Stabilization Clauses and Human Rights

A research project conducted for IFC and the United Nations Special Representative to the Secretary General on Business and Human Rights

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Annex 1: Summary of London Consultation May 2008
Abstract

The purpose of this study was to examine whether stabilization clauses, a widely used risk-management device in investment contracts, may affect a state’s action to implement its international human rights obligations. Specifically, this study examined whether stabilization clauses can limit the application of new social and environmental regulations to investment activities over the life of the investment, or to obtain compensation from host states for the costs of compliance with such new laws. This study used social and environmental laws (such as nondiscrimination, health and safety, labor and employment rights, and the protection of the environment and cultural heritage) as a surrogate for human rights obligations, because social and environmental laws (labor and employment, nondiscrimination, health and safety, environment, protection of culturally significant property, and the like) are some of the more easily identifiable legislative areas that can both protect rights and impact investors.

The contract data used in this research comes from a sample of current investment contracts and model contracts. (The contracts represent actual agreements between government parties and investors. The models represent government starting places for negotiation and may change significantly before actual agreements are reached.) These contracts and models came principally from private international law firms that responded to a request from IFC to participate in the study. These law firms provided a sample of contracts from the last 10 years, spanning a broad range of industries and regions of the world. Research for this project included a literature review on stabilization clauses and relevant international arbitration decisions, as well as interviews with lawyers who represent investors and host states (negotiating investment contracts or litigating contract disputes) and with industry lawyers. No interviews with government officials were conducted for this study. Interviews were conducted with academics who have been involved in the negotiation of host-government agreements, and with nongovernmental organizations (NGOs) that have conducted research on host-government agreements and human rights. The study focused on the drafting of stabilization clauses and only briefly considers the formal enforcement of such clauses.

This study found that of the stabilization clauses examined, a majority of them from countries outside the Organisation for Economic Cooperation and Development (OECD) were drafted in a way that can either insulate investors from having to implement new environmental and social laws or to provide investors with an opportunity to be compensated for compliance with such laws. None of the contracts in the study from OECD countries offer exemptions from new laws, and they only rarely offer an opportunity for compensation for compliance with the same breadth of social and environmental laws as in non-OECD countries.
Acknowledgments

The author of this paper, Andrea Shemberg, is a legal advisor to the United Nations Special Representative to the Secretary General for Business and Human Rights. IFC provided funding, and Motoko Aizawa, Head of Policy and Standards Unit in IFC’s Environment and Social Development Department, facilitated the project.

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Executive Summary

This paper is the result of a joint effort of IFC and the United Nations Special Representative to the Secretary General for Business and Human Rights (SRSG), John Ruggie.

The SRSG examined nontraditional areas of the business and human rights context, such as investment and trade agreements, to assess their potential impact on human rights, and to identify best practices to enhance the protection of human rights in these areas. His objective in pursuing this research was to stimulate multistakeholder engagement based on empirical evidence. This research project was designed specifically to contribute to his mandate. In June 2008, the SRSG submitted his final report to the UN Human Rights Council.¹ The report contains a series of observations from his empirical inquiries and a series of policy recommendations for improving human rights protection in the context of business activities.

IFC’s funding for and management of this project reflects its ongoing interest in advising private sector clients on ways to promote investment that is consistent with principles and standards of sustainable development so that the needs of its member countries and their citizens and are met.

Stabilization Clauses

For the purposes of this study, “stabilization clauses” are those clauses in private contracts between investors and host states that address changes in law in the host state during the life the project. Use of stabilization clauses is widespread across industries and regions of the world.

From an investor's perspective, stabilization clauses constitute a risk-mitigation tool to protect foreign investments from such sovereign risks as nationalization, expropriation, or the obsolescence bargain, in which the host state can use changes in circumstances to impose new requirements on investors. These clauses also may be designed to insulate investors from environmental and social legislation, a matter of growing economic significance to investors.

Lenders often view stabilization clauses as an essential element of the bankability of an investment project, particularly in emerging markets, and they may insist that at least the fiscal terms of an agreement be stabilized. Host states have viewed stabilization clauses as a way to foster a favorable investment climate.

Categories of Stabilization

This study differentiated stabilization clauses into three broad categories, based on the design and range of investor protection:

- **Freezing clauses** “freeze” the law of the host state with respect to the investment project over the life of the project.
- **Economic equilibrium clauses** require that the investor comply with new laws but also require that the investor be compensated for the cost of complying with them (compensation taking such forms as adjusted tariffs, extension of the concession, tax reductions, monetary compensation, or other), but exemptions are not specifically mentioned in the contract.
- **Hybrid clauses** (so named because they share some aspects of both of the other categories) require the state to restore the investor to the same position it had prior to changes in law, including, as stated in the contract, by exemptions from new laws.

Stabilization Clauses and Human Rights

Concerns about stabilization clauses and human rights arose in earnest in 2003 when the oil company BP published its private investment contracts relating to a major cross-border pipeline project.

Subsequently, some civil society groups criticized BP for various aspects of the contracts, including the stabilization clauses. These groups claimed that the clauses—by exempting an investment project from new laws aimed at protecting human rights, or by requiring host states to compensate the investor financially for compliance—limited the host states’ ability to implement their obligations under international human rights law. The objective of these groups was protection of human rights in such areas as nondiscrimination, health and safety, labor and employment, cultural heritage, and the environment.

This criticism signaled a heightened social expectation that investors have a responsibility to respect human rights, and— notwithstanding the legitimate expectation of protection of the investment from arbitrary action by the state—should not place obstacles in the way of the host state’s action to implement its human rights duties.

BP subsequently supplemented the contracts to avoid some of the problems identified by human rights advocates. The supplement, called the “Human Rights Undertaking,” was designed in part to avoid the potential negative impact that stabilization clauses were alleged to have on the protection of human rights in the host states.

Civil society criticism of stabilization clauses has expanded beyond oil pipelines to include other contracts and industries. Human rights advocates have expressed concern that the protection of investor rights in contracts and international agreements is not appropriately limited by 1) the state’s own duty to regulate investors to protect human rights, and 2) the investors’ responsibility to respect rights.

These groups are concerned that investor protection without appropriate limits can make foreign investments exempt from bona fide social and environmental laws that come into force after the effective date of the agreement, or can require the host state to compensate the investor for compliance with such. They argue that such investor protections can deny the state its proper role as legislator, with powers different and greater than those of companies, and creates a financial disincentive for the host state, thus chilling or hindering the application of dynamic social and environmental standards over the life of a long-term project. Human rights advocates claim that the negative effects of stabilization clauses are exacerbated in developing countries, where the need is for rapid legislative development and implementation—not for obstacles to the application of new laws.

Industry groups, on the other hand, have not formally voiced their views regarding whether and how stabilization clauses may affect host-state regulation in such areas as labor, health, safety, security, the environment, and others that could impact human rights.

The Research

This study addresses the question: Can stabilization clauses create obstacles to applying new social and environmental legislation to investment projects in the host state; and if so, to what extent?

To address this question, the study posed the following research inquiries:

- What does current stabilization practice look like with regard to 1) method of stabilization; and 2) substantive coverage of the clause?
- What is the relevance of current stabilization practice to changes in social and environmental legislation?
- What, if any, evidence demonstrates that stabilization clauses can be used to limit a state’s action to implement new social and environmental legislation relative to long-term investments?
- Based on the evidence gathered, what recommendations or solutions might address potential obstacles to the host state’s ability to pass social and environmental legislation and apply it to investments?

This is probably the first empirical study on modern stabilization practice covering a wide range of industries and regions of the world. Such studies are rare due to the confidential nature of most
investment contracts. There is no public repository of private contracts that would allow practitioners, host states, investors, civil society, and academics to view modern practice for all sectors.

The Data

Data and information for this study came from three sources: 1) a collection of 76 modern contracts and 12 modern contract models; 2) a literature review and a review of reported contract and international state-investor disputes that may be relevant to understanding the legal enforceability of such clauses; and 3) interviews with negotiators, lenders, lawyers who negotiate investment contracts or litigate disputes for states and investors, and with nongovernmental organization members who have conducted research on stabilization clauses.

The contracts and models analyzed covered all regions of the world and a wide range of industries, including power, water, rail, roads, airports, unspecified infrastructure, telecom, health care services, and the natural resources extractive industries (upstream and downstream oil and gas, minerals mining, and associated industries).

Contracts were analyzed and coded according to: 1) type of stabilization clause; 2) substantive coverage of stabilization, and 3) procedure for enforcing the stabilization clause.

Summary of Key Findings

Key findings of this study include the following:

- Forty-four of the 75 (about 59 percent) contracts and models in the study from non-OECD countries give exemptions or offer an opportunity for compensation for compliance with all new laws, including environmental and social laws. None of the OECD country contracts or models in the study offer exemptions from new laws, while only two of 13 (about 15 percent) of contracts and models from the OECD offer an opportunity to claim compensation for compliance with all new laws, including environmental and social laws.

- Freezing clauses, with exemptions from new laws, were found in the contracts from Sub-Saharan Africa; Eastern, Southern Europe and Central Asia; and the Middle East and North Africa. It is notable that 4 of the 11 Sub-Saharan African contracts contain clauses freezing all laws (including environmental and social). In Latin America one partial freezing clause gives specific exemptions for labor laws.

- Eleven of 13 stabilization clauses in the OECD contracts and models are limited economic equilibrium clauses (the narrowest form of stabilization clauses in the study). In contrast, limited economic equilibrium clauses are relatively rare in the contracts and models from Sub-Saharan Africa (3 of 11), the Middle East and North Africa (2 of 13), and Eastern, Southern Europe and Central Asia regions (1 of 10).

- Contracts with limited economic equilibrium clauses sometimes contain one or more features that aim to avoid formal disputes and to ensure fairness in the application of the clause. In this study 35 percent of limited economic equilibrium clauses limit both the substantive scope of coverage (so as to not stabilize all laws) and included threshold loss limits. Thirty-seven percent of such clauses require the investor to mitigate cost implications of new laws. Twenty-five percent of such clauses apply stabilization to costs or windfalls resulting from new laws. And 28 percent provide for recourse to an independent expert to determine compensation amounts. None of the contracts with either freezing or hybrid clauses contains such features.

- Of the 22 contracts with limited economic equilibrium clauses from non-OECD countries in the study, 20 provide the investor with an opportunity for compensation for compliance with some social and environmental laws of general application as well as for other laws even when not discriminatory toward the investor.

- Five of the six limited economic equilibrium clauses from OECD countries, in contrast, either do not cover any laws of general application or any laws enacted by federal authorities, meaning those changes in law are at the investor’s risk. Three of six contracts specifically exclude tax laws from stabilization. In these contracts, for specific laws regarding the industry,
three provide some risk sharing or compensation for specific laws that pertain to the project. In two contracts laws for issues such as safety and security, even if discriminatory toward the investor, are explicitly excluded from stabilization and remain at the investor’s risk.

**Summary of Analysis of Potential Impact of Clauses**

Evidence supports the hypothesis that some stabilization clauses can be used to limit a state’s action to implement new social and environmental legislation to long-term investments. The data show that the text of many clauses applies to social and environmental legislation, so that investors are able to pursue exemptions or compensation informally and formally.

Full and limited freezing clauses\(^2\) can thus potentially insulate investors from new social and environmental laws, because the text of the agreement supports a reasonable interpretation that compliance is not required. Hybrid clauses generally give the investor an opportunity to demand adjustments to the contract, including exemption from the law, to compensate the investor. Economic equilibrium clauses allow an investor to demand contract adjustments to compensate the investor. Some stabilization clauses could therefore give the investor leverage to negotiate informally a lower level of compliance with the new law, or a delay in the law’s applicability to the project, or compensation for compliance.

Freezing, hybrid, and economic equilibrium clauses may also be formal tools for investor protection pursuant to a breach-of-contract claim or a claim pursuant to a trade or investment treaty, if either exemptions or compensation are not forthcoming from the host state pursuant to the clause.\(^3\) If formal claims result in monetary compensation, the impact of all types of stabilization clauses would be similar, and they could potentially affect a host state’s ability to apply new social and environmental regulation to investors. Because some hybrid and economic equilibrium clauses only formally require good faith negotiations of the parties in the event of a dispute, it is unclear how these clauses would be enforced formally and whether they would potentially result in monetary compensation.

The impact of hybrid and economic equilibrium clauses on the host government’s ability to implement new social and environmental laws on the investor depends on whether exemptions are given under hybrid clauses and how compensation for compliance with new laws is designed.

In some projects the costs of compliance could be passed on to users of the services. However, if the investor is providing an essential service, such as water or electricity, raising tariffs for users may hinder the users’ ability to pay the increased tariff, creating potentially negative consequences for human rights unrelated to the subject of this study. Alternatively, the cost of compliance could be absorbed in other ways, such as by adding more years to the concession, in which case the equilibrium or hybrid clauses would be less likely to have a negative impact on a state’s ability to adopt and apply new social and environmental laws.

**Identifying Good Practice**

From the sample in this study, it appears that contracts and models from OECD countries are based on principles of risk allocation that significantly limit the scope of stabilization clauses, while protecting investors from arbitrary and discriminatory conduct by the state. In principle, investors are expected to comply with all new laws, and to absorb the costs of compliance with all generally applicable laws. Therefore, contracts from OECD countries may serve, at least in part, as a reference for gathering good-practice criteria.

BP’s Human Rights Undertakings are examples of good practice for transparency and possibly for content. The prevailing practice to avoid public disclosure of investment contracts and disputes relative to contractual or treaty investment protection is an important context for this work. The

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\(^2\) In the case of a limited freezing clause, the text of the clause must cover the subject of the new law. See Part 3 of this paper.

\(^3\) See *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru*, Award on the Merits, 18 August 2008, ICSID Case No. ARB/03/28.
findings of this study are limited, in part because no reported disputes are available. Due to lack of information on the use of stabilization clauses in published disputes, the effect of these clauses on human rights is not well understood.

The Extractive Industry Transparency Initiative and the IFC Sustainability Policy are other examples of current good practice for transparency. EITI is a government undertaking that requires companies to reveal revenue payments made to governments and governments to reveal revenue payments received. IFC’s Sustainability Policy requires that projects reveal significant revenue payments and certain key terms of agreements for some projects.

**Multi-stakeholder Consultations on the Research and Next Steps**

Two formal multi-stakeholder expert consultations were convened to discuss the findings as well as to develop a future agenda to build on those findings. The first took place in London, UK in May 2008. The second was held in Johannesburg, South Africa in October 2008.

Consultation participants were asked to provide their reactions to the report. The report was regarded widely as an important contribution to understanding the potential human rights impact of stabilization clauses and as a useful catalyst to multi-stakeholder dialogue. With the exception of the unexpectedly high number of freezing clauses, the findings seemed to generally represent people’s own experience in practice. Although interest was stirred by the narrow focus of the report, it was also recognised that the narrow focus has drawbacks. The narrow focus can mislead both in terms of identifying obstacles to the state duty to protect human rights in the context of investment projects and in terms of guiding thinking when crafting innovations for contracts. Successful ideas for improving stabilization clauses, it was felt, had to consider the wider context of the agreements, their legal context as well as the project and country context.

During the consultations, many participants confirmed the ongoing need for investor protection against non-bona fide or arbitrary and discriminatory government conduct. It was agreed that the nub of the issue is how to deal with legitimate and bona fide measures that may have a financial impact on the investor. There was considerable interest in proposals to draft stabilisation clauses in ways that would protect investors while allowing governments to implement human rights obligations. One issue that featured often in the consultations was the apparent need to improve government capacity to negotiate host government agreements.

The consultations offered a range of ideas regarding how to effect improvements in stabilization practice towards ensuring they cannot be used to obstruct the state’s fulfillment of its duty to protect. It was suggested that good practice guidelines for contracts could be developed. Others suggested that it is possible to appropriately benchmark reliably dynamic standards to avoid some of the potential pitfalls of stabilization identified in the research. There was also support for the continued study of long-term investment projects and their potential and actual impacts on human rights. Improving the transparency of contracts was also mentioned as a subject of interest to academics, researchers and civil society.

The most widely supported ideas on how to address the concerns expressed in the report include 1) create guidelines on contracting and human rights; 2) create incentives to enable human rights compliant HGAs; 3) address the apparent capacity gap among host states, particularly from developing states.

The next stages of work for the SRSG on investment and human rights and specifically on stabilization is now being planned. Throughout the SRSG’s mandate he will continue to raise awareness and foster discussion of the issue of stabilization.
### Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>AIPN</td>
<td>Association of International Petroleum Negotiators</td>
</tr>
<tr>
<td>BTC</td>
<td>Baku-Tbilisi-Ceyhan pipeline crossing Azerbaijan, Georgia, and Turkey</td>
</tr>
<tr>
<td>HSE</td>
<td>health, safety and environmental</td>
</tr>
<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
</tr>
<tr>
<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
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<tr>
<td>IFC</td>
<td>International Finance Corporation</td>
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<tr>
<td>IPIECA</td>
<td>International Petroleum Industry Environmental Conservation Association</td>
</tr>
<tr>
<td>NGO</td>
<td>nongovernmental organization</td>
</tr>
<tr>
<td>OECD</td>
<td>Organisation for Economic Co-operation and Development</td>
</tr>
<tr>
<td>SCP</td>
<td>South Caucasus Pipeline crossing Azerbaijan, Georgia, and Turkey</td>
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<tr>
<td>SRSG</td>
<td>United Nations Special Representative to the Secretary General for Business and Human Rights</td>
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Part 1: Introduction

1. This paper is the result of a joint effort of IFC and the United Nations Special Representative to the Secretary General for Business and Human Rights (SRSG).

2. In 2005, the Commission on Human Rights requested the United Nations Secretary-General to appoint a special representative on the subject of business and human rights. The Secretary-General appointed John Ruggie, Harvard University professor of international affairs, as SRSG. In June 2008, John Ruggie submitted to the UN Human Rights Council his final report, which contained observations from his empirical inquiries, and policy recommendations for improving human rights protection in the context of business activities. He recommended a “protect, respect, remedy” framework to manage business and human rights issues. The three pillars of the framework are: 1) the state duty to protect human rights from abuses by third parties (including business to ensure that business activities do not infringe on human rights); 2) the responsibility of business to respect human rights; and 3) greater access to effective remedies for those whose human rights are harmed. The Council unanimously welcomed the framework and asked the SRSG to take on a new mandate to operationalize it providing concrete guidance and recommendations to states and companies.

3. The SRSG’s inquiries have led him to consult nontraditional areas of the business and human rights context, such as investment and trade agreements, to assess their potential effects on human rights, and to identify best practices for enhancing the protection of human rights in these contexts. The SRSG observed that stabilization clauses and human rights was one area where the views of stakeholders greatly differ, and that there had been no direct engagement among stakeholders based on empirical evidence on this important aspect of private investment agreements. This research project was designed specifically to stimulate such multistakeholder engagement.

4. The debate on stabilization clauses and human rights began in earnest in 2003 when the oil company BP took the unusual step of publishing the private investment contracts underpinning a major cross-border pipeline project (the Baku-Tbilisi-Ceyhan pipeline crossing Azerbaijan, Georgia, and Turkey) on the project’s Web site. Subsequently, some civil society groups criticized BP, as the largest shareholder, and the host states for aspects of the contracts that they viewed as unfavorable to the promotion and protection of human rights in the states.

5. One major criticism was that the contracts contained “stabilization clauses,” a common risk-management tool for investors. The civil society groups claimed these clauses undermined the willingness and ability of Turkey, Georgia, and Azerbaijan to fulfill their human rights duties pursuant to international human rights law, particularly in areas such as nondiscrimination, health and safety, labor and employment rights, and the protection of cultural heritage and the environment.

6. Civil society groups claimed that the stabilization clauses in the BTC contract could limit the application of new laws aimed at protecting human rights to the investment project, or could require the host states to provide financial compensation to the BP-led oil consortium to cover the costs of compliance with new laws—even minimum wage or health and safety laws.

7. The criticism brought into focus the obligation of states to consider their human rights obligations in the context of investment contracts. It also signaled the social expectation that investors have a responsibility to respect human rights, and—notwithstanding the legitimate expectation for contractual protection from arbitrary action by the state—should ensure such

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5 See Human Rights on the Line, supra note 4, 16-17.
protections cannot be used as an obstacle to host state’s action implementing its human rights duties.

8. While the host states in question did not respond to the criticism, BP, in an unprecedented move, responded by supplementing the contracts with a legally enforceable document called the “Human Rights Undertaking” (“HRU”). The HRU was designed to avoid the alleged potential impact of the stabilization clauses on protection of human rights in host states. BP similarly supplemented the contracts underpinning the South Caucasus Pipeline (SCP) in 2005 with a similar HRU.6

9. Since 2003, human rights, environmental, and sustainable development groups have criticized publicly a number of investment contracts alleging the adverse impacts of stabilization clauses on the promotion and protection of human rights in host states. Civil society groups made such allegations against Exxon and the host states regarding contracts for the Chad-Cameroon pipeline project, and regarding the 2005 Mittal Steel investment in Liberia. Although the Exxon contracts in the Chad-Cameroon pipeline project were not subsequently amended, the Mittal Steel agreement was renegotiated, largely scaling back the breadth of the stabilization clauses.

10. Industry groups have not come forward with their views on whether and how stabilization clauses may affect host-state regulation in such areas as labor, health, safety, security, the environment, and others that could impact human rights. In 2004, the International Petroleum Industry Environmental Conservation Association (IPIECA) sponsored a discussion on stabilization and human rights in one of its working groups, but it is unclear whether any follow-up took place. In 2006, another industry group, the Association of International Petroleum Negotiators (AIPN), commissioned a paper to examine the issue of stabilization clauses and look at ways to accommodate bona fide legislation in such areas. AIPN also spearheaded a model clause project to draft contractual clauses aimed at ensuring respect for social and environmental issues related to oil and gas projects, but that project was discontinued before the model clauses were made public.

11. Research for this study revealed that one private law firm had gathered investment contracts (some of which were used in this study) to analyze the stabilization clauses with respect to human rights. Other than these instances, this research did not find any formal expression of industry views on the potential human rights impact of stabilization. It is possible that useful analyses and data exist privately among practitioners or project developers.

12. This research project contributes to the ongoing discussion on what impact, if any, stabilization clauses might have on the promotion and protection of human rights in host states. It offers some empirical evidence on the nature and scope of stabilization clauses in use today, which in turn allows for an evaluation of the claims made about the risks stabilization clauses pose to supporting and advancing human rights. Also proposed here are recommendations for improving international contracting practice based on multi-stakeholder consultations regarding the empirical evidence in this study.

6 Subsequently, BP also put in place a Human Rights Undertaking for the South Caucasus Pipeline (SCP) project. The BTC and SCP project documents, as well as the Human Rights Undertaking, are available at: http://www.bp.com/genericarticle.do?categoryId=9006628&contentId=7013497.

7 At least five Specific Instances were filed with OECD National Contact Points regarding the BTC contracts (U.S., U.K., France, Germany, Italy). See Friends of the Earth press release at: http://www.foe.co.uk/resource/press_releases/green_groups_in_5_countries.html


13. IFC funding and facilitation for this research project reflects its ongoing interest in advising private sector clients on ways to promote investment that is consistent with principles and standards of sustainable development that meet the needs of its member countries and their citizens.

**Part 2: How This Paper Is Organized**

14. Part 3 of this paper provides a broad-brush description of stabilization clauses, why they are used, and the types of clauses used. Part 4 sets out concerns that human rights, environmental, and sustainable development advocates have expressed about stabilization clauses. Part 5 describes the design of the research and methodology as well as the data sources. Part 6 describes the findings. Part 7 provides some reflections on these findings. Part 8 applies the data to a discussion of stabilization clauses and their potential impact on new social and environmental laws. Part 9 provides conclusions based on the research. Part 10 summarizes the discussions from the multi-stakeholder consultations as well as ideas for improving stabilization practice gathered in the consultations. And Part 11 lays out ideas for possible next steps.
Part 3: Stabilization Clauses

3.1. Purpose and Coverage

15. For the purposes of this research, the term “stabilization clause” refers to the contractual clauses in private contracts between investors and host states that address the issue of changes in law in the host state during the life of the project. Not all investment contracts have these provisions, but they are common in long-term investments in the extractive industries and in contracts for public infrastructure and essential services. These provisions—dealing with “changes in law”—are sometimes integrated into various parts of a contract, or one or more clauses may apply to the entire agreement.

16. The practice of using stabilization clauses of some kind is widely established across industries and regions of the world. From an investor’s perspective, stabilization clauses are a risk-mitigation tool drafted to help protect investments from a number of “sovereign” risks in the context of foreign investments. In the 1960s and 1970s, stabilization clauses were included to attempt to guard against a wave of nationalizations of foreign investment projects in oil and mining. Today, these clauses may be geared to protect investors from arbitrary or discriminatory legislation against the investor, nationalization, or direct expropriation. Additionally, they may be designed to help guard against what is sometimes called creeping expropriation (or legislative takings) by the host state, nullification of the contract pursuant to national law, or more specific fiscal issues like accelerated depreciation and amortization of assets, long loss carry-forward periods, royalty rate changes, or threats to the repatriation of foreign exchange or threats to the keeping of funds in protected offshore accounts.

17. Although these and other financial concerns may constitute the original core of the stabilization issue, other concerns are gaining importance in modern investment contracts. In recent decades, for example, as environmental regulation has become a material cost for investors, some have looked to stabilization clauses to protect investments from costs resulting from changes to such legislation. According to some experts interviewed for this study, stabilization clauses are needed to ensure that the state bear the excessive cost of implementing environmental and social legislation. For example, a new law mandating advanced pollution-control technology may

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12 See World Investment Report, part 2, 37, describing the history of expropriations in the context of foreign investments.

From the beginning of industrial activities in the 1850s till the First World War, petroleum extraction had been 100% privately owned (Yergin, 1991). Since then, the involvement of governments in the management and control of the industry has risen almost constantly. Two major forces have motivated home and host governments to intervene more, and to increase their share in the ownership and management of their oil and gas resources: the strategic importance of these resources for military and other industrial uses, and the considerable rents involved. Outright nationalization of oil and gas firms, defined as the compulsory transfer of the ownership of the whole industry to the State (UNCTAD, 2000: 4), a first took place in the context of the Russian Revolution in 1917. This was followed by nationalizations in Bolivia (1937, 1969), Mexico (1938), Venezuela (1943), Iran (1951), and Argentina, Burma, Egypt, Indonesia and Peru in the 1960s (Kobrin, 1985). In the 1970s, nationalizations occurred in Algeria, Iraq, Kuwait, Libya and Nigeria, and there was a gradual increase in Saudi ownership of Aramco (Yergin, 1991). More recent examples of moves towards nationalizations are the Russian Government’s bid to increase shares in petroleum companies and in extraction projects (chapter II), and Venezuela’s push to reduce foreign TNCs’ shares in individual projects. Nationalizations in the oil and gas industry have taken place in periods of favourable market conditions (high international demand and prices), domestic conditions (social consensus in support of nationalizations) and international political conditions. They have changed the global landscape of petroleum extraction, and contributed to the emergence and subsequent strengthening of State-owned firms.


Perhaps most relevant at the moment [as of 1996] is the imposition of new environmental obligations by subsequent regulation or by an administrative/judicial ruling reinterpreting existing law on which the investment decision may to some extent have been based. While environmental liability is seen as a major political risk in transition economies, unforeseen environmental opposition and restrictions constitute, at the moment, a major (and, in natural resources/energy projects, the prime) political risk facing developers of new industrial projects in Western countries. With this experience in mind, it is understandable that foreign investors will wish to protect their position at the moment of their most favorable bargaining power—i.e., when dealing with a weak (developing or transition) government anxious to attract investment before and during the negotiations for an attractive investment.
prove financially prohibitive for an existing project with older technology. Foreign investment, these experts opined, would not be possible in many parts of the world without stabilization clauses to guard against such new laws.

18. Lenders often view stabilization clauses as essential to the bankability of an investment project, particularly in emerging markets. They see them as a way to ensure that the host state will not enact laws that eliminate or damage the commercial viability of the project, or take other actions to make loan repayments more difficult. Lenders and political risk insurers may insist that at least the fiscal terms of an agreement should be stabilized. They may consider stabilization to be fundamental, particularly for projects with nonrecourse financing (meaning that loan payments come only from the revenue stream of the project).

19. The purpose and design of stabilization clauses may depend in part on the sector and the project design itself. Some industries (power, for example, and resource extraction) that involve large initial investment (to build infrastructure or search for resources) require relatively long periods of time to recoup costs and become commercially viable. Such investments are vulnerable to the “obsolescence bargain,” in which the host state forces renegotiation, and the investor has a hard time refusing, due to significant sunk costs. The investor needs to be assured that, once the infrastructure is built or once the resources are found, obligations under the contract will not change to the detriment of the investment. At least one academic article suggests that there is more political risk in a natural resource project than in a private sector public service project, and some industry representatives interviewed for this study agree.

20. In those industries where tariffs are set publicly (especially where essential services are involved, such as water and electric power), the investor may not be able to pass the costs resulting from changes in law directly to users of the service. Thus, there is a risk that changes in law will create a rise in operating costs or require capital expenditures that were not originally planned. These additional costs can reduce or even eliminate the commercial viability of the project. Stabilization clauses have often been used to protect against this risk.

21. Host states often see stabilization clauses as a way to provide assurances to investors to encourage inward investment. It has been described as part of the “favorable investment climate” or “red carpet” provisions that host states lay out for foreign investors. Investors and lawyers (including those representing states and investors) observe that states sometimes accept sweeping stabilization clauses, along with other terms that appear to tilt the project in favor of the investor, as a way of securing a large investment project and enticing further investment in the country.

3.2. Categories of Stabilization Clauses

22. This study divides stabilization clauses into three broad categories, based on how they aim to protect the investor:

- **Freezing clauses** are designed to make new laws inapplicable to the investment. They are so named because they aim to freeze the law of the host state with respect to the investment project.

- **Economic equilibrium clauses** imply that, although new laws will apply to the investment, the investor will be compensated for the cost of complying with them. Compensation can take many forms, such as adjusted tariffs, extension of the...
concession, tax reductions, monetary compensation, or other. These clauses do not aim to freeze law, but aim to maintain the economic equilibrium of the investment project. The text of some economic equilibrium clauses does not impose a direct requirement that the host state compensate the investor but requires the parties to negotiate in good faith toward restoring the economic equilibrium of the original agreement. The significance of this variation is discussed further in Part 8 of this paper.

- **Hybrid clauses** (so named because they share some aspects of both of the other categories) require the state to restore the investor to the same position it had prior to changes in law, and the contract states explicitly that exemptions in law are one way of doing this.

23. **Freezing clauses** can take two forms: full freezing and limited freezing. Full freezing clauses purport to freeze all laws, usually for the duration of the project. For example, the clause might read as follows:

The GOVERNMENT hereby undertakes and affirms that at no time shall the rights (and the full and peaceful enjoyment thereof) granted by it under this Agreement be derogated from or otherwise prejudiced by any Law or by the action or inaction of the GOVERNMENT, or any official thereof, or any other Person whose actions or inactions are subject to the control of the GOVERNMENT. In particular, any modifications that could be made in the future to the Law as an effect on the Effective Date shall not apply to the CONCESSIONAIRE and its Associates without their prior written consent, but the CONCESSIONAIRE and its Associates may at any time elect to be governed by the legal and regulatory provisions resulting from changes made at any time in the Law as in effect on the Effective Date.

In the event of any conflict between this Agreement or the rights, obligations and duties of a Party under this Agreement, and any other Law, including administrative rules and procedures and matters relating to procedure, and applicable international law, then this Agreement shall govern the rights, obligations, and duties of the Parties.¹⁷

24. **Limited freezing clauses** aim to protect the investor from a more limited set of legislative actions. For example, sometimes they refer to specific laws that are affected by the clause, or they list the areas of law stabilized, tax or customs. An example of this type of clause is as follows:

The...Laws and Decrees which may in the future impose higher rates or more progressive rates of [tax] or would otherwise impose a greater...tax liability than that anticipated under Section...of the Upstream Project Agreement shall not apply to the Company.¹⁸

25. The general view in academic literature and among the lawyers who were interviewed or participated in consultations (representing investors and states in investment projects) is that, at least in the oil and gas industry, freezing clauses have largely fallen out of use in favor of the more modern economic equilibrium clause.¹⁹ Most practitioners interviewed consider freezing

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¹⁷ Sub-Saharan extractive agreement 2000s. Another example comes from a Latin American infrastructure model agreement 2000s, s:

Specific Juridical Stability: The State guarantees the Investors and the Recipient Company that this Investment Contract, the Project Agreements and the State Institution Authorizations, in each case in relation to the Investments and the Project, shall enjoy absolute legal stability in accordance with the Legal Framework in Effect. Accordingly, neither the Investment Contract, nor the Project Agreements nor the State Institution Authorizations may be modified unilaterally by laws or other dispositions from the State of any type that affect them or by changes in the interpretation or application thereof and each thereof in which the State is a party may only be modified by the mutual written agreement of the Parties that expressly evidences such modifications.

¹⁸ From a contract sampled in this study.

¹⁹ See Walde and Ndi, supra note 13, 218-9, “[I]n the last ten to twenty years, stabilization clauses have undergone a substantial evolution….Instead of targeting the legislative power of the state founded on sovereignty, these commitments are designed to set up a contractual mechanism of allocating the financial effect of political risk to the state enterprise.” See also, Al Faruque, A., Transnational Dispute Management April 2007, “Typologies, Efficacy and Political Economy of
clauses to be outdated, and they believe that modern investment contracts generally do not contain such clauses. This research shows that these clauses are still used to some extent, however, and may be more prevalent in the extractive sector, particularly mining (see Section 6.2, below). This research is consistent with the AIPN study that discusses freezing clauses in modern oil and gas contracts, but it is not possible from this study to know the proportion of contracts that contain such clauses today. In the author’s view, one reason for the discrepancy may be that the views expressed came from leading large law firms whose practices are not necessarily representative of modern contract practice generally.

26. **Economic equilibrium clauses** also fall into two categories: full economic equilibrium and limited economic equilibrium. Full economic equilibrium clauses are those that, as described in the contract, protect against the financial implications of all changes of law. For the purposes of this study, full economic equilibrium clauses may require the costs to the investor to be “material,” or such clauses may require that the parties negotiate to restore the economic equilibrium to the extent “reasonably possible.” Alternatively, the clause may use other language that allows room for negotiation on the restoration of economic equilibrium. For the purposes of this study, unless those terms were quantified explicitly in the contract (for example, requiring a threshold loss), then these contracts were counted as full economic equilibrium. This coding is meaningful for this study, because such clauses, even if they have subjective limiting terms, can apply to all new laws and can be interpreted to require full compensation to the investor for compliance with such. In other words, where the investor is provided with a prima facie case that compliance with new laws should be fully compensated, the contract is coded for this study as a full economic equilibrium clause.

27. An example of a full economic equilibrium clause is as follows:

"Change in Law": shall mean (a) the adoption, promulgation, change, repeal or modification after the date of this Agreement of any Legal Requirement, including any Change in Tax (b) the imposition upon the Company, its Contractors, the Lenders, or a Fuel Supplier of any material condition in connection with the issuance, renewal, extension, replacement or modification of any Authorization after the date of this Agreement that in either case (i) establishes requirements for the construction, financing, ownership, operation or maintenance of the Plant that are materially more restrictive than the most restrictive requirements in effect as of the Effective Date or (ii) has a material adverse effect on the Company, the Plant or the return (net of tax) to the investors of the Company;

Recovery Allowance for Change in Law

In the event of the occurrence of a Change in Law (including a Change in Law that becomes applicable to the Company because of damage to and the restoration of the Plant) that requires a material modification or a material capital addition to the plant, which is completed by the Company, or in lieu thereof or in addition thereto, an increase or decrease in operating costs including the use or quality of fuel or consumables by the Plant, and this Agreement is not terminated by…pursuant to Article…, the Company will be entitled to receive Recovery Allowance payments under…from…to recover fully the costs of complying with the Change in Law, including the costs of any material modifications or material capital additions to the Plant that are necessary for the Company to come into compliance with the Change in Law. The amount of any Recovery Allowance due under this Article shall be determined pursuant to Article….

28. **Limited economic equilibrium clauses** have some limitation on the application of the clause designed on the face of the contract. For example, some limited economic equilibrium clauses

Stabilization Clauses: A Critical Appraisal,” 31—33, discussing why strict stabilization (that is, freezing clauses) may have fallen out of favor at least in the oil and gas industry.

20 From a contract sample in this study.
require that the investor incur a certain amount of financial loss before compensation is due. Other contracts state that for some types of new laws (for example, laws protecting health, the environment, individual safety, or security) compensation will not be due. Following is an example of such a clause:

25.5 Equilibrium of this Agreement

"The Parties acknowledge that their fiscal position has been based on this Agreement, the Definitive Agreements and the law and practices which are in force in [state] as of the Effective Date. The Parties agree that in the event that the Government [state] shall enact any new law or decree which demonstrably has a Material and Adverse Effect on [project co] or its Affiliates' fiscal position with respect to the Project, [gov't owned party] shall take all steps as may be necessary to restore the fiscal benefit contemplated to be enjoyed by the Parties under this Agreement….Notwithstanding the generality of the foregoing or anything to the contrary, the Parties acknowledge that the provisions of this Article 25.5 shall not apply if:

(a) the new law or decree enacted by Government [state] has been induced by, and is a reasonable response to, a breach or lack of compliance by [project co] or its Affiliates with any provision of this Agreement; or

(b) the new law or decree has been enacted by the Government [state] with the intent of protecting health, safety, the environment or security, and is generally applicable to all ventures having the same general purpose as does the Project”.

29. **Hybrid clauses** have characteristics of both freezing and economic equilibrium clauses. Like economic equilibrium clauses, hybrids do not make investors automatically exempt from new laws. However, more like freezing clauses, hybrids explicitly include the granting of exemptions from laws as one method to ensure that the investor is not financially impacted by new laws. The following is an example of a hybrid clause:

Based upon Article…above, if any existing Laws of…or any other applicable or existing law of any other Government, is changed or repealed, or if new laws are introduced, or if there occurs a rise in the tax rate or the introduction of a new tax, which bears unfavourably on the financial status of the Joint Venture or the Parties, then the Parties will apply all efforts that are necessary to completely or partially release the Joint Venture or the Parties from the above-mentioned changes, or the Parties will undertake all other necessary steps to alleviate the unfavourable impact of these changes.

30. This study includes one hybrid contract that applies to all laws, and it is referred to as a full hybrid contract. The remaining five hybrid contracts apply stabilization to only some laws and are coded as limited hybrids.22

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21 Contract from the Middle East and North Africa region from the 2000s.

22 One contract in the study combines freezing and hybrid approaches and was coded in the limited freezing category, because it explicitly requires exemptions from some new laws. Table 3.1 describes the types of stabilization clauses coded in the study.
### Table 3.1: Types of Stabilization Clauses

<table>
<thead>
<tr>
<th><strong>Full Freezing Clauses</strong></th>
<th>freeze both fiscal and non-fiscal law with respect to investment for the duration of the project. Exemptions are required.</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Limited Freezing Clauses</strong></td>
<td>freeze a more limited set of legislative actions. Exemptions are required.</td>
</tr>
<tr>
<td><strong>Full Economic Equilibrium Clauses</strong></td>
<td>protect against the financial implications of all changes of law, by requiring compensation or adjustments to the deal to compensate the investor when any changes occur.</td>
</tr>
<tr>
<td><strong>Limited Economic Equilibrium Clauses</strong></td>
<td>protect against financial implications of some limited set of changes in law or after specified costs are incurred. They require compensation or adjustments to the deal to compensate the investor only when the covered changes occur.</td>
</tr>
<tr>
<td><strong>Full Hybrid Clauses</strong></td>
<td>protect against the financial implications of all changes of law, by requiring compensation or adjustments to the deal, including exemptions from new laws, to compensate the investor when any changes occur.</td>
</tr>
<tr>
<td><strong>Limited Hybrid Clauses</strong></td>
<td>protect against financial implications of some limited set of changes in law or after specified costs are incurred. They require compensation or adjustments to the deal, including exemptions from new laws, to compensate investor only when the covered changes occur.</td>
</tr>
</tbody>
</table>

Source: Author.
Part 4: Stabilization Clauses and Human Rights Concerns

31. Human rights law requires states to protect human rights from interference by private parties (including companies). The passing and implementing of laws regulating the behavior of private parties (including companies) is one of the primary methods by which states fulfill their international human rights obligations. UN human rights law and policy support the idea that failures by a state to regulate and enforce its regulations against companies can amount to a violation of the state’s international treaty obligations. Additionally, within the regional human rights systems, states have been found in violation of their human rights obligations for failing to properly regulate or prevent company actions or omissions that resulted in violations of human rights, including the right to life, privacy, and others.


24 For example, every ICESCR general comment since 1999 asserts, usually explicitly, that to fulfill the duty to protect, states must regulate and adjudicate the acts of business enterprises. The substance of the duty to protect includes the duty to “regulate the activities of...corporations so as to prevent them from violating the right to work of others.” General comment 18, “The Right to Work,” UN Doc. E/C.12/GC/18, adopted November 24, 2005, paragraph 35. In accordance with the international human rights treaties, the United Nations has set up committees of independent experts that monitor the implementation of the treaty. These experts interpret the treaty in part via issuing general comments to provide guidance on the substance of the obligations of states.

25 Jurisprudence pursuant to the European Convention on Human Rights, which is generally regarded as a civil and political rights treaty, demonstrates that nuisance laws, zoning laws, and environmental regulations can be important tools for fulfilling the right to life and privacy and family life. Although the state has a range of discretion in determining how to protect rights, and economic well-being of the country is one factor to be considered in judging the adequacy of how a state has fulfilled its human rights duties, there are limits to how much a state can favor economic considerations of the country over the rights of individuals and communities. See for example Lopez Ostra v. Spain ECHR (December 9, 1994) paragraph 58, where the court finds a violation of Article 8 for failing to adequately regulate fumes from a waste-treatment plant. “[D]espite the margin of appreciation left to the respondent State, the Court considers that the State did not succeed in striking a fair balance between the interest of the town’s economic well-being—that of having a waste-treatment plant—and the applicant’s effective enjoyment of her right to respect for her home and her private and family life. There has accordingly been a violation of Article 8 (art. 8).” See also Hatton and Others v United Kingdom ECHR (October 2, 2001), where the court found the United Kingdom had violated Article 8 of the Convention by not sufficiently regulating the noise levels of night flights into Heathrow airport. The court points out that general considerations for the economic well-being of a country cannot justify a failure to properly protect the environment to protect rights:

[The State had a positive duty to take reasonable and appropriate measures to secure the applicants’ rights under Article 8 and to strike a fair balance between the competing interests of the individual and of the community as a whole. In the particularly sensitive field of environmental protection, mere reference to the economic well-being of the country was not sufficient to outweigh the rights of others. States were required to minimise, as far as possible, the interference with these rights, by trying to find alternative solutions and by generally seeking to achieve their aims in the least onerous way as regards human rights. In order to do that, a proper and complete investigation and study with the aim of finding the best possible solution which would, in reality, strike the right balance, should precede the relevant project.”

The Court observed that while it was, at the very least, likely that night flights contributed to a certain extent to the national economy as a whole, the importance of that contribution had never been assessed critically, whether by the Government directly or by independent research on their behalf.

In conclusion, the Court considered that, in implementing the 1993 scheme, the State failed to strike a fair balance between the United Kingdom’s economic well-being and the applicants’ effective enjoyment of their right to respect for their homes and their private and family lives. There had accordingly been a violation of Article 8.

See also Önerylidz v. Turkey (November 3, 2004), where the court found Turkey in violation of the right to life for failing to have adequate regulatory measures and supervision of a trash tip that led to an explosion. The court’s registrar issued a press release about the cases stating “[T]he Court noted that the regulatory framework applicable in the present case had proved defective in that the tip had been allowed to open and operate and there had been no coherent supervisory system. That situation had been exacerbated by a general policy which had proved powerless in dealing with general town-planning issues and had undoubtedly played a part in the sequence of events leading to the accident. The Court accordingly held that there had been a violation of Article 2.” Press release available at: http://www.echr.coe.int/eng/Press/2004/Nov/GrandChamberjudgment%C3%96nerylidzvTurkey301104.htm. On similar points with respect to the right to privacy and family life, see Guerra and Others v. Italy (February 19, 1998, in particular paragraph 57), and Moreno Gómez v. Spain ECHR (November 16, 2004). The right to life and privacy (the rights involved in these ECHR cases) are also guaranteed in the ICCPR. Connections between social and environmental legislation and economic, social and cultural rights are more immediate. For example, the ICESCR includes rights such as the right to health and labor and employment rights. See also text of footnotes 24 and 25, above. See also African Commission on Human and Peoples’ Rights, SERAC and CESR v. Nigeria, Communication No. 155/96, October 13–27, 2001. On the duties to protect,
32. According to the views of human rights advocates, stabilization clauses can either make foreign investments immune from *bona fide* social and environmental laws that come into force after the effective date of the agreement, or require the host state to compensate the investor for compliance with new social and environmental laws. They argue that this requirement for the host state to pay for compliance is wrong in principle, because it denies the state its proper role as legislator with powers different and greater than companies, and furthermore it creates a financial disincentive for the host state, thus chilling or hindering the application of dynamic social and environmental standards over the life of a long-term project. Human rights advocates claim that the negative effects of stabilization clauses are exacerbated in developing countries, where rapid legislative development and implementation is needed, rather than obstacles to the application of new laws.

33. In sum, advocates have expressed concern that the current methods of protecting investor rights in contracts and international agreements are not consistent with: 1) the state duty to adequately regulate investors to protect human rights; and 2) the investors’ responsibility to respect rights. These concerns were echoed by the Office of the High Commissioner for Human Rights in two recent reports. On balancing investors’ rights with obligations, the High Commissioner stated:

Investors’ rights are instrumental rights. In other words, investors’ rights are defined in order to meet some wider goal such as sustainable human development, economic growth, stability, indeed the promotion and protection of human rights. The conditional nature of investors’ rights suggests that they should be balanced with corresponding checks, balances and obligations—towards individuals, the State or the environment. While investment liberalization has focused on the definition of investors’ rights, balancing those rights with States’ “right to regulate,” discussions over investment liberalization have paid less attention to parallel discussions in the United Nations, OECD and ILO defining investors’ obligations towards individuals…[T]his risks skewing investment liberalization in favour of investors’ rights, losing sight of their conditional nature, possibly to the detriment of the rights and interests of other actors.

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see paragraphs 46, 61, and 65. On the findings of violations to these duties, see paragraphs 55, 57, 58, and 66. For a comment, see F. Coomans, “The Ogoni Case Before The African Commission on Human and Peoples’ Rights,” *International and Comparative Law Quarterly*, Vol. 52 (2003), 749–760.


27 See Cotula, supra note 21.


29 Id., 17.
Part 5: The Research

5.1. Scope

34. This research is likely the first empirical study on modern stabilization practice covering a wide range of industries and regions of the world. Such studies are rare, because investment contracts generally are kept confidential. For some industries, expensive databases of contracts and models are available on a subscription basis, but there is no public repository of private contracts where practitioners, host states, investors, civil society, and academics may view modern practice for all sectors. 30

35. This research aimed to gather empirical evidence that would either support or disprove the claim that stabilization clauses can place obstacles in the way of host states’ human rights obligations by limiting the action of the host state to apply dynamic social and environmental legislation to international investments.

36. Social and environmental laws are used here as a surrogate for human rights obligations, because social and environmental laws (labor and employment, nondiscrimination, health and safety, environment, protection of culturally significant property, and the like) are some of the more easily identifiable legislative areas that can both protect rights and impact investors. Most states have ratified one, if not several, international or regional human rights treaties. For example, 149 states are parties to the International Covenant on Economic, Social and Cultural Rights, 152 states are parties to the International Covenant on Civil and Political Rights, and even more states are parties to other UN and regional human rights treaties. 31

5.2. Research Questions

37. To address the question of whether stabilization clauses can affect the host state’s application of new social and environmental legislation to investment projects, the following research inquiries were posed:

- How are the modern stabilization clauses drafted regarding 1) method of stabilization; and 2) substantive coverage?
- What is the relevance of current stabilization practice to changes in social and environmental legislation?
- Can stabilization clauses be used informally or enforced formally to limit a state’s action to apply new social and environmental legislation to long-term investments?

As noted, these questions were formulated, using social and environmental laws as a surrogate for human rights obligations. As a result, this study does not address the full human rights implications arising from investments or investment contracts, including the question of how stabilization clauses may impact the protection of the full spectrum of human rights.

30 According to one account, the United Nations Center on Transnational Corporations established a library of mining contracts for the use by government negotiators in the 1970s to ensure they would not be at a disadvantage to industry negotiators. Following this, in the early 2000s, the World Bank also started to collect infrastructure agreements. According to one source, the development of this collection has been hindered by the unwillingness of the parties to investments to release the contracts. In the last 10 years, the lack of transparency of contracts has also been flagged by civil society not only as a barrier to research, but also as a serious obstacle to the protection of human rights. The continuing opaque nature of contracts, according to human rights advocates, can obstruct the prevention of corruption and can imply that certain legislative measures of the government are kept from public scrutiny. See Wells, Louis T. and Rafiq Ahmed, Making Foreign Investment Safe: Property Rights and National Sovereignty (2007) generally and 151–153. On transparency, see discussion in Part 8 of this paper.

31 For example, there are 192 state parties to the Convention on the Rights of the Child and 167 state parties to the Convention on the Elimination of Discrimination Against Women. Regional human rights treaties also place such obligations on state parties.
5.3. Methodology

5.3.1. Sources of data: contracts, interviews, literature and law review

38. The data and information for this study came from three sources: 1) a collection of 76 modern contracts and 12 modern contract models; 2) a literature review and review of reported contract and international state-investor disputes that may be relevant to understanding the legal enforceability of such clauses; and 3) interviews with negotiators, lenders, and lawyers who either negotiate investment contracts or who litigate disputes for both states and investors, and nongovernmental organization members who have conducted research on stabilization clauses. For reasons discussed in further detail below, this study was designed to be an exploratory study based on available contracts rather than a statistically random sample. As a result, findings are relative to the sample of available contracts. The discussion of enforcement of stabilization clauses below serves merely to illustrate the extent to which the clauses in the sample might be enforced, but it is not a comprehensive discussion of the enforcement of such clauses. Although inferences have been drawn from such findings, at present there is no way to verify that the contracts and findings represent the prevailing global practice in this area.

39. Designing a statistically significant empirical study of modern investment contracts would have been an impracticable endeavor. The contracts generally are not publicly available. This study relied heavily on contracts supplied by private international law firms. IFC approached a number of law firms, based on their international presence, the breadth of their practice relative to international investment agreements, and their existing professional relationship with IFC so as to ensure confidentiality of the contracts and expedite the process of gathering data in the time frame available. Some firms represent both investors and host states in investment agreement negotiations. Two law firms received payment for their services.

40. A statistically random sample of contracts from a small number of law firms was not possible in the time frame and budget provided for this study. Additionally, the study was limited to contracts written in English or contracts where English translations of French or Spanish were already available to the law firms. Statistically random selections from international law firms might have included contracts in languages other than English that would have required costly and time-consuming translations.

41. Noting the practical difficulties with obtaining statistically random samples of contracts, the contracts for this study were selected based upon their being readily available in English (or translated into English) and dating from the last decade. The facilitator of this project and the author of this paper discussed the objective of this study with each law firm in an early stage of the research, before the research questions were formed, and also emphasized that regional and sectoral variety would be important to the study. Due to confidentiality concerns, this study was not able to obtain entire contract documents; instead, law firms extracted the following clauses from the contracts and made them available for the research:

- the region in which the investment was made,
- the industry sector,
- the decade in which the contract became effective,
- the stabilization clauses,
- the governing law clause, and
- the dispute resolution clauses.

This study was conducted on the excerpted clauses, without any information on the identity of the investment projects (unless contracts were obtained from publicly available sources—see paragraph 42). Despite these limitations, this research provides a comparative look at a collection of examples of modern stabilization practice, which begins to shed light on the research questions posed.

32 Due to limitation in time and budget, it was not possible to directly interview officials from governmental agencies involved in negotiating stabilization clauses with investors.
42. One of the participating law firms had already conducted a study of stabilization practice, and it made its files from that study available. From those files, a total of 8 excerpted contracts were obtained with enough information to be used in the study. The other law firms responded by offering a total of 67 contracts with the requested information. Two of the contracts in this sample were subsequently supplemented, and the supplements and contracts were made publicly available; the author added the sample with the supplemented versions of these contracts.

43. A written request for identical contract data was made to a lender, and to five NGOs. The lender provided a total of seven immediately available contracts not bound by confidentiality agreements. One NGO provided two contracts that were used in the study. A second NGO provided 25 contracts from the same country and the same industry. To avoid a heavy representation of one country or one industry, the study included only one of these 25 contracts, chosen at random. No other NGOs responded to the request for contract data.

44. The data for this study were collected to address the research questions posed (see paragraph 37).

5.3.2. The state-investor contracts in the study

45. The sample contains 24 contracts from the 1990s, 49 contracts from the 2000s, and 3 contracts that are undated but were indicated to be from one of those two periods. The duration of the contracts generally ranges from 10 years to 25 or more years, which means that most of the contracts in the study are likely still in force today. The sample also contains 12 model contracts—10 from the 2000s, 1 from 1990s, and 1 undated.

46. The contracts and models analyzed include 11 from Sub-Saharan Africa; 14 from East Asia and Pacific; 16 from the Middle East and North Africa; 10 from Eastern Europe, Southern Europe and Central Asia; 5 from South Asia; 19 from Latin America and the Caribbean; and 13 from OECD countries (other than Turkey, which is included in Eastern Europe, Southern Europe and Central Asia). Figure 5.1 shows the distribution of contracts and models used in the study.

33 For a detailed list of the countries in each region, see http://www.ifc.org/ifcext/about.nsf/Content/Regions.
Figure 5.1: Regional Distribution of Contracts and Models

Source: Author.

47. This study covers a wide range of industries, including power, water, rail, roads, airports, unspecified infrastructure, telecom, health care services, and the natural resources extractive industries (upstream and downstream oil and gas, minerals mining, and associated industries). Figure 5.2 shows the distribution of industries used in the study.

Figure 5.2: Distribution of Industries

Source: Author.
5.4. Coding of the Contracts

48. The contracts were analyzed and coded according to: 1) type of stabilization clause; 2) substantive coverage of stabilization, and 3) application of stabilization. The author of the study performed the coding of contracts, and although there was no formal process to check for reliability, the coding was a straightforward exercise once the categories were determined, eliminating much of the potential for errors.

49. With respect to substantive coverage, the contracts were coded according to the following criteria: 1) types of changes in law covered; and 2) whether they have explicit inclusions or exceptions for social or environmental legislation. Other aspects of stabilization were also coded, such as 3) whether stabilization applied to benefits as well as costs for the investor; 4) whether a threshold loss was required before stabilization applied; and 5) whether the investor was under an explicit contractual duty to mitigate impacts of changes in legislation.

50. In regard to application of stabilization, the contracts were coded according to 1) the type of protocol agreed for determining compensation amounts or adjustments to be made; and 2) the type of procedure agreed to ensure fairness in the determination of costs and how those costs would be absorbed.

51. To gather insights into modern stabilization practice, a number of interviews were conducted with those involved in negotiating host-government agreements, and with lawyers who draft agreements or litigate disputes (for both government and investor parties). Interviews were also conducted with members of NGOs who have researched issues related to human rights and host-government agreements. The interviews did not relate directly to the agreements reviewed in this study, but they were an important source of background information about the role these clauses can play. Due to limited time and budget, it was not possible to interview officials from governmental agencies involved in negotiating stabilization clauses with investors.

52. The literature and law review included an extensive review of academic articles, industry models and writings (such as the Energy Charter Treaty model pipeline agreements and the recent study on stabilization by the Association of International Petroleum Negotiators), as well as civil society reports relevant to stabilization clauses and human rights. The study also conducted a review of relevant reported arbitral cases relevant to investor-state arbitration pursuant to free-trade agreements or bilateral investment treaties. A review of recent reported cases under private dispute processes turned up one case on stabilization. 34

Part 6: Findings

6.1. Summary of Key Findings Regarding Social and Environmental Laws

Following is a summary of the study’s key findings:

- Forty-four of the 75 (about 59 percent) contracts and models in the study from non-OECD countries give exemptions or offer an opportunity for compensation for compliance with all new laws, including environmental and social laws. None of the OECD country contracts or models in the study offer exemptions from new laws, while only two of 13 (about 15 percent) of contracts and models from the OECD offer an opportunity to claim compensation for compliance with all new laws, including environmental and social laws.

- Freezing clauses, with exemptions from new laws, were found in the contracts from Sub-Saharan Africa; Eastern, Southern Europe and Central Asia; and the Middle East and North Africa. It is notable that 4 of the 11 Sub-Saharan African contracts contain clauses freezing all laws (including environmental and social). In Latin America one partial freezing clause gives specific exemptions for labor laws.

- Eleven of 13 stabilization clauses in the OECD contracts and models are limited economic equilibrium clauses (the narrowest form of stabilization clauses in the study). In contrast, limited economic equilibrium clauses are relatively rare in the contracts and models from Sub-Saharan Africa (3 of 11), the Middle East and North Africa (2 of 13), and Eastern, Southern Europe and Central Asia regions (1 of 10).

- Contracts with limited economic equilibrium clauses sometimes contain one or more features that aim to avoid formal disputes and to ensure fairness in the application of the clause. In this study 35 percent of limited economic equilibrium clauses limit both the substantive scope of coverage (so as to not stabilize all laws) and included threshold loss limits. Thirty-seven percent of such clauses require the investor to mitigate cost implications of new laws. Twenty-five percent of such clauses apply stabilization to costs or windfalls resulting from new laws. And 28 percent provide for recourse to an independent expert to determine compensation amounts. None of the contracts with either freezing or hybrid clauses contains such features.

- Of the 22 contracts with limited economic equilibrium clauses from non-OECD countries in the study, 20 provide the investor with an opportunity for compensation for compliance with some social and environmental laws of general application as well as for other laws even when not discriminatory toward the investor.

- Five of the six limited economic equilibrium clauses from OECD countries, in contrast, either do not cover any laws of general application or any laws enacted by federal authorities, meaning those changes in law are at the investor’s risk. Three of six contracts specifically exclude tax laws from stabilization. In these contracts, for specific laws regarding the industry, three provide some risk sharing or compensation for specific laws that pertain to the project. In two contracts laws for issues such as safety and security, even if discriminatory toward the investor, are explicitly excluded from stabilization and remain the investor’s risk.
Table 6.1: Contracts and Models, by Industry:

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<th>Sub sector</th>
<th>Full Freezing</th>
<th>Partial Freezing</th>
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Source: Author.
### Table 6.2: Contracts and Models, by Region

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Source: Author.

### 6.2. Freezing Clauses

#### 6.2.1. Freezing clauses still used in modern practice

53. In the current research, 12 of 76 contracts covering the 1990s and 2000s had some form of freezing clauses, meaning that freezing stabilization clauses occurred nearly 16 percent of the time in the sample.

54. Of the 12 freezing contracts, only 1 is not dated. The remaining 11 date from the 1990s or more recently; most of those contracts with freezing clauses date from the last 10 years. Figure 6.1 shows types of stabilization clauses found in contracts used in the study.

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35 Included in this 12 are two contracts that pertain to the same project. It was renegotiated and the freezing stabilization clause was largely narrowed in the amended version.

36 In the 75 contracts, stabilization was completely absent in 3 of the contracts. In the 12 models, stabilization was absent in 2.
6.2.2. Full freezing clauses were found in three regions

55. Of the 76 contracts in the study, 6 (about 8 percent) have full freezing clauses.

56. Of the 6 full freezing stabilization clauses, 4 are in Sub-Saharan Africa, 1 is in the Middle East and North Africa, and 1 is in East Asia and Pacific. Of the 12 models, 1 (from Latin America and Caribbean in the transportation sector) contains a full freezing clause. No full freezing clauses were found in South Asia; Eastern Europe, Southern Europe or Central Asia; or in the OECD countries. (See Figure 6.2.)

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37 This model is dated as from the last seven years. Although as a model it does not describe an actual contract, it may serve as the starting point for negotiation, meaning the government offers without negotiation a full freezing clause.
57. Among the contracts in the study, one freezing clause stood out for its breadth, having an initial-period duration of 50 years, with an option of an additional 50 years at the choice of the investor. This contract, for a metals smelter from the late 1990s, freezes all fiscal and nonfiscal laws of the host state. The investment project is also exempt from all host-state taxes and other charges, except for a 1 percent royalty for the lifetime of the project. Although such terms may not stand out in the context of such projects generally, in the context of the current sample, the duration of the project and the type of stabilization is significant when considering the potential application to new environmental and social regulations over the lifetime of the project.

58. Similarly, a 2005 African mining concession contract stood out among others, because it states explicitly that new legislation and regulations will have no consequences for the investment, and points out that such stabilization covers all laws, including labor, social, and mining regulations.

59. In at least two of the countries (Democratic Republic of Congo and Liberia) where recent contracts contain full freezing clauses, the contracts were signed shortly after a period of civil armed conflict had ended in the host state. In both these countries, contract reviews are being

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38 The contract reads in part as follows:

For this…project, an industrial Free Zone of…was created by decree…which gives the following tax incentives: IMPORT: exempt from import duties, excise duties (consumer tax), stamp duties, circulation tax, customs service fees, levies for the issue of import licences and any other duties, surcharges, fiscal emoluments or levies, applicable to imports…EXPORT: exempt from export duties, consumer tax, stamp duties, circulation tax, customs service fees, levies for issue of export licences…Until the date of Full Commissioning and during the first 12 months of activity, total exemption from any tax. Thereafter, [company] shall pay a royalty of 1 percent of the quarterly turnover…[company] and its investors shall be exempt from Industrial Contribution and Complementary tax or any other taxation. Shareholders and/or Investors in [free industrial zone] shall be exempt from capital gains tax or any other taxation whatsoever relating to the payment of dividends, …transfer, sale or alienation of any shares in [company].

The terms of this Authorisation are binding on the Government for the duration of this Project and the Government undertakes not to modify the Authorisation unilaterally, or otherwise to act in such way as to affect the terms and conditions granted for the implementation and operation of the Project. The Government undertakes that new legislation, regulations or determinations of the Government (including new taxes that may be adopted) shall not be applicable to the [investment] Project. The provisions of this clause will be extended to [company’s] Investors, Financiers, Employees, Contractors and Sub-Contractors in relation to their activities pertaining to the Project.

39 This clause was renegotiated in 2006 and reduced to a fiscal freezing clause only. The 2006 amendment is also part of this study.
carried out, and as noted above at least one contract in Liberia has been renegotiated, resulting in (among other changes) a narrowing of the freezing clause to specific fiscal issues only.

6.2.3. Five of six full freezing clauses were in the extractives sector

Of the six full freezing contracts in the study, five (83 percent) are in the extractive industries (mining). These five contracts with full freezing clauses represent 29.4 percent of the extractives industry contracts in the study. The remaining full freezing clause is used in an unspecified utilities infrastructure project. Additionally, one model transportation contract contains a full freezing clause.

6.2.4. Limited freezing clauses were found in modern contracts

Limited freezing clauses were found in the Middle East and North Africa; Latin America and the Caribbean; Eastern Europe, Southern Europe and Central Asia; South Asia and Sub-Saharan African contracts.

Six contracts (about 8 percent of the contracts in the study) contain limited freezing clauses. Four of them—two contracts from the Middle East and North Africa in oil and gas, one power contract from South Asia, and one Sub-Saharan African mining contract—have fiscal freezing clauses. The other two limited freezing clauses—one from Eastern, Southern Europe and Central Asia for a gas pipeline project and one from Latin America and the Caribbean in transportation—include at least some nonfiscal issues.

6.2.5. Two limited freezing contracts apply to some social and environmental issues

The Latin American and Caribbean transportation contract freezes fiscal issues and specific labor law issues for the duration of the project. The Eastern Europe, Southern Europe and Central Asian oil and gas contract contains an explicit exemption from compliance with new laws related to any subject matter passed by local authorities (not the national legislature).

6.2.6. Freezing clauses (full and limited) are most prevalent in Sub-Saharan Africa

Of 11 Sub-Saharan African contracts in the study, 5 (more than 45 percent) contain some kind of freezing clauses. Of 13 Middle Eastern contracts, 3 contained freezing clauses. Of the 10 contracts from Eastern, Southern Europe and Central Asia, only 1 had a freezing clause. Within the sample contracts (keeping in mind the small sample size), Sub-Saharan Africa has a much higher rate of freezing clauses than any other region in the sample. (See Figure 6.3.)

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40 The peace accords of the Inter-Congolese Dialogue from 2003 included an agreement that all contracts signed during the wars would be examined. In May 2004, a Congolese Special Parliamentary Commission Charged with Examining the Validity of Economic and Financial Agreements Signed during the War (the Lutundula Commission) was set up in and its final report was submitted in June 2005, but was never debated. In April 2006, the Minister of Mines announced that an interministerial commission would review more than 60 mining contracts signed between private companies and the state or state-owned enterprises. The commission submitted its report and recommendations to the government in October 2007. At publication, the DRC Government had announced that soon the last contract reviews would be completed. See http://beta.miningreview.com/node/15371


42 With respect to labor law, the contract states that the government guarantees stabilization of the transportation workers’ recruitment regime for the life of the contract with respect to specific provisions that are redacted.
6.2.7. Freezing clauses (full and limited) are most prevalent in the extractives industry.

Taking both types of freezing clauses together, a total of 9 of 18 (50 percent) of the extractive contracts contain either full or limited freezing clauses. In contrast, just 1 of the 32 power projects (3 percent), 1 of 7 other transportation contracts (14.2 percent), and 1 of 4 infrastructure projects (25 percent) have a freezing clause. (See Figure 6.4.)

No freezing clauses were found in the railroad, road, water, telecom, or health care contracts or models.

43 No contracts in the study from North America, Australia, or Western Europe were for the extractive industries.
6.3. Economic Equilibrium Clauses

6.3.1. Full economic equilibrium clauses are prevalent in all regions, but not in OECD countries

67. Of the 76 contracts, 55 contained economic equilibrium clauses. Of these, 27 (35.5 percent of the contracts) provide for full economic equilibrium, covering all laws without exception. (See Figure 6.5.)

Figure 6.5: Percentage of Full Economic Equilibrium Clauses, by Region

![Percentage of Full Economic Equilibrium by Region](image)

Source: Author.

68. Looking at just the economic equilibrium clauses in the sample, and keeping in mind the small sample size, it appears that full economic equilibrium clauses are used in all regions of the world but are much less prevalent in OECD countries. Looking at non-OECD countries, full economic equilibrium clauses appear most often in the Middle Eastern contracts, representing 6 of the 8 equilibrium contracts (75 percent). In Eastern, Southern Europe and Central Asia, 2 of 3 (66.7 percent) equilibrium contracts provide for full economic equilibrium. Of 16 contracts from Latin America and Caribbean, 7 (about 44 percent) contain full economic equilibrium clauses. In contrast, only 2 of 8 (25 percent) equilibrium contracts from the OECD are full economic equilibrium. No other region approached this percentage. Notwithstanding the small sample, the disparity between the OECD equilibrium contracts and non-OECD contracts is significant. Additionally, there are 5 OECD models with economic equilibrium clauses in the study, none of which are full economic equilibrium clauses. Only 3 of the 12 models in the study contain full economic equilibrium clauses (2 from Middle Eastern models and 1 from East Asia and the Pacific).

69. Data from this study support the view that full economic equilibrium clauses appear infrequently in OECD contracts in comparison to non-OECD contracts. Notwithstanding that economic equilibrium contracts in the sample from OECD countries are for industries that contain full economic equilibrium clauses in other parts of the world (such as power, water, telecom, rail, transport, road, and infrastructure projects), only one rail project and one road project from Western Europe contains a full economic equilibrium clause. All of the other contracts and
models from the OECD provide for limited economic equilibrium. The limited economic equilibrium clauses are discussed in more detail in Section 6.5.3, below.

6.3.2. Full economic equilibrium clauses are used in power, water, transportation, infrastructure, and extractive industries

70. About half of the power industry contracts contain full economic equilibrium clauses. The study contains 2 water contracts and 2 telecom contracts, and full economic equilibrium clauses are found in 1 of each industry. Of the 5 transportation contracts, 3 contained full economic equilibrium clauses. In the rail industry, 2 of 5 contracts contained such clauses. Of 4 unspecified infrastructure contracts, 1 contains a full economic equilibrium clause, and 2 of the 18 extractives contracts contain such clauses.

71. With the current sample it is difficult to ascertain whether full economic equilibrium clauses are more prevalent in any one type of industry or contract.

6.3.3. Limited economic equilibrium clauses are most common in OECD countries

72. Of the 76 contracts in the study that contain economic equilibrium clauses, 28 of them limit in some way the scope of the substantive coverage of the clause, meaning that they only allow readjustments to the contract or compensation in limited circumstances.

73. The biggest difference observed among the sample contracts is the regional differences in prevalence of limited economic equilibrium clauses. (See Figure 6.6.) Of the 8 contracts from OECD countries, 6 (75 percent) contain limited economic equilibrium clauses. Data from this small sample suggest that the use of limited economic equilibrium clauses is significantly lower outside the OECD:

- Latin America and Caribbean: 9 of 17 contracts (52.9 percent)
- South Asia: 2 of 5 contracts (40.0 percent)
- East Asia and Pacific: 5 of 12 contracts (34.7 percent)
- Sub-Saharan Africa: 3 of 11 contracts (27.3 percent)
- Middle East and North Africa: 2 of 13 contracts (15.4 percent)
- Eastern, Southern Europe and Central Asia: 1 of 10 contracts (10.0 percent)
6.4. Hybrid Clauses

6.4.1. Hybrids clauses offer economic equilibrium and recommend exemptions from new laws

74. Of the 76 contracts, 6 (8 percent) are hybrid contracts. In this sample, hybrids were found only in the Eastern Europe, South Europe and Central Asia and the Middle East and North Africa regions, and 5 of the 6 contracts are for oil and gas projects in the Eastern Europe, Southern Europe and Central Asian region.\(^4^4\) The remaining contract is for an unspecified infrastructure project in the Middle East and North Africa region.

75. As described in Section 3.2 above, hybrid contracts do not require exemptions from new laws, as freezing clauses do, nor do they simply offer some form of compensation to the investor for the cost implications of new laws. These contracts either explicitly require as a first option that the state party attempt to provide exemptions from new laws, or they at least explicitly contemplate exemptions as one way of compensating the investor for changes in law. Whereas limited economic equilibrium clauses either explicitly or implicitly require that investors comply with new laws, hybrid clauses do not, as they support the granting of exemptions.

6.4.2. One partial hybrid clause offers limited stabilization

76. A Middle East and North African infrastructure project provides an explicit recognition of the host state’s obligation to implement international standards or to adapt to scientific and technological progress through domestic legislation. It does not make stabilization applicable to those laws. This contract specifies that:

   The above [stabilization] provisions do not apply in cases where the purpose of the adoption of a new Law or the amendment of a Law after the Date of Signing of the Concession Contract is to implement International Standards or technical, environmental, security or policing standards in adapting to scientific or technical progress.

\(^{4^4}\) It appears that the Energy Charter Treaty model pipeline agreements may have been the model for at least some of these agreements (those underpinning BTC and SCP projects), though it is not clear how widespread the use of the ECT model is and whether it is a reference tool for other industries. Understanding the potential influence of such models would provide useful information for one possible approach to influencing contracting practices in the future.
6.4.3. Two hybrid clauses explicitly stabilize changes in health, safety, labor, environmental, and security law—and foreseeable labor law changes

77. Prior to its subsequent supplement, one of the contracts in the study was designed to stabilize foreseeable changes in labor law. The stabilization clause provided that the government must compensate the investor for all changes to labor and employment laws, even if consistent with EU standards, until the latter of either 2016 or when the host state becomes a candidate for EU membership. In this way, the stabilization clause also covers changes in labor law that are foreseeable as the host state nears EU candidacy, and it would apply to the host state even if it is a candidate for EU candidacy, if membership occurs prior to 2016. This clause demonstrates a use of stabilization for foreseeable changes in law that are not arbitrary or discriminatory, but would be based on host government efforts to join the EU or indeed EU requirements for member states.

78. More broadly, the contract underpinning the BTC pipeline, before its supplement, stabilizes all laws regardless of their general applicability and subject matter—explicitly including new laws regarding health, safety, and the environment. It rejects any distinction between generally applicable laws and laws specific to the industry or discriminatory laws, requiring exemptions or compensation for all.

79. As described in the introduction, the contracts underpinning these two projects were voluntarily published on the Internet by the project companies in an effort to provide transparency. Subsequent to civil society critique of such contracts, the BTC and SCP contracts were supplemented with the “Human Rights Undertaking” (HRU) in 2003 and 2005, respectively.

80. The HRU executed into in 2003 (BTC) and 2005 (SCP) explicitly recognizes the state’s international human rights legal obligations and the implications these might have on the investment. These contracts with the HRU supplement now are designed to omit stabilization of any change in law reasonably required for the host state to meet its international human rights, labor, and health, safety, and environmental treaty obligations. In relevant part, the undertaking to the contracts provides that the investor will:

…not assert or advance, in any claim against, demand to, or dispute with another party, or in any legal action or proceeding an interpretation of any Project Agreement that is inconsistent with Articles 7 and 8 of the Joint Statement, which confirm that the HSE [health, safety and environmental] and human rights standards for the Project are dynamic, will evolve when and as standards under domestic law in the relevant State, EU Standards, and applicable international treaty standards evolve, and thus require conduct of the Project’s human rights and HSE activities in accordance with such evolving domestic law from time to time provided it is no more stringent than the highest of EU Standards, those World Bank Group standards referred to in the Project Agreements, and standards under applicable international labor and human rights treaties…

…not seek compensation under the “economic equilibrium” clause or other similar provisions of the HGAS or any other Project Agreement solely in connection with…any action or inaction by the relevant Host Government that is reasonably required to fulfil

45 “The State Authorities shall take all actions available to them to restore the Economic Equilibrium established under the Project Agreements if and to the extent the Economic Equilibrium is disrupted or negatively affected, directly or indirectly, as a result of any change…in…Law (…excluding any…Law(s)…with respect to cultural heritage, health, safety, the environment and…employment/labour relations…to the extent such…Laws do not impose…conditions more onerous than those generally observed by the member states of the European Union respecting cultural heritage, health, safety, the environment and…employment/labour relations…). The reference to ‘employment/labour relations’ in this Section 7.2(s) shall only apply after the later of (i) 1 January 2016, and (ii) the date the State becomes an Official EU Candidate….“ Georgian Caspian South Caucuses Pipeline project, available at: http://www.bp.com/genericarticle.do?categoryId=9006628&contentId=7013497.


47 Id.
the obligations of that Host Government under any international treaty on human rights (including the European Convention on Human Rights), labor or HSE in force in the relevant Project State from time to time to which such Project State is then a party.\footnote{See id. at Article 2(d).}

81. Pursuant to the HRU, the hybrid clauses were narrowed with a view towards eliminating the possibility of exemptions or compensation when the host state acts “reasonably” to pursue its international human rights obligations.

82. The HRU, on its face, seems to directly address the concerns of human rights groups about application of new legislation to the investments. It does so by providing guarantees that the investor will not seek compensation for certain changes in law.

6.5. Significant Disparities

6.5.1. Disparities between economic equilibrium clauses and freezing or hybrid clauses

83. Contracts in this study with freezing or hybrid clauses lack some features—for ensuring fairness in managing the risks of changes in law—that are fairly common in the contracts with economic equilibrium clauses.

84. These features are geared toward limiting the application of the stabilization clause in some ways, ensuring fairness in the application of the clause, and preserving the long-term relationship necessary for the kinds of investments in this study. For example, over 25 percent of the economic equilibrium contracts in the study contain stabilization provisions that apply in both the investor’s and the host state’s favor. For changes in law that create a windfall, lower costs, or higher revenues, the host state shares in the benefit. None of the freezing or hybrid contracts contains such a clause.

85. Additionally, nearly 35 percent of the limited economic equilibrium contracts and models limit the substantive scope of coverage (exempting out some laws) and contain a threshold loss requirement under which no compensation or contract adjustment is due the investor for changes in law. No freezing or hybrid clauses contain threshold loss limits. Nearly 37 percent of economic equilibrium contracts and models explicitly require the investor to mitigate the cost implications of new legislation. None of the freezing or hybrid contracts has such requirement.\footnote{Some domestic laws may provide the requirement for mitigation, but this was not possible to track in this study. Additionally, as will be discussed below, the explicit language of the contracts may in fact be what is important in some formal dispute situations.}

86. Nearly 97 percent of economic equilibrium clauses in contracts and models provide an agreed informal process, or at least a contractual duty on the parties, to negotiate adjustments or compensation before relying on any of the formal dispute settlement procedures that provide recourse in cases of alleged breaches of contract. Of these, 28 percent of the contracts or models also provide for an independent expert or regulatory body to verify the claimed costs incurred, and in some cases it may even determine for the parties how the costs should be shared among the parties. The freezing clauses do not provide such protocols, but instead either prohibit changes in law, or demand that the investment project be exempt. Four of six of the hybrid clauses simply require the government party to take “all necessary steps” to remedy the impacts on the economic equilibrium. Two of the hybrid clauses do allow for renegotiation or amendments in good faith when exemptions or other compensation is not possible. None of the freezing clauses or the hybrid clauses contains recourse to an independent expert or third party to verify claimed costs or to allocate shared risk among the parties from the change in law.
6.5.2. Disparities between coverage of social and environmental laws from OECD and non-OECD

87. In the 88 contracts and models examined, 46 (52 percent) contained stabilization clauses that pertain to all new laws, offering either exemptions or compensation to investors for compliance with new laws, irrespective of their relevance to social or environmental issues. Of the 46, 44 are in contracts from outside the OECD. Taken separately, 2 of 13 (about 15 percent) of OECD contracts allowed coverage for all laws, whereas outside the OECD, 44 of 75 (almost 59 percent) of contracts covered all laws, irrespective of their relationship to social and environmental issues.

6.5.3. Disparities between limited economic equilibrium clauses from OECD and non-OECD

88. Limited economic equilibrium clauses from the OECD contracts in the study generally limit stabilization coverage to laws that are discriminatory toward the investor, and in some cases offer risk-sharing or compensation for specific laws that pertain to the sector or project. Laws for public policy issues such as safety and security, even if discriminatory toward the investor, often are explicitly excluded from stabilization.

89. The limited economic equilibrium contracts from OECD countries maintain a similar pattern of how changes in law are handled regardless of the sector. A caveat: The study did not include any extractive industry contracts from these countries, and the only telecom contract from these countries did not contain stabilization. Apart from these two sectors, limited economic equilibrium clauses were present in the same sectors as in non-OECD countries in the study, making it easier to compare those contracts.

90. Generally, the OECD limited economic equilibrium contracts appear to be based on the principle that compliance with some new laws should be at the cost of the investor. These contracts include generally applicable laws, and sometimes specified laws, that are geared toward public policy purposes. For example, an OECD toll road contract only compensates the investor for specific or discriminatory laws that impact the specifications for the toll road, and only when it is mandated by an authority other than the national authority. All laws mandated by the national authority, and all generally applicable laws, as well as all nondiscriminatory taxes, are at the risk of the investor. Another similar contract provides compensation only when new laws have a discriminatory intent and impact. One of the rail contracts from an OECD country does not provide stabilization compensation when laws are nondiscriminatory, of general applicability, are mandated by national reforms, or relate to rail safety. Another rail contract from the OECD uses a risk-sharing approach for specific laws—placing the risk of generally applicable laws on the investor and the risk of discriminatory laws on the state. Yet another rail contract provides that a regulatory authority will determine which party in what percentage will cover the costs of compliance with new laws on a case-by-case basis.

91. All the contracts from OECD countries generally compensate the investor for discriminatory changes in law (with some exceptions, mentioned above). The two contracts from this region that define “discriminatory” laws limit the classification to those laws that have both a discriminatory purpose and effect.

92. The five models from the OECD region (all UK government models) appear to be largely consistent with the contracts from this region. Below, these models are examined in some detail, because they provide guidance on what appear to be common principles underpinning the risk allocation approaches in the OECD. For example, the UK’s generic Project Finance model states explicitly that investors are expected to:

- comply with all new laws;
- absorb the cost of compliance with all foreseeable laws (that are already in draft form or in proposal form), not only formally passed laws; and
- mitigate any costs arising from changes in law.

50 Such as infrastructure, roads, railways, or even health care provision.
About allocating costs, the model states up front that it shall be neither always the authority nor the investor that absorbs the risk. Instead, the model presents differing approaches to allocating or sharing the risk, depending on the industry, the project, and the reasonableness of risk allocation in varying contexts. As the model states, risk allocation is determined largely by the character of the law (generally applicable, specific, or discriminatory) and the character of the project (whether costs can be passed on to the users of the project). When costs for compliance with new laws are shared, the model explains that the share of costs is scheduled relative to the magnitude of the financial impact from the law and whether the costs required relate to capital expenditures or to a rise in operating costs.

One UK contract does follow such a scheduled, shared-risk approach. Other contracts from the OECD are similar to the models in that they differentiate who bears the risk of changes in law based on the character, not the subject, of laws.

Limited economic equilibrium clauses in non-OECD country contracts in the study do not appear to limit stabilization on a common set of principles related to the character of the law. Nor do they appear to offer the same flexibility in risk sharing that is present in at least some OECD contracts.

The limited economic equilibrium contracts in this study from outside the OECD generally limit the stabilization coverage in three ways: 1) They may stabilize all laws but limit coverage by providing a threshold loss requirement, meaning the investor must incur a financial impact of a specified magnitude for the clause to apply; 2) they may list what is included or excluded regarding subject matter, such as “this clause pertains only to tax and environmental laws”; or 3) they may stabilize all changes in law that are “not foreseeable.”

Of the 22 non-OECD limited economic equilibrium clauses, 7 stabilize all laws but place a threshold economic impact requirement on the project before adjustments or compensation is required. Of these, 6 are power contracts from 4 different regions, and 1 is for a South Asian road. The threshold requirements limit the applicability of the stabilization clause, but do so regardless of any criteria related to the nature of the new law. In these contracts the character of the law and its foreseeability are irrelevant.

The other non-OECD limited economic equilibrium clauses generally cover specified laws based on the subject matter of the law (targeting certain areas for coverage or exclusion).

For example, two Latin American and Caribbean power projects from the same country and the same period provide a specific list of what is included in the stabilization clause. For these contracts stabilization includes fiscal and customs issues, environmental laws, labor or work safety laws, regulatory laws dealing with electrical power, and discriminatory laws. Additionally, one of the clauses also stabilizes laws dealing with the water usage of the power facility.

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51 See Model PFI agreement at Article 14.2.1 “Contractors have in the past expressed concern that change of law is a risk which they cannot control and which they regard as being within the control of the Authority or wider Government. In practice, however, many Authorities (particularly local authorities) have negligible influence over legislation whereas the private sector has traditionally proved adept at managing the effects of changes of law and minimising their impact on their business. Hence it is appropriate for the Contractor to bear or share in the risk.” The Model PFI is available at: http://www.hm-treasury.gov.uk/media/3/5/pfi_sopc4pu101_210307.pdf, see Articles 14.3-14.10.

52 See the UK PFI model, supra note 40, at Articles 14.4.1 and 2:
14.4.1 In some projects, it is possible to treat changes in law of any type as the Contractor’s risk. This has occurred in particular in projects in which such costs can be passed on to the users of the Project (e.g. toll bridges).
14.4.2 In other sectors, a risk sharing approach has developed where the main user of the Project is the Authority and it is not appropriate for the Contractor to bear all of the change in law risks as the risk cannot be quantified or passed on to third party users. There are a number of different possible approaches to risk sharing that build on the distinctions between discriminatory/specific legislation and general legislation. These all involve a sharing of the risk of changes in law.


54 Sufficient data were not available for comparison of those threshold limits.

55 The thresholds were not provided for the contracts in this study.
98. One rail contract from East Asia and Pacific includes in stabilization all “unforeseeable” changes in law, except for tax changes. Similarly, a rail contract from Sub-Saharan Africa covers all “unforeseeable” changes in law or any law that is discriminatory.

99. Some limited economic equilibrium clauses in non-OECD contracts also stabilize changes in laws that would be generally considered “foreseeable,” including environmental laws. Two such contracts provide stabilization coverage for foreseeable laws that are already passed, but yet to be in force. One is a Latin American power contract that covers all laws, except income tax, but includes enacted laws not yet in force. Similarly a road contract for South Asia covers all laws, including those known at the time of the contract but not yet in force.

100. One contract—a contract renewal for a Latin American and Caribbean power project—stabilizes laws as of those in force years before the contract date. The first contract for the project dates from the 1990s and provides economic equilibrium for all environmental law changes having an economic impact after one year prior to its signature. The 2000s contract maintains the original reference date of the 1990s contract for environmental changes in law in its equilibrium clause. This means that pursuant to the later contract, the investor is entitled to adjustments in the contract or compensation for all changes to environmental laws that make greater requirements than those in force 10 years prior, even if a foreseeable change in environmental law in the 2000s would differ from what was foreseeable in the 1990s.56

101. Three of the contracts from non-OECD countries limit stabilization to fiscal issues. Those include a Latin American water privatization project, a Latin American power project, and a Sub-Saharan extractive industry project. Other variations on limited economic equilibrium clauses include an Eastern, Southern Europe and Central Asia road contract that stabilizes economic status for all laws except inflationary tax law changes, and an East Asia and Pacific power contract that explicitly covers only changes in environmental law and tax and fiscal issues.

102. Of all the non-OECD limited economic equilibrium clauses in the study, only two limit stabilization coverage on the basis of either discriminatory or arbitrary actions by the government. One power contract from Sub-Saharan Africa limits stabilization coverage to those laws with a discriminatory effect on the concessionaire. A Latin American transportation project contains the most narrow clause of all those in non-OECD contracts, providing three specific conditions that must be met for stabilization to apply: 1) the law must be both “onerous” and “highly unusual” in the industry internationally; 2) it must affect the costs of the concessionaire so as to substantially prevent it from carrying on a significant part of its business; and 3) it must prevent the concessionaire from meeting its senior debt requirements. When these requirements are met, adjustments can be made to the contract only as needed to make the senior debt payments. In this way, the contract may stabilize for social and environmental laws, but only in very narrow circumstances when the government has acted arbitrarily, and compensation due is only the minimum to allow debt payments to be made.

103. With these two exceptions, all of the non-OECD contracts in their different formulations would cover at least some new generally applicable social and environmental laws. Examples of generally applicable laws include minimum wage, employment and labor laws, and health and safety laws. None of the non-OECD contracts offers an explicit risk-sharing approach for specific changes in law (targeting the industry) that change project requirements, where the risk cannot be passed on to third parties. Generally, stabilization is stated in absolute terms in these non-OECD clauses, meaning that the operating principle on the face of the agreement is that the investor should be made whole from the costs arising from changes of law.

Part 7: Disparity between OECD and non-OECD country contracts

7.1. Perception, Legality, and Other Issues

104. This research found that non-OECD countries are much more likely than OECD countries to include social and environmental laws—even laws of general application on issues such as minimum wage, labor, health, safety, and the like—in a stabilization clause. There may be at least two reasons for this difference: 1) stabilization practice correlates to the perception of investment risk in a given non-OECD country; and 2) there may be issues related to the legality of freezing clauses in OECD countries.

7.1.1. Perception of investment risk

105. When the stabilization clause coverage is looked at in the light of country credit risk ratings, two general statements seem plausible. First, the OECD countries that have contracts with limited stabilization clauses also have the best risk ratings (very low risk). Secondly, at the other end of the scale is Sub-Saharan Africa, where only one of the countries represented in the study has ever been rated. This study found a high percentage of freezing and full freezing clauses as well as a high percentage of full economic equilibrium clauses in this region. Thus, it appears that the extreme differences between clauses in Sub-Saharan Africa and the OECD might be explained, at least in part, by the perception of country credit risk for Sub-Saharan countries.

106. It is less clear that the stabilization practice in non-OECD countries, other than those of Sub-Saharan Africa, can be explained by country risk perception. Of the remaining non-OECD regions, the ratings are quite mixed. According to Moody’s historical data, 7 countries in East Asia and Pacific obtained investment grade, 4 speculative grade, and 3 were not rated. For the Middle East and North Africa, there were 8 countries with investment grade, 4 with speculative grade, and 5 not rated. For Southern, Eastern Europe and Central Asia, 3 countries obtained investment grade, 3 speculative grade, and 4 were not rated. In Latin America, 1 country obtained investment grade, 15 speculative grade, and 3 were not rated. And in South Asia, 1 country obtained investment and 4 speculative grade.

107. As a general proposition, it might seem that the breadth of stabilization clauses would correlate to the perception of political risk. Assuming that investment ratings represent the perception of political risk, this factor alone does not appear to explain why there was such a variation in type and breadth of stabilization clauses found outside the OECD, nor does it seem to explain why the disparity was found between OECD and non-OECD contracts.

108. Participants in the multi-stakeholder consultations on the draft of this report indicated that the drafting of stabilization clauses can be influenced, at least in part, by the perception of risk factors such as the investor’s experience or lack thereof in the host state or embarking on the first investment of its kind in the country. But other factors can also influence the drafting such as the types of clauses offered historically to the same or other investors in the state.

57 The study looked at a correlation between the use of various kinds of stabilization clauses and the level of credit risk of countries where projects were implemented. The credit risk was assessed based on Moody’s historical data. Where feasible, a rating range was established to reflect a country's rating history in given period of time, and the rating for the country in the year of the contract. Based on the established ranges, each country received a grade, investment or speculative. Overall, sovereign ratings for analyzed countries tend to be stable within particular grade, with an exception of 10 countries that have been balancing between investment and speculative grades. These comparisons should be interpreted cautiously, given the very small size of sovereign bonds sample and relatively short rating histories of most sovereigns. In addition, for many emerging economies, the data were not available, because they have not been rated by the international rating agencies.

58 Data based on Sovereign Ratings Histories updated through September 2007, Moody’s Investors Service.
7.1.2. Legality of freezing clauses

The difference between the OECD contracts and the non-OECD contracts in the study does not seem to relate to the legality of freezing clauses. One published view is that such clauses generally are not enforceable under the domestic law of common law countries, and they may also be difficult to enforce in civil law systems.\(^\text{59}\) Lawyers interviewed for this study generally agreed that freezing clauses may not be formally enforceable under the domestic law of many host states, not just those that follow the common law. Thus, the legality issues may explain in part why only about 15 percent of contracts in this study incorporate freezing clauses. But this would not fully explain the major disparities found in OECD and non-OECD contracts.

7.1.3. Other reasons

Interviews with lawyers involved in drafting investment contracts offered some possible explanations for the disparity in contracts between OECD and non-OECD countries. For example, different levels of sophistication and training in contract drafting might influence the level of sophistication in stabilization clauses. The narrower and more articulated stabilization clauses found in the OECD countries might reflect a more tailored drafting approach. Other factors mentioned that may influence the disparity include length of investment (longer investments tending to require broader clauses), market conditions (commodity prices and fluctuations for e.g.), the investor’s prior experience in the country, and distinct industry practices (models have been developed in some industries and may form the basis of the negotiation).

Part 8: The Potential Impact of Stabilization Clauses

What, if any, evidence demonstrates that stabilization clauses can be used to limit a state’s action to apply new social and environmental legislation to long-term investments? We know from the findings above that stabilization clauses in modern practice are drafted to cover social and environmental laws. In the sample for the study, this was rarely the case in the OECD, while it was true nearly 60 percent of the time in non-OECD countries.

Even with this evidence, it is not clear what actual influence, if any, these clauses have on the passing and implementation of social and environmental laws in host states.

The text of agreements alone does not describe the actual dynamics of any investment project. Yet it is fair to say that some inferences may be drawn regarding the clauses’ potential application to new social and environmental laws. The purpose of the discussion that follows is to lay out the possibilities for using the various types of stabilization clauses—based on the experiences of lawyers interviewed for this study, on a review of academic literature on stabilization clauses, and a review of international arbitration decisions related to investor protection.

According to the interviews, stabilization clauses can be used in at least three different ways: 1) They form part of the project agreements for investments and therefore form part of the ground rules upon which the investor operates the project; 2) they are a reference point for informal dealings and formal negotiations between the parties to the agreement; and 3) they may be a tool for the formal protection of rights if a dispute should arise.

8.1. Informal Use of Stabilization Clauses

Full and limited freezing clauses may be used informally to protect investors from having to comply with new social and environmental laws or to receive compensation from the state for the cost of compliance.

\(^{59}\) See Walde and Ndi, supra note 13 at 236.
116. If the stabilization is a full freezing clause, a company may reasonably believe that its contract protects it from having to comply with new social and environmental laws. For example, a company may assume that it does not have to apply a newly raised minimum wage or a new technology aimed at reducing polluting emissions. Thus, the company could informally rely on the stabilization clause and simply not apply the new law. If it is a limited freezing clause, the specifics of the clause would determine whether the company could reasonably rely on it to avoid applying the new law.

117. Therefore, in some cases, full freezing stabilization clauses may work to reduce the effectiveness of new laws, because they offer the company the reasonable opportunity to rely on it to avoid applying new laws. The freezing stabilization clause also provides the investor with a useful reference point for discussing the obligations of the company with the government. The stabilization clause would provide at least a prima facie argument for the company that the new law does not apply to the company’s operations. The stabilization clause may at this point help the company obtain a mitigated result, such as a negotiated lower requirement or a delay in the law’s applicability to the project.

118. Unlike freezing clauses, economic equilibrium and hybrid clauses do not automatically exempt investors from compliance with new social or environmental laws, although hybrid clauses give the investor an opportunity to demand an exemption. The relevant question regarding economic equilibrium clauses or hybrid clauses is whether the government would be limited in applying new laws to the investor because the contract gives the company the right to make a claim to the government for compensation or the right to require negotiations to adjust the contract to reimburse the company for the costs of complying with the new law.

119. As described below, if hybrid and economic equilibrium clauses result informally or formally in direct compensation payments from the state to the investor, they could have an impact similar to that of a freezing clause, and therefore could have a discouraging effect on the host state’s ability or willingness to apply new social and environmental laws to investors. Alternatively, in some projects such as toll roads, the costs could be passed on to users of the services. (If the investor is providing an essential service, such as water or electricity, raising tariffs may impact the users’ ability to pay for, and thus have access to, essential services that are necessary to fulfill the state’s human rights obligations—a topic of discussion unrelated to the focus of this study.) The cost of compliance could be absorbed in other ways, such as by adding years to the concession. In such case, the equilibrium or hybrid clauses would have a lesser impact or no impact on a state’s ability to adopt and apply new social and environmental laws.

120. From the data available in this study, it is impossible to know whether contract adjustments determined by the parties pursuant to economic equilibrium or hybrid clauses would be made in a manner that preserves the state’s ability to pass and implement new social and environmental measures. It is clear from the data in this study that the economic equilibrium clauses found in

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60 One lawyer (who represents investors) interviewed for this study stated that she found that investors often relied informally on such clauses to continue to apply the standards and laws as applicable on the effective date of the agreement.

61 Several of the lawyers interviewed confirmed that in many host states, in particular in lesser developed states, there is a lack of regulatory capacity, affecting the host state’s ability to administer investment projects. These lawyers indicated that the regulatory capacity of states might even be negatively impacted by contracts that provide the legislative framework for a project, because this amounts to a custom set of laws for every investor—making the task of regulators more complex. It is outside the scope of this paper to analyze the possible impact on regulatory capacity that results from legislating custom standards (or providing stabilization clauses that customize applicable law to investors) in the contract itself.

62 Walde and Ndi, supra note 13 at 265. This form of contractual mechanism, the occurrence of unilateral government intervention in the contractual regime results in an adaptation of the agreement to restore its original equilibrium. As a consequence of the disruptive act, the parties are under obligation to negotiate in good faith to restore the original balance. If this fails, either a specific adaptation procedure or the contract’s general dispute settlement mechanism is competent to carry out such restorative adaptation. The renegotiation clause—originally meant to open the agreement to the government’s desire for change—has thus been turned on its head and functions like a stabilization clause of yore. Supra note 13 at 265.
the non-OECD contracts on the whole apply to a broader set of laws (and therefore a broader set of social and environmental laws) than do the large majority of the contracts from OECD countries. This means that the contracts in this study from non-OECD countries are more likely than those from OECD countries to result in exemptions for the investor from new social and environmental laws or to provide compensation to the investor for its compliance with such laws.

8.2. Formal Use of Stabilization Clauses

122. Stabilization clauses may be used formally to protect investors from having to comply with new social and environmental laws or to gain compensation from the state to pay for such compliance.

123. As described above, some domestic jurisdictions would not consider freezing stabilization clauses to be enforceable under domestic law. However, disputes on investment contracts are sometimes enforced in international fora under international law or pursuant to the law of a third state chosen by the parties. The formal enforcement of freezing stabilization clauses under international law has been a hotly debated topic since the 1970s. It is a complex topic involving conflicts of national and international laws, and there remain divergent opinions about the enforceability of the clauses under international law. However, it is sufficient to note for this study that some freezing stabilization clauses are potentially enforceable in both domestic and international fora. Furthermore, about 85 percent of the clauses in this study are either economic equilibrium clauses or hybrids, and the enforceability of these forms of stabilization clauses is less contested than that of freezing clauses.

124. There appear to be no reported cases where economic equilibrium or hybrid clauses have been enforced in either private or international arbitration, so it is not clear how such clauses would be dealt with in the context of arbitration. On the other hand, it should be assumed that investors include such clauses in investment contracts with the expectation that they may rely on them when faced with adverse changes in the law, and they expect them to be enforced.

125. Freezing clauses would generally result in compensation payments from the government to the investor. In effect, the state would have to cover, in part or in full, the cost to the investor to comply with new social and environmental requirements. If monetary compensation is awarded in the case of hybrid or economic equilibrium clauses, their impact would be similar to freezing clauses on the host state’s ability to implement new social and environmental legislation.

126. On the other hand, if the economic equilibrium or a hybrid clauses formally require the parties to negotiate adjustments to the contract in good faith, but do not explicitly require the government to compensate the investor for compliance with new laws, it is less clear whether monetary compensation would be awarded in formal arbitration.

127. In the case of a foreign investor, where a bilateral or regional investment treaty applies to the investor, freezing, hybrid, or economic equilibrium stabilization clauses may also provide the

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investor with an argument that specific provisions of the treaty have been breached.\textsuperscript{64} International investment treaties might include at least one of three provisions: 1) an “umbrella clause,” a guarantee given by the host state to the home state of the company that it will abide by all contractual obligations with investors;\textsuperscript{65} 2) a promise of the host state to offer “fair and equitable treatment” to foreign investors from the home state; and 3) a prohibition on expropriation.\textsuperscript{66}

128. Pursuant to these provisions, a company may bring a claim for arbitration pursuant to the investment treaty claiming any or all of the following: 1) The host state violated its obligations pursuant to the investment contract (specifically the stabilization clause); 2) the host state did not treat the company fairly and equitably, because it breached a legitimate expectation of the company that it would be exempt from or compensated for new social and environmental laws; and 3) the host state’s application of the new law is an expropriation of the contract right not to be subject to such laws without compensation.\textsuperscript{67}

129. No reported arbitration under an investment treaty has dealt with this exact set of circumstances. However, a number of arbitral decisions have pointed to the relevance of stabilization clauses in determining whether investors’ rights have been expropriated or whether investors have been treated fairly and equitably, at least in the case where an investor alleges a total loss of the investment value.\textsuperscript{68}

130. Furthermore, although arbitral decisions relative to bringing contract claims under umbrella clauses in bilateral investment treaties are not consistent,\textsuperscript{69} it is notable that some arbitral practice does support the conclusion that umbrella clauses may support investor contract claims under investment treaties.\textsuperscript{70}

131. Thus, it is possible that freezing, hybrid, or economic equilibrium stabilization clauses could be used to gain compensation for compliance with new social and environmental laws under the “expropriation” and “fair and equitable treatment” standards and the umbrella clauses of international investment treaties.\textsuperscript{71}


\textsuperscript{66} Id, p. 20. For detailed discussions of these provisions and the potential use of host government agreements to bring claims under bilateral investment agreements or investment chapters of free trade agreements, see UNCTAD Series on International Investment Policies for Development UNITED NATIONS New York and Geneva, 2005. See also Schramke, H.J., “The Interpretation of Umbrella Clauses in Bilateral Investment Treaties,” Transnational Dispute Management, Vol. 4, issue 5 (September 2007).

\textsuperscript{67} It is outside the scope of this paper to fully discuss how stabilization clauses might be used in arbitration pursuant to international investment treaties. For more on this subject, see Howard Mann, International Investment Agreements, Business and Human Rights: Key Issues and Opportunities, International Institute for Sustainable Development, March 2008, http://www.iisd.org/investment and http://www.business-humanrights.org/Updates/Archive/SpecialRepPapers.

\textsuperscript{68} See Methanex, v. United States, Final Award, p. 278, paragraph 7: “[A]s a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.” Emphasis added. See also award in Parkerings-Compagniet v. Lithuania where the tribunal finds the fact that the investor does not have a stabilization clause important in determining that the change of law in the host state is not an expropriation. Available at: http://www.investmentclaims.com/decisions/Parkerings-Compagniet-Lithuania-Award.pdf.

\textsuperscript{69} See Schramke, supra note 66.

\textsuperscript{70} Schramke, supra note 66, 4 - 14, describing various arbitral decisions, some of which specify that umbrella clauses allow the tribunal to entertain claims of contractual breaches.

\textsuperscript{71} See Cameron, supra note 10.
Part 9: Conclusions Based on the Research

9.1. General

132. The research supports the hypothesis that stabilization clauses of many types are very much in use today—across a wide range of sectors and in every region of the world—as a tool to assist investors in managing risks associated with future changes in law.

133. The data suggest that the relationship between stabilization clauses and the effect of stabilization clauses on a host state’s action to implement its human rights obligations has more to do with how a contract is stabilized than with whether stabilization clauses are present in the contract.

134. Whereas the clauses from contracts in certain OECD countries included in the data sample appear to share some common features that take into account the purpose of laws and their impact on the investor, outside the OECD the coverage of the clauses and methods of stabilizing vary significantly. In some cases outside the OECD, such clauses may be used by investors to guard against both arbitrary new laws and *bona fide* laws; laws of general applicability and laws passed for a discriminatory purpose; and both unforeseeable new laws and foreseeable new laws, such as those already passed but not in force.

135. The results of this study suggest that investors and governments continue to conclude investment contracts in which they agree to exempt the investor from—or compensate the investor for the costs of—the application of new laws. Further, it is clear that in a number of cases the stabilization clauses are in fact drafted in a way that may allow the investor to avoid compliance with, or seek compensation for compliance with, laws designed to promote environmental, social, or human rights goals. Assuming the validity of using social and environmental laws as a surrogate for human rights, it is possible to infer further that some stabilization clauses in modern contracts may negatively impact the host state’s implementation of its human rights obligations.

136. In the sample from this study, the stabilization clauses in non-OECD countries are more likely than those in OECD countries to limit the application of new social and environmental laws to the investments.

137. The data also provide some potential models as well as indication of underlying principles that are useful for future efforts to design stabilization clauses aimed at protecting investors against arbitrary or discriminatory changes in law, while also preserving the host state's legislative capacity to introduce necessary environmental and social laws.

9.2. Identifying Good Practice

138. A number of contracts in the study appear to provide examples of approaches to stabilization that could contribute toward model clauses in the future. Although additional study is needed for a better understanding of the characteristics or types of clauses that may be effective in specific contexts to enable the host state to fulfill its human rights obligations, potential elements of good practice or models are suggested below.

9.3. The Human Rights Undertaking

139. As discussed above (paragraphs 79-81), two features of the HRU facilitate the application of new social and environmental laws to the investors: 1) The undertaking makes a wide range of new laws exempt from stabilization, encompassing all laws “reasonably required” for the host state to fulfill its human rights obligations; and 2) the undertaking includes promises that the investor will not assert, even informally, that the stabilization clause applies to social and environmental laws within the benchmarked standards, some of which “are dynamic over
time.” These two features show one technique in an extractive industry project to reinforce the applicability of legislation enacted and applied with the purpose of fulfilling the host state’s human rights obligations.

140. Despite these important features of the HRU, the ability of the host state to enact and pass social and environmental legislation may still be curbed to some extent. Of domestic, EU, or international standards, the undertaking benchmarks the highest. If the host state, based on specific needs of a particular project, were to require technology or standards that are international best practice, but not widely used or required, it is unclear whether the clause would protect the investor. Nevertheless, these examples appear to respond in part to the human rights advocates’ concerns, outlined above.

141. With regard to use of the undertaking in more formal dispute-resolution settings, it is not known whether it has been tested in either a court of law or an arbitral setting. Guidance on future model clauses will come out of formal interpretations by courts or arbitrators of terms and concepts such as “human rights,” “international labor law,” and what is “reasonably required to fulfill the obligations of that host government under any international treaty on human rights (including the European Convention on Human Rights), labor, or HSE” under the HRU.

9.4. Limited Economic Equilibrium Clauses in the OECD Samples

142. The examples from OECD countries generally limit the investor’s full protection from new laws to those that are discriminatory. In some projects, where new laws have a direct impact on the requirements for the project, a risk-sharing approach may be adopted. New laws of general application are at the risk of the investor. Specific policy areas (such as safety or security) are exempted, depending on the investment project. These contracts allow the state to legislate outside the restriction of upper limits or benchmarks, as in the HRU described above. On the other hand, if the legislation is specific to the investment, the state may have to share some of the cost implications.

9.5. Other Ideas for Tailoring Stabilization for Fairness in Risk Allocation

143. A number of features fairly common in economic equilibrium clauses are geared toward limiting the application of the stabilization clause in some ways, ensuring fairness in its application, and preserving the long-term relationship necessary for the kinds of investments used in this study. For example, some economic equilibrium contracts contain stabilization provisions that apply in both the investor’s and the host state’s favor. For changes in law that create a windfall, lower costs, or higher revenues to the project, the host state shares in the benefit. None of the freezing contracts contains such a clause.

144. Also, some clauses contain a threshold loss requirement under which no compensation or contract adjustment is due the investor for changes in law. Some economic equilibrium clauses explicitly require the investor to mitigate the cost implications of new legislation. None of the freezing clauses has such requirements.73

145. Some contracts also provide for an independent expert or regulatory body to verify the claimed costs incurred, and in some cases it may even determine for the parties how the costs should be shared among them. These ideas, especially when taken together, can narrow the scope of stabilization clauses and support fairness in their application.

9.6. Transparency of Contracts

146. The prevailing practice not to publicly disclose investment contracts and disputes on contracts or treaty investment protection makes empirical studies such as this one difficult. The findings of

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72 See Human Rights Undertaking, supra note 6.
73 Some domestic laws may provide the requirement for mitigation, but it was not possible to track this possibility in this study.
this study are limited, in part because no reported disputes were available. It is still unknown exactly how stabilization clauses are at issue in modern disputes, making it difficult to understand their impact on environmental or social laws or human rights.

147. Since the data suggest that stabilization clauses may have an impact on the ability of states to apply new social and environmental legislation to investment projects, it is important that the terms of agreements that may directly or indirectly impact the protection of human rights in host states be revealed, so citizens can be informed of state actions that may adversely affect them.

148. BP’s voluntary publication of project agreements allowed a wide range of interested parties to read and evaluate the project’s contracts. As described in the introduction, this transparency probably led to the HRU supplements in 2003 and 2005.

149. The Extractive Industry Transparency Initiative and the IFC Sustainability Policy are other examples of current good practice for transparency. The EITI is a government undertaking to reveal revenue payments in extractive projects, and IFC’s Sustainability Policy requires that projects reveal significant revenue payments and certain key terms of agreements for some projects. Although not the only solution to the lack of transparency of investment contracts, these are steps in the right direction. Further transparency would greatly aid understanding of stabilization clauses.

**Part 10: Consultation on the Research**

150. The joint research project with IFC was designed specifically to stimulate multi-stakeholder engagement. Two formal multi-stakeholder consultations, jointly sponsored by the SRSG and IFC, were convened to discuss the findings as well as to develop a future agenda to build on those findings. The first took place in London, UK in May 2008. Among the some 60 participants at the all-day London consultation were those with expertise in drafting, negotiating, and handling disputes involving HGAs, as well as those serving as principals or lenders of projects. Representatives from UNCITRAL and the Energy Charter Treaty Secretariat, as well as civil society representatives with experience in analyzing contracts from a human rights or sustainable development perspective also participated. The second multi-stakeholder consultation was held in Johannesburg, South Africa in October 2008, with a focus on Africa. Although the Johannesburg consultation was smaller, it was attended by experts with negotiating, drafting and dispute experience in Africa, as well as civil society members who monitor contracts and the human rights impacts of investment projects on the ground in Africa. The consultations were held under the Chatham House Rule.

151. The SRSG pursued further bilateral consultation with specific stakeholder groups: for example with legal practitioners, developing country negotiators, and with individual companies that are sometimes principals to these transactions. The consultation process both fostered engagement with many stakeholder groups, as well as led to developing:

- A set of further questions for the SRSG to consider during the current mandate period with respect to stabilization clauses and investment agreements.

- Recommendations and suggestions (including examples of existing approaches) regarding mechanisms that integrate respect for human rights and support sustainable development, while protecting investors from legitimate concerns regarding changes in law.

- Proposals for future work within the UN system, or by other international organizations and groups, in relation to investment contracts and human rights.

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74 Annexes 1 and 2 contain summaries of the two formal consultations and participant lists for each.
10.1. Feedback on the Report

The following summarises the participant feedback to the Report.

152. The report was well-received as an important and useful snapshot of current practice and a catalyst for multi-stakeholder dialogue regarding the integration of respect for human rights, and also sustainable development principles, into HGAs. Given the lack of transparency of HGAs generally, stakeholders welcomed the report as a first step to learning more about modern contract practice. Many people also inquired as to whether the database created for the study would be made available for further research. A number of stakeholders indicated they have been using the Report since its publication in their own work, practice or study.

153. During the consultations, many participants expressed their interest in an assessment of actual human rights impacts of stabilization clauses or HGAs. Instead, it was explained that the Report reviewed the text of agreements and the potential obstacles it might pose to states fulfilling the duty to protect. A number of participants suggested an interest in further research into actual human rights impacts in light of the Report’s findings.

154. Sustainable development and human rights advocates stated that stabilization and human rights is only one aspect of understanding the contractual issues in relation to broader sustainable development (social, environmental and economic) issues. In addition, practitioners largely agreed that improving stabilization practice must consider the other HGA provisions, as well as the wider legal context such as national legislation, and any international investment agreements in place.

155. Many felt that the Report’s findings were consistent with their expectations or experience, though some stakeholders expressed surprise at the number and breadth of freezing clauses found in the research contracts.

10.2. Common Themes from Consultations

156. Despite the diversity of stakeholders engaging on this subject, the consultations revealed a number of common ideas, as summarized below.

157. During the consultations, it was confirmed that it is appropriate for a private investment agreement to protect against non-bona fide or arbitrary and discriminatory government conduct. It was agreed that the nub of the issue is how to deal with bona fide measures that may have a financial impact on the investor.

158. A common view seemed to suggest that certain approaches to stabilization should be eliminated from practice, including "freezing clauses". A diversity of stakeholders expressed strong support for the idea that stabilization should not interfere with the state’s duty to protect human rights.

159. There was considerable interest in proposals to draft stabilisation clauses in ways that would not prevent governments from enacting and enforcing new environmental and social laws, though there was no consensus on the appropriate benchmarks that would allow proper regulation of projects while providing investors with adequate reassurance.

160. The need to improve government capacity to negotiate and appropriately regulate investment projects was raised repeatedly from a diversity of stakeholder groups, including companies and legal practitioners. It was expressed by many that the negotiating capacity of the parties to an HGA largely determines the quality of contract and may influence how the stabilization clause is drafted.
10.3. Ideas for improving practice
The consultations offered a range of ideas on how to improve stabilization practice so that stabilization clauses do not affect the state’s fulfilment of its duty to protect. A summary of those ideas are included here:

1. **Develop good practice guidelines for contracts for principles**
   A number of consultation participants, such as negotiators, practitioners, and human rights advocates, suggested creating a guide to contracting or a set of principles with model clauses that can help limit ad hoc negotiation of stabilization on environmental and social issues, and define parameters of negotiation. It was suggested that a charter of principles would be useful as a basic point of reference for companies and lawyers who negotiate contracts. The reference point could also illustrate and inform about how to avoid conflicts between human rights and stabilization clauses, for example.

2. **Benchmark appropriate and reliably dynamic standards in long-term investment contracts.**
   Limiting the potential for stabilization clauses to affect human rights legislation is one idea that came up often in the research and consultation phases of this report. It has been suggested that requiring appropriately high standards for the investment project in the contract, for example applying international social and environmental standards at the outset of a project, provides certainty, and lessens the need to apply new regulations to the investment over time.
   Some opined that the Human Rights Undertaking takes a constructive approach along the lines suggested above with both BTC and SCP, benchmarking the project against the highest of host state domestic, EU, or international standards, while allowing all legislation reasonably required for public policy reasons to be applied without penalty.

3. **Continue to study long-term investment projects and their potential and actual impacts on human rights.**
   Consultation participants recognised the Report and research as valuable and suggested that additional topics of study should build on the Report to further knowledge of human rights impacts of investment agreements. The following were among the topics suggested:
   
   - Document the practice of giving exemptions or compensation for compliance with new laws in special economic zones
   - Analyse the links between stabilization clauses and bi-lateral and regional investment treaties
   - Document the practice of state-owned enterprises (SOEs) with respect to HGAs
   - Document the historical and current democratic oversight of HGAs, and whether stabilization clauses can be challenged by citizens (and if so, how)
   - Document the access to compensation for people negatively impacted by projects with HGAs that stabilize social and environmental laws
4. Improve transparency of contracts.

It was suggested that transparency and public oversight can help ensure HGAs are not drafted in a way that they could be used to interfere with the state duty to protect. To enhance transparency, certain clauses could be standardized by the host government and set out in the public domain, such as in model clauses. Alternatively or in addition, contracts (or specific terms having to do with social and environmental standards and impacts of changes in law) could be published and provided in an accessible form in the public domain. Another idea offered was that certain provisions to be included in all contracts with the government could be passed into national law. This would also reduce the breadth of clauses that are negotiable for any one project. The added transparency that comes with passing provisions into law can act as a disincentive for governments to give exemptions from new laws and/or compensation for compliance with new laws.

Part 11: Ideas for possible next steps

161. The multi-stakeholder consultations on the report were extremely valuable to fostering a unique dialogue among stakeholders. It is not envisioned that further consultations in the style of either London or Johannesburg will take place. Instead the SRSG is now moving on to take account of the learning and plan for the current mandate period that concludes in 2011. The next stages of work on investment and human rights and specifically on stabilization is now being planned. The ideas that were offered with most frequency during the consultations are listed below. Throughout the SRSG’s mandate he will continue to raise awareness and foster discussion of the issue of stabilization.

- Explore the idea of creating guidelines on contracting and human rights perhaps with model clauses.
- Explore how to improve incentives and enable human rights compatible HGAs.
- Explore ideas to address the apparent capacity gap among host states, particularly from developing states.
STABILIZATION CLAUSES AND HUMAN RIGHTS

London, Thursday 22 May 2008

CONSULTATION SUMMARY

INTRODUCTION

Sub-paragraphs (a) (b) and (e) of the initial mandate given to the Special Representative of the UN Secretary-General (SRSG) on Business and Human Rights specifically required him to consider both companies’ and states’ roles with respect to the business and human rights debate. Sub-paragraph (a) asked the SRSG to “identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights.” Sub-paragraph (b) asked the SRSG to “elaborate on the role of states in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights, including through international cooperation.” Sub-paragraph (e) requested him to “compile a compendium of best practices of states and transnational corporations and other business enterprises...”

In addition to other projects on the nature of state roles vis-à-vis business and human rights, the SRSG considered the possible impacts of trade and investment agreements on the ability of states to fulfill their duty to protect against business-related human rights abuses. To this end, the SRSG embarked on a joint-project with the International Finance Corporation (IFC) focusing on state contracts or host government agreements (HGAs) (those signed by private investors and host states for investment projects including extractive, infrastructure and services) and, in particular, the use of stabilization clauses in these agreements. Stabilization clauses are contractual clauses that aim to guarantee that domestic laws with respect to investments will remain unchanged. In essence, they either do not allow new laws to apply to investments or they offer compensation to investors for compliance with new laws. Concerns have been raised that such clauses limit a state’s ability to effectively legislate in line with their international human rights obligations.

In deciding to embark on the joint-project on stabilization clauses, the SRSG observed that the views of stakeholders greatly differ regarding the linkages between stabilization clauses and human rights. He also observed that stakeholders have had no direct engagement on this important aspect of HGAs.

The SRSG is deeply appreciative to the IFC for funding and managing this research. He also recognizes that the IFC’s involvement reflects its ongoing interest in advising private sector clients on ways to promote investment that is consistent with principles and standards of sustainable development.

The research and its resulting report Stabilization Clauses and Human Rights (the "Report") includes a comparison of HGAs. The sample included 88 actual and model agreements. From that sample, it was observed that stabilization clauses are sometimes drafted in a manner which may exempt investors from the obligation to comply with new environmental and social laws, or which may provide
investors with an opportunity to be compensated for complying with such laws. The sample of HGAs gathered for this study showed that this was more likely to be the case in HGAs from countries outside the OECD than in HGAs from OECD countries.

In his 2008 report to the Human Rights Council, the SRSG proposed a conceptual and policy framework “to anchor the business and human rights debate, and to help guide all relevant actors.” The framework comprises three core principles: the state duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and the need for greater access by victims to effective remedies. In June 2008 the Human Rights Council was unanimous in “welcoming” the policy framework. It extended the SRSG’s mandate for another three years, and asked him to “operationalize” the framework in order to provide concrete guidance to states and businesses. The SRSG intends to continue work on HGAs, and more broadly on investment and trade issues, under the framework principle of the state duty to protect, though of course the issues are also relevant to the other two principles.

GOALS OF THE CONSULTATION

The joint research project with the IFC was designed specifically to stimulate multi-stakeholder engagement. Thus it was decided to hold consultations to discuss the findings as well as to develop a future agenda to build on those findings. The first consultation was held in London, UK. It was hosted by the law firm Clifford Chance and supported by the IFC. This will potentially be followed further regional consultations on the Report. It is envisaged that the consultation process may lead to the following outcomes:

- A set of further questions for the SRSG to consider during the next mandate period with respect to stabilization clauses and investment agreements.
- Recommendations and suggestions (including examples of existing approaches) regarding mechanisms that integrate respect for human rights and support sustainable development, while protecting investors from legitimate concerns regarding changes in law.
- Proposals for future work within the UN system, or by other international organisations and groups, in relation to stabilization clauses and human rights.

The consultation included representatives from states, corporations and civil society as well as academics and legal practitioners. Annex 1 contains a list of participants and their affiliations.

In order to encourage full and frank discussion, the consultation was held under the Chatham House rule. Accordingly, set out below is a general record of the discussion, without attribution of particular statements or proposals.

CONSULTATION SUMMARY

SRSG Introduction

SRSG John Ruggie opened the day by summarizing the creation of his mandate as an answer to a difficult impasse that had developed among government, company representatives and civil society organizations regarding business and human rights issues. He introduced a conceptual framework for moving the discussion forward and discussed how his work on stabilization clauses in investment agreements fits into the framework.

The first part of the framework is the state duty to protect from abuses by third parties, including corporations. It is often stressed that governments are the most appropriate entities to make the difficult balancing decisions required to reconcile different societal needs. But in the area of business
and human rights, the SRSG questions whether governments have got the balance right. Research and consultations indicate that most governments take a narrow approach to managing the business and human rights agenda. It is often segregated within its own conceptual and (typically weak) institutional box.

Typically, human rights concerns are kept apart from, or heavily discounted in, other policy domains that shape business practices, including commercial policy, investment policy, securities regulation, and corporate governance. The human rights policies of states in relation to business need to be pushed beyond their narrow institutional confines. Governments need to ensure that human rights compliance becomes part of defining an ethical corporate culture. And they need to consider human rights impacts when they sign trade agreements and investment treaties, and when governments provide export credit or investment guarantees for overseas projects in contexts where the risk of human rights challenges is known to be high.

The framework’s second component is the corporate responsibility to respect human rights—meaning, in essence, to do no harm. In addition to legal compliance, companies are subject to what is sometimes called a social license to operate—that is, prevailing social expectations. The corporate responsibility to respect human rights is the baseline expectation for all companies in all situations.

Access to remedy is the third principle. Even where institutions operate optimally, disputes over adverse human rights impacts of companies are likely to occur, and victims will seek redress. Currently, access to formal judicial systems is often most difficult where the need is greatest. And non-judicial mechanisms are seriously underdeveloped—from the company level up through national and international spheres.

HGAs and stabilization clauses are largely developed in isolation from states’ obligations relative to human rights. The SRSG underscored that such instruments are directly relevant to his mandate: first and foremost because fulfilling the state duty to protect against human rights abuses requires that states don’t tie their hands as a result of other commitments. Investor rights must be protected from arbitrary and discriminatory acts. But we must find ways to ensure the mutually supportive relationship of these two critical policy objectives. Stabilization clauses are also directly relevant to the company responsibility to respect, as companies should ensure the agreements they negotiate will not interfere with the enjoyment of rights and the state’s ability to protect against abuse.

**Discussion of the Report and its key findings**

Some key findings of the Report were presented and participants were given the opportunity to comment on these findings and the Report in general. It was noted by way of introduction that stabilization clauses are a commonly used contractual mechanism for managing “change in law risk” associated with foreign investment. These clauses are prevalent in long term investments in the natural resources sector and also in fixed tariff sectors such as water, power and transport. One participant noted that the Report’s finding of a strong regional split in how HGAs are designed with respect to regulatory change between OECD and non-OECD states was consistent with another international organisation’s experience of cross-border investment projects.

It was mentioned that the European Commission had expressed reservations about including stabilization clauses in HGAs in light of the Commission’s concern to ensure member states are not hindered in any way from implementing EU laws.

It was noted that the Report did not seek to assess actual human rights impacts of stabilization clauses or HGAs. Instead it looked at what potential obstacles the text of agreements might pose to states fulfilling the duty to protect. A number of participants questioned whether there was a need for further research into actual human rights impacts in light of the Report’s findings.

It was suggested that a focus on stabilization clauses could ignore other issues impacting the state duty to protect, such as the re-writing of national laws in order to attract foreign investors. Additionally, a comment was made that in order to understand the different approaches to protecting investors from change in law risk it is necessary to look at the market in which an investment is made; for example, in
the context of a public utility privatisation programme in a liberalised market the burden of new
regulation will typically be shared between investors and ultimately with consumers.

Overall, participants agreed that the Report provides a useful snapshot of current practice. Additionally, the Report was welcomed as a catalyst for multi-stakeholder dialogue regarding the integration of respect for human rights, and also sustainable development principles, into HGAs. However, it was also emphasized that stabilization clauses are only one part of the picture and that the surrounding context is extremely relevant. One participant was concerned that the Report could be difficult to interpret accurately unless more is known about the projects for which the clauses were drafted. For instance, in order to assess possible human rights impacts, it would be important to know the contracting parties, the details of the project and the specifics of the market for which the host government agreement was negotiated, including the specific regulatory context. In this connection it was noted that the HGAs used in the study were provided by the IFC and a number of international law firms and also that many of the HGAs had been provided on condition that they remain confidential. It was also noted that the HGAs reviewed for the purposes of the study, while they represent a useful cross-section of drafting practice, may not be a representative sample.

There was broad interest in furthering consultation and advancing work on the issue as the SRSG continues his work.

**Roundtable Discussion**

Participants next engaged in a roundtable discussion on differing interests with respect to stabilization clauses. The interest of investors in legal stability was emphasised, as were the interests of governments and civil society (particularly in the developing world) in preserving adequate legislative discretion to facilitate legal reform and sustainable development.

In the afternoon the participants discussed how these interests can be served while ensuring respect for the human rights obligations of host states. Lastly, the participants offered recommendations for further work that might be undertaken by the SRSG.

The different perspectives discussed can be summarized as follows:

- Stabilization and human rights is only one aspect of understanding the contractual issues in relation to broader sustainable development (social, environmental and economic) issues.
- Ensuring stabilization does not interfere with the state duty to protect human rights requires understanding stabilization in relation to other provisions in HGAs, the project context and the wider legal context.
- It is appropriate for a private investment agreement to protect against non-bona fide or arbitrary and discriminatory government conduct, but the nub of the issue is how to deal with legitimate and bona fide measures that may have a financial impact on the investor.
- It appears that there is a class of extreme clauses still in effect, and still being drafted, that should be eliminated from practice. A widespread consensus was expressed against the use of "freezing clauses" (those clauses that provide an outright exemption from new laws passed in the host state) which were objected to on various grounds including that they are in fact, unlikely to be enforceable.
- It is worth exploring whether a stabilization clause which prohibited discriminatory and arbitrary changes in law but which expressly recognised the possibility that laws would change throughout the life of the project would be broadly acceptable to investors.
- It was suggested by several participants that sustainable development should be the lens through which stabilization clauses, and indeed HGAs, are analysed. This would require looking at the negotiation process, including issues regarding transparency, access to information and the specific content of the agreement including the role played by domestic and international laws in respect of a particular project. A number of participants expressed the opinion that the drafting of stabilization clauses should not only take account of economic, social and environmental issues
but must remain flexible enough to allow the host government to fulfill current and future obligations under international law.

- Although it was acknowledged that environmental and social laws might have an economic impact on an investment, it was also agreed that protection against extreme fiscal changes is a legitimate concern for investors and so a tool is needed to deal with this different risk.

- It was suggested by several participants that the role of donors could be important in terms of shaping the drafting practice of HGA.

- A discussion took place as to whether the debate was best framed in terms of "changes in law as investor risk" or "changes in law as investor cost". It was noted that investors and funders approach the change in law issue as a "risk".

- The role of the investor's legal advisors was also discussed, including the intersect between drafting stabilization clauses and lawyers’ professional ethics. There was general agreement that lawyers could contribute positively to the development of risk management processes that were sensitive to human rights.

- It was noted that the clause’s principal purpose is a negotiating tool and that its major use is in informal negotiations with the host government to minimize the financial impact of new laws on the investment. It was suggested that investors were unlikely to use arbitration or other formal procedures to oppose sensible, bona fide and non-discriminatory improvements in the laws of the host country (whether fiscal, environmental, social or otherwise). The "tipping point" at which an investor would take steps to formally enforce a stabilisation clause was a high because of the costs involved and the wish of many investors to remain on good terms with the host government.

- There was concern expressed about host countries legislating by contract (creating special rules for individual investors in the host government agreement itself). There seemed to be some agreement that this could pose both administrative and legal difficulties for investors as well as for states. In particular, it was noted that in certain states where new legislative frameworks were adopted in haste the result can be incomplete or ineffective legislation. However, it was also argued that certain types of investments required legislation that did not yet exist in the host state.

- There was concern expressed about using the word "balancing", as some felt it inappropriate when discussing the competing interests of investors and host state human rights duties. They suggested that human rights duties should not be “balanced” against investor interests but instead investor and state needs must be secondary to human rights requirements.

- There was broad acknowledgement that there is sometimes an imbalance in negotiating strength between investors and governments that can make it difficult to negotiate fair HGA, with investors generally in the stronger bargaining position.

- There was considerable interest in proposals to draft stabilisation clauses in ways that would allow governments to implement new environmental and social laws affecting the project. It was left open what might be the appropriate benchmarks that would allow proper regulation of projects while providing investors with adequate reassurance.

Proposals for additional research and initiatives included:

Participants made the following proposals for additional research and initiatives on the link between host government agreements and the protection of human rights under the SRSG’s extended mandate.

Continue to raise awareness and foster discussion:

- Continue consultations, in particular in regions outside the OECD.
Learn more about impacts of stabilization and HGAs with respect to human rights and sustainable development:

- Research to integrate the issue of special economic zones and how stabilization works either inside the context of HGAs or in these zones generally.
- Research on the links between stabilization clauses and bi-lateral and regional investment treaties.
- Research to look at state-owned enterprises (SOEs) and their HGAs specifically.
- Research on transparency, including whether HGAs are generally confidential; the actors that make host government agreement transparency possible and capacity building for both investors and host states.
- Research on HGAs not covered by stabilization clauses in order to better understand how companies have faired when new legislation is proposed.
- Research the historical and current democratic oversight of these agreements, what is the access to compensation for people negatively impacted by projects, can clauses be challenged by ordinary citizens and if so, in what ways?
- Research the differences between stabilisation clauses across different markets within a state or region. Do stabilisation clauses differ according to the market and the investment, or according to the perceived risk to the investor in that particular state regardless of market practice?
- Research into the different bargaining strengths and elements within the context of negotiation of investment agreement, including perceptions from investors about the host state’s risks, the host state’s desire to attract investment, competition from other host states, the investment’s expected benefit, the role played by the parties' professional advisors, and the broader implications of the specific investment in the host state and how this is seen in the global market.

Move towards solutions:

- Look to improve the "enabling environment" for "good" HGAs, in particular consider the effect of corruption, lack of transparency and non-competitive tendering and procurement process on the eventual form of HGAs.
- Foster better practice by doing comparative research on existing models of HGAs and national and international laws and policies regarding contractual mechanisms for dealing with change in law risk.
- Fashion better tools for risk management by researching case law, and money damages and also the issue of regulatory certainty.
- Broaden understanding of investment agreements in context. Use a sustainable development perspective to move the agenda forward looking at economic, environmental and social aspects of investment agreements, not just stabilization, but other clauses and issues that directly impact rights and sustainable development.
- Explore incentives for good HGAs such as the Equator Principles and applying human rights standards with financial incentives. At the same time put together training in host states to build capacity for negotiating HGAs.
- Explore opportunities to develop model clauses and edit existing models to integrate a human rights and sustainable development perspective into the models.
- Explore opportunities for capacity building in developing countries including amongst negotiators, lawyers and civil society.
Next Steps

Dialogue on stabilization and human rights will now continue in regional consultations planned tentatively for Africa, Latin America and the USA. The comments and suggestions are contributing to the ongoing planning of the program of work for the SRSG over the next three years. Consultation on the Report will be finalised in the first quarter of 2009. The next stages of work on investment and human rights and specifically on stabilization will emerge in part from these consultations and will be described in a consultation report released in the first quarter of 2009.
Motoko Aizawa, International Financial Corporation
Abayomi Akinjide, Association of International Petroleum Negotiators
Lucy Baker, Bretton Woods Project
Nathalie Bernasconi, Center for International Environmental Law
Chester Brown, UK Foreign and Commonwealth Office
Graham Coop, Energy Charter Treaty Secretariat
Lorenzo Cotula, International Institute of Environment and Development
Antony Crockett, Clifford Chance LLP
Aidan Davy, International Council on Mining and Metals
Kathryn Dovey, Business Leaders Initiative on Human Rights
Titus Edjua, Clifford Chance LLP
Tricia Feeney, Rights and Accountability in Development
Joanne Greenaway, Herbert Smith LLP
Andrew Grenville, Clifford Chance LLP
David Harris, International Financial Corporation
Nick Hildyard, The Cornerhouse
Katie Hutt, Advocates for International Development
David Kinley, The University of Sydney
Vuyelwa Kuuya, Lauterpacht Centre for International Law
Kato Lambrechts, Christian Aid
Lahra Liberti, Organisation for Economic Cooperation and Development
Munir Maniruzzaman, University of Portsmouth
Howard Mann, International Institute of Sustainable Development
Robert McCorquodale, British Institute for International and Comparative Law
Siobhan McInerney-Lankford, World Bank, Legal Counsel
Julian Oram, Action Aid
Federico Ortino, Kings College, London
Gerald Pachoud, Special Advisor to the SRSG
Ahsan Rizvi, Rizvi, Isa, Afridi & Angell
John Ruggie, SRSG
Alke Schmidt, European Bank for Reconstruction and Development
Andrea Shemberg, Legal Advisor to the SRSG
Audley Sheppard, Clifford Chance LLP
Renaud Sorieul, UN Commission on International Trade Law Secretariat
Suzanne Spears, Wilmer Cutler Pickering Hale and Dorr LLP
May Tai, Herbert Smith LLP
Antonio Tricarico, Campagna per la Riforma della Banca Mondiale
Thomas Van Waeyenberge, AquaFed
Claire Wallace-Jones, Barclays
Niall Watson, World Wildlife Fund
Halina Ward,
Elizabeth Wild, International Petroleum Industry Environmental Conservation Association
AGENDA

9:30 - 10:00  Registration

10:00 - 10:15  Welcome - Professor John Ruggie, Special Representative of the Secretary General on Business and Human Rights

10:15 - 11:00  Presentation of the Research - Andrea Shemberg, Legal Advisor to the SRSG and author of the Report on Stabilization Clauses and Human Rights

Questions and/or comment on the Report and the research.

11:00 - 11:15  Tea & Coffee

11:15 - 11:30  Moderator's Introduction - Gerald Pachoud, Special Advisor to the SRSG

11:30 - 13:00  Roundtable Discussion

Change in law as risk - why do investors need stabilization clauses?

Can stabilization clauses in investment agreements be inconsistent with the state's duty to protect? What risks might they pose?

How do principles of sustainable development inform this discussion?

The perception of risk - why do governments offer legal stability to foreign investors?

The risk of a "one size fits all" approach - how does the approach to change in law risks differ across jurisdictions and across sectors?

13:00 - 14:00  Lunch

14:00 - 15:15  Roundtable Discussion

How can the different interests be balanced with the state duty to protect – and what does best practice look like?

What opportunities are there to shape practice in future, and which actors can help to improve practice?

15:15 - 15:30  Tea & Coffee

15:30 - 16:30  Roundtable Discussion

Developing recommendations for future steps that might be taken to build on the Report and the day’s discussion
STABILIZATION CLAUSES AND HUMAN RIGHTS

Johannesburg, South Africa, Tuesday 21 October 2008

CONSULTATION SUMMARY

INTRODUCTION

Sub-paragraphs (a) (b) and (e) of the initial mandate given to the Special Representative of the UN Secretary-General (SRSG) on Business and Human Rights specifically required him to consider both companies’ and states’ roles with respect to the business and human rights debate. Sub-paragraph (a) asked the SRSG to “identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights.” Sub-paragraph (b) asked the SRSG to “elaborate on the role of states in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights, including through international cooperation.” Sub-paragraph (e) requested him to “compile a compendium of best practices of states and transnational corporations and other business enterprises...”

In addition to other projects on the nature of state roles vis-à-vis business and human rights, the SRSG has also examined factors that could constrain a state’s ability in “effectively regulating and adjudicating” business related human rights abuses, including the possible impacts of trade and investment agreements in this regard. To explore the investment dimension, the SRSG in 2007 embarked on a joint-project with the International Finance Corporation (IFC) focusing on state contracts or host government agreements (HGAs) (those signed by private investors and host states for investment projects including extractive, infrastructure and services) and, in particular, the use of stabilization clauses in these agreements. Stabilization clauses are contractual clauses that aim to guarantee that domestic laws with respect to investments will remain unchanged. In essence, they either do not allow new laws to apply to investments or they provide for compensation to investors for compliance with new laws. Concerns have been raised that such clauses limit a state’s ability to effectively discharge its international human rights obligations.

In deciding to embark on the joint-project on stabilization clauses, the SRSG observed that the views of stakeholders greatly differ regarding the linkages between stabilization clauses and human rights. He also observed that stakeholders from differing perspectives have had no direct joint engagement on this important aspect of HGAs.

The SRSG is deeply appreciative to the IFC for funding and managing this research. He also recognizes that the IFC’s involvement reflects its ongoing interest in advising private sector clients on ways to promote investment that is consistent with principles and standards of sustainable development.
The research and its resulting report “Stabilization Clauses and Human Rights” (the "Report") examines a sample of 88 actual and model agreements. In that sample, stabilization clauses are commonly drafted in a manner that can make investors exempt from the obligation to comply with new environmental and social laws, or to provide investors with an opportunity to be compensated for complying with such laws. Within the sample this was much more likely to be the case in HGAs signed with non-OECD countries than in those signed with OECD countries.

In his 2008 report to the Human Rights Council, the SRSG proposed a conceptual and policy framework “to anchor the business and human rights debate, and to help guide all relevant actors.” (A/HRC/8/5) The framework comprises three core principles: the state duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and the need for greater access by victims to effective remedies. In June 2008 the Human Rights Council was unanimous in “welcoming” the policy framework. It extended the SRSG’s mandate for another three years (A/HRC/RES/8/7), and asked him to “operationalize” the framework in order to provide concrete guidance to states and businesses. The SRSG intends to continue work on HGAs, and more broadly on investment and trade issues.

GOALS OF THE CONSULTATION

The joint research project with the IFC was designed specifically to stimulate multi-stakeholder engagement, including through expert consultations. It is envisaged that the consultation process will lead to the following outcomes:

- A set of further questions for the SRSG with respect to stabilization clauses and investment agreements.
- Recommendations and suggestions (including examples of existing approaches) regarding mechanisms that integrate respect for human rights and support sustainable development, while protecting investors from legitimate concerns regarding changes in law.
- Proposals for future work within the UN system, or by other international organizations and groups, in relation to stabilization clauses and human rights.

Two consultations have been convened to-date to discuss the findings as well as to develop a future agenda. The first took place in London, UK, the second in Johannesburg, South Africa. The latter, which is the subject of this report, was hosted by the Centre for Human Rights at the University of Pretoria and was supported by the IFC and the law firm of Edward Nathan Sonnenbergs.

The consultation included experts from states, corporations and civil society as well as academics and legal practitioners. Annex 1 contains a list of participants and their affiliations.

In order to encourage full and frank discussion, the consultation was held under the Chatham House rule. Accordingly, set out below is a general record of the discussion, without attribution of particular statements or proposals.

CONSULTATION SUMMARY

Introduction

Special Adviser to the SRSG, Gerald Pachoud, opened the consultation by highlighting that the SRSG’s mandate had been created in response to a difficult impasse that had developed among governments, company representatives and civil society organizations regarding business and human rights issues. With the Council’s endorsement of the SRSG’s “protect, respect, and remedy” framework, the agenda
clearly was moving forward. Mr. Pachoud discussed how the SRS’s work on stabilization clauses in investment agreements fits into the framework.

The first principle of the framework is the state duty to protect from abuses by third parties, including corporations. It is often stressed that governments are the most appropriate entities to make the difficult balancing decisions required to reconcile different societal needs. But in the area of business and human rights, the SRS questions whether governments have got the balance right. Research and consultations indicate that most governments take a narrow approach to managing the business and human rights agenda. It is often segregated within its own conceptual and (typically weak) institutional box.

Typically, human rights concerns are kept apart from, or heavily discounted in, other policy domains that shape business practices, including commercial policy, investment policy, securities regulation, and corporate governance. The human rights policies of states in relation to business need to be pushed beyond their narrow institutional confines. Governments need to ensure that human rights compliance becomes part of defining an ethical corporate culture. And they need to consider human rights impacts when they sign trade agreements and investment treaties, and when governments provide export credit or investment guarantees for overseas projects in contexts where the risk of human rights challenges is known to be high.

The framework’s second principle is the corporate responsibility to respect human rights—meaning, in essence, to act with due diligence to avoid infringing on the rights of others. What is required, therefore, is a due diligence process whereby companies become aware of, prevent, and address adverse human rights impacts on an ongoing basis throughout the life of the operation. The only reliable way for companies to generate awareness and develop satisfactory mitigation measures is to engage their workers and affected communities in this process. The responsibility to respect exists even where laws are absent or not enforced because it is also a social responsibility, recognized as such by virtually every voluntary business initiative, soft law instruments such as the ILO Tripartite Declaration and the OECD Guidelines on Multi-national Enterprises, and the UN Global Compact. The corporate responsibility to respect human rights is the baseline expectation for all companies in all situations.

For the substantive content of due diligence companies should look, at a minimum, to the international bill of human rights—the Universal Declaration and the two Covenants—as well as the core conventions of the ILO, because the principles they embody are the most universally agreed upon by the system of public governance. If companies operate in conflict zones, they will also need to consider international humanitarian law to avoid situations where they could be accused of complicity, or worse.

Access to remedy is the third principle. Even where institutions operate optimally, disputes over adverse human rights impacts of companies are likely to occur, and victims will seek redress. Currently, access to formal judicial systems is often most difficult where the need is greatest. And non-judicial mechanisms are seriously underdeveloped—from the company level up through national and international spheres.

As noted above, the issue of stabilization clauses is relevant to all three framework principles, but has particular significance for the state duty to protect, and has been explored mainly through that lens. HGAs and stabilization clauses are largely developed in isolation from states’ obligations relative to human rights. The SRS underscored that such instruments are directly relevant to his mandate: first and foremost because fulfilling the state duty to protect against human rights abuses requires that states do not negate their ability to regulate and adjudicate actions by third parties, including corporations, as a result of other commitments. Investor rights must be protected from arbitrary and discriminatory acts. But at the same time, ways must be found to ensure a mutually supportive relationship between these two critical policy objectives. Stabilization clauses are also directly relevant to the company responsibility to respect, as companies should ensure the agreements they negotiate are not drafted in a way that can interfere with the enjoyment of rights and the state’s ability to protect against abuse.
Discussion of the Report and its key findings

Some key findings of the Report were presented and participants were given the opportunity to comment on these findings and the Report in general.

The discussion focused on the two very distinct sets of data between contracts with non-OECD v OECD host states, particularly host states in Sub-Saharan Africa. While it OECD contracts in the study rarely offered stabilization for anything beyond discriminatory and arbitrary new laws, a majority of contracts in Sub-Saharan Africa stabilized all social and environmental laws (providing exemptions or compensation to investors for compliance), even if implicitly.

Participants were not surprised that the broadest stabilization clauses were found in Sub-Saharan Africa. However two participants, with experience in contracts in the region, said that they have not seen clauses similar to the full-freezing clauses (freezing all domestic law with respect to the investment) found in the study. Other participants said stabilization had traditionally been geared towards stabilizing fiscal, customs and royalties issues in central and west Africa. The freezing clauses were viewed as something big companies did 20 years ago.

It was noted by participants that irrespective of the findings on stabilization, newer contracts, as opposed to those drafted during the 1980s and 1990s, have more provisions geared towards managing the social and environmental impacts of investments, such as requirements for impact studies.

Balancing investor rights with adequate policy space

The roundtable discussions throughout the day focused on a number of themes, the main one being how to balance investor rights with the need for governments to have adequate policy space to fulfill their duty to protect. The following summarizes the discussion:

There seemed to be a consensus that there is a legitimate need for tool(s) to boost investor confidence that governments will not engage in rent-seeking behavior or take other actions to unfairly exploit changed circumstances or disadvantage particular investors.

When the issue of model stabilization clauses was raised, a few participants questioned whether such models would be appropriate for developing countries, which should be able to make decisions based on their own development needs. There was a suggestion that stabilization clause models should be staggered in form, perhaps depending on the country’s development. The developing country could pick and choose what they need for their level of growth.

One participant said that investor due diligence should include negotiating in good faith. It was suggested that the principle of “good faith” would eliminate some things from contracts like stabilization for foreseeable changes in law. This comment referred to the evidence in the report that some stabilization clauses seek to exempt investors from laws that are already passed but not yet in force or are otherwise foreseeable with standard due diligence. However, participants also accepted that this in some jurisdictions due diligence is a less effective tool for predicting legislative changes.

Participants recognized that one of the challenges of changing current practice is the different bargaining positions of investors and states. As one participant suggested, investors view the negotiation of contracts as a purely commercial venture. Governments on the other hand see it partly as commercial but also within a political context. In the case of Africa, on participant indicated, there are tremendous infrastructure problems, and lack of regulation is a big problem for governments and investors alike. Additionally, a lack of trust between parties leads to fear bad faith behaviour and raises the interest in broad stabilization clauses.

One participant opined that the key to fair contracting is not about balancing interests, but making it possible for both parties to represent their own interests in an equal manner in a negotiation. This would ideally include the government representing the interest of its population in realizing rights as well as its own interest in fulfilling its human rights obligations. However, many participants recognized that
governments are hindered in negotiations because they respond to immediate political interests and needs. Furthermore, a few participants suggested governments do not appear to explicitly represent their obligations under human rights treaties or the interests of the population when negotiating deals.

**Ideas for improving practice**

The participants offered a range of ideas to encourage stabilization practices more likely to safeguard, rather than obstruct, the state duty to protect:

To guard against highly one-sided deals, it was suggested that transparency and public oversight can help. To enhance transparency, certain clauses could be set out in the public domain or indeed passed into law, which also has the effect of limiting the range of clauses open for negotiation with investors. Making clauses public might limit what the government offers, assuming governments would be reluctant to make certain types of offers to investors in the public eye. However, if the implications of clauses are not widely appreciated, then public oversight might be less effective. Additionally, states may view stabilization as so integral to attracting investment, that they are proud to make such offers even with public oversight.

According to a few participants, defining risks or carving out laws not appropriate for stabilization would be possible. A charter of good manners, principles or conduct could help companies and governments to work towards eliminating ad hoc negotiation of stabilization on environmental and social issues and define parameters of negotiation. For example, such a charter could recommend against companies asking for most favored company status, and for a promise from the government that it will not offer such to any investor. It was suggested that this type of charter would serve as a useful basic point of reference for lawyers from both sides. The charter could also illustrate and educate about how to avoid conflicts between human rights and stabilization clauses, for example. The charter could come from a regional intergovernmental organization or UNCITRAL.

As stated above, some participants expressed concern about models serving as a template appropriate for all countries. However other participants mentioned that ECOWAS (the Economic Community of West African States), the OECD, UNCITRAL or another intergovernmental forum could come up with a set of model clauses. The models could keep the stabilization clause on an economic and commercial plane without jeopardizing social and environmental issues.

Some participants thought that for companies with a CSR culture, simply raising awareness of the problem of stabilizing social and environmental rules may help to positively influence the narrowing of stabilization clauses.

**Proposals for next steps:**

Participants made the following proposals for next steps for the SRSG under his new mandate regarding the link between host government agreements and the protection of human rights.

**Continue to raise awareness and foster discussion:**

Finalize the stabilization paper consultation draft adding in reference to cases before the OECD and other claims on stabilization as well as wisdom gathered from interviews and consultations.

Present the report to industry groups and foster further discussion.
Move towards solutions:

(1) Identify an appropriate intergovernmental forum to raise these issues, bearing in mind the need for interested IGOs and NGOs to engage.

(2) Ensure the focus is not just on stabilization but looks towards improving the fairness of contracts on a whole—while viewing stabilization as part of the entire investment deal.

(3) Keep in mind negotiating capacity and how to create more capacity on the part of host states.

Next Steps

The Johannesburg consultation was important not only for confirming what was learned in London, but for offering a particular set of views based on experiences in Africa. It is not envisioned that further consultations in the style of either London or Johannesburg will take place. Instead the SRSG is now considering key learnings and next steps – inputs from both consultations will inform his choices in this regard. The Stabilization Report will be finalized in the first quarter of 2009 integrating the consultation comments and learning.
Ms. Louise Chatillon, Fasken Martineau
Ms. Terri Hathaway, International Rivers Network
Ms. Christine Jesseman, South African Human Rights Commission
Mr. Eric Le Grange, Edward Nathan Sonnenbergs
Ms. Susan Maples, Revenue Watch Institute and Columbia Law School
Mr. Michael Mobili, Democratic Republic of Congo Ministry of Mines
Ms. Caroline Nicholas, UNCITRAL
Dr. Achieng Ojwang, National Business Initiative
Ms. Abiola Okpechi, Business and Human Rights Resource Center
Mr. Gerald Pachoud, Special Adviser to the SRSG
Professor Peter Rosenblum, Columbia Law school
Ms. Andrea Shemberg, Legal Adviser to the SRSG
Ms. Tamlyn Stewart, Business Times
Ms. Ashwani Sukthankar, International Commission for Labour Rights
Ms. Yvonne Themba, Shanduka
Mr. Charles Valkin, Bowman Gilfillan
9:00 - 9:30  Registration

9:30 – 10:00  Welcome, Setting the context and introduction to the day
Gerald Pachoud, Special Advisor to John Ruggie, Special Representative of the Secretary General on Business and Human Rights

10:00 – 11:30  Presentation of the Research/ Questions & Answers
Andrea Shemberg, Legal Advisor to the SRSG and author of the Report on Stabilization Clauses and Human Rights

11:30-11:45  Tea & Coffee

11:45 - 13:15  Roundtable Discussion – Stabilization, what it serves and does it pose risks to the state’s ability to protect human rights?
Why do investors ask for stabilization clauses; Why do governments agree to stabilization clauses; and Do these arrangements pose risks outside the project.

13:15 - 14:15  Lunch-Lunch will be provided to participants

(i) How can the various interests be balanced with the state duty to protect – and what does best practice look like?
(ii) What opportunities are there to shape practice in future, and which actors can help to improve practice?

15:45 - 16:00  Tea & Coffee

16:00 – 17:00  Roundtable Discussion – Next Steps
Developing recommendations for future steps that might be taken to build on the Stabilization Report and the day’s discussion;
What should the SRSG do in this mandate regarding stabilization?
What should other institutions do?

17:00 – 17:30  Moderator’s Closing Remarks
Summary of the day’s progress