Unilateral Commitments to Investment Protection: Does the Promise of Stability Restrict Environmental Policy Development?

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I. INTRODUCTION

In recent years, interest in the relationship between investment law and environmental law has increased significantly. This interest has been focused largely on three fora: (1) disputes that have taken place within the context of Chapter 11 of the North American Free Trade Agreement (NAFTA); (2) the failed negotiations for a Multilateral Agreement on Investment (MAI) under the auspices of the Organisation for Economic

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Co-operation and Development (OECD); and (3) the ongoing attempts to develop a similar agreement in the World Trade Organization (WTO). Some light has also now been shed on the vast multitude of bilateral investment treaties (BITs), which mainly affect countries in the developing world. Still largely neglected in academic discussions of investment and environment are unilateral commitments to investment protection made by developing country governments, either through national legislation or contracts with individual investors. These commitments are unilateral in the sense that they are made by a host state without a reciprocal arrangement, be it bilateral or regional, with the investor's home state. Such unilateral commitments may equal, or even surpass, those commitments made in international treaties and may have significant implications for the regulation of the environment.

This article aims to assess unilateral commitments to investment protection in developing countries, with a specific focus on the promise of stability of the domestic legal framework. In order to provide further context for this discussion, a focus is given to one sector in which state contracts and stabilization clauses are particularly prevalent and well advanced—the mineral sector.

Political risk, which is inherent in all investment, is considered to be particularly acute in the mineral sector, and investments in this sector are generally seen as having a greater need for stability than other shorter-term industrial projects. Large-scale mines are viewed as being especially
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vulnerable because they are capital-intensive investments that cannot be relocated; they use relatively stable production technologies; they produce a homogeneous product with little customer or brand name loyalty; and they operate in an oligopolist industrial structure with limited competitors. Furthermore, investors would argue that, since contracts in this sector are long term in nature, they are susceptible to the ‘hostage effect.’ As a result of the high degree of political risk that they face, mineral investors have pushed for the development of a ‘particularly refined system of contractual guarantees for the protection of their investments.’ At the same time, it is also the case that ‘few if any forms of economic development present the array of potential environmental, social and economic problems of the mineral resources industry.’ The mining sector provides a good case study for the analysis of the relationship between investment and the environment in view of the environmental, economic, and social importance of the sector in many host countries.

This article is structured in the following manner. In section 2, unilateral commitments to investment protection are introduced. In particular, the history and development of state contracts is discussed. Section 3 explains the nature of stabilization clauses and agreements and provides examples from the mineral sector in a number of developing countries. Section 4 examines how commitments to stability might impact the development of environmental policy in developing countries. The article concludes in section 5 with the contention that promises of stability have the potential to restrict the development of environmental policy. Much further research is needed on the environmental policy implications of unilateral commitments to investment protection, in general, and stabilization clauses and agreements, in particular. However, such research will be hampered by the conspicuous absence of transparency in this area.

9 At the initial stage of mineral investment investors are in a strong bargaining position, however, their power wanes dramatically over the period of the contract as investment is sunk into the project, thus leaving them vulnerable to a government wishing to change the terms of the agreement. See Wälde and N’Di, supra note 7.
10 Bernardini, supra note 7 at 236.
II. UNILATERAL COMMITMENTS TO INVESTMENT PROTECTION

In the past two decades, a large number of developing and transition countries have opened their doors to foreign investors, and OECD countries have also deregulated and liberalized their economies. An increase in hospitable investment destinations has led to competition among governments to attract foreign investors.\(^\text{13}\) This competition is particularly evident in the mineral sector. Governments respond to these competitive conditions in a number of ways. One way is to offer incentives—fiscal or otherwise—to attract investors, while another way is to provide investors with certain legal protections. States provide such protection not only through bilateral and regional agreements with other states but also through national legislation and contracts with individual investors. It is the latter two unilateral methods that will be discussed in this article.

1. National Legislation

Two main types of national legislation are relevant to foreign investment protection: general investment codes and specific sectoral (in this case, mineral) laws and policies. Only the latter will be examined in this article. In the majority of countries, minerals are owned by the state, and governments employ a variety of mechanisms to vest mining rights to foreign investors.

Three distinct eras of mineral laws and policies in developing countries can be distinguished: the pre-1960 (colonial) era; the 1960–85 period; and the post-1985 years. These eras correspond with fundamental political changes and paradigmatic shifts in economic and development theory: ‘[M]ineral sector policies and laws are neither random nor capricious. Rather, they tend to be rational reflections of the prevailing world view or paradigm.’\(^\text{14}\)

In the colonial period, there was little need for the development of international law for the protection of foreign investment since, in many cases, the colonial legal systems were integrated into those of the imperial powers, and, in areas that remained uncolonized, the use of ‘gun-boat diplomacy’ by home states was considered an acceptable means of protecting foreign interests abroad.\(^\text{15}\) Following decolonization, many developing countries moved to gain more control over mineral investments, supported by the emerging international norm of permanent sovereignty over natural resources. Numerous investments were nationalized and transferred to newly formed state enterprises. However, the debt crisis, combined with the deterioration in developing countries’ terms

\(^{13}\) C. Oman, Policy Competition for Foreign Direct Investment: A Study of Competition among Governments to Attract FDI, at 15–16 (2000).

\(^{14}\) Otto and Cordes, supra note 8 at I-4.

of trade led to a global movement away from state control of the mineral sector, which began in the late 1970s and gained momentum in the 1980s and 1990s. Structural adjustment programmes, which were developed by the World Bank and the International Monetary Fund, also played an important role in driving this process. Thus, the modern, post-1985 era is marked by a stark shift in attitudes and policy in developing countries and the emergence of a ‘contemporary consensus’ on the benefits of foreign investment. As a result, mining investors currently face a large choice of geologically interesting destinations, and, thus, their investment decisions will be based on a number of factors other than merely the availability of resources.

In the present paradigm, a country with exploitable mineral resources cannot expect to draw in significant investment in the sector if it does not provide a ‘friendly’ investment climate for mineral investors. As such, and given the current desire among countries to attract investment, it is hardly surprising that around 120 countries reformed their mineral regimes between 1985 and 2002. These reforms were generally aimed at liberalization as well as ‘establishing a climate of stability and predictability.’ Many mineral laws now provide for investment protection covering expropriation, non-discrimination, and access to international arbitration. However, such protections are limited when they are only enshrined in national laws ‘which can be modified at will,’ which explains why BITs are of increasing importance to investors. Another important avenue by which investors may secure protection is through a contract with the state.

2. State Contracts
In most developed countries, mining rights are based only on law and regulation. However, developing countries have relied far more on agreements

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20 Otto and Cordes supra note 8 at III-3.

21 E. Bastida, Managing Sustainable Development in Competitive Legal Frameworks for Mining: Argentina, Chile and Peru Experiences 12 CEPMLP Internet J. (2002), <www.dundee.ac.uk/cepmlp/journal>.


with investors referred to as ‘mining agreements’ or more generally as ‘investment agreements’ or ‘state contracts.’ State contracts in the mineral sector that were drawn up in colonial times are generally referred to as ‘concession agreements.’ These agreements gave the investors nearly limitless rights over vast areas of land for long periods of time, while imposing few obligations on investors. During this period, mining companies possessed significant bargaining power as they had the support of their home states. Following decolonization, the bargaining power shifted to newly independent governments, and many mining contracts were renegotiated or nationalized. The types of investment agreements that were negotiated in this period were very different from traditional concessions. Referred to as ‘economic development agreements,’ they were far more focused on the goals of the state in promoting development. This generation of contracts took on new forms such as joint venture agreements, production-sharing agreements, service contracts, contracts of work, and management contracts.

In the modern period, with the increased competition between states for mineral investment, the bargaining power has arguably begun to shift back to favour mining companies. As a result, the newest generation of mining agreements are mainly concerned with investment promotion and protection. While they still contain some development provisions, they are mainly ones that impose minimal economic cost to investors.

Countries may negotiate ad hoc agreements with investors, which will be unique, or provide model agreements to establish the same conditions for several different projects or some hybrid of the two (where model agreements are provided but more specific terms can be negotiated). As state contracts are generally confidential documents, at least for a given period of time (usually until after the project has terminated), model agreements obviously provide more transparency and opportunity for public scrutiny and thus reduce the possibilities for corruption in the negotiation process.

24 UNCTAD, Management of Commodity Resources, supra note 16 at 9; and UNCTAD, Issues in International Investment Agreements, supra note 6 at 3.
25 Peter, supra note 22 at 7; and Otto and Cordes supra note 8 at I-33.
27 Otto and Cordes, supra note 8 at I-42.
30 Otto and Cordes, supra note 8 at IV-18.
32 That having been said, one of the most widely recognized examples of a successful model agreement programme is that of the contract-of-work (COW) system in Indonesia, which operated under the new order regime and has been associated with graft.
Mineral agreements rarely endure for fifty years or more as was possible in colonial times, but they are still long term in nature. For example, a thirty-year contract with renewal clauses would not be uncommon. One could argue that the long duration of mineral contracts is justified by the high costs and high risks that investors face, however, it should also be recognized that this aspect of contracts may cause problems for the host state, as international and domestic political circumstances, government priorities, and, indeed, governments themselves can change over such periods of time.  

III. THE PROMISE OF STABILITY

Changes in the law that may adversely affect an investment are arguably the ‘most feared legal risk of mining investors.’ Investors employ several methods to mitigate risk. They may attempt to spread the risk through joint financing, insure against the risk, or they may employ contractual mechanisms. If the investor is seeking to minimize or remove the risk of adverse change in law, then three key (inter-related) contractual mechanisms will be considered. The first is the choice of law applicable to the contract. Three possible choices of law are possible: the national law of the host state only; international law/general principles of law only; or a combination of national law and international law/general principles of law. In some cases, there is no explicit choice of law clause in the contract, in which case it will be up to the court or tribunal to determine the applicable law.

The second key contractual mechanism is the dispute resolution clause, which indicates where disputes between the parties are to be addressed—either in the national courts of the host country or internationally. If investors are given access to international arbitration, it may be institutional or ad hoc. The most common institutions referred to in state contracts are the International Centre for the Settlement of Investment Disputes (ICSID).

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33 Peter, supra note 22 at 14.
34 R. Pritchard, Safeguards for Foreign Investment in Mining, in Bastida, Waldé, and Warden-Fernández, eds., supra note 11, 73 at 80 (2005).
36 Institutional dispute settlement involves a supervising institution that administers the arbitration. The supervising institution may assist in appointing arbitrators, determining the place of arbitration, determining costs and arbitrator fees, and so forth. The institution charges a fee for the performance of these functions.
37 Ad hoc arbitrations follow sets of established rules, however, in these cases, there is no supervising institution.
38 International Centre for the Settlement of Investment Disputes (ICSID) is a part of the World Bank Group and was established in 1966 when the Convention on the Settlement of Investment Disputes between States and Nationals of Other States came into force. Its most recent set of rules and regulations took effect in 2006 (the rules and regulations are available at <www.worldbank.org/icsid>).
and the International Chamber of Commerce (ICC) International Court of Arbitration. The most common ad hoc rules referred to are those of the United Nations Commission on International Trade Law (UNCITRAL).

The third and final contractual mechanism is the stabilization clause. It is this mechanism that will be the focus of the remainder of this article. However, applicable law and dispute settlement will also be discussed in relation to their effect on the stabilization clause. One of the main difficulties associated with research on stabilization clauses, and investment contracts more generally, is a lack of access to information. Thus, while this section draws on some examples of stabilization clauses and agreements in the mineral sector, it is by no means an exhaustive survey.

1. The Purpose of Stabilization

The purpose of a stability clause is ‘to preserve the law of the host country as it applies to the investment at the time the state contract is concluded’ and to ensure ‘that the future changes to the law of the host country are inapplicable to the foreign investment contract.’ Stability can be said to have both a temporal and an economic dimension:

Stability has a temporal dimension to the extent that it requires the continuity of the contractual relationship towards its successful completion and the achievement of desired objectives as contemplated by the parties. The economic dimension, which is also regarded as the most important indicator of a stable contract order, implies maintaining the contractual equilibrium perceived by the parties throughout the duration of the contract.

Notably, stabilization clauses and agreements are found almost exclusively in developing and transition countries. This is for two main reasons. First, the more a government is viewed by foreign investors as being ‘volatile and unreliable,’ the more the use of stabilization methods will be ‘desired and therefore in most cases required by the mining industry.’ In general, investors view developing and transition countries as more politically unstable

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39 The International Chamber of Commerce (ICC) is a private institution, which handles disputes between firms as well as between states and firms. The current Rules of Arbitration of the ICC came into force in 1998 (the rules are available at <www.iccwbo.org/court/english/arbitration/rules.asp#foreword>).

40 United Nations Commission on International Trade Law (UNCITRAL) was established by the UN General Assembly in 1966 and was given the general mandate to further the progressive harmonization and unification of the law of international trade. An integral part of the commission’s work is the promotion of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The UNCITRAL Arbitration Rules were adopted in 1976 (the rules are available at <www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1976Arbitration_rules.html>).

41 UNCTAD, Issues in International Investment Agreements, supra note 6 at 26.


43 Omalu and Zamora, supra note 23 at 17.
than developed ones. Second, the relative weakness of developing countries in terms of bargaining power, combined with a strong desire to attract investment, makes them accept conditions that developed countries would not consider. As Abdullah Faruque notes, “[t]he host state’s interest in agreeing to a stabilisation clause stems from the need to encourage foreign investment.”

2. The Application of Stabilization

Promises of stability may be either restricted in their application or all inclusive. A comprehensive stabilization clause that freezes the general legislative framework ‘attempts to insulate completely contractual undertakings from any change in the applicable law of a host state.’ Stabilization clauses of limited scope may refer to one or more specific areas of legislation. Stabilization is often sought in the fiscal area (tax laws/royalties), in labour legislation, in export-import provisions, or in the free transferability of currencies. Environmental regulations could fall under these categories. Therefore, even if a stabilization clause does not explicitly refer to environmental regulation it could effectively cover it.

The stability of the fiscal regime is generally understood to be the key issue for investors and is the most common area to be stabilized. Stabilization of fiscal matters could also cover any market-based environmental measures. While the use of measures such as environmental levies and taxes is not yet commonplace in developing countries, there is a global trend towards a greater use of market-based mechanisms, and, thus, it can be expected that developing countries will adopt more of these types of instrument in the future.

Clearly, any stabilization of the general legislative framework applicable to the investment will also cover environmental regulation. However, is there evidence that investors are particularly interested in stabilizing environmental requirements? A poll of investors conducted in 1992 suggests that adverse change in law in the area of environmental regulation is a major concern for mineral investors. The ‘ability to predetermine environmental obligations’ ranked tenth out of sixty possible investment decision criteria in the exploration stage and eighth out of sixty criteria in the mining stage.

44 Wälde and N’Di, supra note 7 at 223.
45 Faruque, supra note 35 at 323.
46 Ibid. at 318.
47 Ibid.; and Peter, supra note 22 at 221.
49 Ibid. at 457.
It seems fair to assume that a survey today would rank this criterion as high, if not higher. Leading investment law experts have also suggested that after the fiscal regime, environmental regulations were perhaps the most relevant area in which to seek stability.\(^{51}\)

It is not necessarily the ‘strictness’ of the environmental regulation in the host country that concerns investors (as the controversial ‘pollution haven’ hypothesis would suggest)\(^ {52}\) but, rather, the uncertainty regarding future changes to the framework.\(^ {53}\) The existing environmental regulatory framework can be factored into a risk-profit assessment before the investment is made, whereas future changes cannot.\(^ {54}\) Investors want predictability, and ‘environmental regulation in developing and transition economies is currently one of the most unpredictable factors facing potential investors.’\(^ {55}\) Thus, it is not surprising that, as discussed later in this article, environmental regulations are now also explicitly referred to in some stabilization clauses and agreements.

3. Methods of Achieving Stabilization

Traditionally, the main method of achieving stability was to insert a stabilization clause into the investment contract. However, in some countries, the national legislation also contains a promise of contractual stability, and, in other cases, contracts are ratified by the legislature and are, thus, effectively stabilized without the addition of specific clauses. Finally, more recently, several governments have provided within their mineral or general investment laws the option of negotiating a separate ‘stability agreement’ or ‘legal stability contract.’ Each of these options for stabilization will be discussed in turn, with reference to environmentally relevant examples.

A. Promise of Stability in National Legislation

Investment codes and national legislation in developing countries commonly contain provisions for the stability of investment contracts, and some countries even have a stability guarantee included in their constitution.\(^ {56}\)

\(^ {51}\) Wälde and N’Di, supra note 7 at 230.

\(^ {52}\) This hypothesis suggests that investors will be attracted to countries with lower environmental standards, potentially also causing industrial flight from developed (higher standard) countries and a subsequent ‘race-to-the-bottom.’ For an excellent overview of the debates surrounding this hypothesis, see the special issue of Global Environmental Politics, vol. 2, issue 2 (2002).

\(^ {53}\) Otto and Cordes, supra note 8 at IV-49.


\(^ {55}\) Verhoosel, supra note 48 at 453–4.

\(^ {56}\) Faruque, supra note 42 at 105.
Although a constitutional guarantee may have some weight, legislative promises of stability are generally considered less enforceable than a contractual clause or a separate stabilization agreement. Nevertheless, legislative promises could still be taken into consideration by an arbitral tribunal.\textsuperscript{57} Algeria’s Mining Act of 2001 is one example of a national law that makes specific reference to the stability of environmental regulations.\textsuperscript{58} Article 84 sets out that a mining lease is to be accompanied by a mining agreement, which should be concluded by the state and the investor, and

\textit{[}the mining agreement, after its effectiveness, cannot be modified but by the written consent of parties. This amendment will be formalised by a rider approved by decree on proposal of the Minister in charge of mines. The mining agreement specifies the obligations and rights of the parties in relation with the legal, financial, fiscal, social and environmental conditions applying to exploitation during its term. It guarantees to the mining claim holder the stability of these conditions during the whole term of the claim according to this law provision.

The Mining Act thus commits the government to stabilize all mining agreements, which may also themselves contain stabilization clauses.

\textbf{B. Stabilization Clause within the Investment Contract}

Contractual stabilization clauses\textsuperscript{59} were reported to have diminished in scope and frequency in the 1970s, but they now appear to be re-emerging in even more extensive forms than were previously observed.\textsuperscript{60} Traditionally, there were three main ways in which stabilization clauses were formulated in investment contracts.\textsuperscript{61} The first option was to prohibit the enactment of any legislation that would adversely affect the investor’s rights. This type of clause could even include the prohibition of nationalization. The second type of clause provided that, in the event of an inconsistency between any legislation enacted in the future and the contract, the latter would prevail. This type of clause could also be extended to ensure that any adverse effects of legislation would be avoided, even in the absence of an inconsistency. Finally, the third type of clause incorporated the host country’s law and froze it at a specific date, thus ensuring that legislative changes would not

\textsuperscript{57} Wälde and N’Di, \textit{supra} note 7 at 240.
\textsuperscript{58} Mining Act of the People’s Democratic Republic of Algeria, Law no. 01–10 (2001).
\textsuperscript{59} It should be noted that there is an important distinction to be made between stabilization clauses and so-called ‘intangibility clauses.’ In the latter case, administrative interference is removed (that is, the government cannot modify or terminate the contract unilaterally). In the case of the former, it is legislative interference that is controlled. See B. Montembault, \textit{The Stabilisation of State Contracts Using the Example of Oil Contracts: A Return of the Gods of Olympia}?\textit{6 Int’l Bus. L.J.} 593 (2003).
\textsuperscript{60} Wälde and N’Di, \textit{supra} note 7 at 218.
\textsuperscript{61} Peter, \textit{supra} note 22 at 215–17.
apply to the investment. These three formulations have been collectively referred to as stabilization clauses *stricto sensu.*

Stabilization clauses *stricto sensu* are still employed in modern agreements, however, new stabilization clauses, which are essentially a hybrid of ‘freezing’ with re-negotiation, have also emerged. Such clauses aim to restore the economic equilibrium of the contract in the event of legislative change and have thus been termed ‘economic stabilization clauses.’ The following clause in a Ghanaian mining lease illustrates this concept:

The Parties acknowledge and agree that this Agreement was made on the basis of the laws and conditions prevailing at the date of the effective conclusion of the negotiation of this Agreement and accordingly, if thereafter, new laws and conditions come into existence which unfairly affect the interest of either party to this agreement, then the party so unfairly affected shall be entitled to request a re-negotiation and the parties shall thereupon re-negotiate. The parties hereby undertake and covenant with each other to make every effort to agree, co-operate, and negotiate and to take such action as may be necessary to remove the causes of unfairness or disputes.

Since this type of clause does not seek to completely prevent the development or application of new legislation to the investment and favours re-negotiation over arbitration (although arbitration is not precluded if the parties cannot come to an agreement), it is more compatible with the notion of state sovereignty and is likely to be preferable to host governments. However, restoring the economic equilibrium of the contract following a legislative change may still have significant implications for the state in terms of compensation or concessions to be made in other areas. Furthermore, determining what the economic impact of the regulation is and, therefore, how the investor should be compensated may be complex, making re-negotiation difficult.

**C. Stabilization of the Entire Investment Contract**

The strength of a mineral contract depends both on the type of legal system in the country and the nature of the act approving the agreement. There are three main ways by which mineral contracts are generally approved: by an act of Parliament; by a decree of the executive or the minister responsible for mines; or by the signature of the minister of mines. A mining

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62 Faruque, *supra* note 35 at 319; and Montembault, *supra* note 59 at 600.
63 Faruque, *supra* note 35 at 321.
66 Barberis, *supra* note 29 at 41–3.
agreement enacted by Parliament provides the most protection to investors as it can effectively stabilize the investment contract, perhaps even against subsequent parliamentary actions. This is particularly the case in civil law systems because specific laws supersede general laws, and contracts are deemed *lex specialis*.67

Indonesia is an example of a country that passes mineral contracts through Parliament. Mineral investment in Indonesia is organized under a contract-of-work (COW) system.68 A COW specifies land rents, royalties, and other payments to be made by the investor to the government. In addition, it describes the environmental obligations of the investor, although these are, for the most part, general statements that ‘lack the specificity required to allow effective inspection and enforcement of their terms.’69

Once approved by Parliament, a COW has the status of law in Indonesia70 and, therefore, ‘provides the foreign investor with stable investment conditions since future legislation or changes in Government policy do not affect the COW.’71 This was a key aspect of a dispute between a number of mining companies and the government of Indonesia following the introduction of a forestry law (Law No. 1999/41) after the fall of the Suharto regime. The law banned open-pit mining in areas that were classified as ‘protection’ forests. However, a large number of investors had COWs covering such areas of forest, and several of them reportedly threatened the Indonesian government with international arbitration and claims of up to US $31 billion in compensation.72

It is unlikely that the investors would have been able to take a claim very far under a BIT or regional investment agreement,73 and, therefore, their best recourse would have been to claim breach of contract, based on the argument that COWs are stabilized. This remains only a conjecture, however, as the dispute was never submitted to arbitration. The government of Indonesia agreed to allow a certain number of companies to proceed with their investments, which resolved the conflict.74

67 Ibid, at 49.
68 At the time of writing, the Indonesian government was in the process of drafting a new mining law, which may radically change, or eliminate entirely, the COW system.
70 Barberis, supra note 29 at 47.
71 Omalu and Zamora, supra note 23 at 18.
72 ‘Indonesian Government Can’t Bury Mining Conflicts,’ Asia Times, 10 January 2004. Other analysts have estimated the potential costs and compensation payments closer to US $22.8 billion.
D. Stability Agreements and Contracts Separate from the Investment Contract

In what appears to be a growing trend, many governments now offer investors the option to negotiate agreements separate from the mineral licence or investment contract, which ensures stability. Various terms ‘stability agreements,’ ‘development agreements,’ or ‘(legal) stability contracts,’ these agreements are referred to in a number of countries’ mineral laws. Many of these agreements only stabilize the fiscal aspects of the investment (that is, taxes and royalties), while others stabilize the entire legal framework or other specific aspects of it. Several recent laws allow investors to stabilize their environmental commitments through such agreements.

For example, in Tanzania, the Mining Act of 1998, which was developed in the context of a World Bank-funded sectoral reform project, permits the minister of mines to enter into a development agreement with the holder or applicant for a mineral right. According to the act, the development agreement may contain provisions binding on the government,

(a) which guarantee the fiscal stability of a long term mining project, and for that purpose, but not otherwise, make special provision for the payment of royalties, taxes, fees and other fiscal imposts;
(b) relating to the circumstances or the manner in which the Minister or the Commissioner will exercise any discretion conferred on them by this Act or the Regulations;
(c) relating to environmental matters, including in respect of matters which are project specific and not covered by regulations of general application, provisions intended to define the scope, and, as may be appropriate in any particular case, limit the extent of obligations or liabilities of the holder of a special mining licence;
(d) dealing with the settlement of disputes arising out of or relating to the development agreement, the administration of this Act, or the terms and conditions of a special mining licence, including provisions relating to the settlement of any such dispute by international arbitration.75

This provision goes even further than traditional stabilization clauses, actually permitting the lowering of environmental requirements. According to a Tanzanian non-governmental organization (NGO), this provision allows the minister to ‘choose to overlook the requirements for the commission and submission to him of an [environmental impact assessment] or an [environmental management plan] for a specific project.’76 Another observer

75 Mining Act of Tanzania, No. 5 (1998) at Article 10 [emphasis added].
describes this clause as a ‘legislative loophole,’ which ‘allows some rules to be suspended or modified in favour of private corporate mining interests.’\textsuperscript{77}

In 2006 Ghana enacted mining legislation that follows the Tanzanian model quite closely, which is perhaps not surprising as it is widely recognized that the government was revising the law in an attempt to make the country ‘more competitive vis-à-vis other regimes such as that adopted by the United Republic of Tanzania’\textsuperscript{78} and had also received the advice of the World Bank (as Tanzania had).\textsuperscript{79} The main difference with Ghana’s law is that the offers to investors are divided into two kinds of agreement: stability agreements and development agreements. These agreements are binding and are subject to international arbitration. A stability agreement ensures that the holder of the mining lease will not, for a period not exceeding fifteen years from the date of the agreement,

be adversely affected by a new enactment, order instrument or other action made under a new enactment or changes to an enactment, order, instrument that existed at the time of the stability agreement, or other action taken under these that have the effect or purport to have the effect of imposing obligations upon the holder or applicant of the mining lease.\textsuperscript{80}

According to the minister of lands, forestry, and mines, Dominic Fobih, the ‘essence’ of this provision is to ‘protect the holder of a mining lease for a period not exceeding fifteen years from being adversely affected by future changes in laws that result in heavier financial burdens being imposed on the holder.’\textsuperscript{81} In addition to the stability agreement, an investor may also enter into a development agreement if the proposed investment will exceed US $500 million. Such an agreement may contain provisions

(a) relating to the mineral right or operations to be conducted under the mining lease;
(b) relating to the circumstance or manner in which the Minister will exercise a discretion conferred by or under this Act;
(c) on stability terms as provided under section 48;
(d) \textit{relating to environmental issues and obligations of the holder to safeguard the environment in accordance with this Act or other enactment; and}
(e) dealing with the settlement of disputes.\textsuperscript{82}

\textsuperscript{80} Minerals and Mining Act of Ghana, Act No. 703 (2006) at s. 48a.
\textsuperscript{81} Memorandum to the Draft Minerals and Mining Bill, 17 May 2005.
\textsuperscript{82} Minerals and Mining Act of Ghana, \textit{supra} note 80 at s. 49 [emphasis added].
The former minister of mines in Ghana has stated that ‘such agreements are mutually beneficial to investors and government as they enable both parties to negotiate and agree on specified commitments and expectations.’

The Ghana National Coalition on Mining (a group of organizations, communities, and individuals) is not convinced of this argument and strongly opposed the inclusion of stability or development agreements in the new law.

The next step for Ghana is to develop a model stability agreement. The United Nations Conference on Trade and Development (UNCTAD) has recommended that this model be drafted in close consultation with industry and Parliament and suggests that the stability agreements of Chile and Peru would provide useful models. In Chile, stability contracts include stabilization of the legal, regulatory, and policy regime in addition to fiscal and other incentives. In Peru, the legal stability agreements are valid for ten years and are offered in a wide variety of sectors with variations in the terms of the agreement by sector. According to an UNCTAD report, the mining, power, hydrocarbon, and infrastructure sectors have the most favourable arrangements.

Columbia also provides for legal stability contracts but takes a different approach than Chile or Peru. Direct investments in certain sectors (including mining), which exceed about US $1.2 million, can obtain contractual protection from adverse changes in national legislation. The contract can have a term of three to twenty years, subject to negotiation. While in Chile and Peru, stability agreements can only cover a predetermined list of areas and there is no option for negotiation of the scope of the terms, in Colombia, the government has adopted a positive list approach, which means that they may agree to stabilize any regulation, unless expressly excluded by law. An UNCTAD report rightly points out that this approach will encourage investors to maximize the regulations that will be covered by the contracts. The report also suggests that this approach may foster disputes and that the ‘scope for future litigation could be immense.’

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84 Memorandum on the Minerals and Mining Bill 2005, submitted by the National Coalition on Mining to the Select Parliamentary Committee on Mines and Minerals, 8 June 2005.


87 UNCTAD, Blue Book on Best Practice, supra note 85 at 18.

88 UNCTAD, Investment Policy Review: Colombia, supra note 86 at 25.

89 Ibid. at 27.

90 Ibid.
4. The Validity and Effect of Stabilization Clauses and Agreements
There has been a long and divisive debate in academia about the validity of stabilization clauses, which has been largely drawn along ideological lines. While it is certainly important to acknowledge this division, from a practical perspective one must also examine the effect that a stabilization clause or agreement will have if it is deemed to be valid by an arbitral tribunal.

A. Validity
In examining the validity of stabilization techniques, there would appear to be three main positions taken by legal experts: the acceptance of stabilization clauses and contracts as being valid, the dismissal of stabilization clauses as being invalid, and the ‘middle ground’ view, which accepts the validity of stabilization clauses but denies them full effect (discussed in the following section).

Those that uphold the validity of stabilization clauses, on the one hand, emphasize the principle of sanctity of contract and argue that if a state can bind itself by a treaty with another state, then it may also bind itself by a contract.\(^91\) Furthermore, they claim that the inclusion of certain clauses in a contract (particularly stabilization and arbitration clauses) has the effect of ‘internationalizing’ the contract. According to this theory, if the contract is internationalized then the obligations within it reside in an external system, which has been called the transnational law of business, general principles of law, or *lex mercatoria*\(^92\).

Those that deny the validity of stabilization clauses, on the other hand, generally focus on the principle of state sovereignty and the succession of laws principle.\(^93\) They disagree with both the notion that a foreign investment contract can be equated with an inter-state treaty (as foreign investors do not have international legal personality) and the idea that state obligations rest in some ‘external’ system rather than in national law. It has even been suggested by one author that the theory of internationalization of contracts was only developed in order to give validity to stabilization clauses.\(^94\)

Furthermore, in the case of contracts in the natural resource sector, there is perhaps even more reason to doubt the validity of stabilization clauses,

\(^92\) UNCTAD, Issues in International Investment Agreements, supra note 6 at 6.
\(^93\) The succession of laws principle provides that the ‘legislative capacity of lawmakers cannot be bound, nor can the executive/public powers of the government be fettered by a contract with a private individual or corporation, i.e. no parliament can bind its successor through a contractual mechanism.’ Otto and Cordes, supra note 8 at IV-22.
\(^94\) Sornarajah, supra note 15 at 408.
given the importance of the doctrine of permanent sovereignty over natural resources.\footnote{Ibid.}

Despite the seemingly intractable academic debate on this issue, tribunals have frequently affirmed the validity of stabilization clauses.\footnote{Verhoosel, supra note 48 at 456. See also L. Cotula, Stabilisation Clauses and Evolution of Environmental Standards in Foreign Investment Contracts, in this volume.} Furthermore, notwithstanding the support for the principle of permanent sovereignty over natural resources, states continue to include commitments to stability in their national legislation and their state contracts. Given these realities, the critical issue would appear to be the extent of the effect of a promise of stability.

\textbf{B. Effect}

Most observers now adopt a middle ground on the validity of stabilization clauses, concluding that while they are not completely meaningless they are unlikely to have their intended effect of prohibiting any state interference in an investment.\footnote{Much of the discussion on the effect of stabilization clauses has focused on the issue of whether they make nationalization unlawful. This issue will not be discussed in depth in this article since my primary interest is in legislative change or government interference in a contract rather than all-out nationalization. For an overview of arbitration cases dealing with the issue of nationalization and stabilization, see T. Begic, Applicable Law in International Investment Disputes (2005).} Those adopting this position focus on the effect of the existence of a commitment to stability, which will be determined by several factors. First, the form of the commitment (that is, contractual clause versus national legislation) and its scope (all inclusive versus restricted) will affect the strength of the commitment and determine its application. Second, the applicable law of the contract will have an affect. If the contract is governed by national law, then ‘constitutional and legal constraints on the contractual capacity of that state’ may limit or negate the effect of a stabilization clause, whereas if international law was chosen as the applicable law of the contract ‘the stability of the contract would appear to be enhanced.’\footnote{Faruque, supra note 35 at 333–4.} However, even when international law is the applicable law, it will not provide a complete guarantee of contractual stability since it is recognized in international law that the state has the right to interfere in a contract when its vital interests are at stake.\footnote{Ibid.}

If a tribunal finds that a government has breached a promise of stability, what is the likely consequence? The most accepted argument appears to be that while stabilization clauses cannot stop a government from ‘doing what it pleases,’ the investor will be entitled to ‘comprehensive compensation’
in the instance of a breach.\textsuperscript{100} Paul E. Comeaux and N. Stephan Kinsella similarly suggest that,

\[ \text{generally, arbitrators will not order specific performance of a concession agreement, even if it contains a stabilization clause, out of respect for state sovereignty and an inability to enforce such an award... Instead a state's violation of a stabilization clause is more likely to affect the amount of damages awarded or the certainty that damages will be awarded.} \textsuperscript{101} \]

The affect of commitment to stability on the amount of damages awarded in the case of a breach has been referred to as a 'stabilization premium,' the amount of which should be determined based on the 'legal weight of the stabilization promise.'\textsuperscript{102}

In addition to increasing the likelihood of receiving compensation, and, potentially, the amount of compensation, several authors also suggest that there is a functional value to stabilization clauses since they can act as a 'bargaining chip' for investors in any re-negotiation of the terms of the contract.\textsuperscript{103} There is also a potential 'deterrent effect' of the stabilization clause, which means that governments will be discouraged from breaching these clauses as it would 'undermine the host government’s credibility to undertake contractual commitments' and could lead to arbitration before an international tribunal, which 'obviously has a negative impact on the host state's reputation, and may entail huge costs.'\textsuperscript{104}

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\textbf{IV. ENVIRONMENTAL POLICY DEVELOPMENT}

The key problem with state contracts, and investment law in general, is the need to balance the legitimate need of the investor for stability with the legitimate need of the regulator for flexibility to respond to changing values, risks, and circumstances. This is the main theme of the recent discussions of 'policy space,' which have largely focused on development policy but are equally applicable to environmental policy. Policy space was the focus of the \textit{World Investment Report 2003}, in which it was argued that for developing countries the most important future challenge in international investment agreements is to 'strike a balance' between trying to increase investment flows through investor protection and trying to preserve policy space, noting that while '[t]oo much policy space impairs the value of international obligations,’ conversely, '[t]oo stringent obligations overly constrain

\textsuperscript{100} Peter, supra note 22 at 227.
\textsuperscript{102} Wälde and N’Di, supra note 7 at 267.
\textsuperscript{103} Peter, supra note 24 at 228; and Verhoosel, supra note 48 at 456.
\textsuperscript{104} Faruqee, supra note 35 at 335.
national policy space.\textsuperscript{105} The report went on to note that the ‘foundation’ of national policy space is the ‘right to regulate, a sovereign prerogative that arises out of a State’s control over its own territory and that is a fundamental element in the international legal regime of State sovereignty.\textsuperscript{106} In addition, the South Centre has argued that the concept also composes the principles of the right to development and to special and differential treatment for developing countries.\textsuperscript{107} In 2004 the issue of policy space received even more prominence at the eleventh UNCTAD conference, where the São Paulo Consensus was adopted, which recognized that

\begin{quote}
\textit{[i]t is for each Government to evaluate the trade-off between the benefits of accepting international rules and commitments and the constraints posed by the loss of policy space. It is particularly important for developing countries, bearing in mind development goals and objectives, that all countries take into account the need for appropriate balance between national policy space and international disciplines and commitments.}\textsuperscript{108}
\end{quote}

The need for flexibility or policy space may be particularly acute in the area of environmental policy making. As Konrad von Moltke reasons,

\begin{quote}
\textit{Environmental management is a dynamic activity, responding to growing knowledge concerning the environment and anthropogenic threats to it, as well as to changing perceptions concerning the seriousness of these threats… An added level of complexity derives from the continuous development of technologies designed to protect the environment. As these technologies become available, policy must adjust to reflect new capabilities.}\textsuperscript{109}
\end{quote}

Governments are pressured both from below (from their citizens) and from above (from international treaties and the international community) to respond to environmental problems, and ‘the presumption of sovereign discretion in this area is likely to be even stronger than that applied to fiscal regimes.’\textsuperscript{110} However, especially in developing countries, it is also clear that the pace of development of new environmental legislation is much slower than the adoption of new policies and laws that aim to liberalize and protect foreign investment.\textsuperscript{111}

\begin{thebibliography}{9}
\bibitem{106} Ibid. at 145.
\bibitem{107} South Centre, Operationalizing the Concept of Policy Space in the UNCTAD Eleventh Mid-Term Review Context, Doc. SC/GGDP/AN/GEG/1 (2006).
\bibitem{110} Otto and Cordes, \textit{supra} note 8 at V-49.
\bibitem{111} Bekhechi, \textit{supra} note 54 at 74.
\end{thebibliography}
In the case of the mineral sector, environmental legislation in developing countries is a relatively recent phenomenon, and governments often lack the relevant tools and manpower to properly enforce the environmental regulations that are in place. Furthermore, there is no comprehensive international agreement on mining. The question then becomes what impact foreign investment protection, in this case the promise of stability, might have on the development of domestic environmental policy and, by extension, on the implementation of any relevant international environmental agreements that may be developed in the future.

1. The Impact of Stability on Environmental Policy Development: Three Scenarios

Three scenarios are possible for the overall impact of stability commitments on the development of environmental policy. The first is that the promise of stability may have no, or negligible, impact. This scenario is possible if the government was, in any case, not interested in, or capable of, improving environmental standards for the project or sector that is covered by a commitment to stability over the period of stabilization. This is more likely to occur if the period of stabilization is very short. It is also possible if the government actually does raise standards, but the investor chooses not to enforce its rights. Some authors suggest that it is very difficult ‘in the current climate’ for investors to ‘rely on legal safeguards negotiated in the past to fend off demands for improved environmental protection, especially if subsequent environmental regulation does nothing but adopt current international practices.’

A second possibility is that stabilization clauses could have a positive impact on the development of environmental policy. This scenario is not likely with the type of stabilization clauses discussed in this article (unless environmental standards in the country were lowered over time). However, there is the potential for investment agreements to take on broader policy initiatives aimed at sustainable development. If investors are really only concerned with the predictability of legislation, and not with the strictness of it, then they could conceivably agree to stabilize their environmental commitments at a higher standard (for example, international best practice).

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113 C.B. Onwuekwe, Reconciling the Scramble for Foreign Direct Investments and Environmental Prudence: A Developing Country's Nightmare 7 J. World Inv. & Trade 113 (2006).
115 Wälde and G. N’Di, supra note 7 at 231.
from the beginning of the contract. Governments could also attach comprehensive environmental management plans to state contracts, outlining the measures that the government intends to pursue in a given period of time, thus allowing investors to plan and assess their costs and risks for at least this period.\footnote{Verhoosel, \textit{supra} note 48 at 478–9.}

The final possibility is that stabilization clauses and agreements could have a negative impact on environmental policy development. Developing countries with scarce resources are unlikely to have the funds available to compensate investors for disruptions to the economic equilibrium of state contracts. If a government changes the environmental regulatory framework of an investment, despite the existence of a stabilization clause and without offering satisfactory compensation, then the conflict could be elevated to formal dispute settlement. The issue of how an international arbitral tribunal might deal with such a dispute is covered quite extensively in the article by Lorenzo Cotula elsewhere in this volume.\footnote{L. Cotula, \textit{Stabilisation Clauses and Evolution of Environmental Standards in Foreign Investment Contracts}, in this volume.} Thus, instead of delving into the case law on stabilization, the next section will examine the negative impacts that stabilization clauses and agreements can have on environmental policy development in the absence of a formal dispute.

2. Negative Impacts of Stability in the Absence of a Formal Dispute

While most research on the relationship between investment law and environmental law and policy focuses on disputes that are resolved in international arbitration, many conflicts between investors and states will likely never reach this stage. Arbitration is a high-risk, high-cost option for both governments and investors.\footnote{According to UNCTAD, countries can expect an average tribunal to cost US$400,000 or more, in addition to the US$1–2 million in legal fees. This is not counting the damages that may be awarded to the claimant if he is successful. UNCTAD, \textit{Investor-State Disputes and Policy Implications}, Ninth Session of the Commission on Investment, Technology and Related Financial Issues, Doc. TD/B/COM.2/62 (2005) at 7.} Furthermore, states are concerned with the effect that formal disputes may have on their reputation as investor-friendly hosts. Although formal dispute settlement is certainly not a desirable outcome, it does at least indicate a willingness on the part of a government to defend the regulation in question. Furthermore, while the concern over tribunal decisions made in several investment-environment cases is merited, given the weak bargaining position of many states, negotiated outcomes may be just as bad, or worse, from an environmental policy perspective.

In this section, it will be argued that, even in the absence of a formal dispute, the promise of stability may slow or stall environmental policy development (the maintenance of the status quo); reduce the coherence,
effectiveness, or efficiency of policies that are developed; and lead to a loss of
democratic accountability in the policy development process.

A. Maintenance of the Status Quo

The ultimate aim of stability is the maintenance of the status quo. It is
generally unlikely that stabilization clauses or agreements would result in
‘regulatory rollback,’ although the Tanzanian mining law described earlier
does cause some concern in this respect. However, the maintenance of
the status quo in environmental policy is by no means a desirable outcome,
particularly in the developing world: ‘If the status quo is as stringent as envir-
onmental regulations are going to get, then the effect will be an entrench-
ment of poor quality regulations, and the entrenchment of differences in the
stringency of those regulations between rich and poor countries.’ This
entrenchment has been alternatively described as the ‘stuck at the bottom’
effect or the ‘stuck in the mud’ phenomenon.

The theory of ‘regulatory chill’ (which first emerged in the context of the
‘pollution haven’ debate) would suggest that regulators fear raising environ-
mental standards beyond the status quo because they believe it might deter
new investment or cause industrial flight. The existence of stabilization
clauses and agreements adds a new dimension to this theory since govern-
ments also fear breaching contractual commitments. This is the ‘deterrent
effect’ of stabilization clauses, which is mentioned earlier. Governments are
deterred, first of all, because a breach of a stabilization clause might have a
negative effect on their reputation among foreign investors:

The host State’s compliance with contractual commitments can increase its reputation as a credible and reliable partner in long term investment. On the other hand, a breach of contractual commitment may bring a reputational cost for the host state in future dealings, not only with companies aggrieved by a breach of promise but also in dealings with all other companies that are aware of the breach.

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120 E. Neumayer, Greening Trade and Investment: Environmental Protection without Protectionism, at 80 (2001).
121 See text accompanying notes 75–7.
125 See special issue of Global Environmental Politics, supra note 52.
127 Faruque, supra note 42 at 94.
In addition, a government might fear breaching a contract if the investor threatens to utilize its access to international arbitration. Several observers have expressed concern that arbitration may be used as ‘an offensive weapon to harass or intimidate.’

Although threats of investment arbitration have occurred in developed states such as Canada, such threats are likely to be a much greater problem in developing countries since ‘[t]here is, of course, bound to be an inverse relationship between the degree of experience and human and financial resources available [in the host country], on the one hand, and the [host state’s] willingness to engage in litigation, on the other.’

This deterrent effect, which leads to regulatory chill, may very well be a major reason why investors seek promises of stabilization. It is an open question whether ‘foreign investors really believe or reasonably expect that regulatory regimes will not be modified over time’ or, instead, whether perhaps they ‘reasonably anticipate changes and only hope for few or minor changes—the chilling effect motivation?’ On the other end of the spectrum, governments arguably might use the existence of contractual commitments as an excuse to maintain the status quo in environmental policy. The idea of ‘political cover’ can be understood as a means for a government to avoid domestic backlash for a failure to act or for an unpopular policy decision by using an ‘our hands are tied’ argument. The existence of a stability promise in a state contract with binding arbitration clauses could be used quite effectively in this way, particularly if a previous government was responsible for the negotiation and signing of the contract.

Discerning when a government is being genuinely constrained by a contractual commitment (regulatory chill) and when it is, instead, using this commitment as a convenient defence for a politically unpalatable position (political cover) is difficult in practice. For example, in the Indonesian case mentioned earlier, one could interpret the government decision to allow open-pit mining to proceed in protected forests, despite the ban on such activities, as either evidence that the threat of arbitration has induced a regulatory chill or that the contractual commitments and the threat of...
arbitration have been used as political cover, deflecting some of the political backlash that nevertheless ensued. In either case, the end result remains negative from the perspective of environmental policy development.

Finally, it is also important to consider the internal political struggles within a government. Promises of stability are not likely to be negotiated by the ministries/agencies that make the social and environmental policies that are affected by them. While environmental ministries/agencies may seek to be progressive in policy development, it may be in the interests of the ministries that negotiate state contracts (mining, economic, foreign, and so on) to ensure the maintenance of the status quo. Ministries involved in investment and economic development are likely to hold a stronger position in the government hierarchy than environmental ones, and the development of binding stabilization clauses may serve to reinforce or even exacerbate these power structures.\footnote{This analysis draws on the ideas in R. Brewster, Rule-Based Dispute Resolution in International Trade Law 92 Va. L. Rev. 251 at 287 (2006).}

\section*{B. Reduced Policy Coherence, Effectiveness, and Efficiency}

One could argue in opposition to the earlier discussion on the maintenance of the status quo that stabilization clauses are only applicable to individual projects for limited periods of time and therefore do not cause a general ‘chill’ in environmental regulation. However, the limited nature of stabilization clauses actually creates further problems in terms of policy coherence. If each investment contract freezes the environmental legislation for one project at a given time, then it is possible for different projects in the same sector to be governed by completely different sets of rules. Furthermore, domestic investors are unlikely to be offered the stability that covers foreign investments and will therefore also be covered by a separate set of rules:

Stabilization clauses that attempt to immunize the contract from normal operation of the succession of laws principle raise serious practical and legal problems for host countries. If this limit on legislative discretion is effectively secured, ten or even thirty years later the project may operate under a legal regime very different from that governing all other economic activities. Moreover, different mining projects may operate under different investment terms. From political, economic, administrative and legal perspectives the acceptability of this result is problematic. The concern is likely to be even greater when contracts freeze preferential terms not available to local investors. This would reintroduce a new form of legal and economic enclave and the dangers envisaged by bargaining theorists.\footnote{Otto and Cordes, supra note 8 at V-23.}

In terms of environmental management, this kind of regulatory incoherence would result in an increased strain on the already limited resources
that developing countries have to devote to monitoring and enforcement activities.

In addition to being confined to specific projects for set periods of time, stability may also be restricted to only certain types of legislation. While the regulatory chill hypothesis suggests that environmental policy development may slow down or stall, if a stabilization clause is restricted in its application the potential impact may be subtler, affecting only the options available to governments in the development of policy. In other words, stabilization clauses and agreements may limit the number of tools in the 'policy toolbox.' For example, as already mentioned, stability of the fiscal regime might preclude the use of a market mechanism to tackle environmental pollution:

A particular feature of those environmental levies and charges is that they are changed regularly, adapting to constantly changing environmental and economic conditions. Hence, a conflict between domestic environmental tax regimes and investment stability will predictably emerge in those countries pursuing sustainable policies.136

If stabilization clauses limit the range of instruments available to regulators, then this may in turn result in a reduction of the effectiveness or efficiency of the policies produced.

C. Loss of Democratic Accountability

Transparency, access to information, and public participation are important elements of both the concept of sustainable development and the ‘good governance’ agenda.137 Ironically, while transparency (on the part of governments) is also touted as a key ingredient of a ‘friendly’ investment climate, the negotiation of state contracts with investors remains a remarkably secretive affair in most countries. In many cases, contracts are negotiated and signed without the involvement of Parliament or the disclosure of

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136 Verhoosel, supra note 48 at 457.
the agreement to the public. Where Parliaments are involved in the process, it is often a matter of ‘rubber-stamping’ rather than genuine participation.\textsuperscript{138}

In addition to being negotiated in fundamentally undemocratic ways, state contracts also give governments a way to avoid political backlash to unpopular decisions. The ability of governments to utilize the contractual commitments as political cover, which is enhanced when the details of contractual commitments are not publicly disclosed from the outset, arguably reduces the democratic accountability of government decisions. It can be concluded, therefore, that the inclusion of stabilization clauses in contracts that are not transparent leads to a loss of democratic accountability in the environmental policy-making process:

Without public scrutiny of foreign investment contracts, it is impossible for citizens to judge whether or not their elected governments are acting in their best interests and effectively pursuing or meeting public policy goals. It is also impossible for them properly to hold their governments to account for consequences of foreign direct investment.\textsuperscript{139}

Inter-state investment agreements are public documents, and, increasingly, international arbitration institutions are acknowledging the necessity of transparency in investor-state proceedings. Arguably, the public interest in state contracts is as high, if not higher, than in inter-state agreements and investor-state disputes. While, in recent years, there have been several international efforts aimed at increasing transparency in the natural resources sector (for example, Publish What You Pay and the Extractive Industries Transparency Initiative), the focus has primarily been on the issue of royalties and the management of public revenues derived from the sector rather than on the overall transparency of contractual commitments made by governments.\textsuperscript{140}

\textbf{V. CONCLUSIONS AND RECOMMENDATIONS}

In this article it has been argued that unilateral commitments to investment protection may equal, or even surpass, those commitments made in international treaties, which have as of late been put in the spotlight. In particular, it focused on the promise of stability in the domestic legal framework. Through a survey of recent mineral laws and contracts, it has been demonstrated that, increasingly, developing countries are providing general and specific commitments to stability, which cover environmental regulation.

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\item[138] IIED briefing paper, \textit{supra} note 5 at 3.
\item[139] Ibid.
\item[140] For information on Publish What You Pay, see <www.publishwhatyoupay.org/english/> and on the Extractive Industries Transparency Initiative, see <www.eitransparency.org/>.
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The validity and effect of these commitments continue to be debated, but a consensus appears to have formed on the requirement for comprehensive compensation in the event of a breach.

There is the potential for commitments to stability, if properly formulated, to have negligible, or even positive, impacts on environmental policy development. However, the clauses and agreements reviewed in this article indicate that many existing commitments are instead likely to be restrictive. Whether stabilization clauses and agreements result in regulatory chill, are used as political cover, or reduce policy coherence, efficiency, and effectiveness, they are likely to have significant negative implications for the evolution of environmental policy in developing countries. Furthermore, commitments to stability, which are often unknown to the general public due to the lack of transparency in the negotiation of state contracts, can reduce democratic accountability in the environmental policy-making process.

Conflicts over contractual breaches may damage a host country’s reputation for investor ‘friendliness’ and can also result in costly investor-state disputes, which developing countries can ill afford. It would appear, then, that developing countries are ‘caught between a rock and a hard place.’ On the one hand, through the progressive development of international environmental law and through development assistance projects, they are being asked to ‘catch up’ with the environmental standards of the developed world. On the other hand, they are expected to be ‘stable’ and ‘predictable’ in order to attract much-needed foreign investment in the face of ever-increasing environmental awareness and continuously evolving technologies.

Given the fact that in many developing countries environmental regulation of foreign investment is minimal to begin with, agreeing to general or specific commitments to stability of the environmental regulatory framework could lock the country into deteriorating environmental conditions. If a developing country is determined to adopt stability commitments, then it should, at the very least, frame the clause or agreement in such a way as to favour renegotiation rather than arbitration. Furthermore, it would be more sensible to stabilize environmental commitments for investors at stricter (international best practice) standards than to stabilize more lenient domestic standards.

Stabilization clauses and agreements covering environmental requirements constitute an emerging and complex issue in international investment law, which to date has largely escaped scrutiny. Many of the developments in this area are very recent and their direction and implications are vastly under researched. This article has been a first attempt to shed some light on the ‘state of the art’ in this emerging area of investment law in at least one environmentally sensitive sector. Further research is required on
commitments to stability, particularly in other environmentally relevant sectors. Unfortunately, such research will be greatly complicated by the lack of access to information concerning state contracts. The confidentiality of state contracts is not justifiable, and greater transparency and public debate over stabilization commitments should be considered a part of the broader push for greater public transparency, democracy, and good governance.