LEGAL REGIME ON STABILIZATION CLAUSES IN THE EXTRACTIVE SECTOR IN TANZANIA

Kennedy Gastorn[*]

Abstract

This article analyses stabilization regime in the extractives sector in Tanzania from the perspective of the State's sovereign legislative and regulatory rights. Inherently, stabilization clauses are mitigation tools that seek to limit host States' legislative and administrative actions to the respective agreements in enhancing investors' legitimate expectations and protections.

This paper advances the argument that a government of a sovereign State cannot, as a matter of principle, fetter its duty to act for the public good and interest by binding itself through stabilization clauses. However, the government must do so while also honouring its international contractual commitments. It must therefore act fairly, reasonably and equitably under the power of eminent domain and public powers against the ill-gotten unbalanced terms including investment agreements.

This article also discusses the concept of unconscionability including the practical limitations for the States to use it as a defense, especially, in investment treaty claims. The principle of *pacta*

[*]Department of Public Law, University of Dar es Salaam School of Law. Email: kennedy@udsm.ac.tz

sunt servanda as it relates to the stabilization clauses in the extractive sectors arrangements is also discussed. In this context, this paper argues that stabilization clauses cannot blindly be enforced against a State under the auspices of the *pacta sunt servanda* principle.

Key words: *stabilization clauses, legitimate expectations, unconscionable terms, regulatory autonomy, pacta sunt servanda*.

1. INTRODUCTION

The enactment of the Natural Wealth and Resources Contracts (Review and Renegotiations of Unconscionable Terms) Act and the Natural Wealth and Resources (Permanent Sovereignty) Act in 2017 creates a new legal regime in Tanzania on the use of stabilization clauses. This is more evident in the natural wealth and resources[1] especially the extractive sector as one of the key economic strategic sectors in the country.[2]

---

[1] S. 3 of the Natural Wealth and Resources Contracts (Review and Re-Negotiation of Unconscionable Terms) Act 2017; S. 3 of the Natural Wealth and Resources (Permanent Sovereignty) Act 2017 defines natural wealth and resources as "all materials or substances occurring in nature such as soil, subsoil, gaseous and water resources, and flora, fauna, genetic resources, aquatic resources, micro-organisms, air space, rivers, lakes and maritime space, including the Tanzania's territorial sea and the continental shelf, living and non-living resources in the Exclusive Economic Zone which can be extracted, exploited or acquired and use for economic gain, whether processed or not". S. 2 of the Natural Resources Act defines 'natural resources' as (a) the soil and waters of Mainland Tanzania; (b) the animal, bird and fish life of Mainland Tanzania; c) the trees, grasses and another vegetable products of the soil; and (d) such other things as the Minister responsible for natural resources may, by proclamation in the Gazette, declare to be natural resources.

[2] S. 100E of the Written Laws (Miscellaneous Amendments) Act 2017, amending the Mining Act Cap 123.

Regulations on stabilization regime in extractive sector is therefore not an isolated arbitrary action but one in a series of reforms recently introduced in the wider natural wealth and resources sector. The stated objectives of the reforms are, partly, to reinforce the responsibility of people and the government in protecting the inalienable rights of the citizens in natural resources, create an economic independence that is free from wanton exploitation, as well as to streamline investments in natural and strategic resources.[3]

This is consonance with the customary norm of international law which vests sovereign rights on States over natural resources in their respective territories. It is also consistent with Articles 9 and 27 of the Constitution of the United Republic of Tanzania which imposes clear obligations on the people and the United Republic to protect natural wealth and resources. In so doing, the Constitution ensures that interests of people are paramount and protected in any arrangement or agreement which the government makes in respect of such natural wealth and resources.

Accordingly, the new law not only introduces regulations over stabilization clauses in the extractives sector,[4] it also empowers the government to review and renegotiate all existing mining developments agreements against unconscionable terms.[5] In

---

[3] Memorandum of Objects and Reasons to the Bill of the Natural Wealth and Resources (Permanent Sovereignty) Bill 2017, Memorandum of Objects and Reasons; Natural Wealth and Resources Contracts (Review and Re-Negotiation of Unconscionable Terms) Bill 2017, Memorandum of Objects and Reasons in Special Bill Supplement No. 3, Vol 98, Special Gazette of the United Republic of Tanzania No. 4 of 28th June 2017.

[4] S. 11 of the Written Laws (Miscellaneous Amendments) Act 2017.

[5] S. 10 of the Written Laws (Miscellaneous Amendments) Act 2017. Also see s. 6 of the Natural Wealth and Resources Contracts (Review and Re-Negotiation of Unconscionable Terms) Act 2017.

addition, it expands the oversight and advisory functions of the National Assembly to review any agreements or arrangements made by the government relating to natural wealth and resources.[6] The law proclaims permanent sovereignty of people of Tanzania over all natural wealth and resources,[7] creates a lien over any material, substance, product or associated products extracted from the mining operations or mineral processing such as mineral concentrates.[8] The law also prohibit any proceedings in foreign courts or tribunals that involve questions of Tanzania's sovereignty over all of its natural wealth and resources, including disputes arising from extraction, exploitation or acquisition and use of natural wealth and resources of Tanzania.[9]

Under the old legal regime, there were no specific limitations in terms of stabilization clauses in the extractive sector under the Mining Development Agreements (the MDA) signed between the government and the investors.[10] The Minister responsible for minerals was, for instance, empowered to bind the government and limit the extent of environmental obligations or liabilities of the

---

[6] S. 4 of the Natural Wealth and Resources Contracts (Review and Re-Negotiation of Unconscionable Terms) Act 2017.
[7] S. 4 of the Natural Wealth and Resources (Permanent Sovereignty) Act 2017.
[8] S. 5 of the Written Laws (Miscellaneous Amendments) Act 2017.
[9] S. 11 of the Natural Wealth and Resources (Permanent Sovereignty) Act 2017.
[10] The MDAs were introduced for the first time in Tanzania in 1998 as an outcome of the 1994 World Bank initiated and funded 'Mineral Sector Development Technical Assistance Project. S. 10(1) of the Mining Act 1998 provided that "The Minister may, on behalf of the United Republic, enter into a development agreement, not inconsistent with this Act, with the holder of, or an applicant for, a Mineral Right for which he is the licensing authority relating to the grant Schedule of such a Mineral Right or Rights, the conducting of mining operations under a special mining licence, or the financing of any mining operations under a special mining licence". See also Masamba, M., 'Government Regulatory Space in the Shadow of BITs: The Case of Tanzania's Natural Resource Regulatory Reform' (Investment Treaty News, 8 December 2017) at p. 5 <https://www.iisd.org/sites/default/files/publications/iisd-itn-december-2017-english.pdf> (accessed 15 May 2018).

investor, and guarantee the fiscal stability by freezing the applicable tax rates at the time the agreement is made.

The Buzwagi Development Agreement of 17th February 2008 between the Minister for minerals and Pangea Minerals Limited to develop a gold mine at Buzwagi illustrates the point. It contained freezing clauses that fixed the applicable tax rates at the time the agreement was made throughout the life of the Project.[11] The MDA also provided that:

"4.2 Any tax, duty, fee or other fiscal impost imposed on the Company or its shareholders, affiliates or lenders in respect of income, including dividend income, derived from mining operations conducted under the Special Mining Licence, or in respect of any property held or thing done for any purpose authorized or contemplated by the Special Mining Licence or this Agreement shall be in accordance with the Income Tax Act No. 11 of 2004 as in effect on the Fiscal Stabilization Date.

11.1 The Government shall ensure that, during the term of this Agreement, legal provisions governing the Company or its shareholders' benefits, rights and duties in the following matters shall not be changed unilaterally:

11.1.1 the duration of the Special Mining Licence or the use of land over the Contract area including the use of any land located beyond the Contract

---

[11] See Sipemba, T.M., 'Constitutionality of Mining Development Agreements: With Some Reference to the Mining Development Agreement Between Pangea Minerals Limited and the Government of the United Republic of Tanzania', LLM Thesis, University of Dar es Salaam, 2010, at para 4.4.

Area for its infrastructure or storage or transport of its products;

11.1.2 bringing into Tanzania expatriate personnel, machinery, equipment, tools…and other materials which are necessary for the building of the mine or the conduct of mining operations;

11.1.3 exemption from taxes, duties, levies and imposts of any nature;

11.1.4 guarantees of transfer of capital, profits and dividends and guarantee against expropriation;

11.1.5 …

11.1.6 …

11.1.7 liability to royalty, income tax and the method of computation thereof;

11.1.8 any other matter which is fundamental to the economic position of the Company.

11.2 In the event of fundamental changes concerning the Company or its shareholders' benefits, rights and duties under sub-article 11.1 above which would place the Company in a worse off situation than it was on the Effective Date, the Government shall in consultation with the Company take necessary steps to ensure that the Company's rights or interests are not eroded or otherwise materially diminished."

The above stabilization clauses created a liability on the part of the government to refund and or compensate investors any additional charges out of the change in fiscal and tax regime. They limited the parliament from legislating on several matters without a prior consultation to the company, allowed the company to bring in the country any number of expatriate personnel, and guaranteed without any limitations the transfer of capital, profits, and dividends.

No wonder, through MDAs, Tanzania is among the often cited developing in the global south countries whose agreements in the extractive sector have unreasonably given generous investment conditions to the investors at the expense of government revenues and the best interest of the country.[12] Since MDAs are not open to public in Tanzania, the above Buzwagi Development Agreement may, presumptuously, be deemed as a prototype of all existing MDAs.

2. UNCONSCIONABILITY OF STABILIZATION CLAUSES IN TANZANIA

Under the new legal regime, all provisions which hitherto empowered the Minister for minerals to enter into MDAs have been removed as unconscionable.[13] Practically, henceforth all mining activities will be done under licences (of whatever category be it a special mining licence, a mining licence or a primary mining licence). Arguably, this is a move towards doing away with MDAs,

---

[12] See for instance, Cooksey, B., 'The Investment and Business Environment for Gold Exploration and Mining in Tanzania' (2011) Africa Power and Politics Background Paper 3 <http://www.institutionsafrica.org/filestream/2012 1217-the-investment-and-business-environment-for-gold-exploration-and-mining-in-tanzania> (accessed 15 May 2018).

[13] S. 9 of the Written Laws (Miscellaneous Amendments) Act of 2017, repeals s. 10 of the Mining Act 2010.

especially in the mining sector, to uniform investment codes and laws that apply to all investors in the sector. Alternatively, the existing MDAs are qualified by the codes and not the other way round.[14] This is common in many developed countries where stabilization clauses are deemed against law relating to public contracts.[15]

Furthermore, all stabilization clauses are supposed to be conscionable. By treating some provisions as unconscionable terms, the law imposes limitations in terms of the contents of future stabilization clauses in agreements or arrangements within the sector. The existing agreements or arrangements in the extractives sector will then be reviewed and renegotiated, whenever necessary, to address the unconscionable stabilization clauses.[16]

Under the new law, an unconscionable term is broadly defined as "any term in the arrangement or agreement on natural wealth and resources which is contrary to good conscience and the enforceability of which jeopardizes or is likely to jeopardize the interests of the people and the United Republic".[17] Examples of unconscionable terms include any term which (a) aim at restricting the right of the State to exercise full permanent sovereignty over

---

[14] See Mann, H., et al, 'Model Mining Development Agreement - Transparency Template' (2013) The International Institute for Sustainable Development and Sustainable Development Strategies Group Report 2 <https://www.iisd.org/sites/default/files/publications/mmda_transparency_report.pdf> (accessed 15 May 2018).

[15] Osode, P.C., 'State Contracts, State Interests and International Commercial Arbitration: a Third World Perspective' (1997) 30 *The Comparative and International Law Journal of Southern Africa* 37, at p. 55.

[16] S. 10 of the Written Laws (Miscellaneous Amendments) Act 2017 amending the Mining Act Cap 123 and Part II of the Natural Wealth and Resources Contracts (Review and Renegotiations of Unconscionable Terms) Act 2017.

[17] S. 3 of the Natural Wealth and Resources Contracts (Review and Re-Negotiation of Unconscionable Terms) Act 2017.

its wealth, natural resources and economic activity, and or (b) restricts periodic review of arrangement or agreement which purports to last for life time. Any stabilization arrangement involving tax expenditures by the Government, must also provide for the qualification of the value of the tax expenditures and how the mining company shall recompense the Government for the foregone revenues. In this context, the Government shall have the option to convert the quantified values into equity holdings in the particular mining company.[18]

In principle, stabilization clauses inherently seek to limit host States' sovereign legislative and regulatory actions to the respective investment agreements or contracts as a risk mitigation tool. They ensure regulatory predictability to both the foreign investor and the host State and thereby reinforces investors' legitimate expectations and protections.[19] This is important to the foreign investors in securing the tenure and profitability especially in the capital intensive and high-risk investments like those in the mining and extractive sector. However, poorly negotiated and conceived stabilization clauses may hugely rob and plunder the natural resources of the host State, with impunity. They can conceal illicit financial flows and even expose the country to the arbitral discretion of investment tribunals, should it dare seek to reverse the trend.[20]

---

[18] S. 100E(1) of the Mining Act 2010. Also see s. 6(2) of the Natural Wealth and Resources Contracts (Review and Re-Negotiation of Unconscionable Terms) Act 2017.

[19] Simma, B., 'Foreign Investment Arbitration: A Place for Human Rights?' (2011) 60 *International and Comparative Law Quarterly* 573, at p. 593.

[20] See generally, Frank, S., 'Stabilization Clauses and Foreign Direct Investment: Presumptions versus Realities' (2015) 16 *Journal of World Investment and Trade* 88; Mustafa, E., *International Energy Investment Law: Stability through Contractual Clauses*, Wolters Kluwer, 2011, at p. 220; Oshionebe, E., 'Stabilization Clauses in Natural Resources Extraction Contracts: Legal,

Stabilization clauses may take various forms such as (a) intangibility clauses, where the agreement can only be modified with the consent of the parties; (b) freezing clauses, where the applicable domestic law for the contract is frozen in time as the law and regulations in force at the date of the conclusion of the contract, and which cannot be affected by subsequent legislation inconsistent with that initial body of law; (c) consistency clauses, which applies future domestic legislation of the host State only if it

---

Economic and Social Implications for Developing Countries' (2010) 10 *Asper Review of International Business and Trade Law* 1; Vielleville, D.E. and Vasani, B.S., 'Sovereignty over Natural Resources Versus Rights under Investment Contracts: Which One Prevails?' (2008) 5 *Transnational Dispute Management* 1; Sheppard, A. and Crockett, A., 'Are Stabilization Clauses a Threat to Sustainable Development' in Segger. M.C., et al. (eds.), *Sustainable Development in World Investment Law,* Wolters Kluwer, 2011, at p. 329; Kustnetsov, A.V., 'The Limits of Contractual Stabilization Clauses for Protecting International Oil and Gas Investments Examined Through the Prism of the Sakhalin-2 PSA: Mandatory Law, the Umbrella Clause, and the Fair and Equitable Treatment Standard' (2014) 22 *Willamette Journal of International Law and Dispute Resolution* 223; Adaralegbe, B., 'Stabilizing Fiscal Regimes in Long Term Contracts: Recent Developments From Nigeria' (2008) 1 *Journal of World Energy Law and Business* 239. For an appraisal of arbitral awards see Cotula, L., 'Pushing the Boundaries vs. Striking a Balance: Some Reflections on Stabilization Issues in the Light of the *Duke v. Peru*' (2010) 11 *Journal of World Investment and Trade* 27; Gehne, K. and Brillo, R., 'Stabilization Clauses in International Investment Law: Beyond Balancing and Fair and Equitable Treatment' NCCR Trade Regulation: Working Paper No. 2013/46, <http://www.nccr-trade.org/fileadmin/user_upload/nccr-trade.ch/wp2/Stab_clauses_final_final.pd f> (accessed 16 April 2018); N'gambi, S.P., 'The Effect of Stabilization Clauses on Concession Agreements' (2012) 43 *Zambia Law Journal* 57; *Saudi Arabia v ARAMCO* (1958) 27 ILR 117; *Sapphire International Oil Company v. National Iranian Oil Company* (1963) 35 ILR 136; *B.P. Exploration Company (Libya) v. Libya* (1973) 53 ILR 297; *Revere Copper and Brass, INC. and OPIC v. Jamaica* (1978) 21 ILM 1321; *TEXACO-CALAISATIC v. Libya* (1978) 17 ILM 1; *LIAMCO v. Libya* (1981) 20 ILM 161; *AGIP Company v. People's Republic of Congo* (1982) 21 ILM 726; *AMINOIL v. Kuwait* (1982) 21 ILM 976; *LETCO v Liberia* (1994) 2 ICSID Reports 346; *Paushak v. Mongolia*, UNCITRAL Award (28 April 2011); *Burlington Res INC. v Ecuador*, ICSID Case no. ARB/08/05, Award (14 December 2012); *Duke Energy International Peru Investments Ltd. v Peru*, ICSID Case No. ARB/03/28 Award (18 August 2008).

is consistent with the investment contract; (d) fiscal or tariff stabilisation clauses, which fixes the host State's tax or tariff regimes affecting the investment, and (e) economic equilibrium clauses, which largely links the change of the terms of the contract to the possibility of periodic contractual renegotiation, to restore, as closely as possible, the original economic guarantees of the contract.[21]

Most of sovereign calls in these promulgated regulations on stabilization regime are very progressive. It is important that foreign investors must obey and abide by all laws and regulations in force in a country where they invest. In case of future changes in the laws and regulations that substantially affecting the economic interests of any of the parties, then parties should genuinely agree to make necessary adjustments to the relevant articles of the agreement or arrangement. In doing so, they must observe the principle of the mutual economic benefits of the parties. Such renegotiation must be done in good faith in order to achieve the same benefits or expectations for the investor and the State as would have been anticipated had there not been any adverse economic affects.[22]

---

[21] Simma, *Foreign Investment Arbitration: A Place for Human Rights*?, above note 19, at p. 593, fn 78 drawing from Cotula, L. 'Foreign Investment Contracts' in International Institute of Environment and Development, *Strengthening Citizens' Oversight of Foreign Investment: Investment Law and Sustainable Development* (August, 2007) < http://pubs.iied.org/pdfs/17015IIED.pdf> (accessed on 16 April, 2018). For an empirical analysis of the various stabilization clauses incorporated in agreements in force see Shemberg, A., 'Stabilization Clauses and Human Rights: A research projected conduced for the International Finance Corporation (IFC) and the United Nations Special Representative of the Secretary-General on Business and Human Rights <https://www.ifc.org/wps/wcm/connect/9feb5b00488555eab8c4fa6a6515bb18/Stabilization%2BPaper.p df?MOD=AJPERES> (accessed on 16 April 2018).

[22] Gotanda, J., 'Renegotiation and Adaptation Clauses in Investment Contracts, Revisited' (2003) 36 *Vanderbilt Journal of Transnational Law* 1461, at p. 1467.

Any serious investor knows and appreciates the fact that laws evolve with time and the same may reasonably be changed by the government for a good cause. The government must not change domestic laws to avoid its obligations within the agreed stabilization clauses. As held in *Parkerings-Compagniet AS v Republic of Lithuania* and followed in *Toto Construzioni Generali S.P.A. v. Republic of Lebanon:*

> "It is each State's undeniable right and privilege to exercise its sovereign legislative power. A State has the right to enact, modify or cancel a law at its own discretion. Save for the existence of an agreement, in the form of a *stabilisation* clause or otherwise, there is nothing objectionable about the amendment brought to the regulatory framework existing at the time an investor made its investment. As a matter of fact, any businessman or investor knows that laws will evolve over time. What is prohibited however is for a State to act unfairly, unreasonably or inequitably in the exercise of its legislative power."[23]

3. THE DOCTRINE OF UNCONSCIONABILITY

The concept of unconscionable is common in contracts and agreements and in many jurisdictions, unconscionable international agreements are unenforceable.[24] Also,

---

[23] *Parkerings-Compagniet AS v Republic of Lithuania,* ICSID Case No. ARB/05/8, Award, (11 September 2007), para 332; *Toto Construzioni Generali S.P.A. v. Republic of Lebanon,* ICSID Case No. ARB/07/12, Award (7 June 2012), at para 243.

[24] Born, G.B., *International Arbitration: Cases and Materials* (2nd Edn.), Kluwer International, 2015, at p. 393.

unconscionability is a recognized defense under the UNCITRAL Model Law much as it is not clearly stipulated within its articles.[25]

Historically, the concept of unconscionable can be traced centuries ago back to the equity of redemption or the *Aristotelian* ideal that justice required equity in contractual exchange. It reflects a delicate balance on the tension between the power of courts not to enforce agreements that would produce unjust results and the freedom of contract in free enterprise system. In other words, while the society (or government) must protect its people against injustices of unchecked market system, the parties' autonomy must also be promoted and protected in a free market economy unless a fraud or violation of a public policy can be established.[26]

It has been argued that the purpose of this doctrine is largely not to redress the inequality between the parties but simply to ensure that the more powerful party cannot surprise the other party with some overly oppressive terms.[27] In Tanzania, it is a settled law that a court of laws has an inherent power to reopen a harsh and unconscionable bargain between parties to a contract.[28] This reflects the *Aristotelian* ideal of justice.

There is a difference between a procedural and a substantive unconscionability. In some jurisdictions, like New York, "unconscionability requires a showing that a contract is both procedurally and substantively unconscionable when made".[29] The

---

[25] Id, at p. 404.
[26] Baker III, T.A., Grady, J., and Rappole, J.M., 'Consent Theory as a Possible Cure for In Student-Athlete Contracts' (2012) 22 *Marquette Sports L. Rev*. 619, at pp. 620-621.
[27] Born, *International Arbitration: Cases and Materials*, above note 24, at p. 396.
[28] *Said Kibwana and General Tyre E.A. Ltd v Rose Jumbe* (1993) TLR 175.
[29] Born, *International Arbitration: Cases and Materials*, above note 24, at p. 393. Also under California Law, unconscionability has both procedural and substantive

former occurs in case of contracts of adhesion where a victim has no option other than take-it-or-leave-it or where the imbalance of power between parties is such that a weaker party is unable to negotiate and understand the terms of the contracts in question. This is often referred to as "bargaining naughtiness" where "a party uses superior bargaining power unreasonably to take advantage of the weaker party to the contract".[30] The bargaining naughtiness include a situation where one party can unfairly interfere with the other party's understanding by "phrasing contract terms in language that is incomprehensible to a layperson or in a way that diverts attention away from shifts in material risks".[31]

Substantive unconscionability relates to the fairness of the contractual terms.[32] It occurs where the terms are against one party "to shock the judgement of a person of good sense with terms so unreasonable than no man in his senses and not under delusion would make and no honest and fair man would accept".[33] Arguably, one example unfairness of contractual terms is where an investor is exempted from all environmental obligations or liabilities in the mining investment found in some MDAs in Tanzania.[34]

---

elements. See *Joshua G. Fensterstock v. Affiliated Computer Services, Inc.*, United States Court of Appeals for the Second Circuit, Docket No. 09-1562-cv, Judgment (12 July 2010).

[30] Baker III, *Consent Theory as a Possible Cure for In Student-Athlete Contracts,* above note 26, at p. 625.

[31] Id, at p. 626.

[32] Born, *International Arbitration: Cases and Materials*, above note 24, at p. 396.

[33] Baker III, *Consent Theory as a Possible Cure for In Student-Athlete Contracts,* above note 26, at p. 628. Also see Marrow, P.B., 'Contractual Unconscionability: Identifying and Understanding Its Potential Elements' (2000) 72 *New York State Bar Association* Journal 18.

[34] See Kibugi, R., et al, 'Enabling Legal Frameworks for Sustainable Land Use Investments in Tanzania: Legal Assessment Report' (2015) International Development Law Organization and Centre for International Forestry Research Working Paper 191, 32 < http://www.cifor.org/publications/pdf_files/WPpapers/WP191Wardell.pdf> (accessed 15 May 2018).

The issue of unconscionability is basically an issue of law. As it was held in the Dissenting Opinion of Mr. Ameli in *PepsiCo, Inc. v The Government of the Islamic Republic of Iran, Foundation for the Oppressed, Zamzam Bottling Company and others*[35] the issue of unconscionability is an issue of law for which court must take evidence. It "may not be decided on summary judgment but only on a hearing at which each party is given a reasonable opportunity to present evidence bearing on the question".[36] In this case, the majority had summarily dismissed respondent's defense regarding the unconscionable nature of the pricing provisions. The nature was caused by the Islamic Revolution in Iran that "made a business decision to sell for the time being at the lower price since the alternative in the prevailing circumstances was to give up a market it had developed over a long period."[37]

Ordinarily, the defense of unconscionability is extremely difficult to be used by States in the absence of fraud and therefore States are generally precluded from arguing that a contract or agreement is unconscionable. Even in cases where the agreements have allegedly been negotiated and concluded with corruption or by officials lacking adequate competence, the arbitration tribunals have rarely held such terms unconscionable. This is partly because 'the standard of proof for corruption has been so high that few governments have been able (or willing) to produce convincing evidence'.[38]

---

[35] *PepsiCo, Inc. v Iran,* Award, dissenting opinion of Judge Koorosh H. Ameli, (1986-IV) 13 IUSCTR 3.
[36] Id, at para 77.
[37] Id, at para 88.
[38] Wells, L.T., 'Backlash to Investment Arbitration: Three Causes', in Waibel, M., et al. (eds), *The Backlash against Investment Arbitration,* Kluwer Law International, 2010, at p. 341 at p. 346.

However, as Paul Marrow puts it, there are at least four general rules associated with the denial of claims of unconscionablility. First, as a general rule, commercially reasonable agreements are not unconscionable simply because there is a disparity in bargaining power or a given provision is exacting in nature. Second, contracts will not be struck as unconscionable if they require the implications of a condition not agreed to by the parties. Third, if a party to a commercially reasonable bargain has completed its obligations before the claim of unconscionablility is made, the contract will be upheld. And, fourth, a covenant that has the effect of merely recognizing a condition or status otherwise permissible by law will be upheld.[39]

In *Bridas S.A.I.P.I.C., Bridas Energy International, Ltd., Intercontinental Oil and Gas Ventures Ltd v. Government of Turkmenistan et al,* the International Court of Arbitration of the International Chamber of Commerce decided on the issue unconscionability of the Joint Venture Agreement (JVA) to exploit natural resources of oil and gas. The arbitrators in this matter came from the United States of America and Canada, while claimants were from Argentina and British Virgin Islands.

The claimant, who was a single bidder to this venture, had complained that they were prevented from exploiting the resource by the respondents. It was the respondent's case that the claimants had fundamentally breached the contract, by among other things, making unauthorized charges to the books of accounts, rendering its continued performances impossible. Subsequently, respondents banned export and processing of crude oil. The respondent also contended that the JVA was unconscionable because it contained provisions that were unfair

---

[39]Marrow, *Contractual Unconscionability: Identifying and Understanding Its Potential Elements*, above note 33, at p. 24.

to the Turkmenistan side. The expert with extensive experience in international oil and gas operations gave uncontradicted testimony that disproportionate benefits in the JVA were given to the Claimants. However, the tribunal refused to hold that the Claimants were in breach of an obligation of good faith in negotiating such unbalanced agreement based on the English law that 'one-sideness of the terms, does not rise to the extremes required to render the agreement unconscionable'.[40]

The majority (one dissenting) regarded the making of unauthorized charges to the books of accounts by the claimant as not amounting to a fundamental breach of the JVA.[41] Instead, the tribunal found that the export bans by the government of Turkmenistan (defendant) constituted breaches of the joint venture for which the respondents found liable. It was held that instead of submitting the claims against claimants to arbitration, "the government took the law into its hands and Turkmenneft must now suffer the consequence of its being found to have fundamentally breached the Joint Venture Agreement".[42]

This determination of the tribunal is intriguing particularly looking at the manner in which the JVA was negotiated and concluded. The evidence adduced shows that the interest of the government in the project was weak, and that some senior members of the production had opposed aspects of the agreement, but were overruled by their government superiors. Then, the claimants proceeded with the deal. If the legitimate expectations of the

---

[40] *Bridas S.A.I.P.I.C., Bridas Energy International, Ltd., Intercontinental Oil and Gas Ventures Ltd v Government of Turkmenistan et al,* ICC Arbitration Case No. 9058/FMS/KGA, Partial Award (21 October 1999) dissenting opinion of Prof. Hans Smit, 4, para 7.

[41] Id, at para 20.

[42] Id, at para 19.

foreign investors are determined by the prevailing legislative and regulatory framework, on what basis then was the claimant's legitimate expectations that such unbalanced lucrative terms and internally disputed JVA will last and consistently be maintained and respected by the government? The claimants should have expected that sooner or later the terms will be renegotiated or otherwise. Any stabilization clauses seeking to protect the status quo of such imbalances must be treated as morally and legally questionable. In fact, such clauses cannot raise a legitimate expectation. The *alter ego* of the concept of legitimate expectations is constituted by the Treaty criteria of reasonableness.[43]

As held in *Parkerings-Compagniet AS v Republic of Lithuania,* 'in such situation, no expectation that the laws would remain unchanged was legitimate".[44] Expectations must be determined in the light of circumstances. Foreign investors are first and foremost, required to comply with national laws and public policies of the host State. Attempts to avoid compliance with national laws reflects the ill intention of the claimants in the first place. Foreign investors need also clean hands by not putting themselves in compromised situations and proceed to approach the equity of redemption.

This JVA is, in all fairness, a typical example of the agreement whose terms are against one party "to shock the judgement of a person of good sense with terms so unreasonable than no man in his senses and not under delusion would make and no honest and

---

[43] Separate Opinion on the Issues at the Quantum Phase of: *CME v Czech Republic* by Ian Brownlie, 13 March 2003 at para 58.

[44] *Parkerings-Compagniet AS v Republic of Lithuania,* ICSID Case No. ARB/05/8, Award, (11 September 2007), para 335. In this case, the arbitrators agreed that in a post-civil war or a country in transition, a legitimate expectation regarding the stability of country's investment's environment cannot be justified.

fair man would accept".[45] It is unthinkable that such JVA can exist against a developed nation.

The ICSID Tribunal in *Ioannis Kardassopoulos & Ron Fuchs v. The Republic of Georgia* rejected the defense of unconscionability based on lack of experience of government officials.[46] The defense was raised that claimant's lawyer drafted the Joint Venture Agreement (JVA) and the Concession, and negotiated with Georgian officials who had no experience with foreign concessions involving oil and gas. It was also raised that, at a time of negotiation and contract, the Respondent (Republic of Georgia) was in a state of transition and instability.[47] The Republic of Georgia had further submitted that the commitments under the JVA and the Concession are inequitable and constitute an unconscionable bargain hence unenforceable. In this regard, the Respondent substantiated its defense by pointing out to the claimant's financial commitment under the JVA and the Concession, which was limited to providing a nominal payment to the Authorized Fund. The joint venture vehicle (GTI)'s Concession Fee comprised a requirement merely to carry out ordinary and reasonable maintenance of the pipelines and to effect any improvements or extensions to the pipelines it may deem necessary at its discretion.[48]

The Claimant vehemently rejected the proposition that the terms of the JVA and the Concession were one-sided. It was the Claimant's case also that the "Respondent's unconscionability

---

[45] Baker III, *Consent Theory as a Possible Cure for In Student-Athlete Contracts,* above note 26, at p. 628.
[46] *Ioannis Kardassopoulos and Ron Fuchs v The Republic of Georgia*, ICSID Case No. ARB/05/18 and ICSID Case No. ARB/07/15, Award (3 March 2010).
[47] Id, at para 295.
[48] Id, at para 296.

defence has no foundation and could not, in any event, prevail as such a defence is intended to protect disadvantaged individuals".[49] The Tribunal was not persuaded by the Respondent's arguments.

In both cases discussed above, it is important to note that the International Court of Arbitration and the ICSID Tribunal, did not outrightly rule out that the defence of unconscionable is not available to States. Nor that the same is reserved to the protection of disadvantaged individuals. Like in the ICSID case above, it was a lack of evidence that compelled the Tribunal to reject the defense of unconscionable by Georgia.

Aside the matter of the national pride, it is submitted that many States, have limited in-house capacity and ability to effectively handle and negotiate serious investment agreements and treaties. This includes BITs. For instance, "it was … not until Pakistan was hit by a multi-million-dollar arbitration claim that officials actually realized the implications of treaties signed by successive governments since 1959". This prompted the Attorney General of Pakistan, Mr. Makhdoom Khan, to publicly acknowledge that "BITs were initially instruments that were signed during visits of high-level delegations to provide for photo opportunities".[50]

4. PACTA SUNT SERVANDA AND THE STABILIZATION CLAUSES

This section revisits the question whether the principle of *pacta sunt servanda* is applicable over unconscionable stabilization

---

[49] Id, at para 311.

[50] Volterra, R.G., and Mandelli, G.F., 'India and Brazil: Recent Steps Towards Host State Control in the Investment Treaty Dispute Resolution Paradigm,' (2017) 6 *Indian Journal of Arbitration Law* 90, 94; Nariman, F.S., 'Keynote Address-Redefining the Landscape of ADR in Asian Jurisdiction", Kuala Lumpur International ADR Week, Kuala Lumpur 2017, at p. 7.

clauses. The principle of *pacta sunt servanda* is a principle of private and public international law compelling parties to a treaty to implement it in good faith unless if the agreement in question contravenes a norm of *jus cogens*.[51]

Usually in civil law, the intentions and consensus of the parties regardless of formal requirements determines the bindingness of the contract. In common law jurisdictions, however, not all agreements are contractually binding. The issue is not about the commitments but the bindingness as a matter of law.[52] Furthermore, it has been argued that in respect of State contracts, the principle of *pacta sunt servanda* can only be applied subject to some qualifications on the basis of fundamental fairness, good sense and justice. This is partly because, unlike in State parties to a treaty (public international law), private parties to a contract are motivated by a single motive of profit maximization and represents

[51] Article 26 of the Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 333. Also see Articles 60 and 61 of the same on some exceptions to the rule of *pacta sunt servanda.*

[52] Healy, P., 'Pacta Sunt Servanda once again: the story of Greece and Ireland' (2015) School of History and Archives, University College Dublin, Working Papers in History and Policy No. 14, 3< http://historyhub.ie/pacta-sunt-servanda-once-again-the-story-of-greece-and-ireland> (accessed 15 May 2018). Also see Asante, S.K., 'Stability of Contractual Relations in the Transnational Investment Process' (1979) 28 *International and Comparative Law Quarterly* 401, 406; Geiger, R., 'The Unilateral Change of Economic Development Agreements (1974) 23 *International and Comparative Law Quarterly* 73; Loncle, J., and Philbert-Pollez, D., 'Stabilization Clauses in Investment Contracts (2009) International Business Law Journal 267, 290; Hansen, T.B., 'The Legal effect Given to Stabilization Clauses in Economic Development Agreements' (1988) 28 *Vanderbilt Journal of Transnational Law* 1015; Montebbault, B., 'The Stabilization of State Contracts Using the Example of Oil Contracts A Return of the Gods of Olumpia?' (2003) 6 *International Business Law Journal* 593; Umirdinov, A., 'The End of Hibernation of Stabilization Clause in Investment Arbitration: Reassessing its Contribution to Sustainable Development' (2015) 43 *Denver Journal of International Law and Policy* 455, at p. 460.

no interests to that of a State and has no similar burdens in municipal legal orders.[53]

Scholars, like Samuel Asante and Patrick Osode, have identified two main schools of thought on whether the State party would be within its rights if it changed the content of its law which affects a foreign investor without the latter's consent. The first school argues that State contracts must be sustained by the universally accepted principles of *pacta sunt servanda*, estoppels and good faith. Accordingly, a State contract which incorporates a stabilization clause is, in effect, immune from interference by a competent legislator. The other school argues that:

> "stabilization clauses are invalid as being repugnant to, or inconsistent with, either the contemporary principle of permanent sovereignty over natural resources, or the obvious fact that beyond considering the immediate pecuniary benefits of an agreement as a foreign investor would, a state contracting party must consistently appraise the repercussions of the agreement on the general well-being of the people".[54]

---

[53]Osode, *State Contracts, State Interests and International Commercial Arbitration: a Third World Perspective*, above note 15, at p. 53. See for a contrary view expressed by Prof. Rene Dupuy in *TEXACO-CALAISATIC v. Libya* (1978) 17 ILM 1, at para 57 wherein the concept of administrative contracts or '*imprevision*' well established in French Law was rejected as a general principle of law recognized by civilized nations.

[54] Osode, *State Contracts, State Interests and International Commercial Arbitration: a Third World Perspective*, above note 15, at p. 55; Asante, S.K.B., 'International Law and Foreign Investment: A Reappraisal' (1988) 37 *International and Comparative Law Quarterly* 588, 615. Also see Pate, T.J., 'Evaluating Stabilization Clauses In Venezuela's Strategic Association Agreements for Heavy-Crude Extraction in the Orinoco Belt: The Return of a Forgotten Contractual Risk Reduction Mechanism for the Petroleum Industry' (2009) 40 *University of Miami Inter-American Law Review* 347, 351-357; Cameron, P.D., 'Reflections on Sovereignty over Natural Resources and the

It is submitted, as well presented by Patrick Osode, the compelling conclusion is that “stabilization clauses in state contracts are invalid as a matter of private and public international law to the extent that they seek to restrict significantly the competence of a territorial sovereign to either legislate or otherwise act for the ‘public good’” as “states has always to take the public welfare into consideration for it only contracts as the guardian of the nation’s welfare”.[55] That also mean that the ‘principle of *pacta sunt servanda* does not prevail over a sovereign power”.[56] This principle is applicable subject to fundamental fairness, good sense and justice. Accordingly, a stabilization regime fettering the government duty to act for public good by making it unable to exercise full permanent sovereignty over its natural resources cannot be justified.

The English Courts, for instance, have consistently defended the absolute power of the State to unilaterally interfere in contracts with private individuals under the doctrine of power of eminent domain and public powers that:

> “a government cannot fetter its duty to act for the public good. It cannot bind itself - by an implication in the contract - not to perform its public duties”.[57]

Enforcement of Stabilization Clauses’ in Sauvent, K.P., (ed.) *Yearbook on International Investment Law and Policy 2011-2012,* OUP, 2011, at p. 311.

[55] Osode, *State Contracts, State Interests and International Commercial Arbitration: a Third World Perspective*, above note 15, at p. 54.

[56] Asante, *International Law and Foreign Investment: A Reappraisal*, above note 54, at p. 615.

[57] *Czarnikow v Rolimpex* (1977) 3 WLR 686, also quoted in Osode, *State Contracts, State Interests and International Commercial Arbitration: a Third World Perspective*, above note 15, at p. 54. For a similar view in civil law countries see Wälde, T.W. and Ndi, G., ‘Stabilizing International Investment Commitments: International Law versus Contract Interpretation’ (1996) 31 *Texas International Law Journal* 215, at p. 238.

In the US, the general rule is that a proper law overrides stabilization clause.[58] In the *Georgia v City of Chattanooga*, the Supreme Court of the United States of America held that:

> "the … functions … deemed essential to the life of the state … cannot be surrendered, and, if attempted to be contracted away, it may be resumed at will".[59]

The above positions underlie the essence of the introduced stabilization regime in extractives sector in Tanzania. A stabilization clause cannot fetter government duty to act for public good in properly managing its natural resources. In case those powers are purportedly contracted away through stabilization clauses, the same may be resumed at will even in the face of *pacta sunt servanda*.

The government must indeed be responsible for its contractual terms. But the special character of the government must also not be ignored. As stated by Ian Brownlie, a sovereign State is not a commercial entity and is responsible for the well-being of its people, and therefore BIT is not exclusively a commercial agreement.[60] Accordingly, sovereign responsibilities such as public duties can't be contracted away or limited by stabilization clauses under *pacta sunt servanda*. There can be no contractual obligations for a government to abandon or abuse its obligations to the public, for instance by gifting away public properties or

---

[58] Mann, F.A., 'The Proper Law in the Conflict of Laws' (1987) 36 *International and Comparative Law Quarterly* 453, at p. 449.

[59] *Georgia v City of Chattanooga* 464 US 472 as quoted in Osode, *State Contracts, State Interests and International Commercial Arbitration: a Third World Perspective*, above note 15, at p. 54.

[60] Separate Opinion on the Issues at the Quantum Phase of: *CME v Czech Republic* by Ian Brownlie, 13 March 2003, at paras 74-75.

assets through unconscionable terms.[61] If that happens, people or government have a right to redeem or reclaim it.

Logically, since natural resources are owned by people, the government can't transfer them, and the government as a trustee, it cannot do anything with them that is prejudicial to the beneficiaries (people). And in case, the government decides to do otherwise, then such stabilization clauses cannot be honored and people have a right to reclaim their property through court of laws or political process. The point here is that some terms of the stabilization are not worth contractual obligations and protections.

Unconscionable stabilization clauses cannot blindly be enforced under the auspices of the *pacta sunt servanda* principle. For instance, those which purports to contract away sovereign responsibilities are also contrary to the principles of permanent sovereignty over its natural resources and the norm of self-determination which is a *jus cogens*.[62] As the principle of

[61] On a public interest litigation case, the Supreme court of India in 2012, declared the allotment of 2G Spectrum licences to some companies, unconstitutional and arbitrary, equating it to virtually giving away key national assets. See, *Centre for Public Interest Litigation v Union of India* (2012) 3 SCC 1. Some of the aggrieved investors in those companies had even filed Notices for initiation of an Investor-State Arbitration under the Bilateral Investment Treaties and been successful in their claims. See Malhotra, S., 'Cancellation of Telecom Licenses in the 2G Case: Claim for Indirect Expropriation?' (2013) 6 *NUJS Law Review* 335; Peterson, L., 'India Liable for Expropriation and Unfair Treatment in Satellite Dispute, But Majority of Tribunal Says "Essential Security" Defence Scales Back Liability' (Investment Arbitration Reporter, 26 July 2016) https://www.iareporter.com/arti cles/india-liable-for-expropriation-and-unfair-treatment-in-satellite-dispute-but-majority-of-tribunal-says-essential-security-defence-scales-back-liability/ (accessed 15 May 2018).

[62] Asante, *International Law and Foreign Investment: A Reappraisal*, above note 54, at p. 594; Vielleville, *Sovereignty over Natural Resources Versus Rights under Investment Contracts: Which One Prevails?*', above note 20, at p. 7; Sornarajah, M., The International Law on Foreign Investment, (3rd Edn.), CUP, 2010, at p. 252; Brownlie, I., 'The Legal Status of Natural Resources in

permanent sovereignty over its natural resources and right to self-determination are regarded as norms of jus cogens, the principle *pacta sunt servanda* is not applicable.[63]

5. CONCLUSION

The new regulations on stabilization clauses in Tanzania are progressive and based on a clear constitutional values and principles consistent with international law. They will inform the future investment treaty practices in the extractive sector in the country. They will also enhance government's regulatory autonomy and freedom in the extractives sector against the potential excesses of the foreign investors.

The new regime on stabilization clauses has a potential of creating a predictability of the terms of arrangements within the extractive sector and thereby increase the investments. This is partly due to the removal of the power of the Minister responsible for minerals to negotiate stabilization clauses with investors. Instead, some uniform codes will apply across the sector to all investors. This increases transparency and the integrity of the system which is vital for investors and the public as well. This is

---

International Law (Some Aspects)' (1979) 162 *Recueil des Cours de l'Academie de Droit International* 244, at p. 269.

[63] For a discussion on the *jus cogens* in the light of the principle of permanent sovereignty over natural resources see Wälde, *Stabilizing International Investment Commitments: International Law versus Contract Interpretation*, above note 57, at p. 215; Garcia-Amador, F.V., 'State Responsibility in Case of "Stabilization" Clauses' (1993) 2 *Journal of Transnational Law and Policy* 23, at pp. 48-49; Curtis, C.T., 'The Legal Security of Economic Development Agreements' (1988) 29 *Harvard International Law Journal* 317, 357; Coale, M.T.B., 'Stabilization Clauses in International Petroleum Transactions' (2002) 30 *Denver Journal of International Law and Policy* 217, 244, 259-260; Baker, S.H., 'Climate Change and International Economic Law' (2016) 43 *Ecology Law Quarterly* 53, 82; Chimni, B.S., 'Permanent Sovereignty over Natural Resources: Toward a Radical Interpretation' (1998) 38 *Indian Journal of International Law* 208.

important to a key sector like extractive, which involves a capital intensive and high-risk investments.

In principle, any legislative reform by a sovereign State is legitimate as long it is bonafide, non-discriminatory and in public interest. In this case, investors' expectations on intangibility and freezing clauses that a State cannot enact, modify or cancel a law or regulation at its own discretion is illegitimate. Nevertheless, the State must resolutely act fairly, reasonably and equitably in the exercise of its legislative and regulatory power to also protect the investors.

The challenge now lies in the implementation of the new regime to the letters. As a preventive and reactionary step, the new legal regime treats some of the terms of the existing stabilization clauses in the agreements within the extractives sector as unconscionable to be reviewed and renegotiated. The review of the existing agreements with unconscionable terms may be a matter of pendulum. This review should be done in a manner that reinforces investors' protection and tenure, partly by assuring investors of the stability of the rule-based regime. More importantly, it should also be guided by the principle of achieving mutual economic benefits of both parties.

The new legal regime in Tanzania serves also as a lesson to other developing countries or host States not to unilaterally invoke sovereign powers against the perceived ill-gotten and unbalanced investment agreements. They should instead use ways legislative action consistent with the international law and practices to restructure the terms and change and un-tilt the equation or even terminate the unconscionable stabilization clauses. This will reinforce the legality requirement of international investments.

Then, through review and negotiations, a win-win outcome can be achieved as the cost of unguided unilateral actions against investors by the host State can be very devastating financially, economically and reputation-wise.

For investors in the extractive sector, compliance with the new regime on stabilization is crucial. This compliments the evolving arbitral jurisprudence that only investments in compliance with domestic laws, especially on environmental law, may be protected under international investment agreements. This is irrespective whether such requirement is explicit or otherwise in the applicable BIT. That means, the legality requirement is implicit condition to all investments under the ICSID Convention.[64]

---

[64] *Cortec Mining Kenya Limited, Cortec (Pty) Limited, and Stirling Capital Limited* v. *Republic of Kenya*, ICSID Case No. ARB/15/29, Award of October 22, 2018. See Cotula, L. and Gathii, J.T., 'International Decisions', 580 *The American Journal of International Law*, 113:3, at pp. 574-581.