

Reconciling regulatory stability
and evolution of social and environmental standards:

Towards a rethink of stabilization clauses

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Reconciling

- Investors' legitimate need for regulatory stability: regulatory change can undermine the economic equilibrium of the investment project

with

- Host state ability to regulate for sustainable development

Outline

1. Stabilization clauses
2. Implications for social and environmental standards
3. Possible ways forward

1. **Stabilization clauses**
2. Implications for social and environmental standards
3. Possible ways forward

- Clauses to stabilize the rules regulating an investment project (contract, applicable law)
- Different types - “intangibility”, “freezing”, “consistency”, “economic equilibrium”, hybrids
- Increasingly broad scope - from intangibility to freezing, consistency and economic equilibrium clauses
- Int’l arbitrators likely to take them seriously; compensation likely outcome if breached

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Sustainable development

- The policy imperative to balance economic, social and environmental considerations
- Evolving balance as a result of changing needs and legal obligations
- Stabilization clauses: freezing the balance; safeguarding the economic pillar from legally required or socially desirable evolution in social and environmental standards

Stabilization commitments may result in:

- Regulatory chill - making it more difficult to raise social and environmental standards
- Selective regulation - excluding the investment from the application of regulatory change
- Distortions in legal policy - e.g. favouring measures less costly to investor even if less effective

Legal claims and negotiating power in long-term contracts

- Legal claims alone cannot prevent state action backed by political determination and shifting negotiating power
- Legal claims as “bargaining endowments” affecting negotiating power

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1. Learning from better practice:

a) Limiting scope

- Explicit/implicit “compliance with int’l law” exception

Host states may commit themselves not to exercise their sovereign *rights* but not to evade their international *obligations*

- E.g. BTC HR Undertaking; Kashagan PSA 1997; Mozambique Model EPC 2000

b) Evolutionary approach

- New int'l norms do not undermine existing legal obligations...
...but must be taken into account in their implementation (*Gabčíkovo-Nagymaros*)
- In line with nature of economic equilibrium clauses
- “De minimis” exceptions - “material adverse effect”

2. Need for open debate

- Promoting transparency and public scrutiny on contract negotiation and on policy development
- Role of civil society, in the “North” but also in the “South”