# THE LEGAL DILEMMA OF STABILIZATION CLAUSES IN THE RENEGOTIATION OF STANDARD MINING AGREEMENTS IN TANZANIA: CHALLENGES AND PROSPECTS

*Gaspardus Rwebangira*[1]

**Abstract**

*This article analyses the legal intricacies surrounding renegotiation of mining agreements in Tanzania and gives out the way to address them. Renegotiation of mining agreement which contain stability clause is very technical and requires effective participation of both parties. On one hand the state has sovereign powers to exploit natural resources subject to its laws and policies. This may include enacting new laws or otherwise amending the existing laws, provided the change of law does not affect accrued investor's rights. On the other hand, the investors seek to have their invested capital secured by freezing provisions of the host state. Thus, renegotiation of agreement should be done consciously so as to ensure economic equilibrium of the parties. This article critically analyses the legal intricacies surrounding renegotiation of mining agreements in Tanzania and gives out the way to address them.*

**Key words:** *Stability clauses - freezing effect, renegotiation agreement, arbitration adequate compensation.*

## 1.0 Introduction

This article envisages on analysing the legal implication of the law governing renegotiation of contracts in the extractive industry in Tanzania. It describes general rules, theories and procedures governing construction of stability clauses in the mining agreements. It further expounds on the rights and duties of the host state and the investors during renegotiation of agreements. Finally, the article presents the limits and the extent to which contracts containing stabilization clauses can be renegotiated by the government of Tanzania. This article is purely descriptive and it is based on analysis of literary work, international instruments, domestic legislations and case laws.

## 2.0 The Legal dimensions and Rationale of Stabilization Clauses in the Mining Investment Agreements

Stabilization clause consists of set of mechanisms which are entrenched in the contract with a view of maintaining specific economic and legal conditions that are considered essential and crucial for validity of the contract.[2] It seeks to ensure that terms of contract remain intact during the entire life of the contract regardless of the change of the governing law by the host state. Thus, it acts as risk mitigation tool to protect investors from sovereign prerogatives, e.g., change of law, nationalization, expropriation and nullification of contracts by law.

---

1 Assistant Lecturer at Tumaini University Dar es Salaam College (TUDARCo), Doctoral Candidate, The Open University of Tanzania.

2 Faruque Abdullah; *Validity and Efficacy of Stabilization Clauses: Legal Protection vs Functional Value*, Journal of International Arbitration, Vol. 23, No.4 of 2006, pp.317-318.

However, the occurrence of unforeseeable event usually validates renegotiation of contract provided economic equilibrium of the parties is maintained. It is important to note that negotiation of an international contract is done under certain speculative investment conditions, which may change in the course of execution of the contract. Hence, renegotiation of contract is unavoidable regardless of the existence of stability clause. The practice in other African countries, particularly in Democratic Republic of Congo,[3] Liberia,[4] Central African Republic (2009) Sierra Leone (2011), Guinea (2011) and Malawi (2011) has shown that renegotiation of long-term contract is a pragmatic way to mitigate unpredictable investment risks and preserve contractual relationships.

Generally, on the one hand, stabilization clause may take a classical form of freezing provision of the law to the date of contract, or regarding the contract as a special law that is supreme to the subsequent state law.[5] This classical approach of stability clause (also known as *stricto sensu* clause) if used in the mining and petroleum agreement, has the effect of ousting the power of the state to legislate or carry out administrative measures which violate the existing contracts. The change of the law by the host state on ground of public interests, if considered detrimental to the investor's initial interests, would be regarded as unlawful and breach of the stabilization clauses. This may lead to claim for damages and high amount of compensation.[6]

On the other hand, stabilization clause may take a form of equilibrium clause which is a modern technique to ensure economic equilibrium of the parties. It seeks to maintain economic conditions as of the effective date of the contract, the breach of which entitles an investor compensation. The economic equilibrium clause may take a form of stipulated economic balancing (SEB), non-specified economic balancing (NSEB) and negotiated economic balancing (NEB).[7] As a matter of principle, renegotiation of the contract is allowed as a result of change of law owing to material change of conditions that adversely affect the performance of contract.[8] Generally, this technique is costly since achieving economic equilibrium of the parties involves financial considerations in the form of damages, compensation,[9] and specific performance. Further, failure to come to a mutual agreement, may lead to dispute before the international tribunals on ground of impossibility of performance.

3 DRC renegotiated 61 mining agreements in 2007 and 2008, which were signed by the state owned Gecamines and foreign companies between 1996 and 2006 (Source: African Development Bank Group., *Gold Mining in Africa: Maximizing Economic Returns for Countries, Working Paper Series No.147 of March 2012, at p.14)*

4 The government of Liberia reviewed about 105 concession agreements in the year 2006 which were signed in the country between 2003 and 2006. Out of 105 agreements, 36 were recommended for cancellation, and 14 agreements for negotiation. About 30 of the reviewed agreements were improved (Source: African Development Bank Group., *Gold Mining in Africa: Maximizing Economic Returns for Countries, Working Paper Series No.147 of March 2012, at p.15.*

5 *Ibid.*, p.319.

6 Manirozzaman, A.F.M; *The Pursuit of Stability in international energy investment contracts: A Critical appraisal of the emerging trends*, Journal of World Energy Law & Business, Vol.1, No.2 of 2008, pp.120-124; Lukanda Kapwadi F., *Renegotiating Investment Contract: The Case of Mining Contracts in Democratic Republic of Congo*, Faculty of Law, University of Pretoria, p.307.

7 Ibid., pp.124-127.

8 Faruque Abdullah; *Validity and Efficacy of Stabilization Clauses: Legal Protection vs. Functional Value,* Journal of International Arbitration, Vol. 23, No.4 of 2006, pp.319.

9 The breaching party is required to pay damages equal to the full value of specific performance measured by the profits expected had the agreement not been breached. Refer to *Goldenberg claim* (*Germany vs Romania*) 2 R. International Arbitration 901 (1928).

Regardless of the form and type, a stability clause is used to provide guarantee to investors against change of investment conditions, discriminatory state regulation and political risks.[10] From investors' perspective, a stabilization clause ensures legal certainty and sanctity of contract.[11] It is also used by the developing states to attract investors in large investment projects, particularly the construction projects, mining and development projects.[12] Despite use of stability clauses, the host state is always vested with powers and authority to change laws so as to reflect change in the market forces, economic growth of the country and best interests of the people.

The above position was observed in the case of *Government of State of Kuwait vs. The American Independent Oil Company*[13] whereby the arbitral tribunal refused to regard the 'stabilization clause' as an outright prohibition of nationalization throughout the period of concession. It held that due to the changed circumstances and Kuwait's development as an independent State, it enjoyed 'special advantages' in the contractual equilibrium. Consequently, the given stabilization clause no longer possessed its 'former absolute character' but it impliedly prohibited nationalizations of 'confiscatory character', i.e., confiscation without 'proper indemnification.'

The state's authority to enact laws on its resource is enshrined in a principle of permanent sovereignty over natural resources guaranteed under a good number of UN Resolutions namely: Declaration on the Granting of Independence to Colonial Countries and Peoples, United Nations General Assembly (UNGA) Resolution 1514 of 1960, the UNGA Resolution 1803 (XVII) on Permanent Sovereignty over Natural Resources, the Declaration on the Establishment of a New International Economic Order of 1974, the UNGA Charter of Economic Rights and Duties of States, 1974[14] and the 1986 Seoul Declaration of the International Law Association (ILA).

The same principle is reflected in other UN instruments such as: Convention on the Law of the Sea 1982, Vienna Convention on Succession of States in Respect of State Property, Archives and Debt 1983,[15] and the Convention on Biological Diversity 1993.[16] Similarly, the principle of permanent sovereignty over natural resources is contained in the 1966 human rights instruments, i.e., International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic Social and Cultural Rights (ICESCR). [17] The principle of Permanent Sovereignty over Natural Resources (PSNR) has generally been considered by

10 *Ibid.*,p.5.
11 Faruque Abdullah; *Validity and Efficacy of Stabilization Clauses: Legal Protection vs. Functional* Value, Journal of International Arbitration, Vol. 23, No.4 of 2006, p.322.
12 Cameron, Peter D; *Stabilization in Investment Contract and Changes of Rules in Host Countries: Tools for Oil & Gas Investors*, Association of International Petroleum Negotiators (AIPN), Final Report, 5th July 2006, pp.19-23; See also Mato, Tijjani, H.,*The Role of Stability and Renegotiation in Transnational Petroleum Agreements*, Journal of Politics and Law, Vol.5, No.1 of March 2012, p.33; See also Faruque Abdullah; *Validity and Efficacy of Stabilization Clauses: Legal Protection vs. Functional Value*, Journal of International Arbitration, Vol. 23, No.4 of 2006, p.321
13 21 I.L.M at 1008.
14 UNGA Resolution 3281 (XXIX) December 12, 1974.
15 This was adopted on 8th April 1983, but not yet in force.
16 This was adopted on 5th June 1992.
17 Refer to common article 1(2) of both the ICCPR and ICESCR 1966.

scholars as 'fundamental principle of contemporary international law with *erga omnes* character.'[18] Likewise, the international court and tribunals have considered the principle of permanent sovereignty over natural resources as a prerequisite for economic development.[19] However, the host states should not invoke the same in violation of the international investment rules on fair treatment of aliens and fair compensation in cases of appropriation of property.

Thus, Tanzania is permitted to enact and change its laws as a manifestation of its sovereignty over natural resources. However, such reforms need to be done consciously since it may lead to increase of cases before tribunals and negative publicity for investment climate in the country.

## 3.0 The Approaches to interpretation of Stabilization clauses in the mining agreements

One of the contentious matters in international investment law surrounds the validity and construction of the stabilization clauses in the Petroleum Sharing Agreements (PSAs) and Mining Development Agreements (MDAs). This has been subject to litigation before the international tribunal where host states changed laws regardless of the existing stabilization clauses, and thereby causing financial loss to the investors. Generally, this point is addressed under two distinct approaches. The first approach is based on theory of internationalization of stability contract, which argues that presence of stability clause gives it an international character. This signifies capitalist school of thought on validity of stability clauses.[20] It holds that states are bound by stability clauses which are concluded under valid states' authority and governed by either international law or domestic law. The host state is estopped from repudiating its signification of consent to be bound.

The above legal position was substantiated in the case of *Texaco Overseas Petroleum and Others vs. the Libyan Arab Republic*[21] whereby it was held that reference to general principles of law in the international arbitration context is a sufficient criterion for the internationalization of a contract, and thus private contracting party was protected against unilateral and abrupt modifications of law in the host state. Thus, nationalization of Texaco's properties according to Libyan law was unlawful. Consequently, Libya's defense based on lawful sovereign act was refused by the International Court of Justice (ICJ) on ground that it was bound to observe contractual obligations in good faith in accordance with both national and international laws.

---

18 Pereira Ricardo & Orla, Gough; *Permanent Sovereignty over natural Resources in the 21st Century: Natural Resource Governance and the Right to Self-determination of Indigenous Peoples under International Law*, Melbourne Journal of International Law, Vol.14 of 2013, pp.24-26.

19 The East Timor Case (Portugal vs. Australia).

20 Faruque Abdullah; *Validity and Efficacy of Stabilization Clauses: Legal Protection vs. Functional Value*, Journal of International Arbitration, Vol. 23, No.4 of 2006, p.328; See also Manirozzaman, A.F.M; *The Pursuit of Stability in international energy investment contracts: A Critical appraisal of the emerging trends*, Journal of World Energy Law & Business, Vol.1, No.2 of 2008, pp.136-137.

21 17 I.L.M 1 (1977).

The similar decision was also observed in the case of *Libyan American Oil Co. (LIAMCO) vs. Libya*[22] whereby it was held, *inter alia,* that the right of a State to nationalize was held to be sovereign, subject to indemnification for premature termination of concession agreements. Further, nationalization of concession rights, if not discriminatory and not accompanied by a wrongful conduct was not unlawful, but constituted a source of liability to compensate the concessionaire for said premature termination of the concession agreements. Thus, though the concession agreements were to be governed by and interpreted in accordance with the 'common principles of Libyan and international law', it was observed that any part of Libyan law in conflict with the principles of international law was to be excluded.

Apart from judicial precedents, the internationalization of contract approach is accommodated under a number of international law instruments. Article 26 of the Vienna Convention on the Law of Treaties, 1969 (to be referred to as VCLT) requires the state to observe terms and conditions of an agreement in good faith, also known as *pacta sunt servanda.* This means that states and investors should be bound by the letters of the agreement no matter how cumbersome it may prove to be. It means Tanzania ought to be bound by provisions of the stability clause in the existing MDAs and PSAs regardless of their fairness and validity, and that using internal amended law to avoid liability cannot be justified as per article 27 of VCLT.

However, states may be precluded from performing the contract containing stability clause due to valid grounds. The first ground is fundamental change of circumstances (*rebus sinc stantibus)* of the contract as per article 62 of the VCLT. Here, a state may request for renegotiation of contract as a result of change of conditions that existed at the time of conclusion of an agreement, which were not foreseeable by the parties. Such conditions must have been regarded by the parties as essential basis of consent and the change should radically affect the nature of obligations under the contract.

Secondly, the state may seek for renegotiation on ground of impossibility of performance of contract due to permanent disappearance or destruction of the object considered essential for performance of contract, as per article 61 of VCLT. However, the state should not have actively caused or influenced the impossibility of performance, and such impossibility should not be of a temporary nature. In the latter case, a state may suspend the contract subject to lawful procedure, inter alia, giving three months' notice in writing to the other party as per articles 65 and 67 of VCLT.

Likewise, the sanctity of stability clause is guaranteed under *article 1.3 of the UNIDROIT Principles of International Commercial Contracts (hereinafter referred to as UNIDROIT Principles)* which applies in agreements between states, and agreements between states and investors.[23] It states that a contract validly entered into by the parties is binding, and that it can be modified or terminated

22 17 I.L.M 3 (1978).

23 These Principles are not binding provisions but they are regarded as *lex mercatoria.*

in accordance with its terms or by agreement. This suggests that states and investors are bound by the stability clause in a contract which may be changed subject to renegotiation clause. Consequently, states and investors are obliged to act in good faith and fairly in accordance with international trade.[24] However, parties may be discharged from contractual liability on reasons of hardships and *force majeure*, which impede performance of the contract, as per article 7.1.7 of the UNIDROIT Principles. Thus, the capitalist approach regard stability clause to be a valid instrument of securing investors' interests against sovereignty prerogatives of states.

Unlike the Capitalist approach, the sovereignty approach which is based on *'relocalisation of contracts'* argues that states have inherent and unrestricted powers to control the exploitation of resources located within their territories. Hence, stability clause should be interpreted and construed in accordance with national law of the host state. Consequently, if the stabilization clause provides for matters that contravene fundamental principles of the host state, such clause will have no legal effect. The, the purported freezing effect of the stability clause will not be regarded as manifestation of the host state's intention to provide immunity to the investors' operations. This approach requires an investor to make thorough /appropriate due diligence and feasibility study before it makes decision to invest.[25] It is always assumed that investors subject themselves to political risks, including change of political environment and laws, which are usually addressed through risk insurance.

The logic behind this approach is that most aspects of PSAs and MDAs are governed by the law of the host state, e.g., matters of recruitment of expatriate staff, employment of local labour, customs and exchange regulations, income tax and other forms of charges, and regulation of capital flow.[26] Consequently, the stability clause which to a large extent addresses the above matters should be construed in accordance with the law of the host state. The stability clause in an international contract which contravenes a 'rule of internal law of fundamental importance' will be regarded as invalid, hence unenforceable.[27] Accordingly, the host state has competence to enact laws on regulation of aspects covered by the stability clause, provided the state acts fairly, reasonably and equitably.[28]

It is important to note that regardless of the approach taken, the host state and the investors need to come to terms through renegotiation of the contracts. Usually, the concern of the parties during renegotiation process is maintaining an economic equilibrium of the parties. Where the host state and investors are unable to arrive

24 Refer to article 1.7 of UNIDROIT Principles of International Commercial Contracts, 2016.

25 Katja Gehne & Brillo Romulo; *Stabilization Clauses in International investment Laws: Beyond Balancing and Fair and Equitable Treatment*, Swiss National Centre of Competence in Research, Working Paper No.2013/46 of January 2014, p.25.

26 Faruque Abdullah; *Validity and Efficacy of Stabilization Clauses: Legal Protection vs. Functional Value*, Journal of International Arbitration, Vol. 23, No.4 of 2006, p.329.

27 Katja Gehne & Brillo Romulo; *Stabilization Clauses in International investment Laws: Beyond Balancing and Fair and Equitable Treatment*, Swiss National Centre of Competence in Research, Working Paper No.2013/46 of January 2014, p.22.

28 Manirozzaman, A.F.M; *The Pursuit of Stability in international energy investment contracts: A Critical appraisal of the emerging trends*, Journal of World Energy Law & Business, Vol.1, No.2 of 2008, p.144.

at mutual agreement, it becomes a dispute which should be addressed through agreed appropriate forum. The general law and practice on investment matters is such that disputes should be determined through arbitration or reconciliation by an umpire, and using the agreed law (international law or national law). Regardless of the law applicable, a harmonized interpretation of the stabilization clauses should be sought in order to balance the investors' interests and national interests.

**4.0 Renegotiation of mining agreements in Tanzania: The Legal Challenges**

As discussed earlier, a long-term investment contact must be renegotiated to ensure that interests of the parties are safeguarded throughout the life span of the project. The intention of reviewing the terms and conditions of contract should always be contained in a clearly drafted agreement containing renegotiation clause. The renegotiation clause establishes an obligation on the parties to renegotiate the contract. The refusal to renegotiate or otherwise engaging in the process in bad faith amounts to a breach of duty which may lead to a compensation claim by the injured party.

The agreement may contain as many terms as possible; however, there are some issues which must be expressly provided. These include: definition of events triggering renegotiation of contracts, obligation of parties to renegotiations, legal consequences for breach of that duty and enforceability of the obligation to renegotiate in courts or arbitral tribunals.[29]

The drafting of the renegotiation clause should be done in a way that it does not lead to conflicting interpretation. The clause may either be a general statement which would bring about renegotiation of contract or statement of specific events that may lead to occurrence of renegotiation.[30] Where the parties have not adopted a renegotiation clause, then the applicable law of the contract will be used to address the gap. The practice of the international tribunals show that arbitrators cannot impose onto the parties what ought to have been the terms of agreement; rather they determine rights and obligations of the parties. Hence, whether a given fact is likely to trigger the renegotiation should be agreed by parties. Short of that, common law rules governing frustration and hardship of the contract performance may apply.

It should be noted that matters of procedure for negotiation are generally not provided for in the renegotiation clause. The law governing the contract normally contains procedural matters of negotiation. As a matter of good practice, the state and investors are obliged to cooperate in order to ensure an effective and efficient negotiation process by doing the following: respecting the provisions of the contract and prior contractual practice between them; paying attention to interests of the other party; and disclosing relevant information.[31] Further,

29 Klaus Berger, *Renegotiation and Adaptation of International Investment Contracts: The Role of Contract Drafters and Arbitrators*, 36 VAND J. TRANSNAT'L L., 2003, at p.1361.

30 Lukanda Kapwadi F., *Renegotiating Investment Contract: The Case of Mining Contracts in Democratic Republic of Congo*, Faculty of Law, University of Pretoria, p.325.

31 Lukanda Kapwadi F., *Renegotiating Investment Contract: The Case of Mining Contracts in Democratic Republic of Congo*, Faculty of Law, University of Pretoria, p.326.

parties must show willingness to reach a compromise; be flexible enough and considerate to adjustment solutions; give reasoned arguments for the proposals tabled; avoid unfair advantage and unnecessary delays in the meetings.[32] Thus, parties to contract are obliged to engage in the renegotiation of contract in good faith and they must be fair and reasonable in their discussions.

The procedure for renegotiation of agreements (either existing and future agreements or arrangements) in Tanzania starts in the Parliament. Section 5 of *Natural Wealth and Resources Contracts (Review and Renegotiation of Unconscionable Terms) Act 2017*, states that a report concerning arrangements or agreements on natural resources, must be laid before the National Assembly within six sitting days.[33] Then if it is established that such arrangements or agreements contains unconscionable terms, the National Assembly shall pass a resolution requiring the government to renegotiate the agreements or arrangements.[34] The government is then obliged to give the investors a notice of intention to renegotiate the agreement or arrangement within thirty days of the National Assembly resolution.[35] The notice must disclose the nature of unconscionability of the terms and the intention to expunge them from the agreement if consensus is not reached within ninety days.[36]

The government is required to submit a report of the outcome of renegotiation to the National Assembly after completion of renegotiation proceedings.[37] But, where the renegotiation is not successful or an investor deliberately refuses to renegotiate after duly notification, then the agreement or arrangement will be expunged to the extent of the unconscionability of the terms.[38] However, under the general principles of contract law, particularly section 13 of the Law of Contract Act[39] parties are said to have consented if they agree upon the same thing in the same sense. Thus, the party to a renegotiation agreement who does not agree on the proposals of the other party or otherwise refuses to renegotiate, cannot be presumed to have given consent to any given fact. As a matter of international business practice, if parties fail to reach an agreement, then the existing contract will remain in force.

The provision of section7(1) of the Natural Wealth and Resources Contracts (Review and Renegotiation of Unconscionable Terms) Act 2017, may be regarded as the best tool to create necessary pressure on the part of investors to participate actively in the renegotiation of the existing contracts, for the benefit of the people of Tanzania. It also ensures certainty of the negotiation proceedings by pointing out the end result of the renegotiation proceedings. This ensures effective state control of the negotiation proceedings.

32 *Ibid.*,p.327.
33 The Natural Wealth and Resources Contracts (Review and Renegotiation of Unconscionable Terms) Act 2017, section 5(1).
34 *Ibid.*, section 5(2)and 5(3).
35 *Ibid.*, section 6(1).
36 *Ibid.*, section 6(3)and 6(4).
37 *Ibid.*, section 6(5).
38 *Ibid.*, section 7(1).
39 Cap 345 R.E 2010.

However, it may be considered as a limit to parties' freedom to consent as investors may raise undue influence, duress or coercion claims. Section 14(1) of the Law of Contract Act[40] states that consent is considered to be freely given when it is not caused by coercion, undue influence, fraud, misrepresentation, and mistake.[41] In the cases of *Pao On vs. Lau Yiu Long*[42] and *B & S Contractors and Designs Ltd vs. Victor Green Publications Ltd*[43] it was held that an agreement vitiated by duress entitles the innocent party to recover the payment back. Thus, the government needs to be cautious when renegotiating agreements so as not to affect investor's ability to appreciate the viability of the new terms of agreement.

Practically, investors may agree to certain government demands adverse to their interests in order to secure their capital invested in the long-term mining projects. This may be regarded as coercion since business people would be fearful of appropriation of their properties within the localities of the project if they do not agree.[44] The investor may raise allegations of coercion since states have instruments for enforcement of the law, e.g., the police, military and state security services, against any person who acts contrary to law or government orders. The sovereign state (Tanzania in particular) enjoys power to enact, interpret and enforce the law over any natural and juristic person resident in a particular territory, properties and events happening within territorial borders. [45]

However, duress may not be raised successfully unless it is linked with unconscionability of terms of agreement. In the case of *Government of State of Kuwait vs. The American Independent Oil Company*[46] the claim that the company was forced to renegotiate its concessions was rejected since it decided to accede them irrespective of its constant disagreements. The tribunal was of the opinion that the company's choice to accede the concessions signified its consent to live with them. Therefore, the state's nationalization Decree Law No.124 of 1977 was justified as long as fair and appropriate compensation was payable to the company basing on the economic equilibrium of the parties and their legitimate expectations.

Ideally speaking, performance of renegotiated agreement which is tainted by coercion or undue influence may turn difficult leading to unnecessary conflicts between states and investors. In any case, the innocent party may be exonerated from liability since section14 (2) of the Law of Contract Act presumes that consent is not freely expressed under coercion or undue influence. The logic to this conclusion is simple. The government holds a real authority over the investors who are residing in Tanzania or possess some pecuniary interests in form of shares in a company with a place of business in Tanzania. Thus, it is in a position to influence the renegotiation process, hence affecting the consent of investors in

40 *Ibid.*
41 In the cases of *Pao on vs. Lau Yiu Long* (1980) A.C 614; and *B & S Contractors and Designs Ltd vs. Victor* Green Publications *Ltd* (1984) I.C.R 419, it was held that an agreement was vitiated by duress; hence the party was entitled to recover the payment back.
42 (1980) A.C 614.
43 (1984) I.C.R 419.
44 Cap 345 R.E 2002, s.15(1).
45 Shaw, Malcom N., *International Law*, 6th edition, Cambridge University Press, 2008, pp.651-652.
46 21 I.L.M at 1008.

line with sections16 (1) and 16(2) (b) of the Law of Contract Act.[47] It is important to note that the government as a dominant party to renegotiation agreement, which alleges the unconscionability of the existing agreements, has the burden to prove that the new terms were not occasioned by undue influence.[48]

Similarly, the unilateral change of the agreements may be considered as a violation of principles of sanctity to contract and *pacta sunt servanda* from which a claim for damages may arise. It is a trite law that a state may adopt laws to govern the natural resources but such laws should not be contrary to provisions of international law, particularly those concerned with treatment of aliens or foreign property.[49] Consequently, the foreign states may hold the host state liable under the protective principle in order to safeguard its interests and interests of nationals abroad by taking diplomatic protection [50]against the host state before the international courts, for wrongful acts done against their nationals.[51]

The right to diplomatic protection arises when there is a connection between the claimant state and a national, as held in the famous *Nottebohm case*,[52] while for body corporate diplomatic protection takes cognizance of a place of incorporation, place of business and the question as to majority shareholders, as discussed in the *Barcelona Traction case*.[53] The international bilateral and multilateral investment treaties including *Washington Convention on the Settlement of the Investment Disputes between States and Nationals of Other States 1965* protects natural persons and legal entities incorporated in the host state so long as it is controlled by an entity incorporated in contracting state.[54]

Notwithstanding its good intentions, the overriding nature of the provisions of the Natural Wealth and Resources Contracts (Review and Renegotiation of Unconscionable Terms) Act 2017 is likely to be considered as breach of the principle on non-retroactivity of the law. This is because there are still some MDAs and PSAs which contain a separate legal system governing specific mining projects, which unless cautiously renegotiated, may be another cause of disputes. Under these agreements, investment disputes are to be determined through international arbitration, and the law applicable is the PSA, MDAs or international investment law. Reading the provision of section11 of the Natural Wealth and Resources (Permanent Sovereignty) Act 2017, it is clear that disputes between the states and investors must be determined by the judicial bodies or other organs established in Tanzania in accordance with the law of Tanzania. This provision reflects the Charter of Economic Rights and Duties[55] which has been criticized of having no legal effect for lack of support and uniform state practice among the UN members.

47 Cap 345 R.E 2010.
48 *Ibid.*, s.16(3).
49 Shaw, Malcom N., *International Law*, 6th edition, Cambridge University Press, 2008, p.650.
50 Diplomatic protection includes consular action, negotiation, mediation, judicial and arbitral proceedings, economic pressures, a retort, reprisals, severance of diplomatic relations. See Malcom Shaw (supra), at pp.808-810.
51 Refer to the case of *Diallo (Guinea vs. Democratic Republic of the Congo), ICJ Reports, 2007*, para.39; also refer to the *Mavrommatis Palestine Concessions case*, PCIJ, Series A, No.2, 1924, at p.12.
52 ICJ Reports, 1955 p.4.
53 ICJ Reports, 1970 at pp.3 -42.
54 The Washington Convention, article 25.
55 UN Doc A/RES/3281(XXIX), annex art 2(1).

The rules governing International Centre for Settlement of Investment Disputes (hereinafter referred to as the Centre),[56] of which Tanzania is a party, requires states to enforce awards issued by the Centre even if they are made *ex parte*.[57] The agreement to refer the matter to arbitration excludes all other judicial remedies save for exhaustion of local administrative or judicial remedies.[58] Thus, state courts are under obligation to reject objections raised by a party who fails or refuses to subject himself for arbitration. Article 25(1) of the Convention prohibits parties who have consented to refer the matter to the Centre to withdraw their consent. Thus, unless the investor agrees to settle the matter in the judicial organs present in Tanzania, then the state will still be liable if the investor decides to take the matter to arbitrators constituted by the Centre.

Similarly, section4 of the Arbitration Act[59] provides for irrevocability of arbitration clause. The parties to arbitration agreement are bound to submit the dispute to arbitration unless the High Court of Tanzania grants leave to have the clause revoked. The practice in the High Court is such that it would direct the parties to go before the specified tribunal and not to resort to courts. The party cannot run away from was agreed on pretext that there was fraud and misrepresentation. This was held in the case of *Azania Bancorp & another vs. the Treasury Registrar-Hatibu M.Co.Ltd.,*[60] in which the High Court of Tanzania dismissed the petition seeking for revocation of arbitration clause in an agreement. It ordered the matter to be addressed through arbitration. Furthermore, in the case of *Tanzania Motor Services Ltd and Others vs. Mehar Singh t/a Thaker Singh*[61] the Court of Appeal of Tanzania described arbitration clause as a distinct contract from other clauses which can be strictly enforced by the arbitral tribunal.

The victim part to arbitration agreement may unilaterally refer the investment dispute to ICSID for arbitration by presenting a request to the Secretary General. Such request should contain information disclosing the issues in dispute, identity of the parties and their consent to arbitration, i.e., arbitration agreement.[62] Unless the Centre lacks jurisdiction, the dispute shall be registered and the parties will be notified forthwith. Thus, Tanzania would still be required to appear before the arbitrators if investors opt for arbitration.

Consequently, a conflict of obligation is likely to arise where the United Republic of Tanzania is summoned to attend the arbitration proceedings. It may appear and raise an objection as to jurisdiction of the arbitrators taking into account provision of the local law[63] or refuse to subject itself to international tribunals. The arbitrators are vested with power to hear the objections on jurisdiction and

56 The Centre is established under article 2(1) of the International Convention on Settlement of Investment Disputes (also known as *Washington Convention on the Settlement of the Investment Disputes between States and Nationals of Other States*) to provide facilities for conciliation and arbitration of disputes between the contracting state and the investors (nationals of the other contracting state).

57 *Ibid.*, article 54(1).

58 *Ibid.*, article 26.

59 Cap 15 R.E 2010.

60 *High* Court of Tanzania (Commercial Division), Misc. Commercial Case No.14 of 2001 (Unreported).

61 The Court of Appeal of Tanzania at Dodoma, Civil Appeal No. 115 of 2005, (2006) TZCA 5.

62 *Ibid.*, article 36.

63 ICSID Convention-Conciliation Rules, rule 29.

they may also conduct ex parte hearing subject to a fair procedure.[64] Finally, they will be able to issue a binding award. Article 53 of the Washington Convention is to the effect that the award of arbitrators is binding on state parties and not subject to appeal or other remedy, except the prescribed remedies. Such remedies include: revision of award upon discovery of new unknown facts, interpretation of award, or annulment by an ad hoc committee comprising of three arbitrators.[65] The grounds for annulment are stated under article 52 of the Convention to include: lack of jurisdiction, violation of due process and failure to give reasons for the award.

Similarly, it should be stressed that international arbitration is considered as a forum in which neutrality of proceedings is guaranteed. This is due to the fact that allowing judges, who are servants of states with obligation to protect public policy, to take part in the investment dispute resolution, would affect the independence and impartiality of the proceedings. Thus, to avoid unnecessary biasness of judicial officers, the international investment rules prefer arbitration by international tribunals, which minimize partisanship of arbitrators.[66]A good example of instruments which put emphasis of independence of arbitrators include: article 10 of the United Nations Commission for International Trade Law (UNCITRAL) Rules, article 11(1) of the International Chamber of Commerce (ICC) Rules, and article 12(2) of the UNCITRAL Model Law on International Commercial Arbitration, 1985. The award tainted with lack of impartiality is defective; hence can be set aside.

Nevertheless, such claims may not be sustained if Tanzania is able to establish a *prima facie* case of the investors' malpractices, inconsistencies and fraud in previous business transactions. Every business entity is interested with maximization of profit by any possible means including tax avoidance. At times, corporations give wrong account of the profits made given the complexities of the mining projects, which to a large extent are financed by the international monetary institutions and foreign banks. This has led to unjust enrichment of the mining companies which have been repatriating excess profits into their home countries. Hence, Tanzania may invoke the principle of unjust enrichment as the basis for renegotiation of the contracts or as defense for compensation claims.[67] This principle is among the recognized general principles of international law under article 38(1) (c) of the Statute of ICJ.

64 *Ibid.*, article 45(1) and (2).

65 *Ibid.*, article 51.

66 The lack of independence and impartiality constitute ground for disqualification of arbitrators, and the award may be set aside on reason of misconduct by arbitrator. For a detailed discussion on impartiality of arbitrators, please refer to Redfern, A. *et al., Law and Practice of International Commercial Arbitration,* Fourth Edition Student Version, Thomson Sweet & Maxwell, 2004, pp.236-246.

67 The principle of unjust enrichment was applied by the tribunal in number of cases to determine the appropriate amount of compensation payable as a result of unlawful appropriation of property. Such cases include: *LIAMCO vs. Government of the Libyan Arab Republic* (1977) 62 ILR 141, 144, 175–76, 213; *Landreau Claim* [1922] 1 RIAA 352, 364; *Société d'Investigation de Recherche et d'Exploitation Minière (SIREXM) vs.Burkina Faso* , Award of 19 January 2000, ICSID Case No ARB/97/1; *CMS Gas Transmission Company* vs. the Republic of Argentina, Award of 12 May 2005, ICSID Case No ARB/01/8 paras 218–20; *LG&E vs. Argentina,* Award of 25 July 2007, ICSID Case No ARB/02/1 paras 26, 58; *American Manufacturing & Trading, Inc. v Zaire (AMT)* vs. *Zaire'*; Award of 21 February 1997, ICSID Case No ARB/93/1; *Southern Pacific Properties (Middle East) Limited vs. Arab Republic of Egypt,* Award of 20 May 1992, ICSID Case No ARB/84/3 paras 245–47.

The other ground to be raised by the government would be unfairness of the terms of the mining contract and breach of principles of good faith. According to contract law principles, the terms of agreement must always be fair and open enough to protect the interests of the parties. A good example of unfair and unconscionable terms may include: terms which restrict, hinder or exclude the party to exercise contractual rights.[68] Since the existing mining agreements have for long contained unconscionable terms against the United Republic of Tanzania, then the investors who have experience and familiarity with the mining industry, must be held responsible for breach of the trust.

Accordingly, the government of Tanzania is legally entitled to plea justification for ongoing renegotiation of mining agreements for the purpose of revising unconscionable terms. Section 6(2) of the Natural Wealth and Resources Contracts (Review and Renegotiation of Unconscionable Terms) Act, 2017 defines terms considered to be unconscionable to include: terms which restrict the right of the State to exercise full permanent sovereignty over its resources, hinder authority over foreign investment within the country; and terms which are inequitable and onerous to the state. Furthermore, terms which restrict periodic review of arrangement or agreement, securing preferential treatment designed to create a discriminatory separate legal regime for the benefit of a particular investor, are considered to be unconscionable.

The other reasons considered to be unconscionable under the law include: restricting the right of the state to regulate activities of transnational corporations within the country, depriving the people of Tanzania of the economic benefits derived from exploitation of natural wealth and resources, and subjecting the State to the jurisdiction of foreign laws and fora. Generally, the above grounds would justify the revision and renegotiation of agreements, so long as the state acts fairly and in good faith, and the renegotiated agreement affords fair and equitable treatment of the parties. [69] Thus, in the current Tanzania every agreement or arrangement, which contains terms that are contrary to the interest of the people and the nation at large, would be regarded as unlawful. As a matter of law, all illegal contracts are unenforceable. [70]

## 5.0 Conclusion

The renegotiation of long terms agreements is a tool to ensure that equilibrium of the parties is maintained at different stages of contract implementation. This is a necessary evil to safeguard the contractual relationship regardless of the existence of stability clauses. The effective renegotiation process depends on parties' willingness to reach a consensus and compliance to the code of conduct by the negotiating team. The basic rule is that each party to the negotiation should bargain its interests in good faith and in accordance with the applicable law. Both the investor and the state should make sure that people of Tanzania are involved in the renegotiation of agreements or arrangements, so as to safeguard the public interests. The government of Tanzania needs to enforce laws on permanent

68 Treitel, G.H., *The Law of Contract*, 11th Edition, Thomson Sweet & Maxwell, 2003, pp.273-274.

69 The Natural Wealth and Resource Contracts (Review and Renegotiating of Unconscionable Terms) Act 2017, section 4(2) and (3).

70 Treitel, G.H., *The Law of Contract*, 11th Edition, Thomson Sweet & Maxwell, 2003, pp.429-430.

sovereignty over natural resources in such a way that it does not affect legitimate interests of investors. Nevertheless, investors' conducts should not be against the law and well-established good practice in the mining industry.

The study in other African countries shows that renegotiating of contracts is a way to ensure that people and the country gets fair revenue, not only in form of payment of royalties but also observing international standards. This may take a form of incorporating provisions of local content, compliance to environmental standards, and promoting transparency in revenue and agreements.[71] However, there is a need to balance the nationalistic feelings and respect of investors' accrued rights under the existing mining agreements. Short of that, the people of Tanzania may be held accountable under international law. This paper hereby recommends the following measures: -

First, the government and the investor should first adopt a renegotiation agreement. This is important for validation of the review of the existing agreements which tend to freeze the laws of the land or otherwise prevent review of the contract. It is important to adopt a provision which allows the parties to renegotiate the terms of the agreement, failure of which may amount to breach of the existing MDAs or PSAs. The renegotiation agreement should stipulate the areas and circumstances which may trigger review of the agreements, and the procedure to be observed by the parties.

Secondly, the government and the investor must negotiate the agreements in a win-win situation. They must respect the existing rights and obligations so far as the terms in the agreement do not conflict with the well-established mining code of conduct and international practice. The parties should participate in the negotiation process with their free consent. Thus, there is a need for the government to involve mining companies and other stakeholders when formulating regulations and code of conduct governing review and renegotiation of agreements.

Thirdly, there is a need to maintain confidence and trust in the whole process of reviewing and renegotiation of agreements or arrangements. This could be promoted if the law allowed the parties to designate the dispute settlement mechanism of their own choice in accordance with international investment law. It is recommended that arbitration and conciliation continue to be the sole methods for resolving mining disputes, unless for compelling reasons related to public health, safety, and national security. Similarly, the government officers need to be trained on issues of negotiation of contracts so as to be equipped with sufficient knowledge and skills enough to face the well-versed group of investors.

Fourthly, the development of the existing quasi-judicial institutions mandated to resolve investment disputes. There is the need on the part of the government to

71 African Development Bank Group., *Gold Mining in Africa: Maximizing Economic Returns for Countries, Working Paper Series No.147 of March 2012, at p.22-36.*

equip the Tanzania Institute of Arbitrators (TIA) and the National Construction Council[72] with requisite facilities to enable them impart knowledge and skills to local arbitrators, on complex mining investment disputes techniques so as to meet the international standards. This would encourage investors to voluntarily subject themselves to arbitration or conciliation in accordance with the laws of Tanzania.

Fifth, the review and renegotiation of mining agreements should involve a good number of stakeholders and public accountable institutions. This seeks to ensure that interests of the groups representing the population of Tanzania are actively represented. The Parliament though representative of the people of Tanzania, may not be effective enough due to its composition and different political ideologies. The experience from Ghana and Western Australia shows that parliamentary approved agreements may be used by the government to override previous legal commitments. Similarly, members of parliament usually lack adequate information and time to deliberate on the agreements. This may be caused by refusal of the government to disclose certain terms which may have been used as a bargaining tool to attract the investor and considered to be confidential. The government usually has the duty to protect commercial confidence.

Sixth, the government should amend the Arbitration Act[73] and Arbitration Rules of 1957 in order to reflect the international arbitration standards. The existing Arbitration Act of Tanzania does not contain provisions on procedures for arbitration, confidentiality of proceedings, and the type of proceedings subject to arbitration.[74] These matters are essential for a successful arbitration of investment disputes. Since the law requires disputes arising from mining agreements or arrangements to be determined in accordance with the law of Tanzania, amendment of the Arbitration Act is inevitable so as to meet the international standards set in conventions of which Tanzania is a state party.[75] This would encourage investors to voluntarily subject themselves to locally available legal mechanisms.

Furthermore, the government must set in place a monitoring mechanism of the renegotiation proceedings. The review of contracts may not give out the expected results if not properly negotiated. Thus, the government need to monitor the conduct of persons involved so as not to engage in corrupt practices. There is a need to have a periodic review of the implementation of what is agreed thereafter. The President must constantly call upon the Ministers, Directors and Commissioners in the ministry of minerals to make an account of the steps taken to perfect the renegotiated agreements.

72 The National Construction Council of Tanzania (NCC) resolves construction related disputes through arbitration in accordance with the Arbitration Rules of the National Construction Council, 2001 (as reprinted in 2014).

73 Cap 15 R.E 2010.

74 Mashamba, Clement J., *Arbitration Law in Tanzania: Law and Practice in Tanzania*, Theophilus Enterprises,Dar es Salaam, 2015, pp.37-40.

75 The Arbitration Conventions which have been signed and ratified by Tanzania include: The Washington Convention 1965 (ratified on May 18, 1992 and entered into force on June 17, 1992), the New York Convention on Recognition and Enforcement of Foreign arbitral Awards, 1958 (ratified on 13 October 1964 and entered into force on 12th January 1965), the Geneva Convention, 1927 (ratified on May 26, 1931), Geneva Protocol on Arbitration Clause, 1923 (ratified on 12th March 1926).

equip the Tanzania Institute of Arbitrators (TIA) and the National Construction Council[72] with requisite facilities to enable them impart knowledge and skills to local arbitrators, on complex mining investment disputes techniques so as to meet the international standards. This would encourage investors to voluntarily subject themselves to arbitration or conciliation in accordance with the laws of Tanzania.

Fifth, the review and renegotiation of mining agreements should involve a good number of stakeholders and public accountable institutions. This seeks to ensure that interests of the groups representing the population of Tanzania are actively represented. The Parliament though representative of the people of Tanzania, may not be effective enough due to its composition and different political ideologies. The experience from Ghana and Western Australia shows that parliamentary approved agreements may be used by the government to override previous legal commitments. Similarly, members of parliament usually lack adequate information and time to deliberate on the agreements. This may be caused by refusal of the government to disclose certain terms which may have been used as a bargaining tool to attract the investor and considered to be confidential. The government usually has the duty to protect commercial confidence.

Sixth, the government should amend the Arbitration Act[73] and Arbitration Rules of 1957 in order to reflect the international arbitration standards. The existing Arbitration Act of Tanzania does not contain provisions on procedures for arbitration, confidentiality of proceedings, and the type of proceedings subject to arbitration.[74] These matters are essential for a successful arbitration of investment disputes. Since the law requires disputes arising from mining agreements or arrangements to be determined in accordance with the law of Tanzania, amendment of the Arbitration Act is inevitable so as to meet the international standards set in conventions of which Tanzania is a state party.[75] This would encourage investors to voluntarily subject themselves to locally available legal mechanisms.

Furthermore, the government must set in place a monitoring mechanism of the renegotiation proceedings. The review of contracts may not give out the expected results if not properly negotiated. Thus, the government need to monitor the conduct of persons involved so as not to engage in corrupt practices. There is a need to have a periodic review of the implementation of what is agreed thereafter. The President must constantly call upon the Ministers, Directors and Commissioners in the ministry of minerals to make an account of the steps taken to perfect the renegotiated agreements.

72 The National Construction Council of Tanzania (NCC) resolves construction related disputes through arbitration in accordance with the Arbitration Rules of the National Construction Council, 2001 (as reprinted in 2014).

73 Cap 15 R.E 2010.

74 Mashamba, Clement J., *Arbitration Law in Tanzania: Law and Practice in Tanzania*, Theophilus Enterprises,Dar es Salaam, 2015, pp.37-40.

75 The Arbitration Conventions which have been signed and ratified by Tanzania include: The Washington Convention 1965 (ratified on May 18, 1992 and entered into force on June 17, 1992), the New York Convention on Recognition and Enforcement of Foreign arbitral Awards, 1958 (ratified on 13 October 1964 and entered into force on 12th January 1965), the Geneva Convention, 1927 (ratified on May 26, 1931), Geneva Protocol on Arbitration Clause, 1923 (ratified on 12th March 1926).