# CONTRACTUAL PROTECTIONS AGAINST THE RESOURCE NATIONALISM CYCLE IN ZAMBIA

*Sangwani Patrick Ng'ambi*†

ABSTRACT

*Foreign direct investment (FDI) in resource rich nations is typically fostered through concession or development agreements, which enable investors to explore and exploit the host State's natural resources. Under these agreements various incentives are offered to the investor by the host State, so as to attract their capital. However, once the investment is sunk, the investor becomes susceptible to the resource nationalism cycle. Investors are particularly vulnerable when the natural resource experiences a sustained upward trend. In such instances, the host State seeks to maximize the benefits accruing from the natural resource. This can either be accomplished through reversing the tax incentives offered to investors or by outright nationalizing their assets.*

*The cyclical nature of the resource nationalism cycle can be seen in countries like Zambia, which is a mono-economy that relies primarily on its vast copper reserves. Since the privatization of copper mines in the early 2000s, copper prices have remained relatively mercurial. Since then, the mineral tax regime has undergone many changes.*

*This article examines the contractual mechanisms that foreign investors insert into concession agreements in order to protect themselves against the resource nationalism cycle. It will begin by giving an overview of the factors contributing to the resource nationalism cycle, using Zambia as a case study. Thereafter, it will look at the various clauses which investors insert into concession agreements, including stabilization clauses, arbitration clauses, and choice of law clauses.*

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## I. INTRODUCTION

Foreign direct investment (FDI) in resource rich nations, is typically fostered through concession or development agreements, which enable investors to explore and exploit the host State's natural resources.[1] Under these agreements various incentives are offered to the investor by the host State so as to attract their capital.[2] However, once the investment is sunk, the investor becomes susceptible to the resource nationalism cycle.[3] This cycle means that investors are

† LL.B. (De Montfort), LL.M. (Cornell), Ph.D. (Leicester), AHCZ, ACIArb. Lecturer of Law at the University of Zambia.

1 Sangwani Patrick Ng'ambi & Prince Mwiinga, *Ownership of Large Scale Mining in Zambia and Stabilisation Clauses*, 47 ZAM. L.J. 35, 35 (2016).

2 Thomas W. Waelde & George Ndi, *Stabilizing International Investment Commitments: International Law Versus Contract Interpretation*, 31 TEX. INT'L. L.J. 215, 223 (1996).

3 *See generally* RAYMOND VERNON, SOVEREIGNTY AT BAY: THE MULTINATIONAL SPREAD OF US ENTERPRISES (1971); *see generally* Brandon Marsh, *Preventing the Inevitable: The Benefits of Contractual Risk Engineering in the Light of Venezuela's Recent Oil Field Nationalization*, 13 STAN. J.L. BUS. & FIN. 453, 457 (2008).

particularly vulnerable when the natural resource experiences a sustained upward trend.[4] In such instances, the host State seeks to maximize the benefits, which are accrued from their natural resource. This can be accomplished either through reversing tax incentives that were previously granted to investors or outrightly nationalizing their assets.[5]

The cyclical nature of the resource nationalism cycle can be seen in countries like Zambia, which is a mono-economy that relies primarily on its vast copper reserves.[6] Zambia attained its independence on October 24, 1964.[7] At the time, its copper industry was dominated by two foreign entities, namely: the Anglo-American Corporation (AAC) and the Roan Selection Trust (RST).[8]

These entities were nationalized by the Zambian government in 1970 and later amalgamated into Zambia Consolidated Copper Mines (ZCCM).[9] However, a decline in copper prices, a heavy debt burden and outright mismanagement of the mines, led to the decline of the mining industry in Zambia. This in turn precipitated the privatization of mines belonging to ZCCM.[10] This process was to be facilitated through development agreements between the government of Zambia and the foreign entities. Additionally, most of these agreements were completed between 2002 and 2004.[11]

Since then, the price of copper has been rather mercurial, which has led the government to episodically reconsider the mining tax regime. For example, a windfall tax was introduced in 2008 and retracted in 2009. Likewise, the tax regime has undergone many changes since the Patriotic Front government took control in 2011.[12]

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4 *See* Roderick Duncan, *Price or politics? An Investigation of the Causes of Expropriation*, 50 AUSTL. J. AGRIC. & RESOURCE ECON. at 85 (2006).

5 JESWALD W. SALACUSE, THE LAW OF INVESTMENT TREATIES 286 (2010).

6 ANDREW SARDANIS, A VENTURE IN AFRICA: THE CHALLENGES OF AFRICAN BUSINESS 244 (2007).

7 ANDEW SARDANIS, ZAMBIA: THE FIRST 50 YEARS 11 (2014).

8 SANGWANI PATRICK NG'AMBI, RESOURCE NATIONALISM IN INTERNATIONAL INVESTMENT LAW 10 (2016).

9 Savior Mwambwa et al., *A fool's paradise? Zambia's mining tax regime*, CTR. FOR TRADE & POL'Y DEV. (Dec. 2010), https://www.akpublics.de/media/pdf-dokumente/Publikationen/ctpd%20_fools%20paradise_%20zambia%20mining%20tax%20regime%20briefing%20paper.pdf.

10 John Lungu, *Copper Mining Agreements in Zambia: Renegotiation or Law Reform?,* 117 REV. OF AFR. POL. ECON. 403, 405 (2008).

11 Sangwani Patrick Ng'ambi*, Mineral Taxation and Resource Nationalism in Zambia*, 2(1) S. AFR. J. OF POL'Y AND DEV. 6 (2015).

12 *Id.*

The aim of this paper is to look at the contractual mechanisms that foreign investors insert into concession agreements in order to protect themselves against the resource nationalism cycle. Using Zambia as a case study, Part II will give an overview of the factors contributing to the resource nationalism cycle, including the need for foreign direct investment and the correlation between government systems and resource nationalist policies. Part III will look at the various clauses, which investors insert into concession agreements, including stabilization clauses, arbitration clauses, and choice of law clauses. Part IV will consist of a conclusion.

## II. THE RESOURCE NATIONALISM CYCLE

The resource nationalism cycle describes a situation whereby a host State solicits foreign direct investment and later seeks to maximize the benefits accrued from such an investment, once it has been sunk.[13] Such an act can either mean increasing taxes or outrightly nationalizing assets that belong to an investor.[14] In the beginning, the host State essentially solicits foreign direct investment. However, after operations commence and the natural resource experiences a sustained upward trend, the host State then seeks to exercise greater control over the investment.[15] An additional factor contributing to this cycle—is the system of governance adopted by the host State. This article will showcase how democracies are the least likely of regimes to adopt resource nationalist policies, autocratic regimes are also unlikely to adopt such measures. The most likely *to* adopt resource nationalist policies are "hybrid systems," which have regular elections, but are also characterized by weak institutions that are typically unable to perform the necessary checks and balances concerning the arbitrary use of power by the executive.[16]

A practical example of the resource nationalism cycle is Venezuela, where oil is the "engine of the economy."[17] The oil industry

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13 Paul Stevens, *National Oil Companies and International Oil Companies in the Middle East: Under the Shadow of Government and the Resource Nationalism Cycle*, 1 J. OF WORLD ENERGY L. & BUS. 5 (2008).

14 Ng'ambi, *supra* note 11, at 7.

15 Paul Domjan & Matt Stone*, A Comparative Study of Resource Nationalism in Russia and Kazahkstan 2004-2008*, 62 EUROPE-ASIA STUDIES 38 (2010).

16 *See* Sergei Guriev, Anton Kolotilin, Konstantin Sonin, *Determinants of Nationalization in the Oil Sector: A Theory and Evidence from Panel Data*, 27 THE JOURNAL OF LAW, ECONOMICS, & ORGANIZATION 301 (2009).

17 TERRY LYNN KARL, THE PARADOX OF PLENTY: OIL BOOMS AND PETRO-STATES 101 (1997).

started out in the hands of private oil companies and by the end of the 1920s, Venezuela was one of the world's leading oil exporters.[18] Venezuela's oil companies were nationalized in the 1970s and control was placed in the hands of the State run Petróleous de Venezuela, S.A. (PDVSA).[19] Due to a fall in oil prices and mismanagement, Venezuela's oil industry experienced a decline. This led to the reprivatization of Venezuela's oil industry—after the election of President Caldera in 1994.[20] In a matter of few years, with the election of Hugo Chavez as President in 1998, various policies were introduced, which culminated in the nationalization of Venezuela's oil industry.[21] Since renationalization, Venezuela's oil production has steadily decreased. By 2009, the tone of the government had also changed, with the government toning down its nationalistic rhetoric in a bid to attract foreign direct investment.[22]

### *A. The Need for Foreign Direct Investment*

Host States typically lack the finances and technical know-how to explore and exploit their natural resources.[23] Thus, they solicit foreign direct investment in order to do so. This is owing to the fact that with foreign direct investment comes foreign capital and expertise.[24] It is a particularly attractive option when prices of the host State's natural resources remain relatively low.[25] Furthermore, seeking foreign investment may also be a priority in countries that look to privatize previously nationalized entities.

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18 Marsh, *supra* note 3, at 458-59.

19 *Id.*

20 *Id.*

21 *See* Elisabeth Eljuri & Clovis Treviño, *Venezuela: On the Path to Complete 'Oil Sovereignty', or the Beginning of a New Era of Investment?*, 2 J. WORLD ENERGY L. & BUS. 259, 260-61 (2009).

22 JAVIER CORRALES & MICHAEL PENFOLD, DRAGON IN THE TROPICS: HUGO CHAVEZ AND THE POLITICAL ECONOMY REVOLUTION IN VENEZUELA 89–90 (2011).

23 Hasan S. Zakariya, *Sovereignty Over Natural Resources and The Search for a New International Order*, *in* LEGAL ASPECTS OF THE NEW INTERNATIONAL ECONOMIC ORDER 212 (Kamal Hossain ed., 1980).

24 JAMES C. BAKER, FOREIGN DIRECT INVESTMENT IN LESS DEVELOPED COUNTRIES: THE ROLE OF ICSID AND MIGA 5 (1999).

25 Thomas W. Wälde, *Renegotiating Acquired Rights in the Oil and Gas Industries: Industry and Political Cycles Meet the Rule of Law*, 1 J. WORLD ENERGY L. & BUS. 55 (2008).

Firstly, seeking foreign investment ensures that any outdated infrastructure may be replaced, as was the case in Russia in the 1990s.[26] Secondly, privatized entities are perceived to operate more efficiently than those in the hands of the State.[27] For example, Venezuela was producing up to 3.5 million barrels of oil per day in the 1970s, prior to its first nationalization.[28] However, after the nationalization of the industry, production decreased to 1.5 million barrels per day in 1985.[29] After re-privatization in the 1990s, production rebounded once again, to 3.06 million barrels per day.[30] The cycle however continued, as it reduced once more after President Chavez re-nationalized the oil industry.[31]

At the negotiation stage, the host State will make various promises to the investor in a bid to attract this much needed capital.[32] For example, the State may offer various tax incentives to the investor during the negotiation stage, which is done in order to ensure that the former appears to be an attractive investment destination.[33] This is particularly so, when the host State's natural resource prices remain relatively weak and the investor has a plethora of alternative investment destinations to consider. Once the negotiation stage is complete, the undertakings of both parties are set out in a concession agreement. Thereafter, the investment is sunk.[34]

The problems arise once the investment has been sunk and the natural resource experiences a sustained upward trend.[35] In such a situation, the host State will seek to exercise greater control over their natural resources. This may be influenced by various factors. For starters, the host State will wish to gain a greater share of the profits being

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26 Daniel R. Sieck, *Confronting the Obsolescing Bargain: Transacting Around Political Risk in Developing and Transitioning Economies Through Renewable Energy Foreign Direct Investment*, 33 SUFFOLK TRANSNAT'L L. REV. 319, 328 (2010).

27 *See* Narjess Boubakri, Jean-Claude Cosset & Omrane Guedhami, *Liberalization, Corporate Governance and the Performance of Privatized Firms in Developing Countries*, 11 J. CORP. FIN. 767 (2005).

28 *See generally Internationally,* UNITED STATES ENERGY INFORMATION ADMINISTRATION (2012), http://www.eia.gov/countries/analysisbriefs/Venezuela/venezuela.pdf.

29 *Id.*

30 *Id.*

31 *Id.*

32 Ng'ambi, *supra* note 11, at 5.

33 *Id.*

34 *Id.*

35 Roderick Duncan, *Price or politics? An Investigation of the Causes of Expropriation*, 50 AUSTL. J. AGRIC. & RESOURCE ECON. 85 (2006).

generated by the foreign investors.[36] In addition, there may be public pressure on the host State, especially where the perception is one which entails the investor making excessive windfall profits through no real effort of their own—to the detriment of the people of the host State. In such a situation, the host government may feel compelled to either increase taxes or nationalize the investor's assets outright.[37]

### *B. The Role of Government Systems*

The host State's system of governance plays a crucial role in whether it undertakes resource nationalist policies. Typically, it is in States where the institutions are weak, and the public pressures are high, that a State may undertake resource nationalist policies.[38] On the other hand, if institutions are strong, then a host State is less likely to adopt a resource nationalist stance. This sub-section looks at three systems: a democratic system, an authoritarian system, and a hybrid system.[39] Under authoritarian systems, political hegemony depends less on the electorate than it does under democratic and hybrid systems. It is argued therefore, that they are less likely to adopt resource nationalist policies. This is despite the fact that checks and balances are virtually non-existent. Similarly, democratic governments are the least likely to adopt resource nationalist policies because although they are more susceptible to electoral pressure, the strong institutions that exist in such systems are able to provide protection.[40] Hybrid systems are the most likely to adopt resource nationalist policies because they are not only accountable to the electorate, but such systems are also characterized by weak institutions.[41]

Under a democratic system, the host government is the least likely to adopt a resource nationalist stance. Indeed, a democratic government is susceptible to public pressure. This is owing to a plethora of factors, including regular elections. Thus, if a democratic

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36 Sangwani Patrick Ng'ambi and Prince Mwiinga, *Ownership of Large Scale Mining in Zambia and Stabilisation Clauses*, 47 ZAM. L.J 35 (2017).

37 *Id.* at 36.

38 *See* Sergei Guriev et al., *supra* note 15 at 301; *see also* SANGWANI PATRICK NG'AMBI & KANGWA-MUSOLE GEORGE CHISANGA, INTERNATIONAL INVESTMENT LAW AND GENDER EQUALITY: STABILIZATION CLAUSES AND FOREIGN INVESTMENT 48 (2020).

39 Ng'ambi *supra* note 11 at 35.

40 NIKOLAI PETROV, MASHA LIPMAN & HENRY H. HALE, OVERMANAGED DEMOCRACY IN RUSSIA: GOVERNANCE IMPLICATIONS OF HYBRID REGIMES 3 (2010).

41 *Id.*

government adopts unpopular policies, it is likely to be reflected in the results of its elections. A dissatisfied electorate can certainly vote out a controlling government.[42]

However, a democratic government is unlikely to adopt resource nationalist policies even in the face of public pressure. That is because democracies are typically characterized by strong and independent institutions. Such institutions provide checks and balances on the arbitrary use of power.[43] For example, in a functional democracy, investors have access to an independent judiciary, whose decisions are respected. This renders any arbitrary use of legislative and administrative powers virtually impossible.[44] As such, institutions like these mean that it is less likely that the executive will operate in a way that is detrimental to the interests of foreign investors. For this reason, democratic host States receive a great deal of foreign direct investment.[45]

Authoritarian regimes are also unlikely to adopt resource nationalist policies. Although autocratic governments are characterized by weak institutions and are therefore not susceptible to the same checks and balances that are typical of their democratic counterparts, they also lack regular free and fair elections.[46] For this reason, they are less susceptible to popular pressure.[47] As such, it is easier for the government to ignore the socio-economic demands of the people.[48] Additionally, public calls for increased taxes or nationalization are likely to be ignored by an authoritarian government.[49]

Moreover, authoritarian governments regularly use their State machinery to ruthlessly quash any protests or uprisings.[50] Given this

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42 LARRY DIAMOND, DEVELOPING DEMOCRACY: TOWARD CONSOLIDATION 11 (1999).

43 NATHAN M. JENSEN, NATION-STATES AND THE MULTINATIONAL CORPORATION: A POLITICAL ECONOMY OF FOREIGN DIRECT INVESTMENT 80 (2006).

44 *Id.*

45 *Id.*

46 Nathan M. Jensen, *Democratic Governance and Multinational Corporations: Political Regimes and Inflows of Foreign Direct Investment*, 57 INT'L ORGANIZATION 587, 593 (2003).

47 *Id.*

48 Geoffrey Garrett & Peter Lange, *Internationalization, Institutions and Political Change*, *in* INTERNATIONALIZATION AND DOMESTIC POLITICS 48, 61 (1996); PAUL BROOKER, NON-DEMOCRATIC REGIMES: THEORY, GOVERNMENT AND POLITICS 167-69 (2000).

49 PAUL BROOKER, *supra* note 48, at 167-69.

50 Quan Li, *Democracy, Autocracy and Expropriation of Foreign Direct Investment*, 42 COMP. POL. STUD. 1098, 1106 (2009).

fact, authoritarian regimes are not obliged to adopt resource nationalist policies, despite popular pressure to do so. Policies pertaining to foreign direct investment, are more likely to remain stable as long as a particular government continues to maintain its political hegemony. As such, authoritarian regimes also receive a substantial amount of foreign direct investment.[51]

The most likely regime to adopt resource nationalist policies is a hybrid system.[52] This system, is one that holds regular elections, but also lacks the strong institutions that are typically found in functional democracies.[53] Instead, hybrid systems have a highly centralized executive and weak institutions, which lack the levels of independence that are necessary to keep the arbitrary use of executive powers in check.[54] The fact that there are regular elections, means that host governments of hybrid systems are subject to public pressure, which includes calls to raise taxes or nationalize. The risk of being ousted in the next election places pressure on the host government to take measures that will appease the masses. Additionally, the lack of institutional checks and balances, makes it easier for host governments of hybrid systems, to steamroll their resource nationalist agenda through *inter alia* the legislative branch of government.[55]

### *C. An Expression of Nationalism*

It is also advanced that resource nationalism is an expression of nationalism and not an expression of socialism.[56] States are not enforcing a socialist policy when they pursue a resource nationalist agenda, they are instead seeking to exert a national identity upon their industries. This is typically in response to a perceived foreign domination of the State's industries.[57]

However, once the euphoria of exerting a national identity on the industry subsides, it becomes apparent that eliminating the foreign national from the equation also has the effect of eliminating foreign capital.[58] Consequently, the host State experiences severe economic problems. This is particularly compounded by mismanagement of

51 JENSEN, *supra* note 43, at 593.
52 PETROV et al*., supra* note 40, at 3.
53 *Id.*
54 *Id.*
55 *Id.*
56 Amy Chua, *The Privatization-Nationalization Cycle: The Link Between Markets and Ethnicity in Developing Countries*, 95 COLUM. L. REV. 223, 262 (1995).
57 *Id.*
58 *Id.*

nationalized entities. Furthermore, there may also be a depreciation in the price of the natural resource. The need to eliminate foreign domination from the economic paradigm, is suddenly subjugated by the demand for development and modernization.[59] As such, the host State will once again seek foreign capital, which is to be facilitated through the solicitation of foreign direct investment. This effectively brings us back to the early stages of the resource nationalism cycle.[60]

## III. THE RESOURCE NATIONALISM CYCLE IN ZAMBIA

This section examines resource nationalism in the Zambian copper mining industry. Zambia has undergone a number of waves of resource nationalism since its independence in 1964.[61] When Zambia attained her independence, the mining industry was dominated by two private entities, namely the Anglo-American Corporation and the Roan Selection Trust. The industry was nationalized at the end of the 1960s, and then privatized again in the 1990s. Since then, the government has episodically introduced new taxes so as to maximize the benefits of high copper prices.[62] Additionally, Zambia is also a hybrid system. Although it is characterized by regular elections like a democracy, systems still remain highly centralized in the executive and institutions are relatively weak, as they lack independence. This makes it easier for Zambia, as a host State to adopt resource nationalist policies, when the price of copper experiences a sustained upward trend.[63]

### A. The Zambian Mining Industry at Independence

Evidence from prehistoric burial grounds suggests that copper mining has existed in South-Central Africa for many centuries. Copper was not only used to make ornaments, it was also used as a medium of trade.[64] However, commercial mining began when the first commercial mine was opened at Roan Antelope (now Luanshya) in 1928.[65] The process of commercial mining was fostered by the British South Africa Company (BSAC) who granted concessions to the mining

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59 *Id.*

60 *Id.*

61 Ng'ambi, *supra* note 11, at 101-17.

62 *See* DAVID MANLEY, A GUIDE TO MINING TAXATION IN ZAMBIA (2013).

63 *Id.*

64 *See* ROAN CONSOLIDATED MINES PUBLIC RELATIONS DEPARTMENT, ZAMBIA'S MINING INDUSTRY THE FIRST 50 YEARS 15-16 (1978).

65 ANTONY MARTIN, MINDING THEIR OWN BUSINESS: ZAMBIA'S STRUGGLE AGAINST WESTERN CONTROL 54-55 (1972).

companies. Mining companies were expected to pay royalties to the BSAC from the revenue they made from the mines. Eventually, commercial mining in Zambia "culminated in the industry being dominated by the Anglo American Corporation and the Roan Selection Trust."[66]

The BSAC derived their right to grant concessions, through the acquisition of various compromises from Paramount Chief Lewanika, of Barotseland and various other Chiefs in Northern Rhodesia.[67] The BSAC was then able to use these concessions as a means of asserting ownership on all minerals throughout Zambia, which meant that they could do as they pleased with these minerals including levying royalties "on all minerals won by whoever won them."[68]

### *B. Nationalization of the Zambian Mining Industry*

A few years after Zambia attained her independence in 1964, the administration of President Kenneth Kaunda expressed concern that the mining industry was dominated by foreign entities. [69] In his Mulungushi Reforms Speech, President Kaunda asserted that despite exorbitant profits being made by mining companies, no new mines had been opened since independence.[70]

The government of Zambia had also adopted the socialist policy of "Humanism" and became a one-Party State.[71] Under this policy, the role of the Zambian government was to look after every citizen.[72] The policy of Humanism was similar to that of other governments at the time, who had adopted their own forms of socialism. For example, Tanzania had adopted "Ujamaa"[73] and Ghana had adopted "Consciencism."[74]

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66 Ng'ambi, *supra* note 11, at 10.

67 MUNA NDULO, MINING RIGHTS IN ZAMBIA 36 (1988).

68 *Id.*

69 ANDREW SARDANIS, AFRICA: ANOTHER SIDE OF THE COIN: NORTHERN RHODESIA'S FINAL YEARS AND ZAMBIA'S NATIONHOOD 229 (2011).

70 *Id.*

71 Neo Simutanyi, *The Politics of Constitutional Reform in Zambia: From Executive Dominance to Public Participation?*, *in* ACCOUNTABLE GOVERNMENT IN AFRICA PERSPECTIVES FROM PUBLIC LAW AND POLITICAL STUDIES 26, 30 (DM Chirawa & L Nijzink eds., 2012).

72 CARROL L. GRAHAM, SAFETY NETS, POLITICS, AND THE POOR: TRANSITIONS TO MARKET ECONOMIES 164 (1994).

73 *See* JULIUS K. NYERERE, UJAMAA: ESSAYS ON SOCIALISM (1968).

74 *See* KWAME NKRUMAH, CONCIENCISM: PHILOSOPHY AND IDEOLOGY FOR DECOLONISATION AND DEVELOPMENT WITH PARTICULAR REFERENCE TO THE

Zambia thus proceeded to nationalize the mines, and eventually amalgamated them into a company called Zambia Consolidated Copper Mines.[75] This not only helped to eliminate foreign domination over the mining industry, but it also advanced the government policy of humanism by ensuring that the proceeds emanating from the mining companies were used to provide various resources for the Zambian people, particularly the people of the Copperbelt. As Fraser and Lungu note:

> ZCCM was seen as a reflection of the State's developmental philosophy and supplied amenities much wider in scope than those offered during the colonial period, including free education for miners' children, alongside subsidised housing and food, electricity, water and transport. ZCCM literally operated a "cradle to grave" welfare policy, even subsidising burial arrangements for the dead. Although the system is often referred to as "paternalistic", it should be remembered that these services were not all initiatives from the top-down. In many cases improvements in terms and conditions of living quarters were demanded by the powerful Mineworkers Union of Zambia.[76]

The mines were essentially used as a cash cow in order to facilitate this ideology.[77] However, this wave of prosperity did not last long. A depreciation in copper prices, two oil crises in 1974 and 1979, and outright mismanagement of the mines, led to a decline in the Zambian mining industry and the Zambian economy as a whole.[78]

Consequently, the government had to borrow money in order to keep the economy afloat. This in turn led to a debt crisis. Additionally, copper production declined from a staggering 750,000 tonnes in 1973 to an abysmal 257,000 tonnes in the year 2000.[79] Furthermore,

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AFRICAN REVOLUTION (1964); Steven Metz, *The Socialist Theories of Nkrumah and Nyerere*, 20 JOURNAL OF MODERN AFRICAN STUDIES 377 (1982), Bonny Ibhawo and J.I. Dibua, *Deconstructing Ujamaa: The Legacy of Julius Nyerere in the Quest for Social and Economic Development in Africa*, 8 AFRICAN JOURNAL OF POLITICAL SCIENCE 59 (2003).

75 ALASTAIR FRASER AND JOHN LUNGU, FOR WHOM THE WINDFALLS: WINNERS & LOSERS IN THE PRIVATIZATION OF ZAMBIA'S COPPER MINES 8 (2006).

76 *Id.*

77 *Id.*

78 JAMES FERGUSON, EXPECTATIONS OF MODERNITY: MYTHS AND MEANINGS OF URBAN LIFE ON THE ZAMBIAN COPPERBELT 6-7 (1999).

79 Ng'ambi, *supra* note 11, at 118.

equipment became outdated and was unable to access certain copper reserves as a result. This decline in the industry necessitated attracting foreign direct investment to refinance the mines.[80]

### *C. Full Circle: Privatization and the Subsequent Introduction of a Windfall Tax in 2008 and Subsequent Taxes*

Multiparty democracy was reintroduced to Zambia in 1990.[81] The following year, President Frederick Chiluba's Movement for Multiparty Democracy (MMD) won in a landslide victory.[82] Despite the reintroduction of multiparty democracy, Zambia remained a hybrid system, under which power remained rather centralized within the executive. In order for one to become a Minister in the Zambian government, for example, one had to be a Member of Parliament as well. This remains the case today.[83]

Moreover, since the reintroduction of multiparty democracy, the legislature has generally been dominated by the ruling party of the day. This makes it easier for the ruling government to steamroll its agenda through Parliament. Furthermore, although the judiciary is completely separate from the other arms of government, it remains that judges are appointed by the President, and the judiciary as a whole is funded by the Ministry of Finance.[84]

When the MMD came into power in 1991, it pledged to liberalize the market and privatize the mines.[85] This was facilitated through the Privatization Act 1992, the Investment Act 1993, and the Mines and Minerals Act of 1995. The mines were then unbundled and sold to various investors. This was fostered through "Development Agreements" between the government of Zambia and the mining companies.[86]

Under these Development Agreements, various incentives were offered, including preferential tax rates. To ensure that these

80 JOHN LUNGU, THE POLITICS OF REFORMING ZAMBIA'S MINING TAX REGIME 16 (2009).

81 Michael Bratton, *Zambia Starts Over*, 3 J. OF DEMOCR. 81, 86 (1992).

82 *See* Carolyn Baylies & Morris Szeftel, *The Fall and Rise of Multiparty Politics in Zambia*, 54 REV. OF AFR. POL. ECON. 75, 76 (1992).

83 *See* CONST. OF ZAMBIA (2016) § 116(1).

84 *See* CONST. OF ZAMBIA (as Amended by Act No. 18 of 1996) and the CONST. OF ZAMBIA (as amended by Act No. 2 of 2016).

85 LUNGU, *supra* note 80, at 16.

86 *See generally* John Lungu, *Socio-economic Change and Natural Resource Exploitation: A Case Study of the Zambian Copper Mining Industry,* 25 DEVELOPMENT SOUTHERN AFRICA 543-560 (2008).

incentives subsisted throughout the duration of the contract, "tax stability clauses" were inserted.[87] Under these clauses the government promised not to undertake any administrative or legislative measures that would have a materially adverse effect on the profit making of shareholders in the new mining companies. This was done to present Zambia as a favorable investment destination and thus attract foreign direct investment.[88]

At the time that these agreements were signed in 2004, the price of copper stood at $2,500 per ton; by 2008 the price had increased to $8,000 per ton.[89] This meant that mining companies were earning windfall profits, or profits beyond that which they had envisaged in 2004. For example, in 2005 Vedanta was able to recoup their initial investment of $25 million, which they had made the year before, due to a doubling in copper prices.[90]

Consequently, there were calls to increase taxes so as to capture a greater share of the revenues that mining companies were making. This essentially sparked another wave of the resource nationalism cycle in Zambia. This was further compounded by the fact that in the General Election of 2006, the MMD lost all the seats which they held in the mining towns, although their candidate, President Mwanawasa, ultimately won the Presidential election.[91] President Mwanawasa was only able to maintain a slim majority in Parliament because under the Constitution, the President is able to appoint up to eight members of Parliament.[92]

Given the fact that they had lost seats in the mining towns in 2006, and the fact that they had backing from civil society organizations, the Mwanawasa administration proceeded to impose a "Windfall Tax" on the mining companies operating in Zambia.[93] This meant cancelling all development agreements through the passage of the Mines and

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87 *See, e.g.,* Mufulira Mine, Smelter and Refinery and Nkana Mines, *Concentrator and Cobalt Plant Development Agreement*, RESOURCE CONTRACTS, https://www.resourcecontracts.org/contract/ocds-591adf-0639959550/view#/ (last visited Feb. 16, 2021) (commonly known as the Mopani Copper Mines Development Agreement).

88 U.N. Conference on Trade and Dev., Investment Policy Review Zambia 21–22, U.N. Doc. UNCTAD/ITE/IPC/2006/14, U.N. Sales No. E.06.II.D.17 (2006).

89 FRASER & LUNGU, *supra* note 75, at 13.

90 *Id.*

91 Jeremy Gould, *Zambia's 2006 Elections: the Ethnicization of Politics?,* NORDIC AFR. INST. NEWSLETTER (NORDIC AFR. INST., Uppsala, Swed.).

92 *Id. See also* CONST. OF ZAMBIA (1991) art. 63(1)(b), 68(1) (as amended in 1996).

93 LUNGU, *supra* note 10, at 19.

Minerals Act No. 7 2008.[94] The government then proceeded to raise the corporate tax from 25% to 35%. The mineral royalty tax also increased from 0.6% to 3%.[95] A windfall tax was also introduced, which was triggered at various levels. It was hoped that these measures would bring in revenues of $415 million in 2008.[96] These changes however, rendered mining operations more onerous. For example, the effective tax rates for high-cost mines ranged between 64% and 96%. For low-cost mines it ranged between 57% and 64%. This was clearly way above the intended rate of 47%.[97]

In 2009, world copper prices fell as a result of the effects of the global financial crisis.[98] Consequently, the mining companies announced that there would be major job losses. [99] This compelled the Banda administration, which had come into power in a Presidential by-election in 2008, to announce several changes in the mining sector, including the abandonment of the windfall tax.[100] The government had effectively retreated from a resource nationalist position, in order to ensure that Zambia retained its foreign investors.[101]

Following, in 2011, the Sata administration came into power after a victory in the General Election.[102] The administration introduced various taxes to the mining sector. Of particular note, was an increase in mineral royalties to 20%.[103] As a result, Barrick Gold, who owned the Lumwana Mine, announced that it would suspend its operations. President Michael Sata died in October 2014, which, at the time, meant that a President by-election was necessary. President Edgar Lungu, of the Patriotic Front, won that election in early 2015.[104]

In March 2015, President Lungu announced that the mineral royalties increase would be revisited and revoked. This was subsequently due to the mining companies threatening a suspension of projects as a

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94 *Id.*

95 Hon. Situmbeko Musokotwane, *Ministerial Statement on the Status of Mining Taxation*, NATIONAL ASSEMBLY OF ZAMBIA (Nov. 25, 2010), http://www.parliament.gov.zm/sites/default/files/images/publication_docs/Ministerial%20Statement%20Dr.%20Musokotwane.pdf.

96 *Id.*

97 Musokotwane *supra* note 95.

98 Mwambwa et al., *supra* note 9, at 7.

99 Musokotwane *supra* note 93.

100 *Id.*

101 *Id.*

102 *See generally* Ng'ambi*, supra* note 11, at 6.

103 *Id.*

104 *Id.*

result of high taxes. Royalties were thus revised to 9% and the Corporate Tax was revised to 30%.[105]

## IV. CONTRACTUAL PROTECTIONS AGAINST THE RESOURCE NATIONALISM CYCLE

There are various means of mitigating the risks highlighted in the preceding section.[106] This can certainly be accomplished through the utilization of political risk insurance. Examples of these are the Overseas Private Insurance Corporation (OPIC) and the Multilateral Investment Guarantee Agency (MIGA).[107] There are also a number of private insurers such as the American Insurance Group (AIG), Lloyds of London, Sovereign Risk Insurance Limited, Chubb and the Zurich Emerging Markets Solution.[108] Investors can also rely on the insertion of various clauses in the concession agreements. These include: arbitration clauses, stabilization clauses, and renegotiation clauses.[109]

Arbitration clauses are invariably inserted into concession agreements. These are useful in that they ensure that should a dispute between the investor and host State arise, the dispute will be determined by a neutral forum, operating outside of the mechanisms of the host State. Supplementing this would be a choice of law clause, under which the parties can then determine what substantive and procedural laws apply to the arbitral proceedings. They could choose the law of the host State or choose a foreign law, which operates outside the fray of the national law of the host State.[110]

Stabilization clauses are intended to prevent the host State from utilizing its legislative and administrative functions to override previous undertakings.[111] Renegotiation clauses enable the host State and the investor to modify the terms of the concession agreement when circumstances change. These are useful because they allow sufficient flexibility, which in turn allows both parties to maneuver around the

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105 *Id.*

106 A.F.M. Maniruzzaman, *The Issue of Resource Nationalism: Risk Engineering and Dispute Management in the Oil and Gas Industry*, 5 TEX. J. OIL, GAS, & ENERGY L., 79, 99 (2009).

107 *Id.*

108 *Id.*

109 *Id.*

110 RUDOLPH DOLZER & CHRISTOPH SCHREUR, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 81 (2d ed., 2012).

111 SURYA P. SUBEDI, INTERNATIONAL INVESTMENT LAW: RECONCILING POLICY AND PRINCIPLE 101 (3d ed., 2016).

resource nationalism cycle. This section gives an overview of the clauses which are highlighted above.

### *A. Arbitration Clauses*

A major concern of a foreign investor is having their disputes heard by a non-neutral forum, such as the national courts, in the event that a dispute should arise between themselves and the host State.[112] This is particularly disconcerting in a system of governance where national courts lack the necessary independence to keep the executive in check. In such a scenario, the national court is likely to rule in favor of the host State, even where there is incontrovertible evidence against them.[113]

To avert this scenario, investors insist that all disputes should be settled by arbitration. This notion rests primarily with the parties agreeing to arbitrate. Such agreements can come in two basic forms. The first is called a *comprimis,* which entails the parties agreeing to refer to existing disputes via arbitration. The second is called a *clause compromissoire*, which covers disputes that may arise in the future.[114] The latter is more frequently utilized in practice. This is owing to the fact that an agreement to arbitrate is much easier to reach, when the parties are still amicable and the possibility of a lawsuit, is less likely. When a dispute has already arisen, the parties mistrust one another and tensions are high. Agreeing to arbitrate in such circumstances is much more difficult. It is thus recommended that parties insert a *clause compromissoire* in their concession agreements during the negotiation stage.

Once an arbitration clause is inserted into a concession agreement, the national courts are obligated to refer the matter to arbitration.[115] This is provided for in the Convention on the Recognition and Enforcement of Arbitral Awards (the New York Convention). Article II(3) of the aforementioned Convention stipulates that:

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112 M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 286 (4th ed., 2017).

113 Maniruzzaman, *supra* note 106.

114 TIBOR VARADY ET AL., INTERNATIONAL COMMERCIAL ARBITRATION: A TRANSACTIONAL PERSPECTIVE 121 (6th ed. 2015).

115 Sangwani Patrick Ng'ambi & Chanda Chungu, *Vedanta Resources Holdings Limited v ZCCM Investment Holdings Plc and Konkola Copper Mines Plc, CAZ/08/249/2019*, 3 SAIPAR CASE REV. 47, 52 (2020).

> The Court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall at the request of one of the parties, refer the parties to arbitration, unless it finds the said agreement null and void, inoperative or incapable of being performed.[116]

The process of arbitration typically involves the dispute being heard by an individual or panel of individuals called the "arbitral tribunal."[117] The jurisdiction of the tribunal is derived from the arbitration agreement itself. The fundamental advantage of an arbitral award rendered by an arbitral tribunal, is that it is binding and enforceable. Because most nations are signatories to the New York Convention, the process of seeking recognition and enforcement of non-domestic or foreign arbitral awards is fostered through the New York Convention.[118]

Moreover, even if the State unilaterally terminates a parent contract containing an arbitration clause, the clause itself will continue to subsist.[119] In such a situation, the principle of separability becomes operative. This principle establishes the rule that the arbitration clause embedded in a contract and is considered as separate from the main contract.[120] Therefore, even if the main contract elapses or is voided, the general rule is that the arbitration clause itself continues to subsist. Therefore, a State cannot prevent being subjected to arbitration proceedings by simply terminating the contract. As observed by arbitrator Mahmassani in *Liamco v. Libya*:[121]

> It is widely accepted in international law and practice that an arbitration clause survives the unilateral termination by that State of the contract in which it is inserted and continues in force even after that termination. This is a logical consequence of the interpretation of the intention of the contracting

116 Convention on the Recognition and Enforcement of Arbitral Awards, NY, June 10, 1958, Article II(3).

117 *See generally* US LEGAL, https://definitions.uslegal.com/a/arbitral-tribunal/.

118 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 6, 1958, 21 U.S.T 2517, 330 U.N.T.S 38, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html.

119 Janet A. Rosen, *Arbitration Under Private International Law: The Doctrines of Separability and Compétence de la Compétence*, 17 FORDHAM INT'L L.J. 599 (1993).

120 *Id.* at 606.

121 Libyan Am. Oil Co. v. Libya, 20 I.L.M 1 (1981).

> parties, and appears to be one of the basic conditions for creating a favourable climate of foreign investment.[122]

The arbitration clause can be supplemented by the choice of law clause. This is a term of the contract under which the parties stipulate that the law of a particular jurisdiction will apply to any dispute arising between the two parties. This is a particularly sensitive legal issue because it would involve two conflicting interests.[123] On the one hand we have the State, whose primary interest lies in preserving and protecting its national sovereignty. Thus, it would want its own laws to apply, because it would have the ability to change those laws in the event that it they would not work to the State's advantage. On the other hand, the investor wishes to choose a legal order that is stable and predictable.[124]

The direction that the parties choose, depends largely on their bargaining power. The choice of law clause could refer exclusively to the law of the host State. Alternatively, the parties may elect a law that operates above the fray of the host State's prerogative powers. Thus, they can choose international law or the law of some other jurisdiction. The parties could also opt for the application of both national and international law.[125]

### *B. Stabilization Clauses*

The obsolescing bargaining model hypothesizes that the incentives offered to the investor are susceptible to subsequent changes once the investment is sunk.[126] When an investor is deciding upon whether to deal with a particular country, the primary concern is whether they will recoup their initial investment and in addition, make a profit beyond their initial investment. In order to achieve this goal, investors will need certain guarantees from the host State. This includes a guarantee from the host State that the favorable situation which exists at the time of the negotiation, that will continue to subsist until the concession agreement elapses.[127]

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122 *Id.* at 40.
123 DOLZER & SCHREUR, *supra* note 110.
124 *Id.*
125 *Id.*
126 Marsh, *supra* note 3, at 457.
127 A.A. FATOUROS, GOVERNMENT GUARANTEES TO FOREIGN INVESTORS 63 (1962).

As such, foreign investors need assurances on the part of the host State that "they will receive, both today and in the future, a definite legal treatment, specified in the relevant legal instruments, and that consequently they need not fear any major changes in local legal or political conditions that would be unfavorable to their interests."[128] One way to ensure legal protection is with the insertion of a stabilization clause.

Stabilization clauses are contractual mechanisms under which the State promises not to utilize its legislative and administrative prerogatives in a way that will have a detrimental effect on the investor. The concession agreement may even go on to specify what actions are prohibited. For example, tax stability clauses may include undertaking not to raise taxes for a period of time.[129] The inclusion of these clauses are not just a major concern for investors, but also to other stakeholders such as lending financial institutions.[130] Since lending institutions typically finance investment projects, they too need assurances that they will get their money back from the investor once they make a borrowing.[131]

### *1. Types of Stabilisation Clauses*

Stabilization clauses come in different forms. The first type is called the Stabilization clause *stricto sensu*.[132] The purpose of this clause is to ensure that the law existing at the time that the contract was entered into, will continue to subsist throughout the life of the contract.[133] As such, this type of stabilization clause, in theory, freezes the municipal law of the host State from the day that the contract is concluded until the day that the contract expires.[134] An example of such a clause is contained in the Concession Agreement of 1933 between Iran and the Anglo Iranian Oil Company. It states that the:

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128 *Id.*

129 Sangwani Ng'ambi, *Stabilization Clauses and the Zambian Windfall Tax*, 1 ZAM. SOC. SCI. J. 107, 113-14 (2011).

130 Maniruzzaman, *supra* note 104, at 95.

131 *Id.*

132 Christopher T. Curtis, *The Legal Security of Economic Development Agreements*, 29 HARV. INT'L L. J. 317, 346 (1988).

133 Abdullah Faruque, *Validity and Efficacy of Stabilization Clauses: Legal Protection vs Functional Value*, 23 J. OF INT'L ARB. 317, 319 (2006).

134 Ng'ambi, *supra* note 11, at 53.

> Concession shall not be annulled by the Government and the terms therein contained shall not be altered either by general or special legislation in the future, or by administrative measures or any other acts whatever of the executive authorities.[135]

This would suggest, that if any future legislative changes are made by the host State, then this will not in any way alter the rights and obligations contained in the concession agreement. Thus, if there is any conflict between the provisions contained in the concession and any subsequent legislation, then the former will supersede the latter.[136]

Included in this category are tax stability clauses. These simply stipulate that no new taxes introduced by the host State during the stability period will override those subsisting in the concession. Such clauses were adopted in the development agreements between the Zambian governments and the mining companies that took over the privatized mines in Zambia.[137] Under these tax stability agreements, the government determined that they would not increase taxes, including corporate tax and royalties, for a stability period of fifteen to twenty years, in such a way that would have a "material adverse effect" on the distributable profits of the foreign owned mining companies.[138] This essentially meant that the government of Zambia was precluded from increasing taxes and introducing new taxes for the fifteen-year period stipulated in the development agreements.[139]

Another type of stabilization clause is the "intangibility clause."[140] These clauses stipulate that the contract cannot be altered or abrogated without the mutual consent of the parties.[141] The difference between this type of clause and the *stricto sensu* clause is that the State does not surrender any legislative or administrative prerogatives *per se*. However, the State is prevented from unilaterally altering the terms of the contract. An example of such a clause is the one contained

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135 ESA PAASIVIRTA, PARTICIPATION OF STATES IN INTERNATIONAL CONTRACTS AND ARBITRAL SETTLEMENT OF DISPUTES 162 (1990).

136 Faruque, *supra* note 133, at 319.

137 *See* Ng'ambi, *supra* note 129.

138 *See, e.g.*, *Mopani Copper Mines Development Agreement*, MINEWATCH ZAMBIA, http://www.minewatchzambia.com/agreements.html (last accessed Feb. 1, 2021).

139 Evaristus Oshionebo, *Stabilization Clauses in Natural Resource Extraction Contracts: Legal, Economic and Social Implications for Developing Countries*, 10 ASPER REV. OF INT'L BUS. & TRADE L. 1, 18 (2010).

140 Curtis, *supra* note 132, at 346.

141 Faruque, *supra* note 133, at 319.

in the Production Sharing Contract of Indonesia between Pertamina and Overseas Petroleum Investment Corporation and Treasure Bay Enterprise Ltd.[142] The contract stipulated that: "[t]his contract shall not be annulled, amended or modified in any respect, except by mutual consent in writing of the parties hereto."[143]

The third type of stabilization clause one might encounter, is the "economic stabilization clause."[144] An example of this is contained within the agreement between the Republic of Gabon and Vanco Gabon Ltd. It read as follows:

> [T]he State guarantees to the Contractor, for the duration of the contract, the stability of the financial and economic conditions insofar as these conditions result from the Contract and from the regulations in force on the Effective Date.
>
> These obligations resulting from the Contract shall not be aggravated, and the general and overall equilibrium of the Contract shall not be affected in an important and lasting manner for the entire period of validity hereof. However, adjustments and modification of these provisions may be agreed upon by mutual consent.[145]

Under this clause the State is prohibited from passing a law or taking administrative action that renders the contract more difficult or more expensive to perform. It further ensures that in an instance where the government does pass such a law, it must then examine the adverse economic consequences of such a law and restore the investor economic equilibrium.[146]

### 2. *Case Law on the Effect of Stabilization Clauses*

The issue of stabilization clauses has come before various tribunals. The general consensus among these arbitral tribunals is that stabilization clauses are binding upon the State.[147] This was certainly

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142 *Id*. at 319 (quoting Production Sharing Contract of Indonesia art. 17.2).

143 *Id.*

144 Faruque, *supra* note 133, at 320.

145 *Id.*

146 *Id.*

147 Sangwani Patrick Ng'ambi, *The Effect of Stabilisation Clauses in Concession Agreements*, 43 ZAM L.J. 57, 65 (2012).

evident from early cases, such as *Lena Goldfields, Ltd. v. U.S.S.R.*[148] This case was concerned with the stabilization clause contained within a concession between Lena Goldfields and the Soviet government. When a dispute arose, the Court of Arbitration opined that the contract between the State and a private entity may be internationalized and that the "general principles of law" may be applied in protecting the contractual interests of private entities like Lena Goldfields.[149] The outcome here represented a recognition that something other than national law could apply to a concession agreement between an investor and the host State.[150]

Similarly, in *Sapphire International Petroleums Ltd. v. National Iranian Oil Co. (NIOC)*,[151] the arbitral tribunal held that the premature termination of a concession agreement containing a stabilization clause, imposed a duty on the host State to compensate Sapphire International.[152] This was on the basis of the principle of *pacta sunt servanda*, which prescribes that when parties enter into an agreement; they must respect them. [153]

Concerns were raised as to whether observing these clauses would militate against State sovereignty. This argument was outrightly rejected by tribunals. For example, in the case of *Saudi Arabia v. Arabian American Oil Co. (Aramco)*[154] the contention raised, was that observing the stabilization clause in the contract would have an adverse effect on Saudi Arabia's sovereignty. The arbitral tribunal disagreed and contended that:

> [b]y reason of its very sovereignty within its territorial domain, the State possess the legal powers to grant rights [by] which it forbids itself to withdraw before the end of the concession, with the reservation of the Clauses of the Concession Agreement relating to its revocation. Nothing can prevent a State, in the exercise of its sovereignty, from binding itself

148 Arthur Nussbaum, *The Arbitration between the Lena Goldfields, Ltd. and the Soviet Government*, 36 CORNELL L. REV. 31, 42 (1950).

149 *Id.* at 50, ¶ 22.

150 Margarita T.B. Coale, *Stabilisation Clauses in Int'l Petroleum Transactions*, 30 DENV. J. INT'L L. & POL'Y 217, 227 (2002). *See also* Lord Asquith of Bishopstone, *In the Matter of an Arb. Between Petroleum Dev. (Trucial Coast) Ltd and the Sheikh of Abu Dhabi*, 1 INT'L & COMP. L. Q. 247, 260 (1952) and *Ruler of Qatar v Int'l Marine Oil Company Ltd*, 20 INT'L L. REP. 534 (1953).

151 (1963) 35 I.L.R 136 (Sapphire).

152 *Id.* at 181.

153 *Id.*

154 (1963) 27 I.L.R 117 (Aramco).

> irrevocably by the provisions of a concession and from granting to the concessionaire irretractable rights. Such rights have the character of acquired rights.[155]

Subsequent cases have also endorsed stabilization cases on the basis of the principle of *pacta sunt servanda*.[156] The respect arbitral tribunals have for the sanctity of contracts was also evinced by the case of *Aminoil v Kuwait.*[157] The agreement at issue was signed in 1948, while Kuwait was still a British Protectorate. Within this agreement there was a stabilization clause which read as follows:

> The Shaikh shall not by general or special legislation or by administrative measures or by any other act whatever annuls this Agreement except as provided in Article 11. No alteration shall be made in terms of this Agreement by either the Shaikh or the Company except in the event of the Shaikh and the Company jointly agreeing that it is desirable in the interests of both parties to make certain alterations, deletions or additions to this Agreement.[158]

Counsel for the government of Kuwait claimed *inter alia* that effecting the stabilization clause would militate against the principle of permanent sovereignty over natural resources.[159] The arbitral tribunal rejected this argument. However, in this case it was stated that the stabilization clause in the agreement did not amount to an express undertaking not to nationalize. If Kuwait had expressly stipulated that they wished to limit their right to nationalize in the stabilization clause, then this certainly would have precluded them from doing so.[160] Furthermore, the tribunal held that such a clause should cover only a relatively limited period of time.[161] In this particular case the stabilization was very general and did not expressly prohibit nationalization.[162]

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155 *Id.* at 168.

156 *See* Texaco Overseas Petroleum Co. v. The Gov't of the Libyan Arab Republic (1977). *See also* Texaco v. Libya (1973); LIAMCO v. Libya (1977).

157 Award, 21 I.L.M. 976 (1982).

158 *Id.* at 990-99.

159 *Id.* at 1021, ¶ 90.

160 *Cf. Amoco International Finance Corp. v Government of the Islamic Republic of Iran* (1987) 15 Iran-US CT Rep. 189.

161 *Id.* at 1022, ¶ 91.

162 *Cf. EnCana v Republic of Ecuador* (2006) LCIA Case UN3481, 49 ¶173.

Furthermore, the clause ran for a period of sixty years which in the arbitral tribunal's opinion was "especially long."[163]

From the foregoing, it can be understood that stabilization clauses are respected and accordingly enforced by arbitral tribunals. This is despite the contention that they militate against State sovereignty. However, in order for them to be effective, as suggested by the case of *Aminoil*, investors must specifically refer to the mischief they are trying to avert and the clause must run for a reasonable timeframe.

### C. *Renegotiation Clauses*

Stabilization clauses could also be supplemented by the insertion of renegotiation clauses. Renegotiation clauses are contractual mechanisms which give the parties the option to review, discuss, and adapt the terms of a contract. These typically take effect either upon the occurrence of a triggering event or during specific intervals.[164] The distinction between renegotiation clauses and stabilization clauses is that the latter focuses more on the sanctity of contracts, whereas the former focuses more on maintaining the economic equilibrium.[165] An example of a renegotiation clause is one contained in Article 9 of the concession agreement in *Aminoil v. Kuwait*, which stated that:

> If as a result of changes in the terms of concessions now in existence or as a result of the terms of concessions granted hereafter, an increase in benefits to Governments in the Middle East should come generally to be received by them, the Company shall consult with the Ruler whether in the light of all relevant circumstances, including the conditions in which operations are carried out, and taking into account all payments made, any alterations in the terms of the agreements between the Ruler and the Company would be equitable to the parties.[166]

Another example of such a clause is contained in Article 34.12 of the Model Exploration and Production Sharing Agreement of 1994 of Qatar, which states:

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163 Award, s*upra* note 157, at 1023, ¶ 95.

164 *See* John Y. Gotanda, *Renegotiation and Adaptation Clauses in International Contracts Revisited*, 36 VAND. J. OF TRANSNAT'L L. 1461, 1462 (2003).

165 DOLZER & SCHREUER, *supra* note 110, at 85.

166 Pierre-Yves Tschanz, *The Contributions of the Aminoil Award to the Law of State Contract*, 18 INT'L LAWYER 245, 266.

> Whereas the financial position of the Contractor has been based, under the Agreement, on the laws and regulations in force at the Effective Date, it is agreed that, if any future law, decree or regulation affects Contractor's financial position, and in particular if the customs duties exceed . . . percent during the term of the Agreement, both parties shall enter into negotiations, in good faith, in order to reach an equitable solution that maintains the economic equilibrium of this Agreement. Failing to reach agreement on such equitable solution, the matter may be referred by either Party to arbitration pursuant to Article 31.[167]

From these examples, it can be seen that renegotiation clauses have four elements.[168] The first is that they identify the circumstances that will lead to the renegotiation. This is called the "trigger event." The second element, is that the clause must define the effect that the trigger event should have on the contract. Third, the objective of the renegotiation needs to be outlined. Finally, the clause must stipulate what should happen in the event that the parties fail to reach an agreement. Typically, if the parties fail to reach a resolution, then a dispute is declared, and arbitral proceedings must be initiated.[169]

## V. CONCLUSION

It could thus be concluded that the flow of FDI is fostered through concession agreements between the host State and the investor. However, once the investment is sunk, then such agreements are susceptible to the resource nationalism cycle. This cycle essentially begins with the host State seeking FDI in order to explore and exploit their natural resources. At the negotiation stage, the investor will be offered various incentives. This is done in order to make the host States jurisdiction look sufficiently attractive to the investor. Once the investment is sunk and the natural resource experiences a sustained upward trend, the host State may wish to maximize the benefits of their natural resource. This may mean increasing taxes or outrightly nationalizing the investor's assets.[170]

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167 Piero Bernardini, *The Renegotiation of the Investment Contract*, 13 FOREIGN INV. L. J. 411, 416 (1998).

168 Piero Bernardini, *Stabilization and Adaptation in Oil and Gas Investments*, 1 J. OF WORLD ENERGY L. & BUS. 98, 103 (2008).

169 Ng'ambi *supra* note 11 at 149-56.

170 SALACUSE, *supra* note 5.

The resource nationalism cycle has certainly manifested in Zambia. At independence, the copper mining companies belonged to private entities. However, by 1970, these had been nationalized by the government, only to be re-privatized when multiparty democracy was reintroduced. When copper prices appreciated between 2005 to 2008, the government was led to introduce a windfall tax on mining companies. This was revoked in 2009 and since then, there have been various attempts to introduce an equitable mineral tax regime.[171]

In order to protect themselves, investors have inserted stabilization clauses. Despite these clauses however, it has been seen that the State still proceed to unilaterally abrogate contracts. This is because of the fact that overly rigid contracts can never withstand the resource nationalism cycle. It is thus contended that stabilization clauses should be supplemented by renegotiation clauses. This is owing to the fact that these ensure flexibility and the continued cooperation between the host State and the investor.[172]

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171 Ng'ambi, *supra* note 11.

172 *See* Sangwani Patrick Ng'ambi, *Efficient and Flexible: The Case for Renegotiation Clauses in Concession Agreements*, 45 ZAM. L. J. 1 (2014).