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# Stabilization Clauses in International Investment Law

A Sustainable Development Approach

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# Preface

An imperative of international investment law is to ensure the protection of foreign investors from unfavorable host states' conduct. Stabilization clauses are an essential instrument to achieve such protection. The foundation of stabilization clauses is however challenged by the inherent tension between two legitimate courses: the quest for guaranteeing the legal security of foreign investment and the need to preserve the host state's freedom to protect the public interest. This challenge is evidenced by the antinomy between the host states' stabilization promises undertaken toward foreign investors for maintaining the stability of the legal and contractual regime governing their investment projects and the host states' commitments undertaken toward their citizens for continuously regulating areas of environmental protection and social welfare.

Arguably, such an antinomy may be intensified further by the increasing presence in international and national law of the concept of "sustainable development"—a development paradigm that aims at the integration and balancing of economic development, environmental protection, and social welfare objectives. This concept could serve as the rationale and/or justification for the host states to exercise their power to regulate.

This book addresses and attempts to reconcile the stabilization clause/regulatory power antinomy in international investment law. In addition to examining the traditional and contemporary legal discourses over stabilization clauses, which constitute the foundation of this work, the book defines the actual legal dimension of the concept of sustainable development in international and national law and explores the potential role that this concept can have in such a reconciliation effort. It then endorses the thesis that "sustainable development", if approached constructively, has the potential to mitigate the negative effects of stabilization clauses on the host states' power to regulate environmental and social areas and thus to reconcile the identified antinomy.

This book is the result of my doctoral studies at Bucerius Law School, Hamburg, Germany. The idea of writing it dates back to my Master of Law and Business (MLB) studies at Bucerius Law School and Otto Beisheim School of Management,

where I delved into the disciplines of international investment law and international arbitration.

I am indebted to Prof. Karsten Nowrot for his inspiring insights on international investment law and for introducing me to the contemporary legal discourse over stabilization clauses. Next, my profound gratitude goes to Prof. Clifford Larsen, Dean of the LLM/MLB Program, for his invaluable encouragement and support over the years of my doctoral research at Bucerius Law School. I am equally grateful to my supervisor and first examiner Prof. Jörn Axel Kämmerer. This book would not have been realized without his academic support and guidance through complex and often disputed legal issues. Much appreciation goes also to my second examiner, Prof. Stefan Kröll, for his openness and valuable thoughts during our discussions.

My work at the international arbitration practice of Luther Rechtsanwalts-gesellschaft in Hamburg was also a great opportunity for enriching my doctoral project with practical insights.

I particularly remain thankful to the German Academic Exchange Service (DAAD) and the Excellency Fund of the Albanian Government for the financial support of different periods of my doctoral research in Hamburg, Germany. I am also grateful to the staff of Bucerius Law School, particularly the librarians of the Hengeler Meuller library, as well as to the librarians of the University of Hamburg, Max Planck Institute for Comparative and International Private Law, and ZBW—Leibniz Information Centre for Economics.

I finally wish to thank wholeheartedly Magdalena Kaljaj and her family for making Hamburg my second home, as well as other colleagues and friends who supported me in accomplishing this project.

I dedicate this book to my husband, Plarent Ruka, for his love and encouragement, as well as to my parents and my brother for their support and confidence.

Tirana, Albania  
April 2018

Jola Gjuzi

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(The texts of International Investment Agreements (“IIAs”) are publicly available, primarily at United Nations Conference on Trade and Development (“UNCTAD”) <http://investmentpolicyhub.unctad.org>, as well as at the websites of individual governments (prominently the Government of Canada and the Government of the United States of America), regional organizations, or private operators, such as [www.italaw.com](http://www.italaw.com) and [www.investorstatelawguide.com](http://www.investorstatelawguide.com). Where the text of an IIA is found in sources other than the above, the individual online reference is reproduced in this *Table of Treaties, International Instruments, National Legislation, and Investment Contracts*).

The source of national legislation and investment contracts used in this book, when taken from academic contributions, is indicated in the respective footnote and not in the *Table of Treaties, International Instruments, National Legislation, and Investment Contracts*).

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## **National Legislation, Foreign Investment Contracts, and Model Contracts**

### ***Albania***

- Albanian Mining Law no. 7796, dated 17 Feb 1994
- Constitution of Albania, 1998
- Concession Agreement between the Ministry of Public Economy and Privatization and the Turkish company Ber-Oner for some objects in the copper and chrome industry, as well as on the granting of certain incentives and guarantees to the concessionaire under this Agreement, ratified by Law no. 8761, dated 2 April 2001, as amended by another agreement between the parties approved by Law no. 73, dated 27 April 2017 [*“Ber-Oner Mining Contract, 2001”*]
- Petroleum Agreement between the Albanian state-owned oil company Albpetrol SHA and Sherwood International Petroleum Ltd for the development and exploitation of petroleum in Kuçova Oilfield approved by Council of Ministers’ Decision no. 686, dated 19 Oct 2007
- Concession Agreement between the Ministry of Economy, Trade and Energy and EVN AG, Statkraft SA, Devoll Hydropower SHA relating to the design, financing, construction, ownership, operation, maintenance and transfer of the Devoll River hydropower project in the Republic of Albania, 19 Dec 2008, ratified by Law no. 10083, dated 23 Feb 2009 [*“Devoll Hydropower Project Concession Agreement, 2008”*]
- Albanian Law on Concessions/PPPs no. 125/2013, dated 25 April 2013
- Host Government Agreement between the Republic of Albania, represented by the Council of Ministers, and Trans Adriatic Pipeline AG, in relation to the Trans Adriatic Pipeline Gas Project (TAP Project) ratified by Law no. 116/2013, dated 15 April 2013, as amended by agreement of the parties in 2017 ratified by Law no. 53/2017, dated 13 April 2017 [*“Albania - Trans Adriatic Pipeline HGA, 2013”*]
- (Note: Albanian legal and sublegal acts are available in Albanian language in the website of the Albanian Official Publications Center. [www.qbz.gov.al](http://www.qbz.gov.al).)