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Concession Agreements: From Private Contract to Public Policy

ABSTRACT. Many concession agreements between governments of developing countries and corporations have failed to produce expected infrastructural, monetary, and efficiency gains. This Note argues that these agreements fail in part because the parties construct them as traditional private contracts. Given their subject matter, their noneconomic focus and purposes, and the ways in which they shape future economic development strategy, international policymakers and business leaders should conceptually and procedurally recast concession agreements as traditional matters of public policy. This reinterpretation will make the agreements more stable and successful by making their costs and benefits more transparent, their drafters more accountable to the populations they are intended to benefit, and their terms more responsive to the concerns of those populations.

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INTRODUCTION

In September 1999, the Bolivian government signed a forty-year concession agreement with Aguas del Tunari, a consortium led by a British subsidiary of Bechtel, for water supply and sanitation services in Cochabamba, Bolivia.¹ Six months later, the government cancelled the agreement amid sustained and escalating rioting by the local population and returned responsibility for the water service to the municipal authority.² Although the Cochabamba concession is remarkable for its swift and abject collapse, its fate is part of a larger pattern.

A concession agreement is an agreement between a government and a private company (the “concessionaire”), in which the government transfers to the company the right to maintain, produce, or provide a good or service within the country for a limited period of time, but the government retains ultimate ownership of the right.³ A substantial number of these agreements signed between the governments of developing countries and foreign corporations have recently failed, across many different subject matters and geographic areas.⁴ In the water industry alone, at least seven major concession agreements have collapsed in the last decade.⁵ Some experts estimate that as

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1. Andrew Nickson & Claudia Vargas, *The Limitations of Water Regulation: The Failure of the Cochabamba Concession in Bolivia*, 21 BULL. LATIN AM. RES. 128, 128 (2002).
 2. William Finnegan, *Leasing the Rain: The World Is Running Out of Fresh Water, and the Fight To Control It Has Begun*, NEW YORKER, Apr. 8, 2002, at 43.
 3. See ORG. FOR ECON. CO-OPERATION & DEV., POLICY BRIEF: COMPETITION POLICY AND CONCESSIONS 1 (2007), available at <http://www.oecd.org/dataoecd/12/47/38706036.pdf>.
 4. See, e.g., Young Hoo Kwak, *Analyzing Asian Infrastructure Development Privatization Market*, J. CONSTRUCTION ENGINEERING & MGMT., Mar.-Apr. 2002, at 110 (detailing the failure of roughly thirty percent of the power, transportation, and water concession agreements awarded in twelve Asian countries from 1985 to 1998); John A. Gray, *Forest Concession Policies and Revenue Systems: Country Experience and Policy Changes for Sustainable Tropical Forestry* 53-66 (World Bank, Technical Paper No. 522, 2002) (discussing the large-scale failures of forestry concession agreements in Central and Southeast Asia and West Africa); J. Luis Guasch, Jean-Jacques Laffont & Stéphane Straub, *Renegotiation of Concession Contracts in Latin America* 23 tbl.3 (World Bank, Policy Research Working Paper No. 3011, 2003), available at http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2003/04/25/000094946_03041204014593/Rendered/PDF/multiopage.pdf (noting a fifty-two percent renegotiation or failure rate within three years for infrastructure concessions in Latin America in the 1990s).
 5. See, e.g., DAVID HALL, WATER PRIVATISATION IN LATIN AMERICA 4 (1999), available at <http://www.psiru.org/reports/9909-w-latam.doc>; Kathleen Slattery, Inst. for Pub.-Private P'ships, Inc., *What Went Wrong; Lessons from Manila, Buenos Aires, and Atlanta* (2004), http://www.ip3.org/pub/publication2003_002.htm. See generally Guasch et al., *supra* note 4,

many as fifty percent of all concession agreements signed since the mid-1980s have been renegotiated or cancelled.⁶ This Note seeks to aid the understanding of why these concession agreements break down. It argues that concession agreements fail because their governmental function clashes with their private method and venue of creation.

In their regulatory, proprietary, and administrative capacities, governments perform a variety of functions, not all of which qualify as public policy creation. Under the rubric I set forth, a government creates public policy when it addresses a subject matter that the populace views as properly a matter of public concern, and when its actions are likely to affect broadly the public's well-being. This definition of public policy tracks that found in legal dictionaries⁷ and in the work of political scientists Charles L. Cochran⁸ and Steven Kelman.⁹ Given the breadth of this definition and its mix of both objective and context-specific components, what qualifies as public policy will necessarily vary based on the history and conditions of a given country.¹⁰

at 23 tbl.3 (noting that seventy percent of Latin American water concessions have failed or been renegotiated, ninety percent of those within three years of their creation).

6. See, e.g., Antonio Estache, *PPI Partnerships vs. PPI Divorces in LDCs*, 29 REV. INDUS. ORG. 3, 4 (2006).
7. See, e.g., BLACK'S LAW DICTIONARY 1267 (8th ed. 2004) (defining public policy as "standards regarded . . . as being of fundamental concern to the state and the whole of society"); 8 THE GUIDE TO AMERICAN LAW 351 (1984) (defining public policy as "manifest[ing] the common sense and common conscience of the citizens as a whole that extends throughout the state and is applied to matters of public health, safety, and welfare" and the "general, well-settled public opinion relating to the duties of citizens to their fellow citizens . . . that fluctuates with the changing economic needs, social customs, and moral aspirations of the people").
8. See, e.g., CHARLES L. COCHRAN & ELOISE F. MALONE, PUBLIC POLICY: PERSPECTIVES AND CHOICES 1 (3d ed. 2005) (defining public policy as "government decisions and actions designed to deal with a matter of public concern").
9. See STEVEN KELMAN, MAKING PUBLIC POLICY: A HOPEFUL VIEW OF AMERICAN GOVERNMENT 5-6 (1987) (defining public policy as "a set of governmental actions . . . that have effects on people's lives, positive or negative" and the result of a process that "starts with ideas citizens have about actions they want the government to undertake").
10. Some measures, such as the provision of potable water or major infrastructural projects, are viewed as matters within the public arena in most, if not all, countries. See *infra* notes 101-103 and accompanying text. But others, such as provision of housing or healthcare, will depend more on the demographics and traditional role of the government in a particular country. See, e.g., Carles Muntaner et al., *Venezuela's Barrio Adentro: An Alternative to Neoliberalism in Health Care*, 36 INT'L J. HEALTH SERVICES 803, 803 (2006) (noting that all Latin American countries except Cuba shifted to view healthcare as a private market rather than public policy in the 1990s based on industry performance, economics, and political ideologies).

In effective governance, the function that the government performs matches the method and venue the government uses.¹¹ Typically, to create public policy, an efficient government uses a highly visible and transparent venue (for example, a legislature or publicly accessible meeting) and an openly participatory and deliberative method (for example, a bill passage procedure).¹² By contrast, to make a personal deal, two people or groups work in a private venue through the insular method of bilateral negotiation.¹³ When a potential conflict arises between the function and the method or venue, an effective government will mediate the conflict through procedural reforms. For example, an American administrative agency (a generally opaque venue) introduces a public notice, comment, and debate period (a more participatory method) when it engages in public policy rule making.¹⁴

Part I of this Note explains that governments and concessionaires (that is, the private companies that enter into concession agreements) often conceive of and create concession agreements as traditional bilateral contracts, soliciting, negotiating, and enacting them in an opaque venue and by an opaque method involving only a few high-level government officials, lawyers, and company representatives. Part II shows how the venue and method of concession agreements' creation contribute to the agreements' failures by inducing government officials to make ineffective policies and by exacerbating local opposition to the agreements. Part III argues for reconceptualizing concession agreements as traditional matters of public policy; it then suggests some

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11. See, e.g., KELMAN, *supra* note 9, at 209 (noting that we can “judg[e] if the policy-making process tends to produce good policy by examining features of the process”).
 12. *Id.* at 23; Pablo T. Spiller & Mariano Tommasi, *The Institutional Foundations of Public Policy: A Transactions Approach with Application to Argentina*, 19 J.L. ECON. & ORG. 281, 290 (2003) (arguing that the U.S. Congress’s institutional design enables it to create public policy effectively and comparing it favorably to countries with weak legislatures where “political exchanges will take place in alternative settings that will tend to be less formal, more uncertain, and harder to monitor, observe, and enforce”).
 13. The reason for this is that it would be inefficient, ineffectual, and normatively unnecessary to bring the issue into public debate because the deal will not substantially affect the welfare of people not a party to the deal, or the public does not view it as an issue of public concern. For the purposes of this Note, then, public debate can be viewed as imposing transaction costs that outweigh the benefits of the debate where the issue does not affect the public.
 14. See, e.g., 5 U.S.C. § 553 (2000); Recommendations of the Administrative Conference of the United States, 41 Fed. Reg. 29,653, 29,654-55 (July 19, 1976) (“Agencies should afford interested persons the opportunity to participate as effectively as possible in notice-and-comment rulemaking proceedings. Therefore, in order to enlarge the opportunity for public participation and increase its effectiveness, agencies in appropriate circumstances should utilize procedures . . . which go beyond a single notice and opportunity to comment and supplement . . .”).

procedural reforms to eliminate the identified mismatch and thus increase the sustainability and efficiency of concession agreements.

Scholars and advocates have suggested many large-scale substantive changes to concession agreements. This Note does not attempt to address the merits of these suggestions, which include schemes to alter the number or subject matter of concession agreements agreed to by foreign governments,¹⁵ their duration,¹⁶ and the regulatory regimes that should surround them.¹⁷ Instead, this Note provides a novel explanation for concession agreements' failures and sets the groundwork for procedural remedies to enhance their viability.

I. THE PRIVATE, CONTRACTUAL CREATION OF CONCESSION AGREEMENTS

This Part describes how actors currently create concession agreements as traditional bilateral contracts. It focuses on two aspects of the process—prevention of democratic consideration and insulation from public knowledge.

Governments, concessionaires, and scholars traditionally treat concession agreements as private, bilateral contracts between high-ranking national officials and the concessionaire company. Two aspects of the creation process reveal this approach. First, officials preclude broad, open deliberation at each stage of the creation of concession agreements: they remove initial debate over the agreements from legislative procedure; negotiate the agreements directly with prospective concessionaires; and give the signed agreements the immediate force of law. Second, the parties shield the agreements from public

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15. See, e.g., DAVID HALL ET AL., WATER PRIVATISATION AND RESTRUCTURING IN ASIA-PACIFIC 3 (2004), available at <http://www.psuru.org/reports/2004-12-W-Asia.doc>; Emanuele Lobina, *Problems with Private Water Concessions: A Review of Experiences and Analysis of Dynamics*, 21 INT'L J. WATER RESOURCES DEV. 55, 77-78 (2005).
 16. See, e.g., Sudong Ye & Robert L.K. Tiong, *The Effect of Concession Period Design on Completion Risk Management of BOT Projects*, 21 CONSTRUCTION MGMT. & ECON. 471, 472, 474 (2003) (discussing the length and structure of concession periods in a specific contract setting); Xueqing Zhang & Simaan M. AbouRizk, *Determining a Reasonable Concession Period for Private Sector Provision of Public Works and Services*, 33 CANADIAN J. CIV. ENGINEERING 622, 623 (2006).
 17. See, e.g., Paul Cook, *Privatization and Utility Regulation in Developing Countries: The Lessons So Far*, 70 ANNALS PUB. & COOPERATIVE ECON. 549, 550-52 (1999); David Parker, Colin Kirkpatrick & Catarina Figueira-Theodorakopoulou, *Infrastructure Regulation and Poverty Reduction in Developing Countries: A Review of the Evidence and a Research Agenda*, 47 Q. REV. ECON. & FIN. (forthcoming 2007) (manuscript at 5-9), available at http://www.competition-regulation.org.uk/conferences/Brazil/Papers/Parker_Kirkpatrick_Figueira.pdf (discussing regulation of foreign investment in development infrastructure).

knowledge or influence: they provide the public with limited information about the concessionaire selection process and content of the concession agreements, and limited influence over the result.

A. Preventing Democratic Deliberation

Executive government officials treat concession agreements as private contracts by precluding democratic deliberation at each step of the process. First, they initially prevent the legislature from debating the merits of pursuing a concession agreement. This removal clearly distinguishes the concession agreements from other matters of domestic public policy created through deliberative legislative action, both in the United States¹⁸ and the countries discussed in this Note.¹⁹

In many developing countries, parties face preliminary difficulties in pursuing concession agreements. Many national constitutions and statutes require majority state-ownership and maintenance in the sector of the desired concession agreement.²⁰ Even where no formal statutory barriers to the agreement exist, practical obstacles, such as the dearth of standardized rules or organized oversight regimes governing concessions, remain.²¹

To address these initial obstacles to concession agreements, the government official who spearheads the effort (often a member of the executive branch) frequently makes unilateral decisions. The official will simply ignore the limiting constitutional or statutory provisions, as well as practical obstacles, and will often negotiate an agreement that seems to conflict with existing domestic law.²² Or, the official will clear these obstacles through pronouncement. For example, in 1997, the President of Bolivia used an

18. See, e.g., *Twin City Pipe Line Co. v. Harding Glass Co.*, 283 U.S. 353, 357 (1931) (“Primarily it is for the lawmakers to determine the public policy of the State.”). Where the venue of creation is not initially democratically accountable, U.S. policymakers will often move to make the process more accountable. See *supra* note 14 and accompanying text.

19. My analysis presumes that an alternative, more transparent process exists through which these concession agreements could be set up, negotiated, and enacted. It therefore fails to adequately capture those authoritarian governments in which public policy is never created through open deliberation.

20. For an excellent survey of such laws, see Ha-Joon Chang, *Regulation of Foreign Investment in Historical Perspective*, 16 EUR. J. DEV. RES. 687 (2004).

21. Bolivia, for example, had neither a true executive department to oversee water concession agreements nor any coherent procedure for choosing a concessionaire or agreeing to a concession prior to 1999. Nickson & Vargas, *supra* note 1, at 133-35.

22. This is made possible by the process’s lack of transparency and insular negotiation. See *infra* Section I.B.

executive decree to enact the legislation that ultimately paved the way for the Cochabamba concession by establishing the Office of Water Regulation and the procedures for concession agreements.²³ In the Philippines, President Ferdinand Marcos enacted Presidential Decree Number 705, which allowed the newly created Forestry Department to enter into service contracts “with any foreign person or entity” for “exploration, development, exploitation or utilization of the forest resources.”²⁴ Even when these provisions to enable concession agreements technically do pass through the legislature, international actors and government officials often fast-track them without much time for vigorous debate. The president or other government official—sometimes influenced by major international actors such as the World Bank or International Monetary Fund—employs such a heavy hand that he or she effectively circumvents the legislative process.²⁵ Thus, government officials treat concession agreements as bilateral contracts by precluding effective legislative consideration at the earliest stages of the agreement.

This contractual treatment extends beyond the early planning stages of concession agreement creation and through the negotiation and enactment phases. Participants also treat concession agreements as traditional bilateral contracts when they engage in private, bilateral negotiations over the terms of the agreements. A small cadre of government officials often negotiates the contract outside of a democratic or legislative procedure. Government officers personally meet the preselected private company and lawyers, in small groups away from the legislature and the public, to discuss the terms of the concession agreement as though it were a traditional private contract. In the case of the Cochabamba concession, a government team that consisted of the Deputy Minister of Privatization, a local official, the appointed electricity regulator, and

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23. Nickson & Vargas, *supra* note 1, at 132-34. The Office of Water Regulation currently exists as “the Sectoral Superintendency for Basic Sanitation.” *Id.* at 133, 135.
 24. Revised Forestry Code of the Philippines, Pres. Dec. No. 705, § 62, 71:28 O.G. 4289, (May 19, 1975) (Phil.). Executives are more commonly able to use pronouncements to overcome obstacles to concession agreements in countries such as the Philippines that lack a full-fledged democracy.
 25. For example, the World Bank or International Monetary Fund may either intercede directly or make loans only on the condition that the legislature liberalizes state ownership requirements or privatization. See, e.g., BENEDICTE BULL, ALF MORTEN JERVE & ERLAND SIGVALDSEN, CENTRE FOR DEV. AND THE ENV'T, THE WORLD BANK'S AND THE IMF'S USE OF CONDITIONALITY TO ENCOURAGE PRIVATIZATION AND LIBERALIZATION: CURRENT ISSUES AND PRACTICES 24 (2007), available at http://www.sum.uio.no/publications/pdf_fulltekst/report_13.pdf; Sara Grusky, Global Challenge Initiative, Presentation to the National Forum on Water Privatisation, Accra, Ghana: The World Bank, the International Monetary Fund and the Right to Water (May 2001), available at <http://www.isodec.org.gh/Papers/saragruskyMay2001.PDF>.

the appointed water regulator met directly with the proposed concessionaire officials to conduct the negotiation.²⁶ In Manila, the world's largest water concession agreement was negotiated between President Gloria Macapagal-Arroyo, the Economic Planning Secretary, the Chief Government Corporate Counsel, and representatives from the company that would be granted the concession, Maynilad Water Services, Inc.²⁷

Finally, once the parties set the terms of the concession agreement, the same insulated group signs the agreement, and it gains the immediate force of law as a contract.²⁸ For example, the parties signed the Cochabamba concession agreement on September 3, 1999, and Aguas del Tunari began its operations in Cochabamba in November 1999.²⁹ The agreements do not need to gain any legislative approbation.³⁰ Thus, as with traditional bilateral contracts, concessionaires and government officials set up the agreements outside of the legislature, negotiate concession agreements privately, and give the concession agreement the force of law upon enactment.

B. Insulation from Public Knowledge or Influence

Officials also treat concession agreements as private contracts by limiting public influence and access to information. The extralegislative process by which the parties create concession agreements not only circumvents democratic deliberation, but also limits the public's ability both to acquire knowledge about the selection of concessionaires and the terms of the agreement and to exert any influence on these issues.

Government officials often disseminate little information about the concession bidding and bid selection procedure.³¹ They may withhold information from the public about the method by which they solicit bids or whether prospective bidders must meet a prequalification condition to qualify for consideration. The government may not make clear whether

26. Nickson & Vargas, *supra* note 1, at 135, 136 n.11.

27. Maitet Diokno-Pascual, Bantay Tubig, Lessons from the Suez-Maynilad Water Venture 2-3 (Oct. 18, 2004), <http://www.ipd.ph/Bantay%20Tubig/web-content/Updates/PDFFiles/Lessons%20from%20Suez-Maynilad%20final%20over.pdf>.

28. *See id.*

29. Nickson & Vargas, *supra* note 1, at 136-37.

30. Again, even where concession agreements technically must pass through the legislature, passage can be merely a formality as they are often fast-tracked and aided by the president or the influence of a major international force, just as they can be in the planning stages. *See supra* note 25 and accompanying text.

31. *See, e.g.,* Lobina, *supra* note 15, at 66-67.

concessionaires must have some connection to the government, a proven track record in the industry, or a minimum amount of available capital in order to qualify for consideration, and whether each of the candidates considered meets any or all of these qualifications. For example, in a concession agreement to access road connections into Bogotá, Colombia, the government officials unilaterally cancelled a public bid prequalification system and did not make clear whether the accepted bidder met any prescreening requirements.³²

Furthermore, the government officials who make the final choice often decline to discuss publicly the reasons behind their final choice among the qualified bidders. The selection criteria may vary greatly and play a large part in determining the allocation and amount of benefits distributed. For example, if the award is based on the highest bidder (as in freight railway concessions in Mexico, Brazil, and Argentina³³) the benefits will initially accrue to the government, which gains maximum short-term revenue. But if the award is based in part on the lowest price for the service (such as in bus operation contracts in Santiago³⁴), or the highest number of employees retained (as in the Argentine freight railway concessions³⁵), it will directly benefit consumers or employees, respectively.³⁶ However, in the case of some concession agreements, the government entity never states how or why it chose the particular bidder from the “qualified” group.³⁷

Second, the executive government official may withhold the agreement’s general content, or even its existence, from the public until after the agreement becomes binding. Stakeholders may not even be aware of the agreement until after its implementation. For example, in the Cochabamba case, the parties only released the terms of the concession agreement after it was awarded.³⁸

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32. See PAULINA BEATO, INTER-AM. DEV. BANK, ROAD CONCESSIONS: LESSONS LEARNED FROM FOUR COUNTRIES 5 (1997), available at <http://cdi.mecon.gov.ar/biblio/docelec/MU2013.pdf> (“Colombian regulations require a public bid for concession roads. However, if the public authority declares the bid vacant . . . it can then contract directly with a supplier. This has often been the case. For instance, the projects *El Cortijo-El Vino* and *Cali-Candelaria* were declared vacant and were later negotiated with a sole bidder.”).
33. L. Nicola Shaw, Kenneth M. Gwilliam & Louis S. Thompson, *Concessions in Transport* 14 (Transport Div., World Bank, Discussion Paper No. TWU-27, 1996), available at http://www.worldbank.org/transport/publicat/twu_27.pdf.
34. *Id.* at 28.
35. *Id.* at 29.
36. *Id.* at 14.
37. This has led some commentators to infer that selection results from anticompetitive practices or from inducements at the bid competition or selection stage. See, e.g., Lobina, *supra* note 15, at 59-60.
38. Nickson & Vargas, *supra* note 1, at 147.

Given the short turnaround time of two months between enactment and the start of operations, most people likely did not hear about the terms that affected them until Aguas del Tunari assumed control. In Malaysia, the water agreement between the concessionaire Syabas and the federal and Selangor state governments was still not declassified eleven months after the agreement's implementation, and people only learned the terms of the agreement piecemeal from a brokerage company when they faced a raise in their water rates.³⁹ Furthermore, even if the public does receive information about the concession agreement, they will likely receive an uncontested, positive gloss on the terms because the government officials and the concessionaire company, as the only parties privy to the negotiations, have a near monopoly on information and a bully pulpit for spinning the information.

Finally, even where members of the public do obtain information about the proposed concession at a stage prior to enactment, actors who are not a party to the negotiations retain little ability to influence the outcome. While some international actors, such as the World Bank, International Monetary Fund, or foreign governments, may have a voice because of their financing clout,⁴⁰ the government negotiators rarely confer with local stakeholders—such as the citizens and businesses most directly affected by the plan, interest groups with reason to oppose the plan, or other policymakers—to discuss the attractiveness, effects, or feasibility of the plan's provisions.⁴¹ For example, in Cochabamba, the government did not meet with any local citizens or groups to solicit opinions or gauge the ramifications of the plan.⁴² Furthermore, the insularity of the plan's creation leaves local people or groups outside the process with little meaningful recourse to express their apprehensions, even though their vantage point may give them more insight into the project than those

39. Charles Santiago, *Murky Figures Cloud Water Tariff Hikes: Challenges and Issues of Governance in Water Management in Malaysia*, ALIRAN MONTHLY, Issue No. 11/12, at 29-30 (2005) (Malay.), available at <http://www.aliran.com/oldsite/monthly/2005b/11f.html>.

40. See *supra* note 25 and accompanying text.

41. For an excellent discussion of just such a problem in the La Paz and El Alto water concession, see Andrea Kramer, *Conflict Sources in La Paz and El Alto*, 33 DEV. & COOPERATION 332, 332-35 (2006) (F.R.G.), available at http://www.inwent.org/E+Z/content/archive-eng/08-2006/foc_art5.html. As she explains, "The local governments of El Alto and La Paz were not involved in negotiations, nor was their public utility SAMAPA. The concession was thus awarded without participation by the key stakeholders. The population was also excluded from the discussion on whether and how privatisation could be achieved." *Id.* at 333.

42. See Matthias Finger, *The New Water Paradigm: The Privatization of Governance and the Instrumentalization of the State*, in THE BUSINESS OF GLOBAL ENVIRONMENTAL GOVERNANCE 275, 286-89 (David L. Levy & Peter J. Newell eds., 2005).

negotiating its terms.⁴³ Thus, as with traditional bilateral contracts, outsiders have no influence over or knowledge about concession agreements during the process of their creation.

In sum, concessionaires and participating government officials enact concession agreements as traditional bilateral contracts. Part II establishes how this contractual creation procedure undermines the stability and success of concession agreements.

II. FROM INSULAR CREATION TO NEGATIVE POLICY OUTCOMES

This Part connects concession agreements' contractual creation method to negative policy outcomes. The way that the parties create and treat concessions undermines the potential for effective and stable agreements.

A. *Making Inefficient Choices: Corruption, Timing, and Tariffs*

The current method of creating concession agreements undermines their effectiveness and stability by inducing officials to make inefficient choices. The insular process provides an increased opportunity for malignant corruption, short-term prioritization that undermines long-term gain, and nonoptimal levels of tariff creation.

1. *Personal Gain*

First, the conditions that surround the creation of concession agreements are highly conducive to corruption, exhibiting three of five key causes of corruption identified by the World Bank: lack of institutional restraints, lack of transparency of actors, and lack of general accountability.⁴⁴ In the context of

43. See, e.g., *id.*

44. Institutional restraints, such as a system of checks and balances or of separation of powers, could reduce corruption by limiting what governmental actors can do and punishing them if they do not act within these prescribed limitations. Conversely, government power unrestrained by such checks creates corruption. A lack of transparency leads to corruption because citizens cannot discover the corrupt practices or prove that they are taking place. Finally, lack of accountability induces corruption because it means that people never have to answer (whether financially, politically, or criminally) for their corrupt practices. See World Bank, *Anti-Corruption*, <http://www.worldbank.org/anticorruption> (last visited Oct. 30, 2007); see also Vito Tanzi, *Corruption Around the World: Causes, Consequences, Scope, and Cures*, 45 IMF STAFF PAPERS 559, 569 (1998), available at <http://idari.cu.edu.tr/igunes/butce/makalebute29.pdf> (noting that in situations where officials "have discretion

this Note, corruption may be defined as a quid pro quo exchange of the award of a concession agreement for the personal financial benefit of the government official awarding the concession.⁴⁵

The current method by which concession agreements are created does not contain effective institutional restraints on key actors: there often exists no clear procedure that governments must follow to select concessionaires and negotiate agreements, or there exist only formal constraints, which officials and concessionaires may easily circumvent by decrees, fast-tracking proposals, or ignoring requirements.⁴⁶ This absence of restraints allows governments to make inefficient determinations at various steps of the process: for example in deciding whether and with whom to enter into concession agreements, and what terms to include in the agreements. In the case of the Cochabamba concession, the *Bolivian Times* accused the government of corruption, claiming that government officials chose the local concessionaire, ICE Ingenieros, based on the political connections of the owner, and that because of these connections the government was willing to omit crucial contract components and to overlook irregularities throughout negotiation and early implementation.⁴⁷

Furthermore, the creation and implementation of concession agreements lacks transparency, as executive government officials and concessionaires conduct each step in insulated groups outside of the legislature and without others' awareness or input. Where executive government officials and concessionaires create the agreements through a procedure invisible to the public, and stakeholding groups have no influence over, or even knowledge of, the terms of the agreement before enactment, the government actor may exclude or include terms in the contract that personally benefit him (or include terms in exchange for a direct payment) without fear of discovery.⁴⁸ For

over important decisions . . . corruption, including high-level or political corruption, can play a major role”).

45. The definition used here adheres most closely to the common political science definition of corruption as “efforts to secure wealth or power through illegal means.” Seymour Martin Lipset & Gabriel Salman Lenz, *Corruption, Culture, and Markets*, in *CULTURE MATTERS: HOW VALUES SHAPE HUMAN PROGRESS* 112, 112 (Lawrence E. Harrison & Samuel P. Huntington eds., 2000). It is also compatible with the economic definition of corruption as “an act in which the power of public office is used for personal gain in a manner that contravenes the rules of the game.” Toke S. Aidt, *Economic Analysis of Corruption: A Survey*, *ECON. J.*, Nov. 2003, at F632, F632.
46. See *supra* notes 22-25 and accompanying text.
47. See ELIZABETH PEREDO BELTRÁN, HEINRICH BÖLL FOUND., *WATER, PRIVATIZATION AND CONFLICT: WOMEN FROM THE COCHABAMBA VALLEY* 21-22 (2004); Lobina, *supra* note 15, at 59; Nickson & Vargas, *supra* note 1, at 135 n.9.
48. See Tanzi, *supra* note 44, at 574.

example, former Malaysian Finance Minister Daim Zainuddin allegedly awarded the Cheras toll concession to the company Syarikat Teratai K.G.Sdn Bhd,⁴⁹ which had agreed to set the location and amount of tolls to assure the Minister's profit, even though the company had only two employees and later had to create a subsidiary company to carry out the concession. Nearly twenty years later, at the urging of persistent nongovernmental organizations (NGOs), the details of the concession award are only now finally emerging.⁵⁰

Finally, concessionaires and many executive government officials escape accountability because they do not face popular election. And, though some government officials involved will technically be accountable through elections, the opaqueness of the concession process prevents the public from discovering their corruption. Without any true accountability, concessionaires and government officials are free to exchange quid pro quo payments without fear of direct retribution from the populace.⁵¹

Thus the extralegislative, opaque process by which concession agreements are created lacks institutional restraints, transparency, and accountability. These deficiencies induce corrupt choices that create inefficient policy outcomes by trading benefits to consumers for personal benefits.⁵²

2. Nearsightedness

Concession agreements provide a particularly acute incentive for government officials to take short-term over long-term benefits because the agreements last much longer than a leader's time in office. Concession agreements often last twenty to fifty years, whereas presidential terms are generally set at four to ten years.⁵³ As a result, a leader faces an enormous political incentive to structure a concession agreement so that the greatest benefits accrue during the period of time she is in power, and she receives the

49. This company later renamed itself Metramac Corp. Sdn Bhd. Kim Quek, *Metramac Scandal: No Light at the End of the Tunnel*, MALAYSIA TODAY, Jan. 20, 2006, <http://malaysia-today.net/reports/2006/01/metramac-scandal-no-light-at-end-of.htm>.

50. *Id.*

51. However, there may be indirect electoral accountability for corruption insofar as leaders may be held responsible for projects that fail. See *infra* Section II.B.

52. In addition, corruption necessarily involves an inefficient transfer because the payment is given to the government official for not acting, rather than being directed toward economically productive activities.

53. For example, the Buenos Aires road concession term is twenty-two years and eight months, the Panama port concession term is twenty years, and the Mexico railway concession term is fifty years. Shaw et al., *supra* note 33, app. at 49, 66, 72.

credit for the benefits to society that stem from the agreement.⁵⁴ For example, throughout the 1980s, the Mexican government signed a series of toll road concessions (covering more than 4000 miles of road), with one of the most important selection criteria being the length of time that it would take for the toll roads to earn a positive return. The government official in charge privileged concessionaires who stated they could provide positive returns most quickly over those who had a more long-term focus.⁵⁵

A calculating leader will also construct the agreement so that its costs only become evident after she has left office. This common strategy would allow the leader to receive adulation for the program's success while she is in office, while her successor receives the blame and has to solve the new problems that arise later.⁵⁶

The extralegislative, insulated manner of creating concession agreements heightens the incentive for short-term gain in two ways. First, as mentioned above, the insular process provides no checks on the government official from groups—such as citizen groups, NGOs, or legislators—that may have longer-term goals and concerns than the president.⁵⁷ Second, the construction of these agreements may increase the incentive for short-term benefits by further politicizing the agreement and concentrating the political risks and rewards. If many actors were involved in its creation, the agreement might be viewed as a joint project and the often large political costs of an unsuccessful concession agreement (or the benefits of a successful agreement) would be distributed among them. In contrast, because one government official is the only person

54. See R. DOUGLAS ARNOLD, *THE LOGIC OF CONGRESSIONAL ACTION* 29 (1990).

55. Shaw et al., *supra* note 33, at 26. This incentive to skew the structure of costs and benefits is heightened by the initial time period in which lump sum payments and inducements are offered to the government compared to when the costs of the agreement would come into place. See, e.g., Lobina, *supra* note 15, at 75 fig.3 (citing the increasing water cost to consumers over the course of the Buenos Aires concession); *id.* at 79 (referencing the viewpoint that initial pricing failures have later led to the need for “excessive and nontransparent subsidization” to meet escalating costs). While democratic accountability would not in and of itself ameliorate this pernicious short-term focus, it would introduce new actors into the system (for example, citizens’ groups) who have a much longer time horizon than the president.

56. See ARNOLD, *supra* note 33, at 29 (recognizing that citizens “are far more likely to detect early-order effects than later-order effects”). This strategy assumes and takes advantage of the fact that most individuals will be unlikely to trace the concession agreement’s outcome back to leaders who have left office. To the extent that this is true, the leader structuring the concession agreement does not even face a threat to her legacy.

57. See *supra* Part I; see also *supra* note 48 and accompanying text (discussing the potential for corruption where concession agreements are created and implemented by executive officials outside of the legislature and without others’ awareness or input).

(or one of very few people) involved, her political fortunes are directly and singularly tied to the short-term failure or success of the agreement, which increases her incentive to favor short-term benefits.⁵⁸ In turn, the official's prioritization of short-term gain over long-term efficiency may destabilize the agreement by provoking the ire of the local populace when the benefits suddenly decrease and the costs increase.⁵⁹

3. *Rate and Fee Adjustments*

Finally, the extralegislative, antidemocratic system by which parties create concession agreements undermines efficient outcomes because it disincentivizes optimal adjustments to the rates and fees charged by concessionaires, pushing government officials either away from approving necessary adjustments or toward allowing any proposed increase. Concessionaires in certain areas, such as infrastructure, service, or goods provision, predominately recuperate their investment through income from rates charged to consumers (for example, road tolls or utility rates). Additionally, the government may initially supplement the concessionaire's income with a monetary or resource payment to help cover start-up costs or incentivize investment.⁶⁰ As a result of this arrangement, when the concessionaire fails to turn a profit, or fails to reach a projected income margin, it will push for an increase in the rates or the government support.⁶¹ In extraordinary circumstances or when terms of the concession agreement limit rate increases, concessionaires will push to renegotiate the contract

58. For one stark example of this phenomenon, see *infra* note 75 and accompanying text.

59. See *infra* Section II.B for a complete discussion of the pernicious effects of popular opposition to a concession agreement.

60. See Lobina, *supra* note 15, at 64-65 (discussing investment incentives and subsidization of concessionaires through the indexation of currency and reduction of operating risks); *id.* at 79 (stating that subsidies "are now seen as a key to sustain the presence of the private sector in developing countries").

61. David Haarmeyer & Ashoka Mody, *Tapping the Private Sector: Approaches to Managing Risk in Water and Sanitation*, J. PROJECT FIN., Summer 1998, at 7, 16-19, 22 (recognizing that if more investment is required than was expected in the initial tariff determination and if tariff renegotiation is costly, private developers and investors may find that contractually agreed-upon returns are insufficient).

altogether.⁶² These increases and renegotiations often prove necessary to ensure the continued economic viability of the project.⁶³

Naturally, government officials will always face some political incentives to reject a price raise or payout once the concession is in place. The current process by which governments create concession agreements, however, can significantly exacerbate these incentives. First, because they have control over information during the extralegislative, insular negotiation and enactment,⁶⁴ and because they face fewer forces opposing the agreement prior to enactment,⁶⁵ government officials are more likely to present a uniformly favorable picture of the project's benefits while understating the level of price increases necessary to maintain its viability.⁶⁶ Second, because of the aforementioned political risks and incentive for short-term benefits, and because the government officials face no opposing forces as they would in a legislative or consultative process, government officials may more easily set the initial rates artificially low, which in turn expands the size of the tariff increase that must eventually take place.⁶⁷ Both overly favorable publicity and unsustainably low initial rates exacerbate the negative political consequences of raising the prices or payouts to necessary levels. Leaders are therefore often very resistant to allowing tariff increases and sometimes pointedly refuse to do so. As J. Luis Guasch and his coauthors note, it is a "[t]ypical scenario" for a government "during a re-election campaign [to decide] in a unilateral fashion to cut tariffs or not to honor agreed tariff increases to secure popular support."⁶⁸ This can have particularly deleterious consequences, as the government's refusal to renegotiate tariffs destabilizes the agreement both financially and politically, and may cause it to be cancelled. For example, in Manila, where the government signed two twenty-five-year water concession agreements in the mid-1990s, many argue that the government's refusal to adjust rates to help the concessionaires recoup foreign exchange-rate losses

62. See, e.g., J. Luis Guasch & Stéphane Straub, *Renegotiation of Infrastructure Concessions: An Overview*, 77 ANNALS PUB. & COOPERATIVE ECON. 479, 481 (2006).

63. See, e.g., Louis Skyner, *A Viable Framework for Private Investment in the Utility Sector: An Analysis of the 2005 RF Law on Concession Agreements*, 31 REV. CENT. & E. EUR. L. 155, 162 (2006).

64. See *supra* Section I.B.

65. See *supra* Section I.A.

66. The only other party with access to information, the concessionaire company, has the same incentives to paint a rosy picture of the agreements.

67. See, e.g., Shaw et al., *supra* note 33, app. at 74, 76 (discussing the artificially low initial tolls and then rapid rises in Mexico and Thailand).

68. Guasch et al., *supra* note 4, at 3.

following the Asian financial crisis was the primary reason that the concessions eventually fell apart.⁶⁹ Because the extralegislative, insular creation of concession agreements makes necessary rate or fee renegotiation less likely to occur, this creation method undermines the agreements' effectiveness.

Paradoxically, however, the current process by which parties create concession agreements will also allow government officials to make entirely unwarranted tariff increases in certain circumstances. Specifically, the absence of transparency⁷⁰ creates opportunities for corruption⁷¹ that allow the government to make any tariff increase at the behest of the concessionaire where the benefits of corruption outweigh any possible electoral loss created. For example, in the course of the Malaysian water concession agreement between Syabas and the Federal and Selangor state governments,⁷² which was characterized by a lack of transparency,⁷³ the government officials supported a proposed fifteen percent price increase that would provide the concessionaires with a windfall profit of 50 to 60 million Malaysian ringgit (roughly \$14.3 to \$17 million), though the increase was unconnected to the project's viability.⁷⁴

B. Provoking, Ignoring, and Exacerbating Opposition

Regardless of the merits of the agreement, a concession agreement will invariably engender some local opposition from three different groups: political and business groups that have a vested interest in the agreement's failure; citizens who are hesitant about the agreement on ideological or nationalist grounds; and people who have become dependent on the state-run system. However, the extralegislative, insular method by which concessionaires and government officials create concession agreements provokes, ignores, and aggravates each of these sources of opposition. This opposition threatens the agreements' stability and success.

First, concession agreements naturally engender opposition from groups that have a political or financial interest in the agreements' collapse. Opposition political parties want the agreements to fail because they will

69. See, e.g., Slattery, *supra* note 5; see also Guasch et al., *supra* note 4 (discussing this phenomenon throughout Latin America).

70. See *supra* notes 44, 47-50 and accompanying text.

71. See *supra* notes 44-45 and accompanying text.

72. See *supra* note 39 and accompanying text for a more detailed description of this concession.

73. See, e.g., Santiago, *supra* note 39, at 30.

74. See *id.*

benefit electorally from backlash. This happened in 1999 when the citizens of Panama elected President Mireya Moscoso on a platform of renationalization and nonprivatization, after President E. Ernesto Pérez Balladares's attempts to privatize the telecommunications and railway industries failed to achieve desired efficiency benefits and were plagued by financial and political scandals.⁷⁵ Two major groups may have a financial interest in the breakdown of concession agreements. Competing companies not initially chosen for the concession, and the local consortiums affiliated with them, may oppose the concession agreement's success because a collapse could provide them with an opportunity to take over the concession agreement or eliminate the first-mover advantage obtained by the initial concessionaire in securing future agreements with the country.⁷⁶ In addition, local businesspeople affiliated with the state or municipal entity that previously operated in the area of the concession, or otherwise financially benefited from the existing arrangement, will oppose the concession agreement because they will lose business. For example, in Bolivia, local water providers, which included truck vendors, small cooperatives, and neighborhood associations and companies that drilled private wells, were opposed to the Cochabamba concession from the outset because they feared being put out of business by a concessionaire who was given exclusive water rights.⁷⁷

The extralegislative, insular method by which concessionaires and executive government officials create concession agreements exacerbates this natural opposition from political and business interests in several ways. First, governmental failure to consult with oppositional groups or groups harmed by the project makes those groups feel marginalized.⁷⁸ The groups will likely feel shut out of the process, and they will, in turn, be even less likely to think of the agreement as legitimate—and to accept it without violence. Second, when government officials fail to meet with business interests who might stand to lose from the agreement, they are less likely to attempt to reach an amicable solution, or one that allows these businesses to stay in business even for a short

75. See Marco A. Gandasegui, *The 1998 Referendum in Panama: A Popular Vote Against Neoliberalism*, 26 *LATIN AM. PERSPS.* 159, 159-68 (1999); *Panama: Mireya Moscoso Promises Shift in Priorities as She Begins Her Presidency*, *NOTICEN: CENT. AM. & CARIBBEAN AFF.*, Sept. 9, 1999, <http://www.allbusiness.com/central-america/303576-1.html>.

76. For a further discussion of the concept of the first mover advantage in concessions, see Jonathan P. Doh, *Entrepreneurial Privatization Strategies: Order of Entry and Local Partner Collaboration as Sources of Competitive Advantage*, 25 *ACAD. MGMT. REV.* 551, 556-57 (2000).

77. Nickson & Vargas, *supra* note 1, at 141-42.

78. See, e.g., Finger, *supra* note 42, at 289.

transition period, which could substantially mitigate their opposition.⁷⁹ Finally, as mentioned above, when parties fail to pass the agreements through any legislative (or otherwise openly deliberative) process, and thereby negotiate with opposing political forces, concession agreements become further politicized and explicitly tied to the leader in power at the time of enactment. As a result, this method of creation provides the opposing party with an increased incentive to slander the project and to stoke opposition among the populace wherever possible.⁸⁰

Second, even individuals who stand to gain from concession agreements may be skeptical of them on ideological grounds. Citizens of countries with a long history of state-run industries may believe that states inherently provide better services.⁸¹ They may be opposed to promoting investment from large, often foreign, companies over local investment, either to protect local businesses or because of fears that the profits will leave the country. They also may fear that companies are more interested in their financial bottom line than providing good services at a fair price and in an equitable manner to all citizens.⁸² All three of these concerns existed in Bolivia, where, despite the promise that private sector investment would provide a long-term solution to the abysmal water situation by improving the efficiency and accessibility of water service, many Bolivians initially were hesitant because “for many Bolivians, the new law and concession contract together symbolized all that was wrong with the neo-liberal development strategy.”⁸³

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79. ERIC M. PATASHNIK, *AFTER POLICY REFORM: SUSTAINING GENERAL-INTEREST VICTORIES IN AMERICAN GOVERNMENT* (forthcoming 2008) (manuscript at 285-86, on file with The Yale Law Journal) (discussing whether transition payments effectively mitigate opposition).
80. Because the local population is also inflamed, this method may provide an excellent recruitment and motivational tool for the local opposition. In Bolivia, the Civic Committee (Comite Cívico) and a more radical group, Coordination of Water and Life (Coordinadora del Agua y de la Vida), which was formed only after the adoption of the concession agreement, were able to organize the populace against the agreement. Nickson & Vargas, *supra* note 1, at 143.
81. For a critique of “the neoliberal line that ‘private is better,’” see Jim Schultz, *In the Andes, Echoes of Seattle*, GLOBAL POL’Y F., Mar. 23, 2000, <http://www.globalpolicy.org/security/natres/water/2000/0323coch.htm>. As Schultz argues, in the Bolivian case, “the more obvious results have been . . . increases in prices, and reductions in services.” *Id.*
82. See Gregory Palast, *New British Empire of the Damned*, OBSERVER (London), Apr. 23, 2000, Business Section, at 4, available at <http://www.guardian.co.uk/Columnists/Column/0,,213159,00.html> (“[W]hen a monopoly operator gets its fist around a city’s water spigots, it can pump the funds for capital projects from captive customers rather than shareholders.”).
83. Nickson & Vargas, *supra* note 1, at 139.

Once again, the extralegislative, insular process by which executive government officials and concessionaires create concession agreements exacerbates natural opposition—this time on the part of ideologically skeptical local citizens. The failure to release background information about the candidate companies and how the government chooses the “best” concessionaire may fuel skepticism about whether either party is interested in equity, especially when opposing groups exploit the information gap to slur the parties’ motives.⁸⁴ Furthermore, the government’s failure to release information about the concessionaires under consideration and the concessionaire’s lack of contact with local populations will undoubtedly fuel the perception that the concessionaire does not care about local people or their apprehensions and that it is, indeed, only concerned with its bottom line.

Finally, the process by which parties create concession agreements may increase local opposition to the agreements because it fails to recognize and address local dependency on the current system. Local citizens often develop a comprehensive system of practices around the status quo, regardless of its inefficiencies. Over time, this system becomes a deeply entrenched network of practices, norms, and values. For example, in the city of Cochabamba, where the municipal water company, SEMAPA, was only able to provide water to fifty-seven percent of the population, town members grew to rely on an elaborate patchwork of local tanker-based water vendors or sank their own wells and made their own water storage tanks.⁸⁵ In smaller farming communities surrounding the city, people used underground water resources for irrigation and used an informal, communitarian ownership model that had been in place for generations.⁸⁶ Any concession agreement that changes the status quo will undoubtedly engender some opposition, even where it would create a more efficient system, because it means that people will have to change longstanding behavioral patterns.⁸⁷

Extralegislative, insularly constructed concession agreements again heighten this natural local opposition because they fail to acknowledge properly and transition from the entrenched system. Because the government

84. See, e.g., Finger, *supra* note 42, at 287-88 (discussing how groups opposing the Cochabamba agreement, such as Coordinadora del Agua y de la Vida, were able to use the information gap to impute nefarious motives to the government and concessionaire).

85. Susan Spronk, Moving from Protest to Proposal in Cochabamba, Bolivia: “Social Control” as an Alternative to the Privatization of Urban Water Systems 13 (June 3, 2006) (unpublished manuscript), available at <http://www.aguabolivia.org/fe/ControlSocial/spronk.pdf>.

86. *Id.*

87. For a detailed discussion of this phenomenon, see William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. RISK & UNCERTAINTY 7, 9-10 (1988).

and concessionaires do not meet with local individuals and groups, they do not understand the practices in place or local people's attachment to them. Thus, the resulting agreement will be less likely to integrate existing local practices or to transition effectively from them, which will stoke local anger, both because it forces people to change their practices and because its planners appear not to care about the population.⁸⁸ In Bolivia, the concession agreement provided immediate, exclusive rights to Aguas del Tunari for the provision of water services.⁸⁹ Although this clause preserved the economic viability of the project and the overall quality of water production, it stoked intense anger because it meant that people could no longer use their self-constructed wells free of cost; low-income households had none of their usual water vendor options until they were connected to the Aguas del Tunari network; and local farmers feared they would be charged for water used for irrigation.⁹⁰

The sum total of opposition from these three local groups is particularly detrimental to the ultimate success and stability of an agreement. Strong local opposition to the agreement may incite the populace to refuse to pay the tariffs or tariff increases.⁹¹ Inability to collect tariffs may ultimately undermine the financial viability of the concession and lead to its cancellation. Furthermore, the strong joint opposition of political parties, local business interests, and local citizens may lead to a coordinated cycle of increasingly vociferous and sometimes violent acts of opposition to the plan. In Bolivia, the tariff increase, combined with the forced change in practices and stoked by newly established local opposition groups such as Coordinadora del Agua y de la Vida, led to massive protests in the streets, and ultimately rioting and the deaths of several protesters.⁹² Large-scale, mobilized opposition will almost invariably lead to the cancellation of the concession agreement.

This Part has argued that the current contractual method of concession agreement creation undermines the agreements' success and stability in two major ways. First, the absence of transparency and the incentive structure in the concession creation procedure induce officials to make inefficient policies such as selecting terms that benefit themselves personally, trading away long-term stability for short-term gain, and failing to make necessary and efficient rate and fee adjustments. Second, the insularity of the contractual creation

88. See *supra* note 79 and accompanying text.

89. Nickson & Vargas, *supra* note 1, at 141.

90. BELTRÁN, *supra* note 47, at 25; Nickson & Vargas, *supra* note 1, at 137-43.

91. See Slattery, *supra* note 5 (discussing opposition to rate increases in the Manila concession).

92. See, e.g., Nickson & Vargas, *supra* note 1, at 137.

process both ignores and exacerbates local opposition to the agreement. Part III presents a solution to these problems.

III. RECONSTRUCTING CONCESSION AGREEMENTS AS PUBLIC POLICY

Concession agreements should be treated as public policy mechanisms rather than private contracts because they involve subject matters critical to the populations, they are created by political leaders who profess to effect wide-scale public change, and they substantially constrain the future development of the nation. Academics, officials, and other interested parties should use this new conceptual framework to push for procedural reforms that bring the method of creation into line with the actual public policy nature of the agreements. These procedural reforms will create more stable and effective concession agreements, by increasing transparency, accountability, and responsiveness.

A. *Reconceptualizing Concession Agreements as Matters of Public Policy*

Interested parties should reconceptualize concession agreements theoretically as matters of public policy because of their subject matter, their focus on producing public outcomes, and their effects on future development.

1. *Critical Subject Matter*

Parties should conceive of concession agreements as public policy matters, rather than merely as bilateral contracts between private parties, because of the public-oriented subjects of the agreements. Concession agreements often focus on basic necessities, natural resources, and infrastructural issues, all of which deeply affect a large number of people and lie at the heart of what most consider as public goods.

The agreements for the production, purification, and delivery of water, such as those in Cochabamba,⁹³ Buenos Aires,⁹⁴ and Manila,⁹⁵ and the often

93. For a detailed description of the substance of the Cochabamba water concession, see *supra* notes 1-2 and accompanying text.

94. For a detailed description of the substance of the Buenos Aires water concession, see Lorena Alcázar, Manuel A. Abdala & Mary M. Shirley, *The Buenos Aires Water Concession* (World Bank Policy Research, Working Paper No. 2311, 2000), available at http://www-wds.worldbank.org/servlet/WDSContentServers/WDSP/IB/2000/05/06/000094946_00042605364386/Rendered/PDF/multi_page.pdf.

integrated agreements for sewerage and sewage treatment, are typical examples of concession agreements dealing with basic necessities.⁹⁶ These agreements establish public policy most obviously because they are crucially important for the populace. For example, the Cochabamba water concession would, in theory, have provided potable water to over ninety-five percent of the people in the city by 2019, and ensured that virtually every household had connections to sewerage by 2034.⁹⁷ The Buenos Aires water concession was projected to provide water and sewerage to 584,250 new households (which accounts for over seventy-five percent of the municipal area's impoverished households) in its first five years.⁹⁸ And the Manila agreement intended to provide water coverage to virtually all eleven million of the city's residents.⁹⁹ These agreements thus qualify as public policy because they address topics "of fundamental concern to the state and the whole of society."¹⁰⁰

Moreover, concession agreements establish public policy because they focus on less commoditized subjects than those of most private commercial contracts. Rather than being viewed as a market good, populations throughout the world view goods such as water as fundamentally public.¹⁰¹ People often view access to these goods as a basic human right of all citizens that forms part of the social contract with the government.¹⁰² For example, the United Nations

95. For a description of both the substance and effects of the Manila concession agreement, see Lobina, *supra* note 15, at 62-64, 68, 71.

96. The 1993 Buenos Aires concession agreement, for example, was set to expend \$1.29 billion on water provision and sewerage and sewage treatment within the first five years. *See id.* at 63 tbl.3. In addition, another recent concession agreement—the twenty-five-year concession agreement between Vivendi and the Philippine government to provide water services for Manila—includes a provision for a \$35 million sewerage treatment facility in Fort Bonifacio, a new business district on the outskirts of Manila. *See* HALL ET AL., *supra* note 15, at 8.

97. Nickson & Vargas, *supra* note 1, at 136 tbl.2. This is particularly important because, according to the 1992 census, Bolivia had among the lowest access to crucial water services in the region, with only seventy-five percent of the urban population having household water connections and thirty-six percent having sewerage connections. *Id.* at 130.

98. *See* Alcázar et al., *supra* note 94, at 16.

99. *See* Carla A. Montemayor, *The Manila Water Privatization Fiasco and the Role of Suez Lyonnaise/Ondeo: Presentation at the Summit for Another World 1-2* (May 20, 2003), <http://www.tni.org/altreg-docs/manila.pdf>.

100. BLACK'S LAW DICTIONARY 1267 (8th ed. 2004).

101. *See* Tim Kessler, *From Social Contract to Private Contracts: The Privatisation of Health, Education and Basic Infrastructure*, in SOCIAL WATCH REPORT 2003: THE POOR AND THE MARKET 11, 11 (2003), available at <http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN010129.pdf>.

102. *Id.* at 11-12; *see* International Covenant on Economic, Social, and Cultural Rights, *adopted* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

International Covenant on Economic, Social, and Cultural Rights, signed by 145 countries, declares access to life-sustaining services such as potable water to be a “fundamental right” and binds signatories to promote access to safe water “equitably and without discrimination.”¹⁰³ Because the subjects of concession agreements are less commoditized items often considered basic human rights and the agreements deeply affect many citizens, concession agreements fit this Note’s definition of public policy.¹⁰⁴

Second, concession agreements often focus on natural resources. Agreements for the extraction of resources, such as a recent agreement for the “exploration, exploitation and transport” of oil in the Chari-Ouest and Largeau basins of Chad¹⁰⁵ or concessions for foresting and logging such as those in Cameroon¹⁰⁶ and Indonesia¹⁰⁷ are typical examples. Concession agreements in this area represent public policy matters for several reasons. Like basic necessities, natural resources such as oil and forests are often considered public goods,¹⁰⁸ whose maintenance and use affect many people.¹⁰⁹ The distribution

103. Kessler, *supra* note 101, at 11.

104. See *supra* notes 7-9 and accompanying text.

105. Energem Resources signed a renewable concession agreement for oil and gas “exploration, exploitation and transport” in the Chari-Ouest and Largeau basins in Chad on October 16, 2004. It was approved by presidential decree on December 8, 2004. *Chad Upstream Oil Concession Awarded to Energem*, EXPLORATION: NEWS FOR OIL & GAS AND HYDROCARBON INDUSTRIES, Dec. 10, 2004, <http://www.gulfoilandgas.com/webpro1/main/mainnews.asp?id=1049>.

106. In Cameroon, logging concessions cover seventy-six percent of the forest area, and over fifty percent of that land is governed by abandoned concessions. John A. Gray, *Forest Concession Policies and Revenue Systems: Country Experience and Policy Changes for Sustainable Tropical Forestry* 8 (World Bank, Technical Paper No. 522, 2002).

107. In 1998, the 427 forest concessions in Indonesia accounted for fifty-three percent of the total wood harvest, and another thirty-four percent came from land clearing as a result of related concessions. *Id.*

108. For example, in the United States, the maintenance and provision of national parks is an arena overseen expressly and exclusively by the federal government and shielded from undue business encroachment based on this public rights and ownership model. See ALFRED RUNTE, NATIONAL PARKS: THE AMERICAN EXPERIENCE 260 (3d ed. 1997) (noting that “Congress and the President alone had the power to establish national parks” and that “their administration fell to government officials”). In countries such as Venezuela, the national government keeps ownership over oil resources based on this model. See, e.g., Greg Morsbach, *Venezuela Gives Exxon Ultimatum*, BBC NEWS, Dec. 20, 2005, <http://news.bbc.co.uk/1/hi/world/americas/4544390.stm>.

109. Indeed, the effects on individuals may be measured based on direct visitation in the case of national parks, the effects on inhabitants of the surrounding areas in the case of forests or national parks, the secondary effects of the use of revenue from the resources in the case of oil or mineral reserves, and the environmental effects stemming from their use or extraction/destruction in the case of all of the above.

of these resources is often geographically concentrated. This suggests they are a matter of public policy because it implicates profound national questions of legal ownership over these materials, and given the potential wealth to be extracted from natural resources, decisions that allocate the benefits of the agreement have significant distributional implications for the populace.¹¹⁰ Even more seriously, when combined with ethnic geographic segregation, the agreements can create ethnically disparate effects that lead to ethnic conflict.¹¹¹ Also, when these agreements concern the extraction and refinement of resources such as oil, they may have unforeseen detrimental health or environmental effects on the population. For example, in one major ongoing arbitration case, Ecuador claims that Texaco improperly handled waste, caused several oil spills, and ruptured pipelines as part of its 1973 twenty-year mining concession agreement, and thus massively polluted the groundwater with carcinogenic toxins and extensively damaged local ecosystems.¹¹²

Third and finally, concession agreements often focus on key issues of infrastructure. Agreements to rebuild and maintain ports,¹¹³ construct and operate airports,¹¹⁴ and build highways and collect tolls,¹¹⁵ abound. These types of concession agreements implicate public policy questions, including distribution of benefits, national security, and domestic control. The placement of roads, airports, and infrastructure necessarily will have strong distributional consequences. Areas with the improved facilities will likely receive significant boosts in productivity, tourism, and income when compared to neighboring

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110. For more discussion on this topic, see Amy L. Chua, *The Paradox of Free Market Democracy: Rethinking Development Policy*, 41 HARV. INT'L L.J. 287, 287-94 (2000).
111. See *id.* at 319 (“[B]y causing, maintaining, or exacerbating the disproportionate wealth of the market dominant minority, marketization will cause, maintain, or exacerbate intense ethnic resentment among the impoverished, indigenous majority.”).
112. Maura Mullen de Bolívar, *A Comparison of Protecting the Environmental Interests of Latin American Indigenous Communities from Transnational Corporations Under International Human Rights and Environmental Law*, 8 J. TRANSNAT'L L. & POL'Y 105, 111-12 (1998).
113. See, for example, the concession between Shell and the government in Gujarat, India. *Concession Agreement for Development of Hazira Port Signed in Presence of Hon. Chief Minister, GUJARAT MAR. BOARDNEWS*, Apr. 22, 2002, <http://www.gmbports.org/news1.htm> (discussing the terms of the agreement).
114. See, for example, the agreement between Concorcio Aeropuertos Internacionales SA and the Government of Uruguay. Shaw et al., *supra* note 33, app. at 9.
115. See, for example, numerous agreements throughout Malaysia in the 1980s, described in A.R. Abdul Aziz, *Privatisation of Highways in Malaysia: The Peril of Not Consulting End-Users*, INT'L J. FOR CONSTRUCTION MARKETING, Mar. 2003, <http://www.brookes.ac.uk/other/conmark/IJCM/Vol3-1/Vol3-Issue2/Papers/IJCMpaper2rashid.htm> (providing detailed analysis of the series of concession agreements to maintain highways, entered into between the Malaysian government and private companies during the 1990s).

communities.¹¹⁶ Often these agreements also implicate issues such as safety and national security that local populations properly consider issues of public policy.¹¹⁷ Finally, where the concessionaire is not a domestic company, the concession agreements may implicate difficult value questions about foreign maintenance of a country's infrastructure.¹¹⁸

2. *Purported Enactment for Public Effect*

The government's ostensible focus on public welfare in concession agreements also suggests that they should be viewed as acts of public policy. While governments often sign concession agreements in order to reap financial gain in the form of payment for the right or of reducing the governments' administrative costs, governments often argue that these agreements promote several societal welfare goals.

Governments often present these agreements to the public as a means to redistribute and equalize resources and promise that concession agreements will increase the poor or rural population's access to the resource directly provided by the concession. The Bolivian government, for example, stated that it created an earlier 1997 water concession agreement "to provide all households in poor peri-urban neighborhoods of La Paz and El Alto with access to high-quality water and to sewer connections,"¹¹⁹ and that the 1999 Cochabamba agreement sought similar goals in that municipal area.¹²⁰ In the best cases, these promises gain substance through direct, enforced provisions within the agreements themselves. For example, a concession agreement for

116. See John Gibson & Scott Rozelle, *Poverty and Access to Roads in Papua New Guinea*, 52 *ECON. DEV. & CULTURAL CHANGE* 159 (2003) (providing an excellent case study to demonstrate the strong inverse relationship between access to roads and poverty).

117. See, for example, Stephen E. Flynn, *Port Security Is Still a House of Cards*, *FAR E. ECON. REV.*, Jan.-Feb. 2006, at 5, for a detailed analysis of the national security implications of port control.

118. This national security concern may even extend beyond the two parties involved in the concession and provoke opposition to the concession agreement from a third party. For example, U.S. officials opposed a port concession agreement between a Chinese company and the government of the Panama on the grounds that it would provide hostile interests with access to U.S. waterways. *The Panama Canal and United States Interests: Hearing Before the S. Comm. on Foreign Relations*, 105th Cong. 7-10 (1998) (statement of Adm. Thomas H. Moorer, Former Chairman, Joint Chiefs of Staff).

119. Kristen Komives, *Designing Pro-Poor Water and Sewer Concessions: Early Lessons from Bolivia 1* (World Bank, Policy Research Working Paper No. 2243, 1999), available at <http://web.mit.edu/urbanupgrading/waterandsanitation/resources/pdf-files/Komives-Bolivia.pdf>.

120. Nickson & Vargas, *supra* note 1, at 135-37.

road construction in Bogotá, Colombia, successfully required the concessionaire to build a road to connect the poorer nearby town of Caqueza to the capital city, and a concession agreement for Brazilian railways required the concessionaire to employ a workforce of 1800 local people at all times.¹²¹ Even when governments do include such terms, however, the terms may simply serve public relations purposes, and the governments may either not even threaten enforcement or else give in and allow the concessionaire to abandon the terms when they prove unprofitable.¹²²

Officials also claim to create some concession agreements to enhance the quality or efficiency of goods and services available to the area's population. Governments often seek concession agreements in industries where the government struggles to provide the good or service to the public and private corporations have more technological expertise and a track record of success.¹²³ In other words, the governments profess to seek a replacement provider to offer a public service. Again, the government may even make this purpose explicit in its criteria for qualified bidders. For example, in Bogotá, the government detailed the existing traffic problems and asked prospective bidders to submit their particular ideas to create an integrated, efficient, and improved transportation system for the entire city.¹²⁴

Some concession agreements often theoretically seek to advance public goals because they cap the price of goods and services. While many agreements contain no provisions of the sort, some agreements limit or remove the company's ability to set the goods prices, especially in transportation and infrastructure service agreements. For example, the concession for the Bangkok

121. See Shaw et al., *supra* note 33, app. at 50, 91.

122. For example, the Manila water concession agreement explicitly required the concessionaire to expand coverage of water supply, sewerage, and sanitation services to cover eighty-five percent of the population by 2001 and ninety-six percent by 2006, to provide twenty-four-hour water supply to all connections by June 2000, to maintain a set level of water pressure by 2007, and to meet water purity standards. See Cristina C. David, *MWSS Privatization: Implications on the Price of Water, the Poor and the Environment* (Phil. Instit. for Dev. Studies, Discussion Paper Series No. 2000-14, 2000), <http://dirp4.pids.gov.ph/ris/pdf/pidsdps0014.pdf>. The concessionaire failed to meet any of these benchmarks, yet faced no repercussions.

123. This often happens in telecommunication concession agreements or infrastructure building agreements. For example, when Jordan sought to find private management for its telephone industry, it did so because the government simply could not keep up with the current demand. It provided service to only about seven percent of households, and the waiting list for a new telephone line was nine years long. Mohammad A. Mustapha, *Telecommunications in Jordan: Performance, Policy Environment and Reforms Ahead* (May 12-17, 1997), available at <http://www.worldbank.org/mdf/mdfi/perform.htm>.

124. See Shaw et al., *supra* note 33, at 30.

Transit System states that fares may increase only once every eighteen months, requires that the government negotiate rate increases, and gives the government veto power over proposals.¹²⁵ The agreements may also explicitly cap the price of a good or service. For example, economic development specialists Melissa Houskamp and Nicola Tynan studied fifteen concession agreements and found that seven of the fifteen set top connection prices, capped tariff levels, or both.¹²⁶ However, as discussed above, government officials may initially set these price caps artificially low and then allow unmitigated increases, or refuse to allow any increases, either way maximizing benefit to themselves while undermining the efficacy of the agreement.¹²⁷ Whether the concession agreements actually seek to advance the lot of the affected population or merely advance a public relations strategy, the professed focus on effecting change for the population demonstrates that the agreements are a matter of public policy.

3. *Effective Constraints Placed on Future Policy Determinations*

Interested parties should conceptually recast concession agreements as matters of public policy, rather than merely as bilateral contracts between private parties, because the agreements affect the countries' future welfare policies by constraining, shaping, and determining future policy. Concession agreements formally constrain the choices of future actors in the areas surrounding the original concession agreement. Unlike most enacted laws, which allow an administration, legislature, or populace that disagrees with the policy to revoke it fairly easily, concession agreements must legally remain in force for the length of the agreement, often thirty to fifty years, or else the government must make severance payments to the corporation.¹²⁸ As a result, concession agreements formally constrain government policy long after the agreements' original governmental signatory has left office or retired. Thus, the concession agreement essentially leaves the future government with only

125. *Id.* at 8 box 2.

126. Melissa Houskamp & Nicola Tynan, Review of PPI Projects To Identify Potentially "Pro-Poor" and "Anti-Poor" Provisions 9 (May 31-June 2, 2000) (unpublished manuscript), available at <http://www.ppiaf.org/conference/section1-papers5.pdf>.

127. See *supra* notes 64-69 and accompanying text.

128. Most agreements contain an arbitration clause or a liquidated damages clause so that if the agreement is breached, the nonbreaching party, generally the company, receives damages. There are, however, two notable exceptions to the binding, binary nature of such agreements. First, some agreements contain buyout clauses whereby the government can gradually buy back the concession. Second, some companies have agreed to allow for renegotiation of contracts.

two choices in the area governed by the concession if it cannot renegotiate the agreement; it must either continue with its portion of the agreement—regardless of the changed circumstances or uncalculated costs that may now make the agreement unnecessary, unprofitable, inefficient, or bad distributional policy—or violate the agreement and pay damages.

Concession agreements also indirectly dictate future policy options by constraining the choices of actors in the economic sectors surrounding the original concession agreement. Concession agreements may lock in a policy that commands resources so as effectively to preclude the pursuit of alternative policies. For example, although the terms of a toll road concession may not expressly forbid the government from building alternative roads, often the terms of the concession agreement heavily discourage it by containing a guarantee from the government to the concessionaire of minimum road traffic and toll income.¹²⁹ Similarly, although an oil supply concession may not prohibit the government from developing alternative energy sources, concession agreements that guarantee concessionaires a minimum level of crude oil sales (with government payment for missed targets) will dissuade the government from pursuing such a strategy.¹³⁰

Concession agreements may constrain future policy more broadly by influencing the course of economic development. Concession agreements do not act only in the localized context surrounding the agreement. Instead, they can control the engine of economic development. They may, in effect, allocate the economic growth focus to one industry or economic sector, thereby determining distribution of resources between industries. For example,

129. In other words, the government will be unlikely to pursue any strategy that would divert traffic from the toll road because it would be forced to pay the concessionaire if the toll income fell. Thus, it will perpetuate the concessionaire's local monopoly. See Andrés Gómez-Lobo & Sergio Hinojosa, *Broad Roads in a Thin Country: Infrastructure Concessions in Chile* 29-30 (World Bank, Policy Research Working Paper No. 2279, 2000), for an explanation of such minimum traffic and minimum income guarantees in Chile toll concessions.

130. For example, though early concession agreements between the Venezuelan Government and Royal Dutch-Shell, Occidental, and Socony Mobil did not expressly preclude the government from investing in alternatives, the revenue incentives perpetuated reliance on oil in practice. The government received bonuses only after certain stages of development and made revenue based on output and profit levels with revenue rising greatly with increased oil output and use (with as much as fifty-five percent share of profits above fifty cents per barrel and the opportunity to purchase excess at face value). See Bernard Mommer, *The New Governance of Venezuelan Oil* 9 (Oxford Inst. of Energy Studies, Working Paper No. 23, 1998), available at <http://www.oxfordenergy.org/pdfs/WPM23.pdf>. See generally Paul Pierson, *When Effect Becomes Cause: Policy Feedback and Political Change*, 45 *WORLD POL.* 595 (1993) (describing how path dependency locks in suboptimal policy outcomes because of transition costs).

countries may use concession agreements to create infrastructure in order to focus the economy on trade or tourism, or to build oil refineries and factories to focus more on manufacturing or labor. The concession agreement may also shape the spread of economic development throughout the populace by determining geographic, socioeconomic, and ethnic distribution of developmental benefits.¹³¹ Finally, concession agreements may affect future policy by transitioning into increased marketization, privatization, or both. The “carrot” of temporary transfer of power from the government to private industry often induces competition within the industry¹³² and may soften ideological opposition to a broader market-based strategy of development. Furthermore, if effective, the agreement may serve as a stepping stone toward a large-scale policy of increased privatization by displaying the virtues of private goods and service delivery and by making it particularly difficult for the government to regain a foothold on the provision of goods and services in the areas surrounding the agreement.¹³³ Thus, the formal and informal influences that concession agreements may have on future policies, both locally and generally, establish these concession agreements as matters of public policy.

B. Constructing Procedural Reforms from Recasting Concession Agreements

While the previous Section argued for reconceptualizing concession agreements as matters of public policy, this Section argues that academics, legislators, and other interested parties should apply this reconceptualization to pressure executive government officials and concessionaires into procedural reforms that would bring the method and venue of concession agreements’ creation into congruence with their public policy nature. This Section focuses on two procedural reforms: government-implemented deliberative consideration and local consultation by concessionaires. It goes on to explain the feasibility of the procedural reforms and argue that the reforms will

131. As noted in Subsection III.A.1, different types and locations of concession agreements have different implications for the distribution of economic development across the country.

132. For example, companies may begin to do business in peripheral areas in the potential host country or otherwise compete to demonstrate their viability and desirability as concessionaires.

133. This was likely the case in Chile, for example, as concession agreements in the 1970s and 1980s led the government to accept—and pursue—a broader privatization strategy in other areas. See M. Victoria Murillo, *Conviction Versus Necessity: Public Utility Privatization in Argentina, Chile and Mexico 2* (Aug. 24, 2001) (unpublished manuscript), available at <http://www.yale.edu/leitner/pdf/2001-17.doc>.

enhance the viability and profitability of concession agreements by increasing accountability, traceability, and responsiveness.¹³⁴

1. *Democratic Control and Local Consultation*

Conceptualizing concession agreements as traditional matters of public policy provides a frame for interested parties to persuade executive government officials and concessionaires to enhance democratic control over the agreements' creation. Specifically, they can use this new understanding of concession agreements to pressure government officials to increase openness and deliberation in their creation and to pressure concessionaires to increase local consultation—and thus to treat concession agreements as the public policy measures that they truly are.

Recognizing concessions as traditional matters of public policy exposes a disjuncture in their method of enactment. As Part I explains, the typical creation of concession agreements as traditional bilateral contracts—in an opaque method and insular, nondeliberative venue—directly conflicts with the usual formation of public policy. Governments usually create measures of public policy through a more publicly open and deliberative process, most often in a democratically accountable legislative body,¹³⁵ in order to realize the benefits that stem from this method of creation.¹³⁶ Most simply, parties should not treat concession agreements so differently from other measures of public

134. It should be noted that in doing so, this Note expressly does not evaluate the merits of many of the large-scale substantive changes to concession agreements suggested by scholars and advocates. See *supra* notes 15-17 and accompanying text.

135. This venue and mode of public policy creation holds true in countries, and with regard to similar subject matters, referenced in this Note. For example, the Philippines legislature debated (and passed) a proposal to regulate the content of fuel and reduce dependence on some foreign oil. The sponsor, Representative Zubiri, said: “With the eventual signing of this bill into law, we expect investors to expedite applications for ethanol plants, thus creating new employment for our people and in turn increasing the income for our farmers as the demand for their produce increases.” Maricel V. Cruz, *Bicam Passes Biofuels Measure*, MANILA TIMES, Nov. 24, 2006, at A1, available at http://www.manilatimes.net/national/2006/nov/24/yehey/top_stories/20061124top2.html.

136. For a more detailed discussion of the benefits that stem from creating a public policy in an open, deliberative process, see *infra* Subsection III.B.2. See also Joseph E. Stiglitz, Senior Vice President & Chief Economist, World Bank, Oxford Amnesty Lecture: On Liberty, the Right To Know, and Public Discourse: The Role of Transparency in Public Life 15 (Jan. 27, 1999), available at http://www2.gsb.columbia.edu/faculty/jstiglitz/download/2001_On_Liberty_the_Right_to_Know_and_Public.pdf (“Public officials do have strong incentives for secrecy. But if we are to avoid the myriad adverse political and economic consequences of secrecy, in the design of the architecture of public institutions, we need to take this into account: we need to force more openness than public officials might willingly offer.”).

policy that achieve a positive effect. Thus, conceiving of concession agreements differently can help interested parties push for procedural change in their creation.

Drawing a direct analogy to other current methods of effective governmental policymaking and focusing on the negative effects of the current method of creation is a more viable strategy than the traditional rights-based advocacy because it does not dictate particular content. Existing suggestions regarding procedural change are unlikely to be accepted by governments or concessionaires because they use language that implicitly or explicitly advocates substantive change in concession agreements.

Many advocates adopt a “rights-based” or “justice-based” push to change the way concession agreements are created. For example, Publish What You Pay, a coalition of NGOs, states that companies extracting oil and other resources should publish their agreements because “[n]atural resources are held in trust by the state for the citizens of a country. Those citizens have a clear right to information”¹³⁷ Amnesty International calls for transparency in the Chad-Cameroon pipeline concession agreement with an Exxon Mobil-led consortium as a “human rights” enforcement mechanism.¹³⁸ Rights- or justice-based argument faces strong opposition, both because it shifts the focus on benefits entirely from the concessionaire to the population and, more importantly, because despite having procedural suggestions, it focuses on substantive outcomes. Because advocates often predicate a right to openness, information, and consultation on public ownership of the resource (such as forests or minerals) or a human right to the resource (such as water or electricity), it is difficult for governments and concessionaires to implement the procedural suggestion without recognizing the underlying substantive ownership or right. If the government and concessionaire did recognize the underlying public ownership or right, however, this recognition would likely lead to *ex ante* restrictions on the terms or conditions of concession agreements.¹³⁹ The concessionaires’ fear of these *ex ante* substantive restrictions undermines their assent to the potential procedural

137. Publish What You Pay, Background, www.publishwhatyoupay.org/english/background.shtml (last visited Oct. 30, 2007).

138. See AMNESTY INT’L, CONTRACTING OUT OF HUMAN RIGHTS: THE CHAD-CAMEROON PIPELINE PROJECT 41 (2005), available at [http://www.amnesty.org/ru/library/pdf/POL340122005ENGLISH/\\$File/POL3401205.pdf](http://www.amnesty.org/ru/library/pdf/POL340122005ENGLISH/$File/POL3401205.pdf).

139. See, e.g., Press Release, Global Witness, Global Witness Briefing Document—Cambodia: Colexim and Everbright Logging Companies (Oct. 22, 2003), available at http://www.globalwitness.org/media_library_detail.php/317/en/global_witness_briefing_document_cambodia_colexim_ (arguing that public ownership of the forest prevents concessionaires from restricting the use of the forest or community forestry).

improvement.¹⁴⁰ Thus, though this rights-based procedural reform strategy has clear moral appeal, its shift in focus and substantive implications undermine its potential for implementation and thus its ability to effect positive change.¹⁴¹

In contrast, the solution offered in this Note is truly procedural¹⁴² and carries no strong implications for *ex ante* substantive restrictions on concessions. Furthermore, this conceptual argument presents a lens to focus on how reforms will enhance the stability of the concession agreements. Because the argument for procedural reform is based on producing more sustainable and efficient concession agreements, rather than on producing specific substantive outcomes, it provides a strong rhetorical pitch to executive officials, for whom the success of the agreement could carry great political reward, and to concessionaires, who have a clear financial interest in creating stable agreements.¹⁴³ Thus, this strategy provides an easier sell to wary parties.

To maximize effectiveness, however, interested parties must combine this rhetorical strategy with credible threats to both host country officials and concessionaires. Credible threats to officials may come in the form of electoral repercussions for noncompliance (for some elected officials) or economic incentives for compliance. To a certain extent, threats may occur naturally from local citizen groups that seek enhanced benefit from concession agreements. A concerted drive for compliance by the international community may effectively supplement these threats. One promising model for international involvement, presented by Publish What You Pay, is an attempt to persuade international

140. Furthermore, where concessionaires recognize human rights only based on external pressure and not a perceived benefit to themselves, they may simply act to avoid actually effectuating those rights. *See id.* (“In early 2003, local people living within the Colexim concession reported that company representatives were visiting villages and handing out blankets in exchange for villagers’ thumb-printing a document. Colexim subsequently sought to present this exercise as a consultation with local people about the content and implications of the company’s Strategic Forest Management Plan.”).

141. For a discussion of the positive effects stemming from the enactment of the proposed procedural reforms, see *infra* Subsection III.B.2.

142. *See supra* notes 12–14 and accompanying text.

143. For example, academics, officials, and advocates can credibly argue to concessionaires that if they consult with local parties, the locals will be less likely to oppose the agreement postenactment because they feel recognized as stakeholders in the agreement. Furthermore, academics, officials, and advocates can credibly claim that if the concessionaires consult with local parties, the concession agreement will be more stable because locals know how to adapt the agreement to the particular conditions in their communities—and can predict the likely effects of the agreement in their localities more accurately than far-removed national officials can.

banks to condition outside project financing in developing countries upon governments meeting transparency targets.¹⁴⁴

To be most successful in inducing concessionaires and governments to comply, this line of rhetorical argument must combine pressure from the top down and from the bottom up. Advocates and other interested parties must make this case to concessionaires. A credible commitment from governments or international institutions must supplement this strategy, however. Ideally, individual governments of the host countries would each condition negotiations of concession agreements upon transparency principles, recognizing the benefits that approach would afford to their citizens. However, even for the most well-meaning governments, that outcome seems unlikely without outside sources of support or pressure. One solution may be to advocate a structure analogous to the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises.¹⁴⁵ These guidelines provide detailed conditions of employment and skills transfers for multinational enterprises in OECD countries and other signatory countries.¹⁴⁶ While enterprises' assent to these operating conditions is neither required nor legally enforceable,¹⁴⁷ the OECD has been remarkably successful at getting major multinational enterprises to participate and adhere to the guidelines by relying on the threat of negative publicity for noncompliance and on economic and business arguments to promote compliance.¹⁴⁸ Analogously, international institutions and developing countries' governments could create procedural guidelines for concessionaires to follow during concession agreement creation and could promote voluntary compliance of the concessionaires by using publicity as a weapon and a reward combined with economic arguments.

Thus, conceptualizing concession agreements as traditional matters of public policy provides a new framework for interested parties to persuade executive government officials and concessionaires to enhance openness, deliberation, and local consultation in the creation of the agreement. This

144. See Publish What You Pay, Objectives, <http://www.publishwhatyoupay.org/english/objectives/banks.shtml> (last visited Oct. 30, 2007).

145. Organisation for Economic Co-operation and Development, The OECD Guidelines for Multinational Enterprises, June 27, 2000, 40 I.L.M. 237.

146. *Id.* at 240.

147. *Id.* at 239.

148. See PAUL HOHNEN & JASON POTTS, INT'L INST. FOR SUSTAINABLE DEV., CORPORATE SOCIAL RESPONSIBILITY: AN IMPLEMENTATION GUIDE FOR BUSINESS 52 (2007) ("All 30 of the OECD's industrialized country members have formally adhered to the revised guidelines, as well as nine nonmember countries (Argentina, Brazil, Chile, Estonia, Israel, Latvia, Lithuania, Romania and Slovenia).").

predicates the argument on enhancing the effectiveness and stability of the agreements while maintaining a procedural, outcome-neutral approach, avoiding the barriers to acceptance that plague current rights-based strategies. Therefore, especially when combined with external threats or inducements for compliance, it presents a credible avenue to push for procedural reform. The next Subsection examines how these procedural reforms would increase the potential stability and success of concession agreements by enhancing transparency, accountability, and responsiveness.

2. *Transparency, Responsiveness, Accountability, and Increased Stability and Success*

The reforms—increased open, public deliberation, and increased consultation with local stakeholders—caused by actors who recast concession agreements as traditional matters of public policy will substantially enhance transparency, responsiveness, and accountability in the creation of concession agreements.

Debate in a public forum would allow affected individuals to follow the proceedings easily, as compared to closed-door meetings between high-level government officials, lawyers, and representatives from the concessionaire company. Public debate would also enhance transparency by giving opposing political parties,¹⁴⁹ NGOs,¹⁵⁰ and media sources¹⁵¹ increased access to

149. For example, even if the parties to the agreement did not make terms available directly to the public, opposing parties would strategically release the information they can access to the public or interest groups that support their position. The United Nations election and referendum supervision programs, such as those in Malawi and Cambodia, recognized the opposing party's ability to access and present government information as so important to transparency and accountability that it served as a key guideline to effective elections. See Letter Dated 30 October 1991 from the Permanent Representatives of France and Indonesia to the United Nations Addressed to the United Nations Secretary-General, at 26, U.N. Doc. A/46/608 ("Ensuring fair access to the media, including press, television and radio, for all parties contesting in the election . . ."); ARTICLE 19 GLOBAL CAMPAIGN FOR FREE EXPRESSION, GUIDELINES FOR BROADCAST COVERAGE OF ELECTION CAMPAIGNS IN TRANSITIONAL DEMOCRACIES, guideline 9 (1992), <http://aceproject.org/ero-en/topics/parties-and-candidates/mex01.pdf>.

150. For example, Transparency International, one of the leading NGOs in the field, seeks to increase NGOs' access to and dissemination of government information in order to increase transparency and decrease corruption. Transparency Int'l, Anti-Corruption Handbook, http://www.transparency.org/policy_research/ach (last visited Nov. 4, 2007).

151. See, e.g., *Democracy Dialogue on Journalists' Access to Government Information*, U.S. INFO, June 4, 2007, <http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2007&tm=June&x=20070604163025eafas2.117336e-03> (Eric Johnson, the executive director of Internews International, describing how he increased journalistic access to governments in

information about terms and potential effects of concession agreements, which they would then disseminate to the broader public.

These reforms will also enhance the responsiveness of government officials to the concerns of the most acutely affected populace. The current method of concession agreement creation largely neglects local concerns because government officials exclude local actors from the negotiating table.¹⁵² However, nearby populations' increased access to information and consultation with concessionaires and officials will allow local voices to contribute to the debate. This consultation may also increase responsiveness to local concerns because it may encourage the current parties to the agreement to view these populations more as quasi-parties to the agreement.¹⁵³

Finally, such reforms would enhance the accountability of government officials. Currently, officials who enact the concession agreements face little accountability because the public is unable to trace concession failure back to them and because some are unelected.¹⁵⁴ Government officials currently can obscure the connection between their negotiations and the outcomes both by deemphasizing the role that they played in the agreement and by highlighting the role of the unscrupulous concessionaire if necessary.¹⁵⁵ Decision makers who do not face popular election are even less accountable for their actions. A more deliberative and consultative process allows the public to connect the concession agreements directly to the actions and statements of particular officials.¹⁵⁶ This will hold parties accountable by allowing the public more accurately to dole out political penalties—or rewards—to elected officials

developing countries, thus enhancing transparency of government actions); *see also* ARTICLE 19 GLOBAL CAMPAIGN FOR FREE EXPRESSION, *supra* note 149, guidelines 8, 10, 11 (discussing the importance of the media in producing transparency about government actions through voter information and accountability through fair and free elections).

152. *See supra* Sections I.B, II.B; *see also* Houskamp & Tynan, *supra* note 126, at 10 (noting that of the twenty-six concession and license agreements studied, only seven “made any specific reference to or provision for serving low-income households”).
153. This does not, however, ensure that government officials will actually implement the policy preferences of the local population.
154. *See, e.g.*, ARNOLD, *supra* note 54, at 60-87.
155. *See id.*
156. Even if the population could merely see the parties and terms of the agreement after its enactment (without changing the procedure), that would enable them to hold the responsible officials more accountable. *Cf.* Steve Wood, *A Year of Openness in Government?*, BBC NEWS, Jan. 16, 2006, <http://news.bbc.co.uk/1/hi/uk/4616610.stm> (noting that in the first year after the Freedom of Information Act passed in Britain, giving citizens access to documents from government bodies, citizens filed an estimated 130,000 requests for information and “[n]ew information of real value is reaching the public for the first time,” such as the level of subsidies the government provides to farmers).

commensurate with the role that they played in the agreement, as well as to appropriately credit or punish concessionaire companies, such as by increasing or withdrawing investments or financing.¹⁵⁷

These improvements in transparency, accountability, and responsiveness will also enhance the success of concession agreements by ameliorating two major difficulties: local opposition¹⁵⁸ and the propensity for corruption.¹⁵⁹ The changes will decrease local opposition in two major ways. First, to the degree that voters or other parties can hold leaders accountable for the outcomes of their decisions, and to the degree that the process responds to local concerns, agreements that more substantively take into account local opinions and ways of life are more likely to result. If the content of concession agreements reflects local concerns, local parties will naturally be less likely to oppose them.¹⁶⁰ Second, even without any substantive changes to the agreements, a more public procedure will engender less local opposition. The ability to view and take part in the concession agreement creation in and of itself will allow local stakeholders to better understand the context of the agreement, be prepared for the transition, and feel included and accepted.¹⁶¹ A decrease in local opposition will substantially boost the long-term success prospects of concession agreements, especially given the strong role that vociferous local opposition has played in undermining past agreements' stability.¹⁶²

Improvements in transparency, responsiveness, and accountability will also decrease corruption. Because the absence of transparency and accountability

157. For example, international banks and organizations could more accurately base their funding of developing country projects (and evaluate their ongoing funding) on whether the parties actually act in support of their mission. This proposal dovetails with this Note's suggestions for international involvement. *See supra* notes 144-147.

158. *See supra* Section II.B.

159. *See supra* Subsection II.A.1.

160. In other words, local populations will usually prove less likely to oppose concession agreements that actually benefit them, especially in the case of procedural reforms that allow them to access information to discern the actual effect of the agreement.

161. Significant psychological research as well as firsthand reporting suggests that providing underrepresented groups with a "seat at the table" can decrease their opposition to the final agreement. *See, e.g.,* WILLIAM BOYCE ET AL., *A SEAT AT THE TABLE: PERSONS WITH DISABILITIES AND POLICY MAKING* 64 (2001) (quoting a member of such a group that its inclusion was "a very strong symbol that had tremendous repercussions for us. It not only set a precedent, but it would ensure an equal approach to planning and to public perception, to political perception."); Donetella della Porta, *Protest, Protesters, and Protest Policing: Public Discourses from Italy and Germany from the 1960s to the 1980s*, in *HOW SOCIAL MOVEMENTS MATTER* 66, 92 (Marco Giugni, Doug McAdam & Charles Tilly eds., 1999) (discussing the importance of the "politics of signification").

162. *See supra* Section II.B.

directly facilitates corruption, any increase in openness and responsibility produced through democratic deliberation and local consultation will directly decrease corruption. The responsiveness of the process to local concerns will also decrease the possibility of corruption. The inclusion of others in the creation and implementation of concession agreements, especially those with a great vested interest in the success of the project, will largely prevent a self-interested executive from crafting a policy for self-gain at the expense of long-term public benefit.¹⁶³

CONCLUSION

Stable concession agreements can provide crucial aid to developing countries. They present a vital source of income for impoverished governments.¹⁶⁴ They offer key financial resources and technical expertise to modernize infrastructure by building roads, highways, and airports,¹⁶⁵ and they can expand the availability and ensure the efficient provision of most basic resources such as potable water and electricity.¹⁶⁶ Yet the concession agreements implemented thus far have largely failed to live up to this potential and instead have faced early renegotiation and cancellation. Consequently,

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163. This will not serve, of course, as a perfect check, as local players could still collude with government officials and concessionaires. The more democratic and participatory the process becomes, however, the less likely such an outcome is to occur.
164. See, e.g., WORLD BANK, CAN AFRICA CLAIM THE 21ST CENTURY? 144 (2000), available at <http://www.worldbank.org/html/extdr/canafriacclaim.pdf> (“[P]rivatizing can be a source of revenue for cash-strapped governments.”).
165. See *Commission Green Paper on Public Private Partnerships and Community Law on Public Contracts and Concessions*, at 2-3, COM (2004) 327 final (Apr. 30, 2004) (“The public authorities of Member States often have recourse to PPP arrangements to undertake infrastructure projects At European level, it was recognized that recourse to PPPs could help to put in place trans-European transport networks, which had fallen very much behind schedule, mainly owing to a lack of funding.”); Mark A. Jamison, Lynne Holt & Sanford V. Berg, *Measuring and Mitigating Regulatory Risk in Private Infrastructure Investment*, ELECTRICITY J., July 2005, at 36, 37 (“In developing countries in 1990-2001, nearly 2,500 infrastructure projects involved private participation, with commitments of more than \$750 billion.”).
166. See, e.g., WORLD BANK, *supra* note 164, at 144 (“Urban power, water, sanitation, and telecommunications require large investments But much of the funding can come from the private sector”).

governments and potential concessionaires are increasingly hesitant to invest in this critical developmental strategy.¹⁶⁷

This Note has argued that a substantial reason for the failure of concession agreements is that developing countries create concession agreements as traditional bilateral contracts. Executives prevent democratic deliberation at each stage of concession agreement creation and shield the process from public view and input. This opaque method induces corruption, shortsighted decision making, and inefficient tariff setting, and exacerbates local opposition. The subject matter, purpose, and effects of concession agreements demonstrate that developing countries and their concessionaires should instead treat concession agreements as matters of public policy. Such a reconceptualization would facilitate procedural reforms, which would enhance transparency, responsiveness, and accountability in the agreement-making procedure, and consequently reduce corruption and local opposition to the agreements. These effects would enhance both the stability and the effectiveness of the concession agreements. Thus, recasting concession agreements as measures of public policy provides a tool to benefit both concessionaires, who will make increased profits from stable agreements, and developing countries, which will realize the intended benefits of the concession, including better roads, highways, and airports, or increased access to clean water and electricity.

167. See, e.g., Estache, *supra* note 6, at 25; Ada Karina Izaguirre, *Private Infrastructure: A Review of Projects with Private Participation, 1990-2001*, PUB. POL'Y FOR PRIVATE SECTOR, Oct. 1, 2002, available at <http://ppi.worldbank.org/book/2501zagu-101502.pdf>.