

Investment Agreements and Human Rights

The Effects of Stabilization Clauses



Andrea Shemberg

March 2008 | Working Paper No. 42

A Working Paper of the:
Corporate Social Responsibility Initiative

A Cooperative Project among:
The Mossavar-Rahmani Center for Business and Government
The Center for Public Leadership
The Hauser Center for Nonprofit Organizations
The Joan Shorenstein Center on the Press, Politics and Public Policy

Citation

This paper may be cited as: Shemberg, Andrea. 2008. "Investment Agreements and Human Rights: The Effects of Stabilization Clauses." Corporate Social Responsibility Initiative Working Paper No. 42. Cambridge, MA: John F. Kennedy School of Government, Harvard University. Comments may be directed to the author.

Corporate Social Responsibility Initiative

The Corporate Social Responsibility Initiative at the Harvard Kennedy School of Government is a multi-disciplinary and multi-stakeholder program that seeks to study and enhance the public contributions of private enterprise. It explores the intersection of corporate responsibility, corporate governance and strategy, public policy, and the media. It bridges theory and practice, builds leadership skills, and supports constructive dialogue and collaboration among different sectors. It was founded in 2004 with the support of Walter H. Shorenstein, Chevron Corporation, The Coca-Cola Company, and General Motors.

The views expressed in this paper are those of the author and do not imply endorsement by the Corporate Social Responsibility Initiative, the John F. Kennedy School of Government, or Harvard University.

For Further Information

Further information on the Corporate Social Responsibility Initiative can be obtained from the Program Coordinator, Corporate Social Responsibility Initiative, Harvard Kennedy School, 79 JFK Street, Mailbox 82, Cambridge, MA 02138, telephone (617) 495-1446, telefax (617) 496-5821, email CSRI@ksg.harvard.edu.

The homepage for the Corporate Social Responsibility Initiative can be found at: <http://www.hks.harvard.edu/m-rcbg/CSRI/>

Investment Agreements and Human Rights: The Effects of Stabilization Clauses*

By Andrea Shemberg

March 2008

This paper is a consultation draft prepared for a joint project of the International Finance Corporation and the mandate of the United Nations Secretary-General's Special Representative for Business and Human Rights, Professor John Ruggie. Andrea Shemberg is an attorney who serves as a legal advisor to the mandate.

Contents

Executive Summary	vi
Part 1: Introduction	1
Part 2: How This Paper Is Organized	3
Part 3: Stabilization Clauses	4
3.1. Purpose and Coverage	4
3.2. Categories of Stabilization Clauses	5
Part 4: Stabilization Clauses and Human Rights Concerns	10
Part 5: The Research	11
5.1. Scope	11
5.2. Research Questions	12
5.3. Methodology	13
5.4. Coding of the Contracts	16
Part 6: Findings	17
6.1. Summary of Findings	17
6.2. Freezing Clauses	19
6.3. Economic Equilibrium Clauses	24
6.4. Hybrid Clauses	26
6.5. Significant Disparities	28
Part 7: Relevance of Stabilization to Changes in Law	32
7.1. Current Practice in OECD and Non-OECD Countries	32
7.2. Perception, Legality, and Other Issues	32
Part 8: Potential Impact of Stabilization Clauses	35
8.1. Informal Use of Stabilization Clauses	35
8.2. Formal Use of Stabilization Clauses	37
Part 9: Conclusions	39

9.1. General	39
9.2. Identifying Good Practice	39
9.3. The Human Rights Undertaking	39
9.4. Limited Economic Equilibrium Clauses in the OECD Samples	40
9.5. Other Ideas for Tailoring Stabilization for Fairness in Risk Allocation	40
9.6. Transparency of Contracts	41
Part 10: Recommendations for Next Steps	42

Figures

Figure 5.1: Regional Distribution of Contracts and Models	15
Figure 5.2: Distribution of Industries	15
Figure 6.1: Types of Stabilization Clauses	20
Figure 6.2: Percentage of Contracts with Full Freezing Clauses, by Region*	21
Figure 6.3: Percentage of Full and Limited Freezing Clauses, by Region*	23
Figure 6.4: Percentage of Full and Limited Freezing Clauses, by Industry	23
Figure 6.5: Percentage of Full Economic Equilibrium Clauses, by Region	24
Figure 6.6: Percentage of Limited Economic Equilibrium Clauses, by Region	26

Tables

Table 3.1: Types of Stabilization Clauses	9
Table 6.1: Contracts and Models, by Industry:	18
Table 6.2: Contracts and Models, by Region	19

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 these domestic laws are some of the most common means of implementing international human rights obligations in regulating business activity.

The contract data used in this research come 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.)¹ 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. The firms provided the following data from each contract: the region, the industry, the decade in which the contract became effective, the stabilization clauses, the governing-law clause, and the dispute-resolution clauses. 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. The study did not interview government officials. It did conduct additional interviews 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 more on the drafting of stabilization clauses than on the enforcement of such clauses.

This study found that stabilization clauses are sometimes drafted so as to 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. The sample of contracts gathered for this study showed that this was more likely to be the case in the contracts from countries outside the Organisation for Economic Co-operation and Development than in OECD country contracts.

¹ At least one model in the study offered full freezing stabilization as a starting place, without requiring negotiation.

Acknowledgments

The author of this paper, Andrea Shemberg, is a legal advisor to the United Nations Special Representative of 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.

Andrea Shemberg and Motoko Aizawa wish to thank the following people for their helpful insights, advice, and comments on preliminary drafts of this paper: Nathalie Bernasconi, Peter Cameron, Geoffrey Chandler, Lorenzo Cotula, Christian Curtis, Peter Frankental, Global Witness, Thomas Dimitroff, Nicholas Hildyard, Kathryn Khamisi, Sheldon Leader, Howard Mann, Susan Maples, Peter Muchlinski, Norman Nardorff, Rachel Nicholson, Marcos Orellana, Luke Eric Peterson, Peter Rosenblum, John Sherman, M. Sornarajah, Antonio Tricarico, Halina Ward, Louis Wells, Thomas Walde, and the law firms and IFC staff who participated in the study.

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 was to stimulate multistakeholder engagement regarding this topic, based on empirical evidence. This research project was designed specifically to contribute to his mandate. In June 2008, the SRSG will submit his final report to the UN Human Rights Council. The report will contain 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 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 of 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 how they are drafted to protect the investor:

- **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’ action 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 amended the contracts to avoid some of the problems identified by human rights advocates. The amendments, called the “Human Rights Undertaking,” were 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 being balanced with 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 failure to balance these interests either 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. They argue that this perceived imbalance denies 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?

In this analysis, new social and environmental legislation served as a surrogate for human rights, since these are primary areas of legislation through which states implement human rights obligations.

This is the first empirical study on modern stabilization practice covering a wide range of industries and regions of the world, such studies being 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, and 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 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 Organisation for Economic Co-operation and Development (OECD) countries (other than Turkey, which is included in Eastern Europe, Southern Europe and Central Asia).²

Industries covered in this study include 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) application of stabilization in practice.

Summary of Data

Key findings of this study include the following:

- Freezing clauses continue to be used in modern practice and were found in contracts from Sub-Saharan Africa; Eastern, Southern Europe and Central Asia; and the Middle East and North Africa.
- In this study, 83 percent of full freezing clauses are in the extractive sector (all are mining projects).
- Limited freezing clauses explicitly include labor law changes, and in some cases, foreseeable labor law changes.
- Contracts with limited economic equilibrium clauses often contain one or more features that aim to ensure fairness in the application of the clause, such as threshold loss limits before compensation can be awarded, requirements on the investor to mitigate cost implications of new

² For this study, contracts were grouped according to IFC's regions for lending operations, with the following exceptions: Qatar and Israel (not part of any IFC region) are included under Middle East and North Africa; IFC's regional designation of Europe and Central Asia is described here as Eastern Europe, Southern Europe and Central Asia, for clarity. Countries that do not fall into any of the IFC-designated regional groupings are developed economies, referred to herein as OECD countries, with the exception of Turkey, which is included in the Europe & Central Asia regional grouping and categorized as non-OECD. For this paper, non-OECD countries are those in which IFC has lending operations. The list of countries belonging to each of the IFC-designated regions can be found at <http://www.ifc.org/ifcext/about.nsf/Content/Regions>.

laws, stabilization for costs or windfalls, recourse to an independent expert to determine compensation amounts, and others. None of the contracts with either freezing or hybrid clauses contains such features.

- No contracts from the OECD countries contain full or limited freezing clauses or hybrid clauses.
- Full economic equilibrium clauses are prevalent in the contracts used in all non-OECD countries. Only two contracts, both from one OECD country, contain such clauses.
- Stabilization clauses in the OECD contracts and models are, with two exceptions, limited economic equilibrium clauses (the most narrow form of stabilization clauses in the study). In contrast, such clauses are relatively rare in the contracts from Sub-Saharan Africa, the Middle East and North Africa, and Eastern, Southern Europe and Central Asia regions.
- Further, limited economic equilibrium clauses from non-OECD countries differ greatly from those in OECD countries, and are more likely to cover social and environmental laws of general application as well as to provide full compensation for laws that are not discriminatory toward the investor.
- Limited economic equilibrium clauses from OECD countries almost always 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 project. Other laws for issues such as safety and security, even if discriminatory toward the investor, are often explicitly excluded from stabilization.
- Unlike economic equilibrium clauses, hybrid clauses are underpinned by the principle that investors do not always have to comply with new laws in the host state, because exemption may be the first (or at least one) explicit option for addressing the impact of new laws.
- This study includes examples of freezing, economic equilibrium, and hybrid clauses that provide the investor with protection from arbitrary changes in law, as well as non-discriminatory, *bona fide*, and even foreseeable changes in law

Summary of Analysis

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 clauses³ 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, if either exemptions or compensation are not forthcoming from the host state pursuant to the clause. There are no reported cases on point, but it can be said that if the formal claim results 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. Since 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.

³ 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.

It is also possible that some freezing, hybrid, and economic equilibrium clauses may also be used by a foreign investor in a claim pursuant to an international investment treaty. There are no reported cases on these facts, but some arbitral practice indicates that stabilization clauses could support a claim pursuant to the “expropriation,” “fair and equitable treatment,” or “umbrella” provisions in investment treaties. These provisions might allow investors to advance claims for compensation for compliance with new laws.

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.

Economic equilibrium clauses found in non-OECD contracts generally apply to a broader set of laws (including social and environmental laws) than do most of the contracts from OECD countries. To the extent that our sample is representative, contracts from non-OECD countries are more likely than those from OECD countries to insulate the investor from new social and environmental laws or to provide compensation to the investor for compliance with new social and environmental laws.

Identifying Good Practice

Contracts and models from OECD countries appear to be based on principles of risk allocation that significantly limit the scope of stabilization clauses. Investors are expected to comply with all new laws, and to absorb the costs of compliance with all generally applicable laws. They must make efforts to minimize costs arising from complying with changes in law. The state compensates for discriminatory laws, and in some cases either shares the risk of laws aimed at the specific industry or project, or passes the costs on to users of the service. Contracts from OECD countries can serve, 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 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. BP voluntarily published the agreements, allowing a wide range of interested parties to evaluate the project’s contracts. This transparency also helped facilitate the amendments in 2003 and 2005.

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

Recommendations for Next Steps

The report makes the following recommendations:

- 1. Benchmark appropriate and reliably dynamic standards in long-term investment contracts.**

One way to avoid the potential of stabilization clauses to have a negative effect human rights is to benchmark appropriately high standards for the investment project. 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.

2. Conduct further studies on stabilization.

This research was a first step toward gaining a better understanding of the potential impact stabilization clauses may have on host states' ability to implement new laws, and on how new laws affect investors. Many questions emerging from this study are worthy of follow-up:

- a. Are stabilization clauses necessary, and if so, in what contexts? What are the diverse needs of different sectors or different geographical regions that influence whether stabilization is needed and how it is designed? What factors influence the host government's decision to include stabilization?
- b. From a human rights perspective, what does *good practice* look like in stabilization clauses, considering also the formal enforcement of such clauses? Do the Human Rights Undertaking and models from OECD countries offer good-practice models that can be used elsewhere?
- c. How does the potential for host states' capacity to administer investment projects relate to the design of stabilization clauses?
- d. How do host-state capacity and the skills of negotiators impact the design and scope of stabilization clauses? What can be done to support states' and negotiators' capacity?
- e. What is the appropriate scope of risks (for example, arbitrary and discriminatory laws versus bona fide laws for the protection of human rights) that should be covered in stabilization clauses?

3. Hold multistakeholder consultations to discuss the findings of this study.

Since this is the first study of this kind on private investment contracts, it is important to disseminate the findings as widely as possible and ask for comment from a range of stakeholders, including industry groups, companies, civil society representatives, lenders, and subject-matter experts. It also may be useful to invite government agencies to comment. Consultations should be geared toward understanding whether this paper and the data on which it is based are consistent with other evidence of current stabilization practice. Also, consultation should serve to build a fuller understanding of the significance of the findings, and provide additional ideas for recommendations or follow-up research. Issues to explore in consultation include current renegotiation of contracts, information on disputes, and insights into the particularities of different industries.

4. Improve transparency of contracts.

Because long-term investments can have major positive and negative human rights consequences, investors and governments should consider publishing investment contracts and project information that can have a positive effect on rights. Such publication would inform the affected community and provide those in the host state with an important assurance of legitimacy of process. The public sharing of contracts also provides a more level playing field to host states and investors, giving both parties access to a library of contracts to reference when new contracts are negotiated. Furthermore, published contracts are open to public scrutiny, which may mean that parties to those contracts will act with a greater sense of fairness in negotiating them.

5. Continue to study long-term investment projects and their potential and actual impacts on human rights.

Stabilization is just one small aspect of an investment contract, and an even smaller aspect of long-term, cross-border investments and international trade. Understanding the human rights impacts of investment projects requires looking beyond stabilization at other issues, within and outside of contracts. For example, research should address issues such as:

- the types of regulatory frameworks and capacity required prior to and during the implementation of major private investments to maximize the positive human rights impacts of investments;
- the issue of potential corruption associated with the negotiation and implementation of investment contracts;
- methods for achieving meaningful human rights impacts assessments during a project cycle;
- the impact of tax holidays and other financial and nonfinancial incentives granted to attract foreign investments, and the balance of the overall economic bargain of the project, and its benefit and detriment to the host state and its citizens.

Such research can build on this work to help in the understanding of how to develop tools, approaches, and methods of improving the human rights impact of foreign investment generally.

Abbreviations

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

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. The current phase of his work focuses on three areas: 1) state duties (including regulation of business to ensure that business activities do not infringe on human rights) to protect human rights from abuses by third parties; 2) the responsibility of business to respect human rights in their business activities; and 3) remedies, accountability, and grievance mechanisms for ensuring that victims have an appropriate remedy and redress when human rights are harmed.
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 the views of stakeholders greatly differ regarding stabilization clauses and human rights, and that stakeholders have had no direct engagement based on empirical evidence on this important aspect of private investment agreements. This research project was designed specifically to stimulate such multistakeholder engagement. In June 2008, John Ruggie will submit to the UN Human Rights Council his final report, which will contain observations from his empirical inquiries, and policy recommendations for improving human rights protection in the context of business activities.
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, for aspects of the contracts that they viewed as unfavorable to the promotion and protection of human rights in the host states.
5. A 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,⁴ 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.⁵
7. The 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.

⁴ For the Amnesty International report on the BTC pipeline, see "Human Rights on the Line: The Baku-Tbilisi-Ceyhan pipeline project," Amnesty International (2003), available at: www.amnesty.org.uk/business. See also the Amnesty International report on the Chad-Cameroon pipeline project, "Contracting out of Human Rights, the Chad-Cameroon pipeline project" (2005), POL 34/12/2005, available at www.amnesty.org.uk/business.

⁵ See Human Rights on the Line, *supra* note 1, 16-17.

8. In an unprecedented move, BP responded to the criticisms by amending the contracts—via a document called the “Human Rights Undertaking”—to, in part, avoid the alleged potential impact of the stabilization clauses on protection of human rights in host states.⁶ BP similarly amended the contracts underpinning the South Caucasus Pipeline (SCP) in 2005.
9. Subsequent to the BTC amendments, human rights, environmental, and sustainable development groups continued to allege adverse impact of stabilization clauses on the promotion and protection of human rights in host states. Civil society groups made such allegations regarding contracts for the Chad-Cameroon pipeline project,⁷ for example, and for the 2005 Mittal Steel investment in Liberia⁸. Although the 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 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, 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. Other than these instances, this research did not find any formal expression of industry views on 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 in light of the empirical evidence and host-state duties to protect human rights.
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.

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 See “Contracting Out of Human Rights,” supra note 1.

⁸ See “Heavy Mittal,” Global Witness 2006, available at: http://www.globalwitness.org/media_library_detail.php/459/en/mittal_steels_us900_million_deal_in_liberia_is_in_e.

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. And Part 10 recommends possible next steps for this project and initial ideas for improving stabilization practice.

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 private 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.⁹ From an investor’s perspective, stabilization clauses are a risk-mitigation tool to protect investments from a number of “sovereign” risks in the context of foreign investments. In the 1960s and 1970s, stabilization clauses largely guarded against a wave of nationalizations of foreign investment projects in oil and mining.¹⁰ Today, these clauses may deal with the risk of arbitrary or discriminatory legislation against the investor, nationalization, or expropriation, but they also are likely to guard against physical or creeping expropriation by the host state, nullification of the contract pursuant to national law, or more specific fiscal issues of accelerated depreciation and amortization of assets, long loss carry-forward periods, royalty rates, or guarantees that foreign exchange can be repatriated or kept in a protected offshore account. Although these and other financial concerns may constitute the original core of the stabilization issue, other concerns are gaining importance, and modern investment contracts are covered by general or specific stabilization guarantees. In recent decades, for example, environmental and social legislation have caused investors to use stabilization clauses to protect their investments from costs resulting from changes to such legislation.¹¹

⁹ Delaume, *Transnational Contracts—Applicable Law and Settlement of Disputes*. Law and Practice, Booklet 8 (issues July 1983), 301, 307–9.

¹⁰ 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.

See also WIR, part 2, 108, detailing the wave of nationalizations of foreign mining investments, 1960–1979.

¹¹ See Walde, Thomas and George Ndi, “Stabilizing International Investment Commitments: International Law Versus Contract Interpretation,” 31 *Tex. Int’l L.J.* 215, 230-1:

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.

17. Some individuals interviewed for this study are of the view that 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 prove financially prohibitive for an existing project with older technology. For this reason, they believe that foreign investment would not be possible in many parts of the world without stabilization clauses.
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 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,¹² and some individuals 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 encourage inward investment and provide a favorable investment climate, so they accept stabilization clauses as one way to provide assurances to 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 created three broad categories of stabilization clauses, based on how they aim to protect the investor:
 - **Freezing clauses** are designed to make new laws inapplicable to the investment.¹³ They are so named because they aim to *freeze* the law of the host state with respect to the investment project.

¹² Walde and Ndi, *supra* note 11, 234.

¹³ In many countries domestic law will not allow the sovereign to promise not to legislate in the future. This is precisely why many lawyers interviewed for this study state that they no longer use freezing clauses. Although the freezing clause may have an informal purpose, such as providing the investor with a *prima facie* argument that a new law does not apply, it is less clear whether it will be enforced if the contract goes to private arbitration. Notwithstanding the enforceability of stabilization clauses in private arbitration, the stabilization clause may be meaningful to international arbitration pursuant to bilateral investment treaties. See Part 8 of this paper.

- **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 directly a 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, but the text does not impose directly a requirement that the host state compensate the investor. 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** were divided into two subcategories: *full freezing* and *limited freezing*.
24. *Full freezing clauses* purport to freeze both fiscal and nonfiscal issues, usually for the duration of the project. For example, the clause might read as follows:

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.¹⁴

25. *Limited freezing clauses* aim to protect the investor from a more limited set of legislative actions. For example, sometimes they refer only to tax and customs issues. 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.¹⁵

Other limited freezing clauses simply list the types of laws that they pertain to, or they exempt sets of laws.

26. The general view in academic literature and among the lawyers interviewed (representing investors and states in investment projects) is that, at least in the oil and gas industry, freezing clauses have

¹⁴ Latin American infrastructure model agreement 2000s. Another example comes from a 2000s Sub-Saharan extractive agreement:

Section 9 Non-Derogation; Stabilization

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.

¹⁵ From a contract sampled in this study.

largely fallen out of use in favor of the more modern economic equilibrium clause.¹⁶ Most practitioners interviewed consider freezing 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.

27. **Economic equilibrium clauses** also can be divided into two subcategories: *full economic equilibrium* and *limited economic equilibrium*.
28. *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 them. 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.
29. Full economic equilibrium clauses can take many forms. An example of such a clause 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

¹⁶ See Walde and Ndi, *supra* note 11, 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 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.

compliance with the Change in Law. The amount of any Recovery Allowance due under this Article shall be determined pursuant to Article....¹⁷

30. *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 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:

“Change in Law” shall mean any change in the Applicable Laws (including the Issuance or promulgation of any Applicable Laws) on or after the fifth Banking Business Day prior to the date of receipt of the Proposal in accordance with the Bidding Guidelines, but only to the extent that such change (a) relates to (i) fiscal matters, (ii) customs matters, (iii) environmental matters (including any condition or requirement, other than the mitigation measures referred to in Section 4.12 of the Bidding Guidelines which may be imposed by the competent...Governmental Authority for the granting of approvals in matters relating to the environmental impact assessment of the Project), (iv) labor or job safety matters, (v) water consumption of the Power Plant, (vi) changes to the Commission Dispatch Procedures or related with the electric power regulation including extraordinary adjustments (that exceed the inflation percentage estimated by the...for the corresponding fiscal year) to the fees applicable to the power to be supplied by the Commission during the construction period and the first start-up, or the sale or transportation of the Base Fuel, or (b) affects the foreign capital power producers and the domestic capital power producers in a different manner, including changes to the Commission Dispatch Procedures.¹⁸

31. **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.

32. Since this study is concerned with the possibility that stabilization clauses could limit the application of new laws to investors, these hybrid forms were analyzed separately. 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*. 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.

¹⁷ From a contract sampled in this study.

¹⁸ From a contract sampled in this study.

Table 3.1: Types of Stabilization Clauses

<p>Full Freezing Clauses freeze both fiscal and non-fiscal law with respect to investment for the duration of the project. Exemptions are required.</p>	<p>Limited Freezing Clauses freeze a more limited set of legislative actions. Exemptions are required.</p>
<p>Full Economic Equilibrium Clauses protect against the financial implications of <i>all changes of law</i>, by requiring compensation or adjustments to the deal to compensate the investor when any changes occur.</p>	<p>Limited Economic Equilibrium Clauses protect against financial implications of <i>some limited set</i> 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.</p>
<p>Full Hybrid Clauses protect against the financial implications of <i>all changes of law</i>, by requiring compensation or adjustments to the deal, including exemptions from new laws, to compensate the investor when any changes occur.</p>	<p>Limited Hybrid Clauses protect against financial implications of <i>some limited set</i> 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.</p>

Source: *Author*.

Part 4: Stabilization Clauses and Human Rights Concerns

33. As the social and environmental impact of major investment projects gained attention in recent years, human rights advocates (along with environmental and sustainable development advocates) began to look at how investor protection may be inconsistent with the protection of human rights in host states. This attention focused on the investor protections contained in investment contracts and international investment agreements, such as bilateral and regional investment treaties.
34. Specifically these advocates expressed concern that the protection of investor rights in contracts and international agreements is not being balanced with: 1) the state duty to regulate investors to protect human rights; and 2) the investors' responsibility to respect rights. These advocates claim that favoring investor rights over human rights can have a negative impact on human rights. These concerns were echoed by the Office of the High Commissioner for Human Rights in two recent reports.¹⁹ 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.²⁰
35. Concerns about stabilization clauses thus stem from fears that investor protections may wrongly infringe on state duties and investor responsibilities toward human rights. Human rights advocates point to the positive obligations that international human rights law places on states to protect rights by regulating the actions of private parties (including companies).
36. According to the views of these 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.²¹ The 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.²²

¹⁹ "Human Rights, Trade and Investment. Report of the UN High Commissioner for Human Rights, E/CN.4/Sub.2/2003/9 (2003).

²⁰ *Id.*, 17.

²¹ See Human Rights on the Line, *supra* note 1; Contracting out of Human Rights, *supra* note 1; Lifting the Lid on Foreign Investment Contracts: The Real Deal for Sustainable Development, International Institute for Environment and Development (September 2005), available at www.iied.org; "Heavy Mittal? A State within a State: The inequitable Mineral Development Agreement between the Government of Liberia and Mittal Steel Holdings NV" (October 2006), available at www.globalwitness.org. See also, Cotula, Lorenzo, "Stabilization Clauses and the Evolution of Environmental Standards in Foreign Investment Contracts," *Yearbook of International Environmental Law* (forthcoming).

²² See Cotula, *supra* note 21.

Part 5: The Research

5.1. Scope

37. 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.²³
38. This research aimed to gather empirical evidence that would either support or dispel the claim that stabilization clauses 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.
39. The state's ability to pass laws regulating the behavior of private parties (including investors) is fundamental to human rights protection, because such measures are primary tools by which states implement their international human rights obligations—specifically the duty to protect rights.
40. Human rights law and jurisprudence supports 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.²⁴ Indeed, within the UN system and regional 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.²⁵ Human rights law and jurisprudence points to a duty of the state to take state action in the form of legislation, regulation, monitoring, and enforcement to ensure that company activities do not negatively impact the enjoyment of human rights.²⁶
41. 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 protect rights and could also directly 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

²³ 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.

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 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, 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.

²⁶ See UN OHCHR report, supra note 19, 17.

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.²⁷ Under such treaties, social and environmental legislation regulating the behavior of private parties (such as companies) is an important means of fulfilling rights obligations, even towards civil and political rights.²⁸

5.2. Research Questions

42. This study was designed to address the question of whether and to what extent stabilization clauses can affect the host state's application of new social and environmental legislation to investment projects.
43. To address this question, of 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?

²⁷ 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.

²⁸ 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:

[T]he 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 *Öneriyıldız 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%96neryildizvTurkey301104.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.

- 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?
- Based on the evidence gathered, what recommendations can be made?

5.3. Methodology

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

44. 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.
45. Designing a statistically significant empirical study of modern investment contracts would have been an impracticable endeavor, since these contracts generally are not publicly available. Subscription services do exist for oil and gas contracts, but not for other sectors. As a result, to avoid having a concentration of oil and gas contracts in the analysis, this study did not rely on the oil and gas subscription service.
46. 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.²⁹ Two law firms received payment for their services.
47. 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. Random selections from international law firms might have included contracts in languages other than in English that would have required translations.
48. Noting the practical difficulties with obtaining random samples of contracts, the guiding principle for gathering contracts for this study was to obtain from the participating law firms readily available contracts in English (or those translated into English) entered into in the last decade. 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 (but see paragraph 49); 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,

²⁹ 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.

- 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 49).

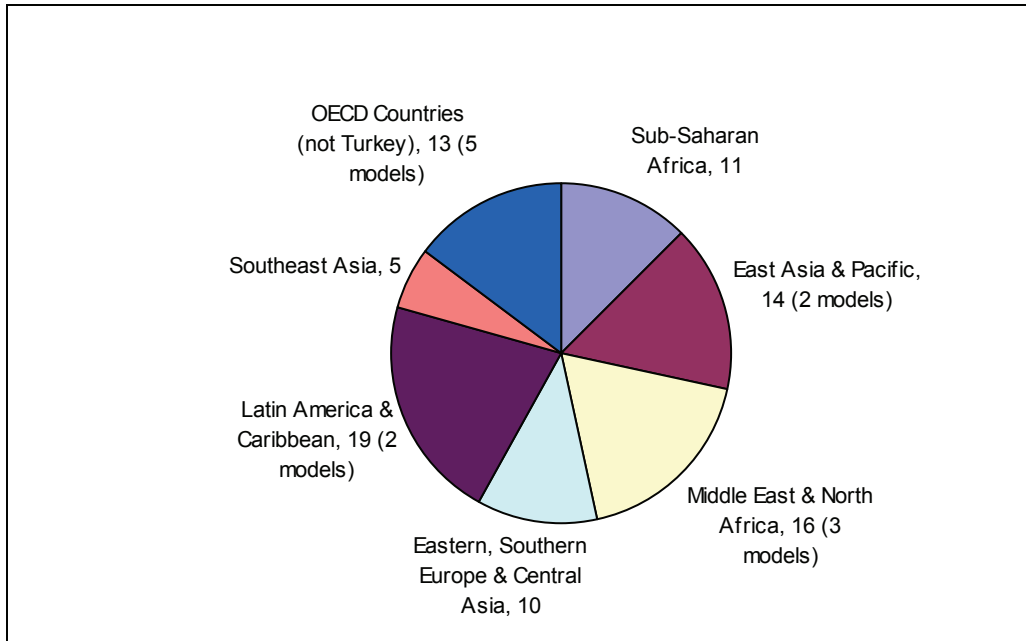
49. One of the law firms had already conducted a study of stabilization practice, and it made its files from that study available. From those files, a total of 8 excerpted contracts were obtained with enough information to be used in the study. The other law firms responded by offering a total of 67 contracts with the requested information. Two of the contracts in this sample were subsequently amended, and the amendments and contracts were made publicly available; the author supplemented the sample with the amended versions of these contracts.
50. 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.
51. The data for this study were collected to address the research questions posed (see paragraph 43). 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.
52. 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.

5.3.2. The state-investor contracts in the study

53. 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.
54. 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).³⁰ Figure 5.1 shows the distribution of contracts and models used in the study.

³⁰ See footnote 2 for an explanation of how the contracts in this study were grouped.

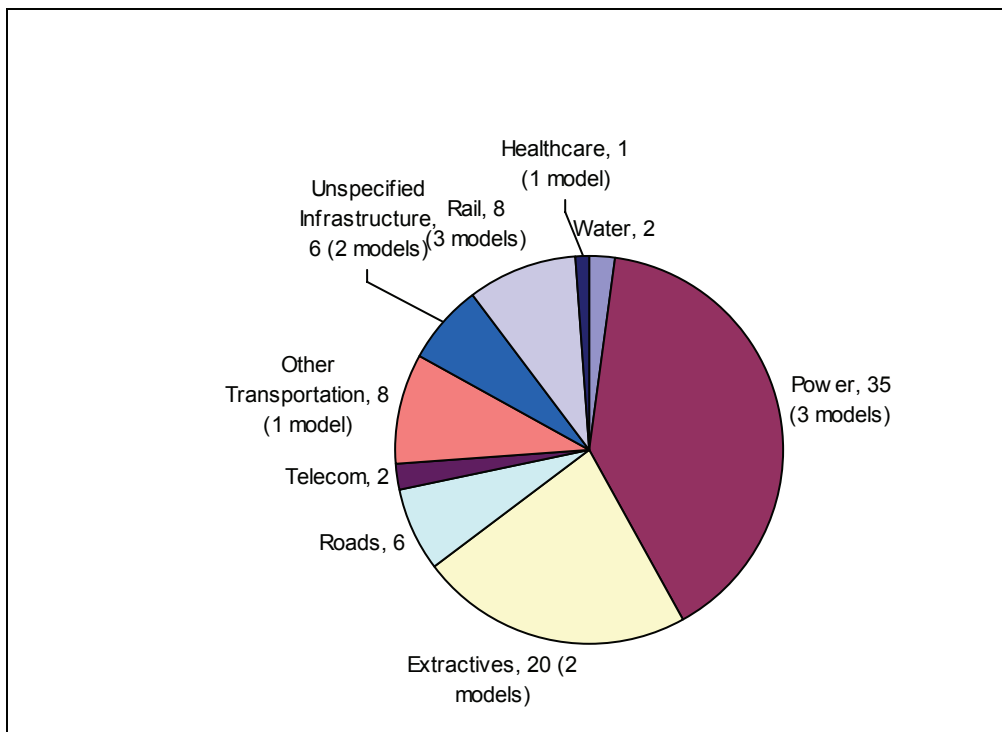
Figure 5.1: Regional Distribution of Contracts and Models



Source: *Author*.

55. 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

56. 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.
57. Each contract was placed into one of following six categories (as described in Section 3.2, above):
 1. full freezing clauses
 2. limited freezing clauses
 3. full economic equilibrium clauses
 4. limited economic equilibrium clauses
 5. full hybrid clauses
 6. limited hybrid clauses
58. 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.
59. 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.
60. 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.
61. 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 did not turn up any cases on stabilization.³¹

³¹ The AIPN study published in 2006 also found no recent reported private contract cases on stabilization clauses.

Part 6: Findings

62. This part of the paper addresses the question: What does current stabilization practice look like in the sample in regard to 1) method of stabilization, and 2) substantive coverage?

6.1. Summary of Findings

63. Following is a summary of the study's key findings:

- According to the contracts sampled, freezing clauses continue to be used in modern practice.
- Full freezing clauses are found in contracts in Sub-Saharan Africa; Eastern, Southern Europe and Central Asia; and the Middle East and North Africa.
- In this study, 83 percent of full freezing clauses are in the extractive sector (all are mining projects).
- Limited freezing clauses still appear to form a part of modern practice in the Middle East and North Africa; Latin America and the Caribbean; Eastern, Southern Europe and Central Asia; and South Asia.
- Limited freezing clauses explicitly include labor law changes, and in some cases foreseeable labor law changes.
- Some limited freezing clauses explicitly carve out those laws enacted by the host state to implement international standards and progressive standards based on technological and scientific advancements.
- Contracts with limited economic equilibrium clauses often contain one or more features that aim to ensure fairness in the application of the clause, such as a threshold loss requirement before compensation is to be awarded, requirement on the investor to mitigate cost implications of new laws, stabilization for costs or windfalls, recourse to an independent expert to determine compensation amounts, and other. None of the contracts with either freezing or hybrid clauses contains such features.
- No contract from the OECD countries contains either full or limited freezing clauses.
- Full economic equilibrium clauses are prevalent in the contracts in this study in all non-OECD countries. Only two contracts (from one OECD country) contain such clauses.
- In the sample contracts, full economic equilibrium clauses are used in the power, water, transportation, infrastructure, and extractive industries.
- Stabilization clauses in the OECD contracts and models in this study are, with two exceptions, limited economic equilibrium clauses. In contrast, such clauses are relatively rare in the contracts from Sub-Saharan Africa; the Middle East and North Africa; and Eastern, Southern Europe and Central Asia.
- Limited economic equilibrium clauses are prevalent in the sample contracts in the road, railroad, infrastructure, and power sector, but not in the extractive sector.
- The limited economic equilibrium clauses from non-OECD countries differ greatly from limited economic equilibrium clauses from OECD countries. The contracts from non-OECD countries more often stabilize generally applicable and other nondiscriminatory social and environmental laws.
- Limited economic equilibrium clauses from OECD countries almost always 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 project. Other

laws for issues such as safety and security, even if discriminatory toward the investor, are often explicitly excluded from stabilization in the OECD contracts.

- Unlike economic equilibrium clauses, hybrid clauses are underpinned by the principle that investors do not always have to comply with new laws in the host state, because exemption may be the first (or at least one) explicit option for addressing the impact of new laws.
- This study found examples of freezing, economic equilibrium, and hybrid clauses that provide the investor with protection from arbitrary changes in law, as well as non-discriminatory, *bona fide*, and even foreseeable changes in law. Table 6.1 provides a listing by industry of the types of contracts and models used in the study, and Table 6.2 lists them by region.

Table 6.1: Contracts and Models, by Industry:

Sub sector	Full Freezing	Partial Freezing	Full Econ. Equilibrium	Partial Econ. Equilibrium	Full Hybrid	Partial Hybrid	None	Total
Contracts								
Extractives	5	4	2	2	2	3	0	18
Other Transport	0	1	3	2	0	0	1	7
Infrastructure	1	0	1	1	0	1	0	4
Power	0	1	15	15	0	0	1	32
Road	0	0	2	4	0	0	0	6
Rail	0	0	2	3	0	0	0	5
Water	0	0	1	1	0	0	0	2
Healthcare	0	0	0	0	0	0	0	0
Telecom	0	0	1	0	0	0	1	2
Total Contracts	6	6	27	28	2	4	3	76
Models								
Power	0	0	2	1	0	0	0	3
Rail	0	0	1	2	0	0	0	3
Extractives	0	0	0	0	0	0	2	2
Other Transport	1	0	0	0	0	0	0	1
Infrastructure	0	0	0	2	0	0	0	2
Healthcare	0	0	0	1	0	0	0	1
Total Models	1	0	3	6	0	0	2	12
TOTAL BOTH	7	6	27	28	2	4	3	88

Source: *Author*.

Table 6.2: Contracts and Models, by Region

Region	Full Freezing	Partial Freezing	Full Econ. Equilibrium	Partial Econ. Equilibrium	Full Hybrid	Partial Hybrid	None	Total
Contracts								
East Asia & Pacific	1	0	5	5	0	0	1	12
Eastern, Southern Europe & Central Asia	0	1	2	1	2	3	1	10
Latin America & Caribbean	0	1	7	9	0	0	0	17
Middle East & N. Africa	1	2	6	2	0	1	1	13
OECD	0	0	2	6	0	0	0	8
South Asia	0	1	2	2	0	0	0	5
Sub-Saharan Africa	4	1	3	3	0	0	0	10
Total Contracts	6	6	27	28	2	4	3	76
Models								
East Asia & Pacific	0	0	1	0	0	0	1	2
Eastern, Southern Europe & Central Asia	0	0	0	0	0	0	0	0
Latin America & Caribbean	1	0	0	0	0	0	1	2
Middle East & N. Africa	0	0	2	1	0	0	0	3
OECD	0	0	0	5	0	0	0	5
South Asia	0	0	0	0	0	0	0	
Sub-Saharan Africa	0	0	0	0	0	0	0	0
Total Models	1	0	3	6	0	0	2	12
TOTAL BOTH	7	6	27	28	2	4	3	88

Source: *Author*.

6.2. Freezing Clauses

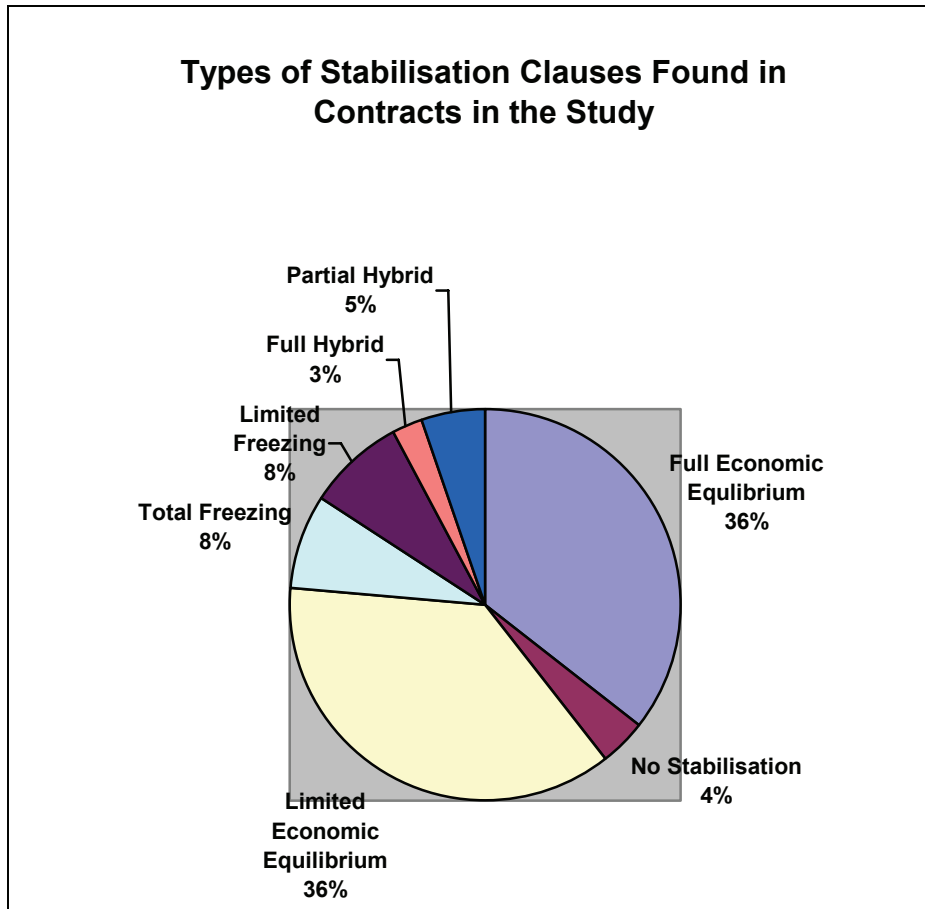
6.2.1. Freezing clauses still used in modern practice

64. In the current research, 12 of 76 contracts covering the 1990s and 2000s had some form of freezing clauses,³² meaning that freezing stabilization clauses occurred nearly 16 percent of the time in the sample.³³
65. 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.

³² 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.

³³ In the 75 contracts, stabilization was completely absent in 3 of the contracts. In the 12 models, stabilization was absent in 2.

Figure 6.1: Types of Stabilization Clauses



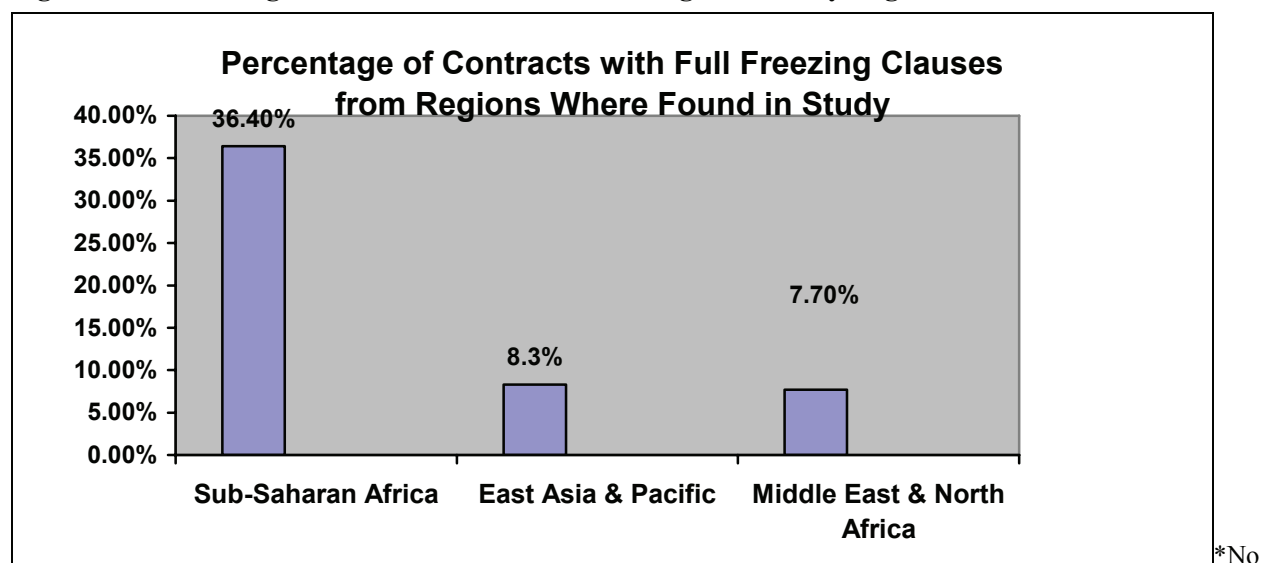
Source: *Author*.

6.2.2. Full freezing clauses were found in three regions

66. Of the 76 contracts in the study, 6 (about 8 percent) have full freezing clauses.
67. 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.³⁴ 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.)

³⁴ 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.

Figure 6.2: Percentage of Contracts with Full Freezing Clauses, by Region*



*No full freezing clauses for South Asia; Eastern Europe, Southern Europe and Central Asia or OECD countries.
Source: *Author*.

68. Among the contracts in the study, one freezing clause stood out for 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.³⁵ 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.
69. 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.³⁶
70. 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

³⁵ 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.

³⁶ This clause was renegotiated in 2006 and reduced to a fiscal freezing clause only. The 2006 amendment is also part of this study.

had ended in the host state. In both these countries, contract reviews are being carried out,³⁷ 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.³⁸

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

71. 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

72. 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.

73. 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

74. The Latin American and Caribbean transportation contract freezes fiscal issues and specific labor - law issues for the duration of the project.³⁹ 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

75. 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.)

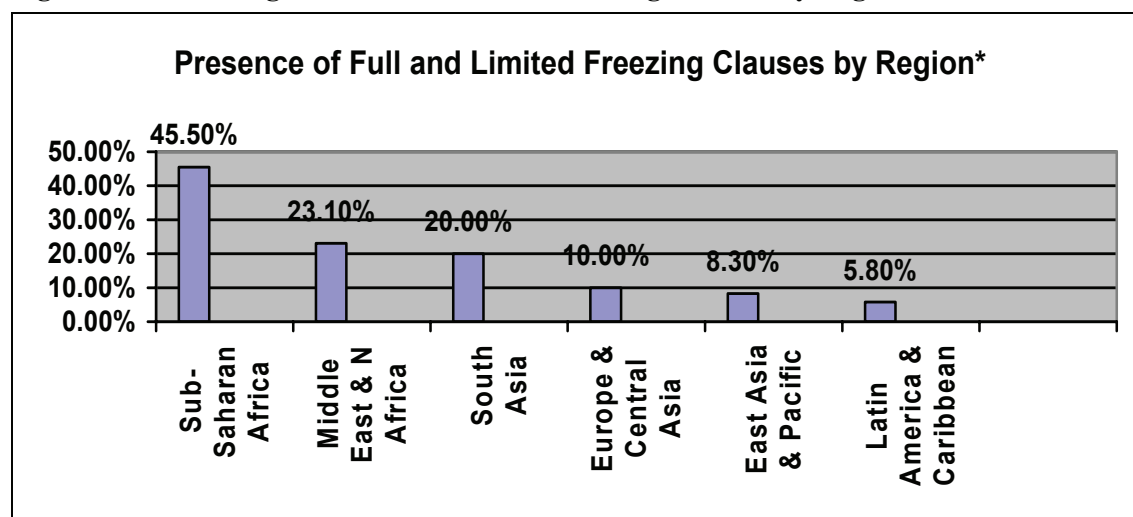
³⁷ In the Democratic Republic of Congo, a review of mining concessions was initiated after a July 18, 2006, expert report to the UN's Security Council "raised serious questions over concession rights held by individuals of unknown or questionable standing." The expert report argued that "an undetermined number appear to be held by concessionaires affiliated with investors whose personal and professional integrity is doubtful." See: "Behind the DRC mining contracts review," Sergeant, Barry, November 4, 2007, available at:

<http://www.mineweb.com/mineweb/view/mineweb/en/page36?oid=39266&sn=Detail>. For more on the DRC and host government agreements, see the World Bank Report, Democratic Republic of Congo Growth with Governance In the Mining Sector, Oil/Gas, Mining and Chemicals Department, AFCC2, Africa Region (forthcoming). Renegotiation of agreements in Liberia followed a 2006 promise by President of Liberia, Ellen Johnson Sirleaf, to review all contracts made by the transitional government before she became head of state. She targeted the Mittal contract specifically for renegotiation. See Liberia: "Contract renegotiations with Mittal Steel meant to amend, not end, deal," *Herald Tribune*, October 5, 2006.

³⁸ See "Update on the Renegotiation of the Mineral Development Agreement between Mittal Steel and the Government of Liberia, August 2007," available at www.globalwitness.org.

³⁹ 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.

Figure 6.3: Percentage of Full and Limited Freezing Clauses, by Region*

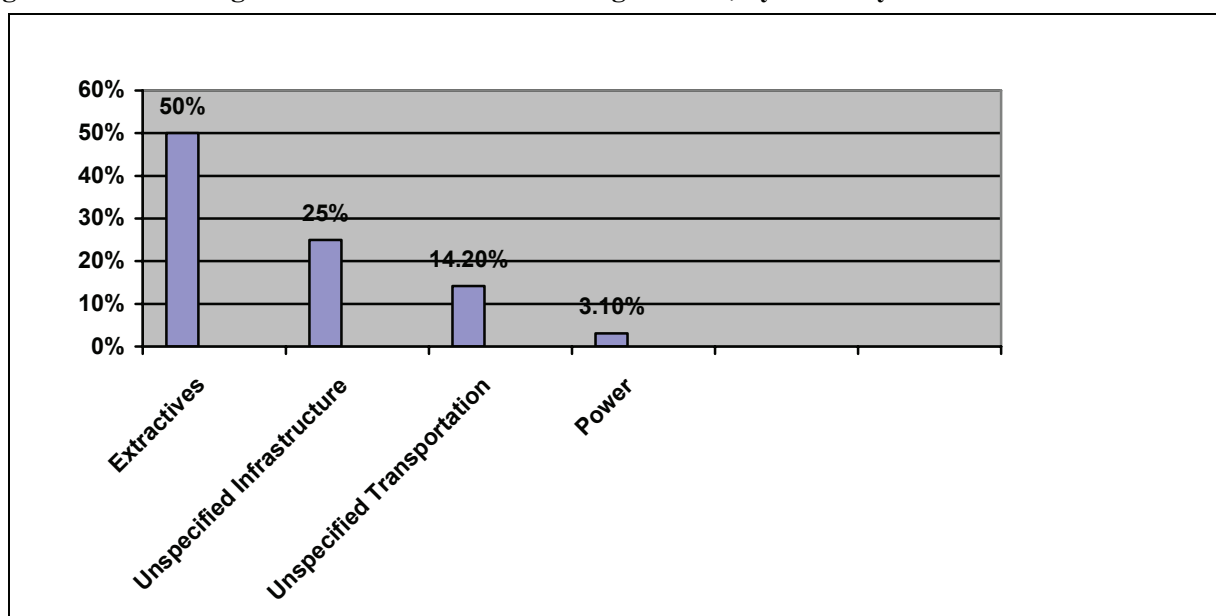


*No freezing clauses are from OECD countries.
Source: Author.

6.2.7. Freezing clauses (full and limited) are most prevalent in the extractives industry⁴⁰

76. 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) has a freezing clause. (See Figure 6.4.)
77. No freezing clauses were found in the railroad, road, water, telecom, or health care contracts or models.

Figure 6.4: Percentage of Full and Limited Freezing Clauses, by Industry



Source: Author.

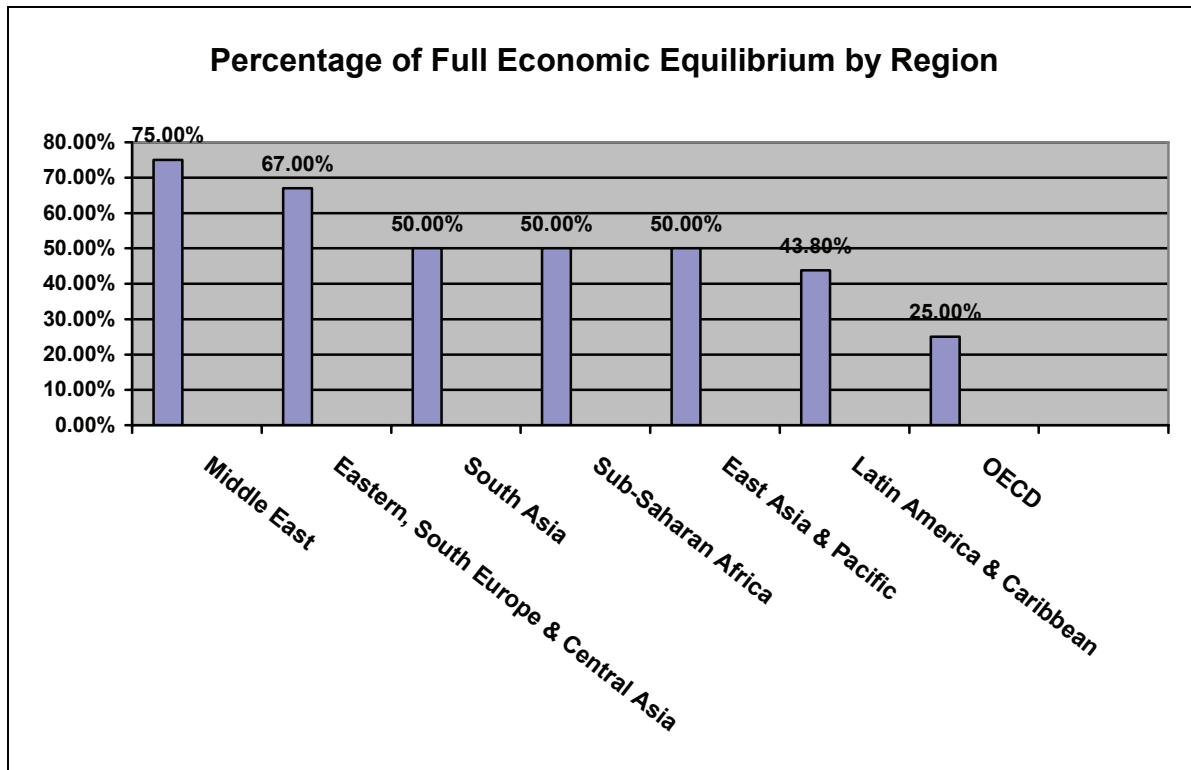
⁴⁰ No contracts in the study from North America, Australia, or Western Europe were for the extractive industries.

6.3. Economic Equilibrium Clauses

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

78. 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



Source: Author.

ce: Author.

79. 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).

80. Data from this study indicate 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 6.4, below.

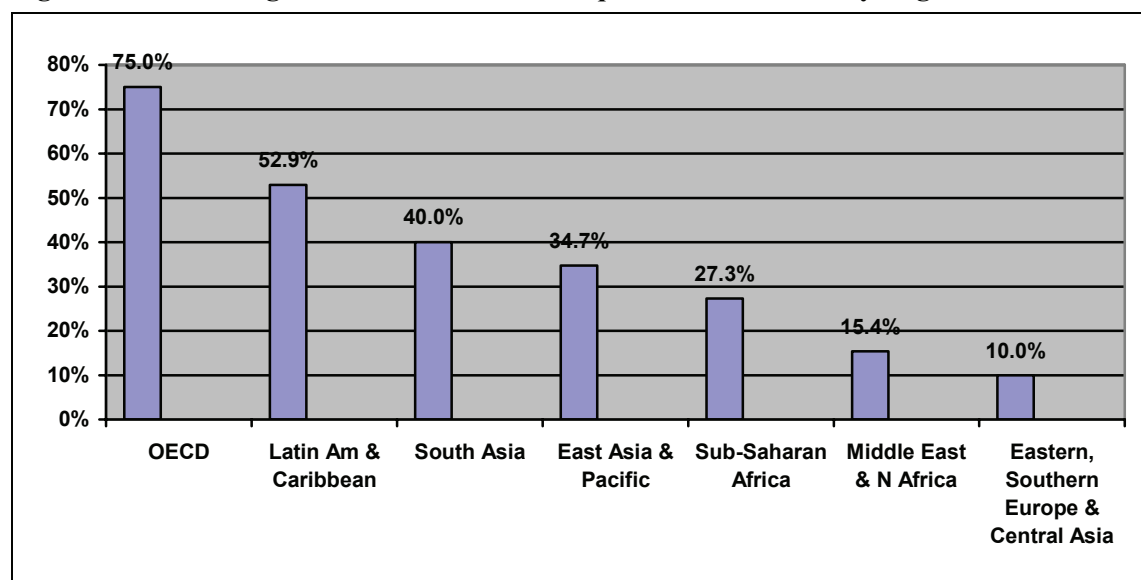
6.3.2. Full economic equilibrium clauses are used in power, water, transportation, infrastructure, and extractive industries

81. 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.
82. 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

83. Of the 76 contracts in the study that contain economic equilibrium clauses, 28 of them limited 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.
84. 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)

Figure 6.6: Percentage of Limited Economic Equilibrium Clauses, by Region



Source: *Author*.

6.4. Hybrid Clauses

6.4.1. Hybrids studied offered economic equilibrium and recommended exemptions from new laws

85. 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.⁴¹ The remaining contract is for an unspecified infrastructure project in the Middle East and North Africa region.
86. 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 are either neutral on the issue or support exemptions.

6.4.2. One partial hybrid clause limits stabilization

87. 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.

⁴¹ 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

88. Prior to its subsequent amendment, 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.⁴² 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 it 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.
89. More broadly, the contract underpinning the BTC pipeline, before its amendment, 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.
90. 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 amended with the “Human Rights Undertaking” in 2003 and 2005, respectively.
91. The Human Rights Undertaking entered 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 now explicitly exempt out of stabilization any change in law reasonably required for the host state to meet its international human rights, labor, and health, safety, and environmental treaty obligations.⁴³ 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...⁴⁴

...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

⁴² “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(x) 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 Caucasus Pipeline project, available at:

<http://www.bp.com/genericarticle.do?categoryId=9006628&contentId=7013497>.

⁴³ See The BTC Human Rights Undertaking at: <http://subsites.bp.com/caspian/Human%20Rights%20Undertaking.pdf>.

⁴⁴ Id.

action or inaction by the relevant Host Government that is reasonably required to fulfil 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.⁴⁵

92. Pursuant to this undertaking, the hybrid clauses were narrowed to explicitly eliminate the possibility of exemptions or compensation when the host state acts “reasonably” to pursue its international human rights obligations. Therefore, the labor law exception described above was directly eliminated by the undertaking.
93. The undertaking, 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

94. 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.
95. These features 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 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.
96. 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 requirements.⁴⁶
97. 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.

⁴⁵ See *id.* at Article 2(d).

⁴⁶ 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.

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

98. **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.
99. The limited economic equilibrium contracts from OECD countries maintain a similar pattern of how changes in law are handled regardless of the sector.⁴⁷ 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.
100. 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 concessionaire. 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.
101. 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.
102. 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.

About allocating costs, the model states up front that it shall be neither always the authority nor the investor that absorbs the risk.⁴⁸ Instead, the model presents differing approaches to allocating or

⁴⁷ Such as infrastructure, roads, railways, or even health care provision.

⁴⁸ 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.

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).⁴⁹ 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.⁵⁰ 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 the character of laws to determine who bears the risk.

103. **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 nature of the law (as generally applicable, specific, discriminatory, or for an overriding public purpose). Nor do they appear to offer the same flexibility in risk sharing that is present in at least some OECD contracts.
104. 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.”
105. 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.⁵¹ 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 it doesn’t matter whether the change in law is foreseeable, or whether it is a law of general applicability, specific applicability, or for a public policy purpose.⁵²
106. 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).
107. 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.
108. 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.

⁴⁹ 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.

⁵⁰ See: http://www.hm-treasury.gov.uk/media/3/5/pfi_sopc4pu101_210307.pdf, Articles 14.3-14-10.

⁵¹ Sufficient data were not available for comparison of those threshold limits.

⁵² The thresholds were not provided for the contracts in this study. It would be interesting to study the various thresholds across industries and regions to discover whether there are industry or regional standards, or whether the thresholds themselves differ greatly, which may point to their being influenced by commercial negotiations.

109. 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.
110. 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.⁵³
111. 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.
112. 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.
113. 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.

⁵³ See Latin American and Caribbean power plant contracts 1994 and 2005.

Part 7: Relevance of Stabilization to Changes in Law

114. This part of the paper addresses the question: What is the relevance of the stabilization practice of contracts in this sample to changes in social and environmental legislation?

7.1. Current Practice in OECD and Non-OECD Countries

115. It appears from the data that social and environmental laws in some form often may be covered by stabilization clauses—more likely to be the case in non-OECD countries. The following points shed some light on whether current stabilization practice is relevant to new social and environmental laws:

- A number of modern investment contracts—mainly in the extractive industries, and mainly in Sub-Saharan Africa and in Eastern, Southern Europe and Central Asia—are designed to provide investors with either total or partial exemptions from new laws, including social and environmental laws, over the lifetime of the project. These contracts were not found in OECD countries.⁵⁴
- Contracts from OECD countries—across a variety of private infrastructure and services industries, such as rail, roads, infrastructure, transportation, health care, and power—generally provide stabilization for new laws only if they are discriminatory. Thus, for generally applicable laws addressing social and environmental issues, OECD contracts in this study would not provide exemptions or compensation. For specific laws addressing the project or industry on the environment or social standards, in some cases the OECD contracts would offer compensation. Other contracts provide a risk-sharing approach to allocating the costs among users, the state party, and the investor. In other instances (when the law addresses an overarching public policy concern, such as safety or security), some OECD contracts would require the investor to cover the costs.
- Contracts from non-OECD countries generally do not limit stabilization coverage to nondiscriminatory laws. Often, contracts offer stabilization for all laws or offer explicit coverage for at least some categories of environmental and social laws.
- Some non-OECD contracts in the study require or provide the explicit option of exemptions from new laws. None of the OECD contracts offers such. The design of OECD contracts, by contrast, appears to support investor compliance with new laws and to hold that generally applicable laws are at the expense of the investor—making it more likely that OECD contracts will require the investor to absorb the costs of new social and environmental laws. The OECD contracts also appear to incorporate the principle that discriminatory laws are at the host state’s expense, and that flexibility in approaches can be used for allocating risk for specific laws that apply to the project or industry.

7.2. Perception, Legality, and Other Issues

116. 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

⁵⁴ This study shows that the stabilization clauses that provide the broadest investor protection are in the extractive industries in Sub-Saharan Africa and Central Asia. A recent government review in the Democratic Republic of Congo of the mining contracts in that state reviewed 38 contracts. The outcome of the review, according to an unofficial report, notes that the contracts were placed into three categories: those contracts that could remain in vigor as having sufficient qualities of fairness; those that need to be further reviewed; and those that need to be cancelled. None of the 38 fit into the first category, 23 are recommended for further review, and 15 are recommended for cancellation. As described in footnote 36, the contract review was prompted by an expert report to the UN Security Council raising concerns about the legitimacy of a number of mining concessions in the Democratic Republic of Congo in 2006.

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.

7.2.1. Perception of investment risk⁵⁵

117. 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).⁵⁶ 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.
118. 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.
119. 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.

7.2.2. Legality of freezing clauses

120. 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.⁵⁷ Lawyers interviewed for this study generally agreed that freezing

⁵⁵ 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.

⁵⁶ Data based on Sovereign Ratings Histories updated through September 2007, Moody's Investors Service.

⁵⁷ See Walde and Ndi, *supra* note 11 at 236:

Common law countries quite generally seem to adhere to principles which do not allow to fetter by contract the executive powers of government or the legislative power of the legislature, except if contracts are concluded within statutory authority or otherwise sanctioned by the legislature. In civil law countries, government agencies need to be explicitly empowered with regard to the content, scope and sometimes procedure of agreements. Often, particularly, for example, in Latin America, there are constraints and rules for government contracting in the constitution, investment and sectoral laws, in general public contract regulations and the laws and regulations applicable to particular government agencies, e.g. Central Banks and other monetary authorities. Contracts concluded by government agencies without sufficient authority and, most likely, in breach of material procedural rules, are *ultra vires* and therefore void....Even if an agreement with authorised scope and content is concluded under applicable law and mandated procedures, most legal

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.

7.2.3. Other reasons

121. 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 developed drafting approach. Other factors mentioned that may influence the disparity include length of investment, market conditions, and distinct industry practices.

systems will recognise unilateral public power prerogatives of government in terms of rescission and amendment, often under the concept of "administrative law contract" ("contrat administratif")

Part 8: Potential Impact of Stabilization Clauses

122. This part of the paper addresses the question: 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?
123. It is not possible to fully understand the potential impact of stabilization clauses on the protection of human rights from this study alone. For example, the research did not attempt to document instances where investors used stabilization clauses to limit the application of new social and environmental laws. Also, the research on economic equilibrium clauses in particular did not consider such relevant issues as pricing and market dynamics for fixed-tariff industries. Nor did it explore the distinct approaches taken by different industries. Moreover, this study did not examine how governmental agencies view and administers these clauses. Subsequent consideration of these issues is needed to develop sufficient understanding of stabilization to support innovations in contract drafting and negotiation practices that can appropriately address any potential impact of stabilization clauses on human rights.
124. The data collected for this study do provide a snapshot of the text of modern stabilization clauses, from which inferences may be drawn regarding the clauses' potential application to new social and environmental laws, even though the text alone does not describe the dynamics of how such clauses may be used, informally or formally, when new social and environmental laws come into effect. 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.
125. 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

126. 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.
127. 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.⁵⁸ 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.
128. 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

⁵⁸ 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.

new laws, and government is either unaware of such noncompliance, or is inefficient at enforcement.⁵⁹

129. 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.
130. 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.
131. 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,⁶⁰ 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.
132. 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 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.

⁵⁹ 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.

⁶⁰ Walde and Ndi, *supra* note 11 refer to equilibrium clauses and also note that the impact may indeed be similar to freezing clauses:

In 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 11 at 265.

8.2. Formal Use of Stabilization Clauses

133. 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.
134. 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 forums 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 forums.⁶¹ Furthermore, About 85 percent of the clauses in this study are either economic equilibrium clauses or hybrids, which have not been questioned on the same legal bases as freezing clauses.
135. 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.
136. 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.
137. 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.
138. 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 investor with an argument that specific provisions of the treaty have been breached. 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;⁶² 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.⁶³

⁶¹ The enforceability of stabilization clauses where the domestic system prohibits such clauses is sometimes more complex if the governing law of the contract is the law of a foreign state or international law and if the jurisdiction for dispute resolution is a foreign court or international arbitration. On the enforceability of stabilization clauses in domestic systems see: Walde, Thomas and George Ndi, "Stabilizing International Investment Commitments: International Law Versus Contract Interpretation," 31 *Tex. Int'l L.J.* 215 (1996), pp. 238–240, also citing: Cf. A.F.M. Maniruzzaman, "Conflict of Laws Issues in International Arbitration," 9 *Arb. Int'l* 371, 282-84 (1993); Sornarajah, M., *The Pursuit of Nationalized Property*, p. 103 (1986); Georges R. Delaume, *Transnational Contracts: Applicable Law & Settlement of Disputes* (re-issue 1992); Julian D.H. Lew, *Applicable Law in International Commercial Arbitration*, p. 348 (1978).

⁶² UNCTAD, *Investor-State Disputes Arising from Investment Treaties: A Review*, Series on International Investment Policies for Development, UNITED NATIONS New York and Geneva, 2005, p. 19.

⁶³ *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).

139. 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.⁶⁴
140. 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.⁶⁵
141. Furthermore, although arbitral decisions relative to bringing contract claims under umbrella clauses in bilateral investment treaties are not consistent,⁶⁶ it is notable that some arbitral practice does support the conclusion that umbrella clauses may support investor contract claims under investment treaties.⁶⁷
142. 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.⁶⁸

⁶⁴ 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>.

⁶⁵ 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>.

⁶⁶ See Schramke, *supra* note 52.

⁶⁷ Schramke, *supra* note 52, pp. 4—14, describing various arbitral decisions, some of which specify that umbrella clauses allow the tribunal to entertain claims of contractual breaches.

⁶⁸ See Cameron, *Peter Stabilization in Investment Contracts and Changes of Rules in Host Countries: Tools for Oil & Gas Investors*, pp. 53—72.

Part 9: Conclusions

9.1. General

143. 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.
144. 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.
145. 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.
146. 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.
147. 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.
148. 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

149. 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

150. As discussed above (paragraphs 90 and 91), the “Human Rights Undertaking” has two features that 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.”⁶⁹ 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.

151. Despite these important features of the Human Rights Undertaking, 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.
152. 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 Human Rights Undertaking.

9.4. Limited Economic Equilibrium Clauses in the OECD Samples

153. 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 Human Rights Undertaking 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

154. 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.
155. 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.⁷⁰
156. 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.

⁶⁹ See Human Rights Undertaking, *supra* note 6.

⁷⁰ Some domestic laws may provide the requirement for mitigation, but it was not possible to track this possibility in this study.

9.6. Transparency of Contracts

157. 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 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.
158. 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.
159. 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 Human Rights Undertaking amendments in 2003 and 2005.
160. 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: Recommendations for Next Steps

Below are recommended follow-up steps based on the findings of this study. Several issues can be addressed at least initially in consultation and then perhaps in follow-up research.

1. Benchmark appropriate and reliably dynamic standards in long-term investment contracts.

One way to avoid the potential of stabilization clauses affecting human rights is to benchmark appropriately high standards for the investment project. 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.

The Human Rights Undertaking takes this approach 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. In this way, the investor has a guarantee that laws and regulations will be in line with recognized standards, and the host state has an ample margin of legislative freedom to fulfill its human rights obligations.

2. Conduct further studies on stabilization.

This research was a first step toward gaining a better understanding of the potential impact stabilization clauses may have on host states' ability to implement new laws, and on how new laws affect investors. Many questions emerging from this study are worthy of follow-up:

- a. Are stabilization clauses necessary, and if so, in what contexts? What are the diverse needs of different sectors or different geographical regions that influence whether stabilization is needed and how it is designed? What factors influence the host government's decision to include stabilization?
- b. From a human rights perspective, what does *good practice* look like in stabilization clauses, considering also the formal enforcement of such clauses? Do the Human Rights Undertaking and models from OECD countries offer good-practice models that can be used elsewhere?
- c. How does the potential for host states' capacity to administer investment projects relate to the design of stabilization clauses?
- d. How do host-state capacity and the skills of negotiators impact the design and scope of stabilization clauses? What can be done to support states' and negotiators' capacity?
- e. What is the appropriate scope of risks (for example, arbitrary and discriminatory laws versus bona fide laws for the protection of human rights) that should be covered in stabilization clauses?⁷¹

3. Hold multistakeholder consultations to discuss the findings of this study.

Since this is the first study of this kind on private investment contracts, it is important to disseminate the findings as widely as possible and ask for comment from a range of stakeholders, including industry groups, companies, civil society representatives, lenders, and subject-matter experts. It also

⁷¹ Walde and Ndi suggest that the domestic implementation of international standards should not be blocked by stabilization clauses. In writing on how arbitrators should interpret stabilization clauses, they write: "Unreasonable attempts to forever fetter a state's regulatory powers (which it may use to adjust legislative terms to international developments) should not be given effect, while a tax stabilization promise made to allow the development of a long-term, high-risk project should be given full effect, at least in the initial and essential phase of investment recovery." Walde and Ndi, *supra* note 11 at 267. Although it is easy to agree with this suggestion in principle, it begs the question whether it is appropriate that arbitrators make such a determination, or whether it is more appropriate that the contract be drafted in a more explicit manner to ensure such an interpretation.

may be useful to invite government agencies to comment. Consultations should be geared toward understanding whether this paper and the data on which it is based are consistent with other evidence of current stabilization practice. Also, consultation should serve to build a fuller understanding of the significance of the findings, and provide additional ideas for recommendations or follow-up research. Issues to explore in consultation include current renegotiation of contracts, information on disputes, and insights into the particularities of different industries.

4. Improve transparency of contracts.

Because long-term investments can have major positive and negative human rights consequences, investors and governments should consider publishing investment contracts and project information that can have a positive effect on rights. Such publication would inform the affected community and provide those in the host state with an important assurance of legitimacy of process. The public sharing of contracts also provides a more level playing field to host states and investors, giving both parties access to a library of contracts to reference when new contracts are negotiated. Furthermore, published contracts are open to public scrutiny, which may mean that parties to those contracts will act with a greater sense of fairness in negotiating them.

5. Continue to study long-term investment projects and their potential and actual impacts on human rights.

Stabilization is just one small aspect of an investment contract, and an even smaller aspect of long-term, cross-border investments and international trade. Understanding the human rights impacts of investment projects requires looking beyond stabilization at other issues, within and outside of contracts. For example, research should address issues such as:

- the types of regulatory frameworks and capacity required prior to and during the implementation of major private investments to maximize the positive human rights impacts of investments;
- the issue of potential corruption associated with the negotiation and implementation of investment contracts;
- methods for achieving meaningful human rights impacts assessments during a project cycle;
- the impact of tax holidays and other financial and nonfinancial incentives granted to attract foreign investments, and the balance of the overall economic bargain of the project, and its benefit and detriment to the host state and its citizens.

Such research can build on this work to help in the understanding of how to develop tools, approaches, and methods of improving the human rights impact of foreign investment generally.