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Understanding the Ramifications of Stabilisation Clauses in Investment Contracts: A Developing Economy's Perspective

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ABSTRACT

The discussion on stabilisation clauses centre on settling the conflicting interest between the host government and the investor. The investors are always doubtful about the guarantee or protection and safety of their investments in developing host countries while the host government always seek to maintain its powers to legislate as a sovereign entity. This often calls for the insertion of stabilisation clauses in their investment contracts. The rationale for such clauses is to ensure that the investment agreements remain in force during the life span of the contract. The focus there of this paper is to examine the consequences of the operation these clauses or provisions on both the host state and the investors. From the analyses, it is observed that, in spite of the promising prospects of stabilisation clauses, they have severe legal, economic and politico-social negative consequences on the host state and the investors.

***Keywords**: ramifications, stabilization, investment contracts, developing countries*

I. INTRODUCTION

This paper explores the consequences of the operation of stabilisation clauses in investment contracts on host governments as well as on the investor. It is the goal of this paper, to verify how the host state as well as the investor is affected by the incorporation of stabilisation clauses in investment contracts. To attain this goal, the write-up examines the legal, political socio-economic and cultural impacts of stabilisation clauses in investment contracts on host countries; particularly developing countries and especially Cameroon, then the consequences of same on the investor. The *raison d'être* of such clauses is to ensure that the investment agreements remain in force during the life span of the contract. The bone of contention here is what are stabilisation provisions? To this, several writers on the subject have advanced different definitions. Robert Howse defines stabilisation clause as that clause in a host government agreement that commits host government not to alter regulatory frameworks in a

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way that undermines the economic viability of the investment. These clauses greatly limit the ability of host governments to have new laws or regulations apply to foreign investors. And, can make investment contracts enforceable through international arbitration thus, avoiding dependence on domestic law court system in the host country.[2] In recent decades, the use of stabilisation clauses in investment agreements, especially in developing countries including Cameroon, has been at a climax. It is aptly reported that the origins of stabilisation lies in the period between the first and the Second World War (1914 to 1945).[3] In the case of *Kuwait v AMINOIL*[4], it was noted that the American companies had begun including the clauses in their concession agreements, as a result of acts of nationalisation by Latin American countries. The incorporation of stabilisation clauses in investment contracts is catalysed by the fact that, most developing countries, after independence (African States), is simply owing to the economically and politically unstable state of affairs in these nations[5]. In order to benefit more, developing countries have resorted to attracting investors by inserting stabilisation provisions in their contractual agreements with investors. That is why their insertion does not invalidate acts of nationalisation or expropriation as the case may be. Nevertheless they make the act unlawful. The TOPCO v. Libya exemplifies the potential of stabilisation clause in a petroleum contract wherein the issue at stake concerned the nationalisation act of the government of Libya. The tribunal decided in the following words:

The host government shall take all the steps that are necessary to ensure that the company enjoys all the rights conferred on it by this concession agreement and the contractual rights expressly provided for in this concession agreement shall not be infringed except by agreement of both parties.[6]The 1980s was a period characterised by an analysis of stabilisation commitments in terms of state responsibility, protection of foreign direct investments and their property against nationalisation and breach of contractual interests by the host state.[7] It has been argued that the years that followed were amplified by an atmosphere of pragmatism in which mutuality of interest was better understood especially by host governments.[8] This paper therefore focuses on the implication of stabilisation provisions generally, in investment contracts. These implications are best classified separately-implications faced by the host

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[2] Howse R. (2011). "*Freezing government policy: stabilization clauses in investment contracts" IISD, at p. 9.*
[3]*Ibid.*
[4] (1982), 21 ILM 976.
[5]*Ibid*.
[6]*Ibid.*
[7]Peter D. C. *(2005), 'Stabilization Clauses in Investment Contracts and Changes of Rules in Host Countries: Tools for Oil and Gas Investors', Final Report of AIPN, P. 16.*
[8]*Ibid.*

government and implications faced by the investors.

II. THE EFFECTS OF STABILISATION CLAUSES ON HOST GOVERNMENTS

The ramifications or effects of stabilisation clauses on host government are both positive and negative. These effects are usually viewed for the angel of legal effects, political and socio-economic repercussions.

- **Legal implications of stabilisation clauses on host government.**

The desire of parties generally in initiating an investment contract is to see to it that, disputes, which might ensue from the contract, should be dealt with, efficiently, rapidly and confidentially.[9] This is a typical characteristic of investment contracts, particularly, the aspect of confidentiality. It is based on this postulation that most parties would generally want their disputes to be settled by a neutral body and not national courts of either party.[10] Arbitration allows parties to have their disputes resolved by a private tribunal consisting of a sole arbitrator or panel of arbitrations who, may be chosen by the parties themselves.[11] It is for this reason that most awards in investment contracts are made by arbitration tribunals.

In the cases of AMINOIL[12], AGIP[13] and others supra, international arbitrators have held that stabilisation clauses are lawful, valid and binding under international law –the legal system governing the relationships between nations; more modern, the law of international relations, embracing not only nations but also such participants as international organisations and individuals (such as those who invoke their human rights or commit war crimes). International law may also, under this hypothesis, be applicable to certain interrelationships of individuals themselves, where such interrelationships involve matters of international concern.[14] Although there has been a controversy over the legality and binding nature of these clauses in the 1970's and 1980's, many writers have argued that, stabilisation clauses could not bind the host state since the contract was entered into between the host state and an individual who is not a state.

It is now widely accepted that stabilisation clauses are lawful and binding as a matter of international law. The legal value therefore, of these clauses, may be further reinforced by provisions in bilateral investment treaties (BITs) where-by state parties commit themselves to honour contractual undertakings *vis-a-vis* nationals of the other state. Some writers have

[9] Martor, B. et al., (2007), *Business law in Africa. OHADA and the Harmonization Process,* 2nd Ed., London, GMB Publishing Ltd., p.259
[10] *Ibid.*
[11] *Ibid.*
[12] (1982), 21 ILM 976.
[13](1979), 21 (1982) ILM 726
[14] Philip C. J, (1949). A *Modern Law Of Nations*.

suggested that the breach of stabilisation clauses in an investment clause is tantamount to the breach of a BIT.[15] It is evident from the above that, stabilisation clauses are legally binding on host states. The ensuing question is what is the position of the HC where it interferes in its regulatory framework such that these clauses are violated? In this vein, Lorenzo argues that the host country is bound to compensate. In fact, the learned author further posits that the amounts of compensation due the investor may be linked to the following two main factors:

- *The lost incurred by the investor because of the new regulation and*
- *The expectation that the regulatory framework applicable to the investment project would not change; itself an expectation generated by the presence of a stabilisation clause.*

Under international law, if the host state interferes with the regulatory framework in violation of a stabilisationclause, it must compensate the investor[16] as was noted particularly in the *AMINOIL* case. It has been observed that host state will pay compensation where the change of the law is in relation to health, safety, social and environmental conditions of the citizens; this is especially where the freezing stabilisation clause is used. The 1998 COTCO-Cameroon establishment convention for the construction and operation of the Chad-Cameroon pipeline contains a freezing stabilisation clause to commit Cameroon "not to modify the legal, tax, customs and exchange control regime in such a way as to adversely affect the rights and obligation of COTCO" and not to apply any legislative, regulatory or administrative measure inconsistent with the convention to the project.[17] It is worth-noting, therefore, that, the HC, Cameroon, cannot dare to make changes in whatever way that would affect the contract (the project). If this is done, then it is bound to compensate the investor for breach of the stabilisation clause. It surmises to know that Stabilisation clauses in their "crude form'' (freezing clauses and full economic equilibrium clauses) will retard the government from making new laws even where those laws are bound for public purposes; failing which the investor is bound to be compensated. This leads us to the next effect of the use of stabilisation clauses in investment contracts on host state.

- **Political effects of stabilisation clauses on host government**

As introduced above, it is clear that a state remains a state, and has sovereign powers to carter for its populace and resources; so stipulates Resolution 3021 of the United Nation General

[15] Jagrittti S., (2015), op.cit at p.7
[16] Lorenzo C., (2007), op.cit at p.2
[17] *Ibid*. at p.3

Assembly (UNGA). So in a bid to attract heavy investment in its country, it engages in an investment contract in which stabilisation commitments are put, aimed at stabilizing the contract. The use of stabilisation clauses combined with BITs especially in developing countries, may have adverse effects politically on the HC by shifting power and authority from HC to other players such as investors, arbitral tribunals and enforcing courts. As a result, it will strengthen the HC's power to regulate activities of foreign investors that run counter to its development aspirations.[18]In fact article 21(3) of the TOTCO-Chad agreement provided that, where dispute arises under the project, the enforcement of the agreement would be possible only through international arbitration and that domestic laws are to be interpreted by the arbitrators and not in a way causing economic disadvantage to the consortium[19].

The agreements (TOTCO-Chad & COTCO-Cameroon) bar the way to any international as well as domestic law and establish that the project is to be carried out in conformity with the relevant national Petroleum **C**odes and ordinary laws that do not conflict with the project agreement as well as the operating standards generally acceptable in the international petroleum industry.[20] In the case of Cameroon, this is a complete breach of section 45 of the 2008 Constitution of Cameroon amending the 1996 Constitutions which provide thus: *Duly approved or ratified treaties and international agreements shall, following their publication override national law provided the other party implements the said treaty or agreement.'*

Cameroon is a party to many international agreements; be they in the domain of investment, human rights, environment etc. most of which are duly ratified. This therefore implies that politically, where stabilisation clauses are used in the investment contracts the country's especially developing countries' power is drastically diminished. More so, there has been an argument that the use of Stabilisation clauses in investment contracts has failed to respect the famous doctrine of separation of powers.[21] In most cases investment contracts are entered into by the executive body of the host state or their representatives. In the case of Cameroon for example, the Petroleum Code provides that:

The petroleum contract is negotiated and signed, on behalf of the state, by the government or one of its units or bodies duly mandated for such purposes, and by a legal representative of the applicant.[22] The Code further provides that in model production sharing agreement (MPSA)

[18] Jagritti, S.,(2015), op.cit at p.5
[19] Helgadotirr, I. S. (2014), op.cit at p. 49
[20] *Ibid*.
[21] Lorenzo C.,(2007), op.cit at p. 4
[22] Section 11(1) of Law No. 99/06 of 22 Dec. 1999 to institute the Petroleum Code –herein referred to as the Petroleum Code of Cameroon.

contracts, the National Hydrocarbon Corporation, best referred to in its French acronym as SNH will represent the state of Cameroon. The 2012 Gas Code lends credence to the Petroleum Code, in that, a gas agreement is negotiated by, and signed on behalf of the state, by the Minister in charge of downstream gas sector or by any establishment duly authorized to do so, and on behalf of other party or parties to the agreement, by their legal representatives.[23]

To further buttress the fact that stabilisation clauses undermine the doctrine of separation of powers, it is visible from the above position of the laws that, the legislature would find it difficult to make laws in relation to any agreement that may affect a project where the state is a party. In the case of Cameroon, again the SNH which is the state representative is board-chaired by the Secretary General at the Presidency. Therefore, everything seems to be done by the executive arm government to the exclusion of the other arms of the government.

This, however, should not be completely mistaken for the fact that, there are no legal experts who can act on behalf of the state. The point here is that the use of Stabilisation clauses in investment contracts undermines the powers of the other arms of the host state. Cameroon is not the only developing country which suffers from this effect. It seems as though other developing countries suffer the same fate. In fact the case of Guinea is another glaring example. Recently the Guinean Minister of Mines and Geology, Kerfalla Yansanne made the "New Code" in 2015; following the adoption by the Guinean Parliament and promulgated by Law L/2014/034 by President Alpha Cunde implementing the new Code to enter into force on the 23rd December 2014. The new code repeals all other laws.[24]

III. SOCIO-ECONOMIC REPERCUSSIONS OF STABILISATION CLAUSES ON HC.

The incorporation of Stabilisation clause**s** in investment contracts in developing countries is without doubt, having some adverse economic impacts on the host government. As must have been noted in the COTCO-Cameroon agreement, for example, the use of these clauses (freezing clauses) is aimed at maintaining the position of IOC. This agreement fails to take into consideration non-commercial risks such as wars, force majeure, external influence etc. which may, in the course of the project, hinder or hamper the smooth flow or running of same. In fact, Stabilisation clauses keep a "blind eye" on such circumstances particularly force majeure, which are not the making of the host state. A clear example of this hardship is seen in Peter D's work;[25] though not exactly a kind of force majeure, Kazakh situation was an act not defined

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[23] Section 10(1) Law No 2012/006 of 19 April 2012 to institute the Gas Code –herein referred to as the Gas Code of Cameroon.
[24] Sherman & Sterling, Guinea: New Hydrocarbon code April 21, 2015
[25] Peter, D. C. (2005)'*Stabilization in investment of rules contracts and changes in host countries:*

by the state but the change resulted from a change in laws of another state (Russia).

In most developing countries the impact of stabilisation clauses is a matter of deduction (impact on revenue). Nigeria is a clear example.[26] It is recorded that although the Nigerian state company owns some 49 percent (49%) shares in the oil and gas sector, all of it is lost in tax losses. Also, the Federal Government of Nigeria (FGN) further observes that, the gas development in Nigeria is being funded out of the FGN's share of the economic rents from oil projects.[27] This situation explains the frustration of most developing countries for engaging in such investment contracts wherein stabilisation commitments are incorporated into it.

Furthermore, stabilisation clauses have adversely affected host governments of developing countries economically in that, the rampant award of contracts with stabilisation commitments to investors, by these HCs, including Cameroon for purposes of development, has indeed witnessed some economic negativity and a clear example can be seen in the case of Zambia.[28]In the course of the privatization of the mining industry in the 1990s, the Zambian government approximately entered into eleven (11) development agreements with mining companies. Under these agreements, there were stabilisation clauses that froze the fiscal regime for some 15-20 years. For instance, the development agreement fixed the royalty rate of copper at 0.6% of gross revenues of the company which was less than the then applicable statutory rate of 3%. This resulted in lower revenues in Zambia in spite of the increase in the price of copper in the world market. Consequently, in 2007, only US$ 20 million from combined gross proceeds of US$ 3.4 billion was backed home by Zambia.[29]

One may be apt to say that the financial losses to the host countries are enormous and is a lesson for developing countries to learn. Indeed it is, particularly for Cameroon. Cameroon accords a 1% royalty rate to those seeking to invest in the mining sector. Another example of how developing countries suffer economically can be seen in the case of Tanzania, third African nation in the production of gold.[30] Tanzania is losing large amounts of money from foreign investment in the mining sector due to low royalty water and gaseous tax exemptions rates while contracts with so-called Stabilisation clauses have locked the government into this tax regime for up to 50 years.

Tanzania has seen its gold mining industry swell in the last decade thanks to a variety of

Tools for Oil and Gas investors'.

[26] Okenabirhie, T. O., "*A stabilization clause or a stabilization curse? A look at the effects of Stabilization clauses on Host Country, by measuring the effects of the LNG Act on the Nigerian economy*," p.12.

[27] *Ibid*. at p.13

[28] Jagritti, S.(2015), op.cit at p.7

[29] *Ibid.*

[30] Damon Vis-Dunbar,(2008)'Tanzania bad deals with foreign mining companies'

investment incentives.[31] However, it is reported that Tanzania mineral investment laws are too liberal. The liberal nature of these laws attracts foreign investors, who benefits more as compared to what the state, receives. In fact the state only gets a very minimal of portion of the global revenue from this sector. The government of Tanzania currently levies 3 percent (3%) royalty rate on gold, 2 percent (2%) short of 5 percent (5%) rate as demanded in the case with Botswana. Tanzania would have netted an extra US$ 58 million over the last 5 years; reports Mark C. & Lissu T.[32]The Cameroonian Gas Code provides a 5% royalty rate to be paid quarterly when they are due.[33] Surely this is a better situation than that in Tanzania. However, the Petroleum Code rather posits that royalties shall be determined by parties to the relevant concession contract.

It adds that payment of royalties shall be done monthly proportionate to production. Also, royalties shall be paid in kind or in cash pursuant to the terms of the petroleum contracts. This position, in particular, could be very misleading to any HC without a good bargaining power. It implies that parties may go for a very low royalty rate; even less than the 0.6% royalty rate for mining like in the Zambian case supra. Thus, the country will suffer from serious revenue losses.

In the Tanzanian example, it is noted that efforts to boost government revenue in the mining sector may be hampered by the contracts that the country has negotiated with foreign mining companies, as propounded by Alex Stewarts Assayers.[34] While these contracts are often kept secret, nonetheless, their contents are occasionally leaked; such was the case with a 2007 agreement with Barrick, a Canadian company, for a new mining operation in North Tanzania.[35] The contract commits the government to maintain current tax levels for 25 years, with an option for the company to renew for another 25 years on the same terms. Compensation is guaranteed under contract, should the government change the terms in such a way that the company is in a "worse off situation".[36]

As a matter of fact, the issue of compensation comes in again and the amount of compensation is often ‘‘mouth-watering" thus draining the economy. An example of such a situation can be

[31] *Ibid*.
[32] Mark, C. & Tindu L., (1998), *A Golden Opportunity*? *How Tanzania is Failing to Benefit Gold Mining*, 2nd Ed., CCT, BAKWATA, and TEC at p.4
[33] Section 61 (1) and (2) of the Cameroon Gas Code.
[34] Alex Stewart Assayers (ASA) is an American company that the Tanzanian government contracted in 2003 to conduct an audit of the large gold mines in the country, to check if their declarations on their production and Financial positions were correct.
[35] Damon Vis-Dunbar, (21 November 2008) "*Tanzania bad deals with foreign mining companies*" Investment Treaty News, IISD.
[36] *Ibid.*

seen in the case of *Bernhard Von Pezold and others v Zimbabwe*.[37] There, it was decided that expropriation carried out by the Zimbabwean government on land owners was unlawful and therefore the investors were due compensation.

Reports hold that if Zimbabwe were to return the farm licenses, it will owe just some US$ 65 million; but if it fails to return the licenses, then it will owe some US$ 196 million.[38] This is a colossal sum of money that may adversely affect the host state's economy, if chunked out simply because a given commitment in the contract has been breached. In fact in November 2015 Zimbabwe moved to annul the award[39].

Broadly speaking, Stabilisation clauses affect host states in three major ways: legally, economically and politically as seen above. It is also important to note that the use of Stabilisation clauses in investment contracts hampers the host state from fulfilling its mission to its citizens in the domain of human rights, environmental sustainability, health, safety, security etc.

In the domain of law making, some writers have opined that the use of Stabilisation clauses in investment contracts severely distort the legal policy of the host state.[40] It renders the host state incapable of making new laws. This is simply robbing the state of its legitimate right to make new laws. Economically, it slows down government development plans. Since the clauses freeze the host state law, it makes it pretty difficult for new laws to be enacted geared towards economic development. Also, the compensations awarded to the investors are very huge and drain the state coffer or even plunge it into more debts. On the social domain it is said that, MNC, come in with a lot of economic benefit.

IV. Implication of stabilisation clauses in investment contracts on investors

Having discussed the impact of Stabilisation clauses on host government, it is very necessary to examine the repercussion of same on the investor. We have herein demonstrated how these clauses, no matter their form affect the investor. It is common knowledge that, these clauses will affect the investor mainly positively. However this proposition can only be in the affirmative in the end of this subchapter.

[37] ICSID case No ARB /10/15.
[38] Mark C. & Tindu, L., (2008), A *Golden Opportunity? How Tanzania is Failing to Benefit Gold Mining*, 2nd Ed., CCT, BAKWATA, and TEC.
[39] *Ibid.*
[40] Reuters T., (2011) Practice note, Understanding Stabilisation Clauses in International Investment Agreement. Investment Treaty News, IISD.

A. Effects of Stabilisation clauses in favour of the investor

Effects of stabilisation clauses in favour of the investor may be observed from the legal, politico-social and economic point of view in the sense of investment.

1. Legal outcomes of stabilisation provisions on the investor

One of the very first effects of Stabilisation clauses in investment contracts on the investor is that, the investor is often compensated when there is a change in law. Freezing clauses would generally result in compensation payments from the government to the investor.[41] In effect, the state would have to cover in part, or in full, the cost of the investor complying with the new laws or regulations relating to social and environmental standards. This implies that the use of these clauses gives the investor an advantage in that even when things are "worse" such will not go without compensation.

The outcomes of these clauses especially from the legal point of view, is that they guarantee a stable business (legal) environment for the investor. Since the investment contracts require huge sums of money, and given the fact that most developing countries are frequently making new laws and regulations, the use of stabilisation provisions is therefore aimed at guaranteeing the stability of the contract even when there is a change in laws**.** Most developing countries are very unstable so the inspiration of these clauses resolves the issue of instability. Jagritti Singh writes to exemplify the Nepal case, a developing country open for investment.[42]

The use of stabilisation clauses in investment contracts also legally works to the advantage of the investor in that, it provides same with a useful reference point for discussing the obligations of the company with the host government. These clauses provide prima facie arguments for the company that the law (new) does not apply to the company's operation[43]. Therefore, these clauses may help the company to obtain mitigation results, such as, a negotiated lower requirement or a delay in the law's applicability to the projects.

In a nutshell the incorporation of stabilisation clauses in investments contracts immunizes the investors from subsequent changes in law that may negatively affect the investor's business. A good example is noted in the BTC, Cameroon-Chad pipeline project, "MDA etc. In fact in the case of MDA, the immunity from the law that was given to the investor was extreme. This can be seen from the wordings of the agreement.[44]

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[41] Shemberg, A., (2008), op.cit.
[42] Jagritti , S., (2015),op.cit at p. 7
[43] Ruggie J. (2008), op.cit at p.
[44]Mineral Development Agreement between the National Transitional Government of Liberal and Mittal Steel Holding that was amended in 2007 two years after signing.

2. Politico-social effects of stabilisation clauses on investors:

Among the numerous factors arising from investing in developing countries, are politico-social risks most dreaded by investors. So, the incorporation of stabilisation clauses is also geared towards avoiding some political and social influences on the investor's project. In effect, the use of Stabilisation clauses safeguards the interest of the investor intending to invest in a country which has different socio-economic conditions prevailing and different legal systems in practice.[45] A clear example is the case of Cameroon, where basically two legal systems operate; that is the common and civil law systems. However, note should be taken in this regard that the Cameroonian government is taking every effort to harmonize some major legal texts of its laws –the Labour Code.[46]

Political instability and poor governance are some of the ills that plaque most developing countries including Cameroon so, investors see stabilisation clauses as a legal sheath to protect them from such instances. It is important to note that these clauses are not out to make the host state politically unstable, but rather it is in the event of such circumstances like post-election instability, like the case of Gabon,[47] which is indeed a characteristic of most African elections; the investors' investments will be secured. Nationalisation and expropriation are all measures that can be used by the host state to do away with the investor's investment.

They are both within the whims and caprices of the host state to decide to nationalize completely by seizing the investment projects. These seizures always do affect the investors. So, the insertion of these clauses, work to the advantage of the investor in that it directs the host state not to nationalize. An instance of nationalisation can be noted in the Bolivian nationalisation of oil fields in the 1990's as a result of low tax regime.[48]

In the case of expropriation, developing countries are quick to engage in what is now called 'creeping expropriation'.[49] The expropriation may be direct or indirect. No matter its form as seen above, it can be noted that, it affects the investor negatively, so the use of stabilisation clauses would help to fight against this practice. Nonetheless, developing countries are still engaged in expropriation.

3. Economic implications of stabilisation clause on investors

It is important to note at this juncture that the main reason for which investors invest is simply

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[45]Law Teacher, Explaining the function of stabilization, and renegotiation clauses in production sharing.
[46]Law No. 92/007 of August 14th, 1992 instituting the Labor Code of Cameroon
[47]After the declaration of the results of the election on August 30, 2016, two days after there were serious clashes leaving some dead and others seriously wounded.
[48] However the nationalization was done even with stabilization commitment.
[49] Peter, D.C.,(2005), op.cit

to reap profits from their investments where-so-ever they are maybe found. The use of stabilisation clauses is a means to ensure that these profits are secured. In consideration of the gains to be reaped an example can be seen in the Tanzania-case when the mining companies back home US$195 million. Generally the purpose of investment is to generate money(we invest to make money). Although a majority would agree with the statement that 'we invest to make money' there is however need for more precision.

Investments improve on our welfare of the investor, which for our purposes can be defined only in monetary wealth, both current and future.[50] Therefore, it would be just to opine that investors are interested in monetary gains obtained from investing. Given that we have adopted this argument for the purposes of this work, one would be right to say that the reason for which Barrick, the largest gold mining company in the world[51] is investing in the mining sector is simply for profit reaping. With this motive in mind, the investors seek the use of stabilisation clauses in order to avoid instances where, for example, repatriation of their profits would be difficult. Another positive impact of stabilisation clauses on the investors is that they are compensated where the clause is breached.

Compensation remains one of the major remedies for breach of Stabilisation clauses no matter their type. Though the project may be restored to the economic equilibrium position, it is clear that compensation would be the ultimate award to the investor. It is worthy to note here that compensation is mostly in monetary terms. Considering the nature of investments made and the duration of same, it is important to note that the financial amount for compensation is usually colossal.

The Zimbabwean case supra, is an example where the host state was charged to pay some 196 million dollars. This amount is very huge for developing countries dish out. So, the incorporation of stabilisation clauses in the investment contracts greatly secures the investors' investments. This implies that there would hardly be a circumstance or situation where the investor is not compensated.

Nevertheless, it does not however imply that, awards are always made in favour of the investor. In the course of our discussion above we have discovered that awards have been made in favour but what is certain is that, stabilisation clauses are there to ensure that compensation is made to the investor. This tells that the use of these clauses have adverse repercussions at on the investor.

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[50] Charles P. Jones, (1998), *Investments: Analysis and management* (6th Ed.) John Willey & sons, New York p. 4

[51] Mark C. & Tindu L., (1998), *A Golden Opportunity? How Tanzania is Failing to Benefit Gold Mining,*

4. Adverse effects of Stabilisation clauses on the investor

In the first place, stabilisation clauses create moral hazard on the part of the firm. Knowing that, they are insulated against regulation or laws, the investors sometimes decide not to take precautions against the occurrence of events that, because of their social implications may trigger regulatory responses that are costly to investor or the firm, for instance certain environmental harms.[52] It is succinctly propounded that an infringement of a moral rule is actionable, and the aggrieved party is at liberty to sue the defendant, host state.[53] Worthy to note here, is the fact that, this view is tilted towards intellectual property. The force further given to this position under the Copyright Design and Patents Act[54] gives one the impression that, as seen above, investors as well, owe a moral obligation to the inhabitants of the particular place where they are operating, failure which, moral hazards is created.

Also, stabilisation clauses have been criticized by international human rights organizations because they have a negative effect even on the firm itself. For instance, workers of firms are sometimes poorly treated or even paid. This situation is not the best for the "investor" because every now and then workers go on strike which limits the production capacity of the firm. A good instance, of this disregard of human rights is visible in the ADA[55] report about compensation to employee gold-miners in Tanzania. Their pay package, according to Mark C., is very minimal compared to the work they do. The universal declaration of human rights posits that;

"*Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and protection and to the protection against unemployment. Everyone has, without discrimination, the right to equal pay for final work. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection*".[56]

Indeed the situation of the gold-miners is appalling, given their wage or remuneration amounts to almost nothing; yet the gold mining companies yield fabulous profits and care less about the miners. This is simply because of the powers granted them under the stabilisation clause. To them the commitment of stabilisation clause enables them to do that which, they want nevertheless their very act gravely affects them. Another risk of stabilisation clauses in

[52] Howse, R.., (2011), op.cit, at p.5
[53] David, I. B., (2007), *Intellectual Property, 6th Ed., University of Plymouth, Candida Harris, p.128.*
[54] Section 103(1), of the Copyright, Design and Patents Act 1988.
[55]Compare the pay package of these workers and that of director of Barricks. This is one of the more reasons why most investors activities have come under questioning is simply because their disregard for people's andWorkers right.
[56]See Article 23 (1) (2) & (3) of the Universal Declaration of Human Rights, December 1948.

investment contracts, that may affect the investor, is that, these clauses may be used as a measure by developing countries to attract foreign investors, who may, after sinking huge sums of money in a project, be called upon to quit the project. Of course, this would be considered as bad faith on the part of the host state.

This notwithstanding, the HC may do this on grounds of sovereignty of power and the desire to protect natural resources in such cases; and parties may end up sitting for renegotiation, which is not what the party (parties), particularly the investor had previewed. This is closely linked to the risk of expropriation and nationalisation wherein, even though the investor may be compensated adequately, promptly or effectively, he must have gone through a lot of expenses for hiring an arbitrator, and definitely some drop in profits.

Another negative effect of Stabilisation clauses in investment contracts on the investor is that, the investor is also subjected to the provision of the terms of the contract in conducting its business; in fact, there are instances where the investor may suffer loss not caused by the HC but as a result of external influence. An instant case is, The Karakhs.[57] This project was operated by EN/-BG-Chevron-Lkoil. The Karakhs tax regime applicable at the date when the contract was stabilized implied that VAT for sales of hydrocarbons into the Russian Federation was to be charged in Kazakhstan. Russian buyers could reclaim (offset or obtain a refund from the Russian budget) input VAT charged in Kazakhstan against their output VAT in Russia.

However, with effect from 1 July 2002, Russia changed its tax code so that foreign VAT could not be included in the calculations to be paid to Russia. The economic effect on the buyers of Karachaganate condensate was that, their purchasing cost increased by the amount of VAT charged on Karachaganak consortium in Kazakhstan (20%). Hence, the Russian buyers requested that the sales price of Karachaganat condensate be reduced by the amount of the now non recoverable VAT. The consortium could not agree to this proposal. The sales contracts were not signed, and the field was shut for more than two months from September 2002. Production restarted in the field in November 2002, when the consortium realized that the losses from the suspended production exceeded negative effects from reduced sales price.

It may be noted that, the Kazakhs authorities took up the view that tax stabilisation, was entirely applicable to the case and that Kazakh VAT should continue to be charged at the rate of 20% in Kazakhstan irrespectively of any changes in the tax legislation in the Russian Federation,[58] in its view, the risk faced by the investor in this case is that, if the investor had dared to amend

[57] Peter D. C. (2005).
[58] *Ibid* p. 38

the rules of the above, the host state would use the opportunity to seek renegotiation which, also, has its own impact on the investors. In the case of renegotiation, the HC may act as a stronger party and even seek better terms.

It should be noted that the annual losses of revenue to the consortium in the development were in the neighbourhood of US$50 million.[59] See how much money that the investor loses because the clause the stabilisation clause works against him. Nonetheless, note may be taken, that, this is just an exception in the many cases where the clause puts the investor at a dead end.

V. CONCLUSION

In summary, this paper sought to examine the ramification of stabilisation clauses in investment contracts on host developing countries as well as on the investor. In the light of the forgoing discussion, it is observed that, in spite of the promising prospects of stabilisation clauses, they have severe legal, economic and politico-social negative consequences on the host state. We have also seen that, stabilisation clauses may act in favour of the investor as well as against it. Positively, the investor is sure of compensation, especially as it is legally backed-up, where, there arise an issue. On the other hand investors may suffer seriously from financial losses especially where the compensation is not up to the invested sum. As such the host government ought to be aware of the effects of these clauses so that they may not take them unawares and thus permit the aggrieved investor to bring in a third party (arbitrator or the court) to resolve the issue.

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[59] *Ibid.*

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