁴

Tajikistan's present federal laws permit ways for foreign investors to participate in the market, but are inadequate to protect the country's development goals. Articles 4 and 5 of the Law on Foreign Investment in the Republic of Tajikistan provide the parameters for foreign investors to invest in the country.⁴⁵ However, definitional standards in Articles 4 and 5 are overly broad and contextually vague for project details.⁴⁶ Tajikistan's investment laws do not address the wide investment scope for mining projects that involve complex issues related to real property, land use, pollution, environmental toxins, and mineral rights.

A viable NMP could improve FDI in Tajikistan's mining sector and simultaneously preserve its national interests. The rate of progress for implementation of national legislation regarding mining has been slow.⁴⁷ This lull in advancement can be linked to a lack of political consensus on key issues.⁴⁸ The formulation of an NMP encourages discussions, cooperation, and agreement among politicians, government administrators, and the private sector and lays the framework for effective regulatory reform.⁴⁹ Each country has its own set of social, political, economic, and legal factors to consider when formulating a NMP. Political factors, such as interested government agencies and private sector groups, set the agenda for global economic policy.⁵⁰

International investment law is a building block of the global economy.⁵¹ Foreign investment occurs in settings that require international cooperation because of the involvement of the host nation as a state actor.⁵² The government and its legal system establish institutions that sustain a functioning economy, while simultaneously imposing constraints on the government's power to regulate and interfere in economic activities. As such, the formulation of a NMP

42. *See infra* Part IV.

43. Nesbitt, *supra* note 28.

44. *Id.*

45. Law on Foreign Investment in the Republic of Tajikistan, Arts. 4-5, *available at* http://www.tajinvest.tj/downloads/eng_zakon/3.pdf.

46. *See id.*

47. James M. Otto, *A National Mineral Policy as a Regulatory Tool*, 23 *RESOURCES POL'Y* 1 (1997).

48. *Id.* at 1.

49. *Id.* at 1-2.

50. *Id.* at 2-3.

51. *See generally* STEPHAN W. SCHILL, *THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW* (2009).

52. *Id.* at 3.

will incorporate development goals and development planning. In the 1990s, senior mining companies started publishing corporate responsibility policies discussing environmental, health and safety, and community issues.⁵³ These policies ranged from strong to weak.⁵⁴ The weaker policies contained relatively general pledges, whereas the stronger policies provided more active commitment engagement, such as the recognition of the need for local consultation and community development.⁵⁵

Foreign companies seeking to invest in Tajikistan's gold mining industry would likely have to incorporate such techniques for community development. In fact, the government should require a certain standard for environmental, health and safety, and community issues for FDI projects. The formulation and implementation of concrete government goals for economic and social developments are necessary.⁵⁶ Development goals vary widely, but can include growth of gross national product and per capita income, expansion of regional infrastructure, diversification of industrial structure, promotion of import-substituting industries, promotion of industries for export, creation of employment, administrative restructuring and reforms, improvement of the educational system, redistribution of national income, and promotion and dynamization of agricultural production.⁵⁷ These development goals account for competing interests, infrastructure, and industries for mining ventures in developing nations. As broad as these goals may be, they represent the complexity on the national and local levels for FDI in newly independent, developing countries.

In 1998, nine of the world's biggest mining companies operating within the World Business Council for Sustainable Development ("WBCSD") collaborated to create a joint agenda to tackle "the industry's reputational, environmental and social concerns under the rubric of sustainable development" to form a group called the "Global Mining Initiative."⁵⁸ These mining companies pooled their influence and resources "to exercise an agenda-setting influence upon both the mining industry and its critics."⁵⁹ WBCSD prepared a recent report called *Vision 2050* to lay a pathway for a global population of nearly nine billion people to live within the resource limits of the planet by 2050.⁶⁰ Although distinct, the elements

53. DAVID SZABLOWSKI, *TRANSNATIONAL LAW AND LOCAL STRUGGLES: MINING, COMMUNITIES AND THE WORLD BANK* 82-83 (2007).

54. *Id.*

55. *Id.*

56. KIRCHNER ET AL., *supra* note 18, at 43.

57. *Id.*

58. SZABLOWSKI, *supra* note 51, at 84-85.

59. *Id.*

60. *Vision 2050: The New Agenda for Business – Executive Summary*, WORLD BUS. COUNCIL FOR SUSTAINABLE DEVELOPMENT, 1, <http://www.wbcsd.org/pages/edocument/edocumentdetails.aspx?id=219&no-searchcontextkey=true> (last visited Aug. 30, 2013). This groundbreaking work is the culmination of an 18-

of *Vision 2050* illustrate “the interconnectedness of issues such as water, food and energy—relationships that must be considered in an integrated and holistic way, with tradeoffs that must be understood and addressed.”⁶¹

Factoring in positive and negative externalities and carbon emissions with the cost of mining operations would assist national development goals as well as global norms for sustainable development.⁶² Land use planning of mining projects in conjunction with national goals for agriculture and land conservation would have to be considered.⁶³ The omission of non-investment human rights and environmental rules by investment tribunals is significant.⁶⁴ This absence of any reference to general environmental law principles in investor-state jurisprudence applies equally to sustainable development particularly in the context of human rights.⁶⁵ The status of sustainable development is “rather unclear in international law” and “no consensus on whether it is a general principle of law producing substantive obligations, or a mere conceptual matrix, an objective, a process devoid of any law creating character” exists.⁶⁶

For sustainable development to enter the legal discourse, it is necessary to consider it on the national level and plan for it accordingly. Christian Kirchner asserts that “[c]entral planning of economics and social development is a commonly recognized and practiced policy in the Third World,” but Kirchner neglects to consider the sustainable development aspect of the planning process.⁶⁷ Riccardo Pavoni recognizes the importance of paying attention “to the

month combined effort with CEOs and experts, and dialogues with over 200 companies and external stakeholders in 20 countries. The report spells out the “must haves”—the things that must happen over the coming decade to make a sustainable planetary society possible. These include incorporating the costs of externalities, starting with carbon, ecosystem services and water, into the structure of the marketplace; doubling agricultural output without increasing the amount of land or water used; halting deforestation and increasing yields from planted forests; halving carbon emissions worldwide (based on 2005 levels) by 2050 through a shift to low-carbon energy systems and improved demand-side energy efficiency, and providing universal access to low-carbon mobility. *Id.*

61. *Id.* at 2.

62. Roque Romero, *Fostering the Positive Externalities of Mining—Policy Options*, 15 CENTRE FOR ENERGY, PETROLEUM & MIN. L. & POL’Y 1, 3-4 (2005).

63. KRISTAL MAZE ET AL., MINING AND BIODIVERSITY IN SOUTH AFRICA: A DISCUSSION PAPER 1 (2004), available at http://www.forest-trends.org/documents/files/doc_602.pdf.

64. Riccardo Pavoni, *Environmental Rights, Sustainable Development, and Investor-State Case Law: A Critical Appraisal*, in HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 525, 528–29 (Pierre-Marie Dupuy et al. eds., 2009).

65. *Id.* at 528.

66. *Id.* at 528-29.

67. KIRCHNER ET AL., *supra* note 18. A key component of development plans and programs is the reliability of information and statistics. Yet due to weak economic and administrative structures, the collection of such data is increasingly difficult. Rational planning necessitates development of plans that represent consistent extensions of earlier initiatives: “Formal planning, apart from its substantive objectives, can take on further significance as elements of political rationality that generally favors the development of an industrial economic structure. In some cases, therefore, the existence of formal planning alone may balance out many of the instabilities of political institutions.” *Id.*

relationship between investment law and the exercise of environmental participatory rights at the national level.⁶⁸ Pavoni states that public participation is “linked to other general principles, concepts, and requirements of vital importance, not only for environmental law, but also for the matter of international public policy.”⁶⁹

In Tajikistan, gold is not only a means of economic freedom, but political upliftment and social empowerment, which are earmarks of successful economies as well as democracies. According to a report by *Safe Haven: Preservation of Capital*, Kryso is an emerging mineral exploration company that seeks to explore gold and other precious and base metal deposits previously discovered in Central Asia, bringing them into production.⁷⁰ Kryso was admitted to the AIM in December 2004 in order to continue funding the development of the Pakrut Gold Deposit, explore the Pakrut Licence Area, and obtain and acquire other gold and base metal deposits in Tajikistan and elsewhere in Central Asia.⁷¹ Being listed as an AIM company is a milestone because, for the majority of junior mining companies listed on AIM, it means that “their analysis requires even more specialist technical information not typically required in analyzing industrial, financial, or service based smaller U.K. companies.”⁷² Kryso highlights its selection as the first foreign company to obtain a one hundred percent interest in a mining and exploration project in Tajikistan.⁷³ In April 2004, LLC Pakrut, a wholly owned subsidiary of Kryso, was granted a license and geological lease to explore and exploit the Pakrut License.⁷⁴ This Pakrut area is reputed to have the second largest known gold resource after the Witwatersrand in South Africa.⁷⁵

IV. INTERNATIONAL INVESTMENT LAW AND POLICY CONSIDERATIONS FOR AN NMP

Prior to the actual investment, both the host nation and investor have converging interests for the establishment of the investment, but once a deal is struck, the dynamics between the relationship of the host nation and the investor are dramatically changed.⁷⁶ The host nation has an incentive to unilaterally alter the original contract terms, amending investment laws, or even expropriating the

68. Pavoni, *supra* note 64, at 545.

69. *Id.*

70. *Kryso Resources PLC (London:KYS): New Recommendation*, SAFE HAVEN: PRESERVATION OF CAPITAL (June 10, 2009), <http://www.safehaven.com/article/13573/kryso-resources-plc>.

71. *Id.*

72. UNDERSTANDING JUNIOR MINERS, AIM MINING RES. LTD. (Fiona Perrott-Humphrey ed., 2006).

73. KRYSO, *supra* note 40.

74. SAFE HAVEN, *supra* note 70.

75. *Id.*

76. SCHILL, *supra* note 51, at 3.

investor without compensation.⁷⁷ This political risk results from opportunistic behavior that raises investment costs to the investor and may in an extreme cases block FDI entirely.⁷⁸

As a general principle of sovereignty, a state is under no legal obligation to permit investment within its borders, but once a state admits foreign investors, it is required to afford them “the protection of the law and provide for a certain standard of treatment.”⁷⁹ Should the situation arise, the host nation cannot exercise its territorial sovereignty in an arbitrary manner.⁸⁰ For example, in the United States, bilateral investment treaties (“BITs”) require that particular standards be upheld in the pre-entry stage.⁸¹ While the standards for national and most-favored-nation (“MFN”) treatment rely on the treatment accorded to a reference group, investment treaties can mandate standards of treatment on host states, including fair and equitable treatment and full protection and security, which are “absolute in character and grant protection to foreign investors independent of the host State’s treatment of its own nationals or of third-party nationals.”⁸² The obligation of national treatment has commanding influence in trade law for questioning differentiated treatment of goods based on environmental grounds.⁸³

Possible choices for applicable laws are based on the bargaining power and negotiating skills of the parties in creating investment contracts.⁸⁴ The rules of admission, however, can pose requirements for the host nation, which may limit investor rights for dispute settlement if the investor ignores rules on admission.⁸⁵ Thus, violations of domestic law may place investments outside of substantive guarantees.⁸⁶ Having an effective dispute settlement mechanism is “at the heart of any investment code.”⁸⁷ Yet nations balk at enacting a firm dispute settlement

77. *Id.*

78. *See id.* at 3-5.

79. Alexandra N. Diehl, *Tracing a Success Story, or, “The Baby Boom of BITs”: Characteristics and Particularities of the Tight Net of Bilateral Investment Treaties Existing Today*, in INTERNATIONAL INVESTMENT LAW IN CONTEXT 7, 11 (August Reinisch et al. eds., 2008).

80. *Id.*

81. *Id.* (“Article 3 of the US Model BIT prescribes that each party shall accord to investors of the other party treatment no less favorable than it accords, in like circumstances to its own investors with respect to establishment(!) [sic], acquisition, management, conduct, operation, and sale or other disposition of investments in its territory (so-called ‘national treatment’). Article 4 of the US Model BIT stipulates that ‘most-favored-nation treatment’ should be accorded to the establishment phase as well.”).

82. SCHILL, *supra* note 51, at 78.

83. Romson, *supra* note 37, at 45.

84. RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 74 (2008).

85. *Id.* at 85.

86. *See id.*

87. Edward M. Graham, *Towards an Asia Pacific Investment Code*, in INVESTMENT ISSUES IN ASIA AND THE PACIFIC RIM 15, 29 (Carl J. Green & Thomas L. Brewer eds., 1995).

process because of the implications on national sovereignty.⁸⁸ The two existing international bodies for investment disputes are the International Centre for the Settlement of Investment Disputes (“ICSID”), an entity of the World Bank, and the United National Commission on International Trade Law (“UNCITRAL”).⁸⁹ ICSID is an autonomous international institution whose primary purpose is to provide facilities for conciliation and arbitration of international investment disputes.⁹⁰ UNCITRAL is the core legal body of the United Nations in the field of international trade law business and its business is the modernization and harmonization of rules on international business.⁹¹ ICSID and UNCITRAL, however, require that both the disputing firm and government consent to the resolution process, and even then, neither dispute resolution body can enforce the settlement.⁹²

A. *Deficiencies in Existing Norms for NMPs*

Mining acts usually fail to stipulate the time period from the date of application in which the granting authority must decide to grant or reject an exploration application.⁹³ This missing timetable is important because delays occur in the process.⁹⁴ More recent mining acts stipulate—either in the act or in the regulations—a maximum decision-making and processing time limit, and some acts even provide that if an application is not decided within a certain time, it is “deemed” to have been approved.⁹⁵ Practically speaking, administrative procedures may not comply with the time limits set by the statute, but such limits may reduce the risk of indecision.⁹⁶ Kryso has set a timetable to start mining on Pakrut gold deposits in 2014.⁹⁷ Kryso expects that capacity for this project will be

88. *Id.*

89. *Id.*

90. *About ICSID*, INT’L CTR. FOR SETTLEMENT OF INV. DISPUTES, <https://icsid.worldbank.org/ICSID/Index.jsp> (last visited Aug. 16, 2013) (“ICSID sought to remove major impediments to the free international flows of private investment posed by non-commercial risks and the absence of specialized international methods for investment dispute settlement. ICSID was created by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States as an impartial international forum providing facilities for the resolution of legal disputes between eligible parties through conciliation or arbitration procedures.”).

91. *About UNCITRAL*, U.N. COMM’N ON INT’L TRADE LAW, http://www.uncitral.org/uncitral/en/about_us.html (last visited Aug. 16, 2013).

92. Graham, *supra* note 87, at 29. Procedures for the ICSID and UNCITRAL have been criticized for being legalistic and biased in favor of nations. *Id.* at 30.

93. JAMES OTTO & JOHN CORDES, *THE REGULATION OF MINERAL ENTERPRISES: A GLOBAL PERSPECTIVE ON ECONOMICS, LAW AND POLICY* 3-19 (2002).

94. *Id.*

95. *Id.*

96. *Id.*

97. V. Zhavoronkova, *British Company to Start Gold Mining in Tajikistan*, TREND, (Oct. 31, 2012),

660,000 tons of ore per year and is expected to grow up to 1.32 million tons per year in 2017.⁹⁸ This timetable and generation capacity may be upset due to political and social instability in the country, which is why a viable NMP is crucial.

Mining acts do not always make clear which official has the power to grant an exploration right, because in some acts, the granting power may reside with the “government” or with several levels of government.⁹⁹ Unless another act clearly identifies the government officer authorized to make the grant on behalf of the government, difficulties can arise when several agencies or levels of government vie for control.¹⁰⁰ In most nations, the granting of a mining right in most nations “does not convey the state’s or people’s ownership interest in *in situ* minerals to the mining right holder.”¹⁰¹ This nuance demonstrates the state’s intent to maintain “permanent sovereignty over its mineral endowment.”¹⁰² A mining lease or concession simply grants a right to a mine, as opposed to a real property interest in the minerals underground.¹⁰³

Modern investment protection does not effectively empower arbitral tribunals on the procedural and institutional level.¹⁰⁴ The vagueness of underlying substantive investor rights impedes FDI: “[b]oth wording and concept of standard guarantees, such as indirect expropriation, fair and equitable treatment or full protection of security, are of such indeterminacy that they lack hard and ascertainable normative content.”¹⁰⁵

B. Taxation Issues

Taxation consequences of international investment regimes also bear upon national policy. The structure of the fiscal regimes can be described as profit-based fiscal regimes and revenue-based regimes.¹⁰⁶ The profit-based regimes depend upon corporate income tax and dividend withholding tax, while revenue-

<http://en.trend.az/capital/business/2082589.html>.

98. *Id.*

99. OTTO & CORDES, *supra* note 91, at 3-25. “In most [recent] mining acts, the unrestricted transparent power to grant an exploration right is clearly given to a titled officer, usually an official in the ministry responsible for the mines. . . . [Yet n]ot all mining acts require a grant of exploration rights by a government officer. [This] right may appear as a general nonexclusive right under the mining act automatically upon mere completion of a registration process.” *Id.* at 3-25.

100. *Id.*

101. *Id.* at 3-44.

102. *Id.*

103. *Id.*

104. SCHILL, *supra* note 51, at 263.

105. *Id.*

106. KOH NAITO & FELIX REMY, MINING SECTOR REFORM AND INVESTMENT—RESULTS OF A GLOBAL SURVEY 72 (2001).

based regimes depend upon royalties, import and export duties, and value-added taxes (“VAT”).¹⁰⁷ On account of market fluctuations in profitability under cyclically changing international mineral prices, mining investors prefer profit-based tax regimes.¹⁰⁸ In Latin America, successful mining reform countries have made the switch from revenue-based to profit-based systems, but many countries continue to apply schemes based on output or input taxes such as royalties, custom duties, VAT, and employment taxes.¹⁰⁹ Analysts that support preferential tax treatment for mineral investors propose that mining risks are “sufficiently different in magnitude and character to justify special consideration.”¹¹⁰ Risks in the mineral industry “are expressed as geological, commercial, or political factors beyond the control of investors or inherent in the decision-making process.”¹¹¹ Even if a potentially good mine is discovered, a lengthy wait can be expected in between discovery and exploration, and during that time, market factors can impact project economies.¹¹² As the host country, Tajikistan “has an interest in the realization of a continuous and steady income stream to serve as the basis of reliable long-term economic planning,” but on the national level, it is important for policymakers to be mindful that “short-term economic opportunities usually cannot be exploited if they imply risking a future minimum income level.”¹¹³

C. *International Corporate Social Responsibility*

International investment law, like general international law, should address the concept of International Corporate Social Responsibility (“ICSR”) in the development of laws, rules, procedures, and decision-making. ICSR obligations are “the *quid pro quo* for the protection of investors and investments under international investment protection agreements and international economic rules such as of the WTO.”¹¹⁴ ICSR is a separate concept than governance, which describes “the organization of ownership, participation, disclosure and decision-making in corporations.”¹¹⁵ ICSR regards the wider relationships between the business entity and social actors.¹¹⁶ Peter Muchlinski argues “the interaction of the two concepts is significant from the perspective of putting ICSR into

107. *Id.*

108. *Id.*

109. *Id.*

110. OTTO AND CORDES, *supra* note 93, 7-9.

111. *Id.* at 7-10.

112. *Id.*

113. ERICH SCHANZE ET AL., *MINING VENTURES IN DEVELOPING COUNTRIES: PART 2: ANALYSIS OF PROJECT AGREEMENTS* 112 (1981).

114. Peter Muchlinski, *Corporate Social Responsibility*, in *THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW* 637, 643, 645 n.21 (Peter Muchlinski et al. eds., 2008).

115. *Id.* at 645.

116. *See id.*

operation.”¹¹⁷ Muchlinski proposes that one way to ensure corporate responsibility for employment rights or health and safety would be to incorporate worker participation and consultation within the firm through laws that require the establishment of works councils or the placement of worker representatives on the company board.¹¹⁸

Tajikistan still has a patterned record for human rights, so labor programs should be designed to improve development in this area.¹¹⁹ At the grassroots level, education for high school and university students to inform them of the necessity of human rights and the sustainable development of Tajikistan is another core problem.¹²⁰ Human rights reports generally praise Tajikistani students’ openness and eagerness to discuss human rights, even though the Tajik government considers human rights a taboo subject¹²¹

D. Towards a Viable NMP

Models for mining policies for countries similarly situated to Tajikistan include Malawi, Kazakhstan, and Ghana.¹²² For example, in southern Africa, a region that is also mineral-rich, like Tajikistan, but poverty-stricken, the discussion of mining policies and stakeholder participation is already taking root.¹²³ The Kryso gold exploration project in Pakrut is critical even though London-based Kryso is not a substantially large company. So much is at stake with this venture, including how company and local stakeholders will benefit from the investment. Tajikistan’s central government should also include safeguards in its NMP for the formulation of investment contracts. Poor contracts may undermine the government’s legitimacy among its people “if the contracts create the impression that the state is corrupt or incapable of looking after the interests of the country as a whole.”¹²⁴ Poor contract terms allow corruption to fester by enabling extractive firms too much power in the nation’s internal affairs

117. *Id.*

118. *Id.*

119. George Camm, *Human Rights in Tajikistan: Don't Even Mention It*, INSIDE THE COCOON: CENTRAL ASIA TODAY (Aug. 26, 2011, 2:59 AM), <http://www.eurasianet.org/node/64096>.

120. See generally US DEP’T OF STATE, TAJIKISTAN 2012 HUMAN RIGHTS REPORT, (2012), available at <http://www.state.gov/documents/organization/204625.pdf>.

121. *Id.*

122. Nesbitt, *supra* note 28.

123. For example, an effective policy in the southern African development community will engineer the delicate balance between poverty reduction and an internationally competitive minerals sector. This balance enhances the possibility of long-term economic growth and development in the SADC region. The overriding advantage of this strategy is that it generates home-grown policy instruments and implementation of mineral law with which stakeholders can identify. See H.D. Mtegha et al., *National minerals policies and stakeholder participation for broad-based development in the southern African development community (SADC)*, 31 RESOURCES POLICYPOL’Y 4, 231-38, (2006).

124. Rustad et al., *supra* note 26, at 10550.

and allowing extractive firms to engage in unsustainable resource use.¹²⁵ On the other hand, better contracts may “stipulate improved conditions for workers; establish stricter environmental and social safeguards; and include provisions for local development projects, such as the construction of schools, wells, and roads—all of which provide tangible peace dividends for local populations.”¹²⁶

The national government must negotiate its position when allowing mining firms to explore and extract within its border. The government cannot give away its resources and have less money to construct and maintain infrastructure, schools, and other facilities.¹²⁷ In negotiating contracts, the government must also consider the possibility of environmental disaster and should develop emergency cleanup plans.

V. CONCLUSION

The sustainable mining practices and policies discussed in this Article, in the context of international investment legal regimes, show the impetus for a viable NMP. Despite the high market demand for gold, unsustainable investment techniques have hindered Tajikistan's mining enterprises and accelerated environmental degradation.¹²⁸ As a caveat, the mining industry must be regulated and security measures implemented to protect the business integrity of any gold mining projects.¹²⁹ Similar to any major development project, the risk of environmental degradation and economic exploitation are elevated.¹³⁰ While multi-national entities may in the future be able to extract and export gold from Tajikistan, others will also seek the rewards of this multibillion-dollar annual trade, including rebels, drug cartels, and common criminals.¹³¹ Nonetheless, Tajikistan with its large and hidden gold reserves could be a serious contender on the gold commodity market, and a viable NMP, could stimulate Tajikistan's mining investment projects so that it encourages sustainable FDI.

125. *See id.*

126. *Id.*

127. JOSEPH E. STIGLITZ, *MAKING GLOBALIZATION WORK* 141 (2006).

128. *See supra* Part II.

129. *See supra* Part IV.

130. *See supra* Part III.

131. Elizabeth Dickinson, *Foreign Policy: Downgrade Good as Gold, Literally*, NATIONAL PUBLIC RADIO, (Aug. 10, 2011), <http://www.npr.org/2011/08/10/139347972/foreign-policy-downgrade-good-as-gold-literally?sc=tw&cc=share>.