Legislative Drafting Tools for Stabilization Provisions and Economic Balancing Provisions

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Abstract

The article outlines the problems with stabilization provisions in national oil or gas legislation with regard to the difficulty of governments to implement legislation to develop its economic, social and environmental regimes. It also seeks to provide a potential guideline for legislative drafters in order to address the problems wrought by stabilization provisions, in national oil or gas legislation, through the use of economic balancing provisions. The article further gives tools for legislative drafters to use when drafting economic balancing provisions.

A. Introduction

The drafting of legislation is the most important facet of public administration[1], it is therefore not startling that a legislative draftsperson has to bear the particular problems or views of the subject matter being drafted, the legal fraternity or international law in mind at all times. Therefore, in line with international law, drafters usually use provisions in legislation that reflect international law. Sometimes these are good provisions and at other times, not so good. The dominant theory,[2] in traditional international law, behind stability provisions (these are provisions that stabilize or 'freeze' the application of legislation to foreign investment projects in oil and gas. One should also note that stabilization and freezing

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1 N.J.C. Van den Bergh, *Legislative Drafting and Drafting Techniques,* University of Zululand), 1984, p. 2.

2 *See* M.T.B. Coale, 'Stabilisation clauses in international petroleum transactions' *Denver Journal of International Law and Policy*, 2002; El Sheikh, Fath el Rahman Abdalla, *The Legal Regime of Foreign Private Investment in Sudan and Saudi Arabia,* Cambridge University Press 2003; R. Garnaut & A. Ross, *Taxation of Mineral Rent,* Clarendon Press, Oxford 1983; M. Sornarajah, *The International Law On Foreign Investment,* Cambridge University Press, 1994; T.W. Wälde, *Stabilising International Investment Commitments: International Law Versus Contract Interpretation,* Centre for Petroleum & Mineral Law Policy, Scotland 1994. *See also* P. Bernardini, 'Stabilization and adaptation in oil and gas investments', *JWELB,* Vol. 1, No. 1, 2008, pp. 98-112; P.D. Cameron, 'Stabilisation in Investment Contracts and Changes in of Rules in Host Countries; Tools for Gas and Oil Investors', *AIPN*, 2006, pp. 1-116; L. Cotula, 'Regulatory Takings, Stabilisation Clauses and Sustainable Development', Paper prepared for the OECD Global Forum on International Investment, 2008; J. Gotanda, 'Renegotiation and Adaptation Clauses in Investment Contracts, Revisited', *VJTL*, No. 36, 2003, p. 1461; A.F.M. Maniruzzaman, 'Drafting stabilisation clauses in international energy contracts: some pitfalls for the unwary', *OGEL*, 2007, 2, 23-26; C. Ochieze, 'Fiscal stability: to what extent can flexibility mitigate changing circumstances in a petroleum production tax regime?' *IELTR*, Vol. 10, 2006, pp. 252-258.

go hand in hand. Legislation is 'frozen' through the use of a stabilization provision) in foreign direct investment legislation is that these provisions prevent the government from amending the laws that apply to foreign investment, thereby resulting in the alteration of the economic terms of the agreement. Stabilization provisions are a classical method of 'freezing' legislation applicable to foreign direct investments. Stabilization provisions in national laws have existed for a long time and continue to be found in statutes; and are commonly found in the oil, gas and energy industry. However, recently there has been a growing tendency in national laws to use economic balancing provisions instead of stabilization provisions to promote foreign direct investment in the oil, gas and energy industry.

I. Problem Statement

Stabilization provisions provide protection from political risk in the form of nationalization, expropriation or changes in fiscal or environmental legislative rules that apply to foreign direct investment projects. Governments have these provisions in their national laws as it is "believed that foreign direct investment is an important source of capital and technology necessary for economic development"[3] and therefore provide the stability needed by foreign investors. The main focus of these provisions is, in part, on the risk of unforeseen changes in the fiscal regimes, mostly in relation to taxes, fees, royalties, penalties or foreign exchange rates.

However, what is now widely known[4] about these stabilizing provisions is that their implications to fiscal and environmental regulation are very controversial. By 'freezing' legislation, these provisions purport to interfere with a host government's parliamentary law making powers and future administrative actions. They stifle the efforts of the host government to raise public revenue when a foreign investment project is doing well and also improve its legislation on matters dealing with the economy and the environment. Even though stabilization provisions reduce the perceived political risk to the foreign investor on nationalization or expropriation, these provisions create legislative and executive problems by hindering the enactment of new laws or amending existing legislation or regulations.

3 *See* A. Perry, 'Effective legal systems and foreign direct investment; In search of the evidence', *Int'l. Comp. L. Q,* Vol. 49, 2000, p. 779.

4 Id. *See also* further writings by B. Nwete, 'To what extent can renegotiation clauses achieve stability and flexibility in petroleum development contracts?' *IELTR*, Vol. 2, 2006, pp. 56-63; N.E. Ojukwu-Ogba, 'Legislating development in Nigeria's oil producing region: the NDDC Act seven years on', *AJICL*, Vol. 17, No. 1, 2009, pp. 136-149; G. Verhoosel, 'Foreign Direct Investment and Legal; Constraints on Domestic Environmental Policies; Striking a "Reasonable" Balance Between Stability and Change', *Law & Pol'y Int'l Bus*, Vol. 29, 1997-1998, pp. 451-479; G. Verhoosel, 'Foreign Investment and Environmental Regulatory Change In Developing And Transition Economies: How To Reconcile The Tension For The Benefit Of Technology Transfer', *CEPMLP*, Vol. 1, Art. 1; T.W. Wälde & J. Gunderson, 'Legislative Reform in Transition Economies; Western Transplants – A short-cut to social market economy status?' *ICLQ*, No. 43, 1994, pp. 347-378.

Because of these problems, legislative drafters have recently begun enacting a provision that they have termed 'economic equilibrium provisions'[5] or 'economic balancing provisions' in national laws. This provision is designed to allow for amendments in legislation to occur in order to deal with unforeseen issues, economic or otherwise, and also allows the executive to make future administrative decisions.
Therefore the article will focus on the principal elements arguing in favour of justifying the discontinuation of the use by legislative drafters of freezing provisions in national legislation.

II. Purpose of the Study

The aim of this article is to illustrate that the ever changing policies with regard to economic, social and environmental regimes in the oil, gas and energy industry are making the freezing of legislation problematic in that they restrain governments from enacting new legislation or amending existing legislation to cater to policy changes plus incorporate developments in environmental law that is forever evolving. The article will also illustrate that legislative drafters should refrain from using stabilization provisions but rather should provide for an economic balancing provision in their stead as this provision addresses the challenges presented by stabilization provisions.

III. Hypotheses

1. Stabilization provisions in oil and gas national legislation make it difficult for governments to implement legislation to cater for changes in economic, social and environmental policies and, as a consequence, no drafting instructions to draft new legislation or amend existing legislation to cater to changes in the economic, social and environmental policies are issued by the government.
2. The use of economic balancing provisions in oil and gas national legislation (as this is where stabilization and economic balancing provisions are mostly found) would address the problem in (1.4.1) and as a consequence, a govern-

5 *See* the following authors for some of the writings on economic balancing provisions; Z. Gao, (Ed.), *International Petroleum Contracts: Current Trends and New Directions,* Graham & Trotman/Martinus Nijhoff, London, 1994; M. Sornarajah, *The International Law On Foreign Investment,* Cambridge University Press, 1994; T.W. Wälde & G.K. Ndi, *International oil and gas investment: moving eastward?,* Graham & Trotman/Martinus Nijhoff, London, 1994; K. Berger, 'Renegotiation and Adaptation of International investment contracts: the role of contract drafters and arbitrators', *VJTL*, No. 36, 2003, p. 1347; P.D. Cameron, 'Stabilisation in Investment Contracts and Changes in of Rules in Host Countries; Tools for Gas and Oil Investors', *AIPN*, 2006, pp. 1-116; L. Cotula, 'Reconciling regulatory stability and evolution of environmental standards in investment contracts: towards a rethink of stabilisation clauses', *JWELB*, Vol. 1, No. 2, 2008, pp. 158-179; J. Gotanda, 'Renegotiation and Adaptation Clauses in Investment Contracts, Revisited', *VJTL*, No. 36, 2003, p. 1461; A.F.M. Maniruzzaman, 'National Laws Providing for Stability of International Investment Contracts; A Comparative Perspective', *JWIT*, Vol. 2, No. 2, 2007, pp. 233-242; A.F.M. Maniruzzaman, 'Stabilisation in Investment Contracts and Change of Rules by Host Countries: Tools for O and G investors', *Association of International Petroleum Negotiators*, 2005, pp. 1-251.

ment can implement legislation to address changes in economic, social and environmental policies through drafting instructions.

IV. Methodology

This article will seek to illustrate that the use of economic balancing provisions, by legislative drafters in national legislation relating to the extraction of oil and gas, is a novel way of addressing the main problem posed by stabilization provisions (which is that of constraining a government from implementing legislation to address changes in economic, social and environmental policies as stabilization provisions have the effect of 'freezing' certain national laws applicable to foreign investment projects) and that the former provision is taking precedence over the latter provision.

The illustration will be through a content analysis of stabilization provisions in national oil and gas laws (these type of provisions are mostly found in foreign direct investment legislation, with particular reference to natural resources such as minerals, oil and gas[6]) the history of stabilization provisions and how they are inherently fraught with problems when they are used by legislative drafters in foreign direct investment legislation, particularly in the oil, gas and energy industry, to stabilize freeze laws which are applicable to foreign investment agreements. The justification for this method has its foundations in the belief that it is only by understanding and analyzing stabilization provisions in past and present foreign direct investment legislation that the problems inherent therein can be revealed.

In order to prove the hypotheses, the article will define what stabilization provisions are and their perceived importance in foreign direct investment legislation, especially in the oil and gas industries in order to minimize political risk. Thereafter, the article will seek to illustrate how freezing legislation applicable to the foreign investment project, particularly the freezing of the fiscal regime (such as taxes) and environmental regulations, hampers the efforts to government to develop the economy and the environment by raising revenue for economic and social development through the imposition of tax and consequent amendments to tax legislation and also amendments to environmental legislation to address changes in international environmental policies.

Having explained why the use of stabilization provisions to freeze legislation is declining because of the inherent problems in stabilization provisions, the article will then propose a solution to legislative drafters that has recently emerged to address the problems caused by stabilization provisions. The solution will be in the form of an economic balancing provision which is a provision that enables the government to amend legislation to address fiscal and environmental issues and allow for renegotiation of the foreign investment agreement to provide for these changes and further balance the economic equilibrium in order for the government to maintain the foreign investment project. The article will further seek to prove the hypotheses by showing how national laws that have an economic bal-

6 *See* T.W. Wälde, 'Stabilising International Investment Commitments: International Law Versus Contract Interpretation' *CPMLP*, Vol. 13, 1994, p. 2.

ancing provision have allowed for amendments to tax and environmental legislation in order for governments to raise public revenue for economic and social developments and have full control of their natural resources for the public good.

V. Structure of the Article

Section A is the introduction and explains the methodology and structure of this article. Section B will give the history of stabilization provisions especially in the oil, gas and energy industry and how they came to be included in national laws. The section will also look at some of the techniques implemented by legislative drafters in stabilization provisions and also the categories that exist in legislation to encourage foreign investors and safeguard against political risk by freezing certain areas of the law.

Section C will show how drafters have drafted stabilization provisions to freeze legislation applicable to the fiscal features of foreign direct investments, such as taxes and levies, interferes with parliament's law-making powers as the provisions effectively restrain the government from making or amending laws or making administrative decisions to cater for unforeseen economic situations; and also show how this can be detrimental to the government's economy. Section C will further show how stabilization provisions that freeze legislation also frustrate the governments' efforts to amend legislation on environmental issues as these are always changing and the government is party to a host of treaties on the protection of the environment.

Section D will introduce drafters to recent developments on how the problems mentioned in section C can be circumvented or reduced by drafting a provision term 'economic balancing provision'. The section will illustrate how this recent provision balances the rights and obligations of the government and foreign investor as it allows the legislation to be amended to deal with unforeseen economic changes and also economic situations such as the recent financial problems presented by the global recession and also amend legislation to cater for any new developments in the protection of the environment.

Section E will conclude by giving a summary of the article and also make some recommendations to drafters when drafting foreign direct investment legislation.

B. The History of Stabilization Provisions

I. Definition of the Provisions

It is important that at the very start, the two provisions that are discussed in this article; namely, stabilization and economic balancing provisions, are briefly defined so that the reader has an overview of how these provisions work in order to fully appreciate the discussion brought forward. It is also worth noting that these provisions have mostly been discussed from an international point of view and not much has been written from a legislative point of view. The author is of the opinion that this is a very relevant legislative topic and worth paying attention to as it shows legislative drafters the rationale why stabilization provisions are problematic and also why they should instead resort to economic balancing

provisions.[7] As Thornton rightly puts it, a drafter plays a significant role in the procedure of regulating the conduct of society[8] and this inevitably also includes foreign investors.

1. Stabilization Provisions

Unlike most industrial projects or sectors, the oil and gas industry has an acute need for stability to be maintained in that area.[9] In order to cater for political risk, especially in the form of expropriations and nationalizations, foreign investment contracts always contain a stabilization clause.[10] The philosophy behind a stabilization clause is to render the foreign investment contract immune from subsequent adverse legislative or administrative acts by the host state.[11]

This therefore means that when a foreign investor wishes to establish an investment in a country, one of the agreements between the foreign investor and the government is that the government will not enact any legislation, make any legislative amendments or administrative decisions that will affect the foreign investment. It essentially means that the government 'freezes' all laws that apply to that investment.

This is a provision that "seeks to freeze the law of the host state as at the time of entry so that the operating conditions of the foreign investment process will remain constant throughout the life of the foreign investment contract."[12] The provision basically prevents the government from unilaterally amending the laws that regulate the foreign investment contract to the detriment of the investor. Amendments to legislation regulating the foreign investment contract can result in change in the tax or fiscal regime, expropriation, nationalization or confiscation of the investment.[13]

7 *See* B. Adaralegbe, 'Stabilising Fiscal regimes in Long-Term Contracts: Recent Developments from Nigeria', *JWELB*, No. 1, 2008, pp. 239-246.

8 G.C. Thornton, *Legislative Drafting,* Butterworths, 1996, p. 125.

9 R. Doak Bishop et al, *Foreign Investment Disputes; Cases, Materials and Commentary*. Kluwer Law International, 2005, p. 286.

10 *See* A.F.M. Maniruzzaman, 'Stabilisation in Investment Contracts and Change of Rules by Host Countries: Tools for O and G investors' Association of International Petroleum Negotiators, *AIPN Research Project*, 2005, p. 6; M. Sornarajah, *The International Law On Foreign Investment,* Cambridge University Press, 1994; T. Daintith and G.D.M. Willoughby, (Eds.) A *Manual of United Kingdom Oil and Gas Law,* Oyez Publishing, London, 1977. P. Comeaux & S. Kinsella, *Protecting Foreign Investment under International Law. Legal Aspects of Political Risks*, Oceana Publications Inc., 1997.

11 Maniruzzaman, 'Stabilisation in Investment Contracts and Change of Rules by Host Countries: Tools for O and G investors.'

12 A.F.M. Maniruzzaman, 'Stabilisation in Investment Contracts and Change of Rules by Host Countries: Tools for O and G investors', Association of International Petroleum Negotiators, 2005, p. 8. *See also* M. Sornaraja, *The Settlement of Foreign Investment Disputes*, Kluwer Law International, 2000.

13 *Libyan American Oil Company (LIAMCO) v. The Libyan Arab Republic*, Award of 12 April 1977, 20 ILM 1 (1981), *The Government of the State of Kuwait v. The American Independent Oil Company* ('Kuwait v AMINOIL') 1982 <www.biicl.org/files/3938_1982_kuwait_v_aminoil.pdf>, *TEXACO*.

Previously, stabilization provisions were found in investment contracts and they were termed stabilization clauses.[14] As the practice developed and governments continued expropriating foreign investments,[15] investment agreements with stabilization clauses were promulgated as a 'special law'.[16] The practise of enacting contracts into laws is evident in Egypt and Chad as well as in other countries.[17] This meant that the contract was given force of law and was accorded supremacy over current or subsequent legislative amendments.[18] Section 3 of Act No. 999 of 1976, *Petroleum (Gulf of Papua) Agreements Act* provides:

> 1) The following Articles and Clauses of the Agreements have the force of law as if contained in this Act and apply notwithstanding anything to the contrary in any other law in force in Papua New Guinea or a part of Papua New Guinea[...]
> 2) No law at any time in force in Papua New Guinea or a part of Papua New Guinea made after the commencement date shall affect this Act or any of the Agreements–
> (a) unless the contrary intention appears, either expressly or by implication, in that law; or
> (b) except as provided by the Agreements.
> 3) Except where the contrary intention appears, either expressly or by implication, in the Agreements or any of them, and subject to Subsections (1) and (2), all laws at any time in force in Papua New Guinea or a

14 P.D. Cameron, 'Stabilisation in Investment Contracts and Changes in of Rules in Host Countries; Tools for Gas and Oil Investors', *AIPN*, 2006, p. 12.

15 *AGIP, Anglo-Iranian Oil Co. Case*, The League of Nations Official Journal, 1953 at p. 1653.

16 A.F.M. Maniruzzaman, 'The Pursuit of Stability in International Energy Investment Contracts: A Critical Appraisal of the Emerging Trends', *JWELB*, Vol. 1, 2008, p. 122.

17 P. Bernardini, 'Stabilisation and adaptation in oil and gas investments', *JWELB*, Vol. 1, No. 1, 2008, p. 100: states that "The stabilisation may be ensured by providing that the agreement takes precedence over any provisions enacted subsequent thereto by way of legislation or administrative regulation if the effect of such provisions is to the investor's prejudice, a result that may be achieved by only be conferring to the agreement the force of law so that its provisions may not be modified by general law". He further states that this pattern is followed in Egypt, Qatar and other Middle East countries as well as countries of the former Soviet Union, as is the case in the Republic of Azerbaijan, where a petroleum agreement was made subject to its effectiveness to '*legislation giving this Agreement the full force of the law*' [emphasis added]. *See also* P.D. Cameron, 'Stabilisation in Investment Contracts and Changes in of Rules in Host Countries; Tools for Gas and Oil Investors' p. 39, and Barrows, 'Basic oil laws and concession contracts', (1997) Suppl 25.1 Russia & NIS.

18 An Azeri Agreement of 1999 reads as follows: "Upon approval by the Parliament of the Azerbaijan Republic of this Agreement, this Agreement shall constitute a law of the Azerbaijan Republic and shall take precedence over any other current or future law, decree or administrative order (or part thereof) of the Azerbaijan Republic which is inconsistent with or conflicts with this Agreement except as specifically otherwise provided in this Agreement", dated 14 December 1996, on the Exploration, Development and Production Sharing for Prospective Structures Ashrafi Dan Ulduzu and Area Adjacent in the Azerbaijan Sector and Caspian Sea, 52 Basic Oil Laws and Concession Contracts: Russia and NIS 1 (Supplement 24) 2003. *See also* A.F.M. Maniruzzaman, 'The Pursuit of Stability in International Energy Investment Contracts: A Critical Appraisal of the Emerging Trends'.

> part of Papua New Guinea that are not inconsistent with this Act apply to and in relation to all acts, matters or things done or suffered under the Agreements or any of the Agreements, as the case may be.[19]

The above is a classic example of a stabilization provision that freezes all laws that are applicable to the Petroleum Agreement Act, which also provides that all inconsistent laws are also not applicable to the Act. The petroleum agreements are contained in the schedule to the Act. Some of the countries that have national laws providing with stabilization provisions are; Timor Leste, Peru, Panama, Ivory Coast, Bolivia, Venezuela, Colombia, Kazakhstan.[20] Ecuador provides for stability of the tax regime.[21] Panamá also provides the stability of its custom and labour regimes.[22]

Recently, stabilization clauses have been enacted in the national laws of some countries and are referred to as stabilization provisions.[23] These provisions mostly provide that the legislation regulating fiscal issues, such as taxes, are not to change and are to remain the same for the duration of the investment. This creates problems in legislation as it means that legislative drafters cannot draft any legislation purporting to amend the laws that apply to these foreign investments. It has been said, whether justified or not, that legislative drafters "have no judgement and don't know what to include or what to leave out",[24] and that this is therefore one of the major causes of poorly drafted legislation.

It should be noted that stabilization provisions are mostly popular in foreign investment ventures dealing with oil and gas because of the stability that is required in these investments.[25] Hence this article will be focusing on legislation in the oil and gas industries. As will be discussed later, freezing legislation and prohibiting any amendments to be made to legislation hampers the government from issuing drafting instructions to draft legislation to develop the country's economy and environment and further purports to interfere with parliament's law-making powers.

19 <www.paclii.org/pg/legis/consol_act/popaa1976345/>.

20 *See* A.F.M. Maniruzzaman, 'National Laws Providing for Stability of International Investment Contracts; A Comparative Perspective', *JWIT*, Vol. 2, No. 2, 2007. *See also* M. Terterov & J. Reuvid, *Doing Business with Estonia,* Kogan Page, London, 2003, p. 274.

21 Law on Promotion and Guaranty of Investment, Art. 22.

22 Law No. 54, Art. 10. *See also* Vielleville, D.E. & Vasani, B.S., 'Sovereignty Over Natural Resources Versus Rights Under Investment Contracts: Which One Prevails?' (2008) OGEL, Vol. 5 (2) 1-22, p. 18.

23 A.F.M. Maniruzzaman, 'National Laws Providing for Stability of International Investment Contracts; A Comparative Perspective', *JWIT*, Vol. 2, No. 2, 2007, p. 1. *See also* Columbian Judicial Stability Law (8 July 2005, Law 963, passed through decree 2950 of 29 August 2005); Timor Sea Petroleum Development (Tax Stability) Act, 2003. <www.eastimorlawjournal.org/East_Timor_National_Parliament_Laws/Law-2003-04.pdf>; Resource Contracts Fiscal Stabilisation Act 2000 (Consolidated to No. 19 of 2001) of Papua New Guinea.

24 R.J. Martineau, *Drafting Legislation and Rules in Plain English,* West Publishing Co., 1991, p. 1.

25 C. Kirchner, *Mining Ventures in Developing Countries, Part 1: Interest in Bargaining Process and Legal Concepts*, Kluwer-Deventer, 1979. *See also* R.D. Bishop, J. Crawford & M. Riesman, (Eds.) *Foreign Investment Disputes; Cases Materials and Commentary,* Kluwer Law International, 2005, p. 286.

2. Economic Balancing Clauses

Because a sovereign state cannot be completely restrained from exercising its power to enact laws, certain techniques have recently been developed that respect this reality and at the same time protect the economic equilibrium of the foreign investment. This modern technique is known as the economic balancing provision[26] and it is also found in recent national legislation.[27] As the name of the provision suggests, it allows for amendments to legislation that regulates the foreign investments to be made. These amendments may be a result of changes in the economy affecting the taxes applicable to the investment venture or relating to the environment.[28] The article will later discuss how these changes may come about and how a drafter should draft the provision in order to ensure that these changes are captured.

Having given a brief overview of what stabilization and economic balancing provisions are. I will now discuss how and why stabilization came to be.

II. Background on Stabilization Provisions

In law and development, as elsewhere, legislation performs many functions; it allocates rights and duties; it provides for dispute settlement[29] among other things. Stabilization provisions are therefore one of those provisions in legislation that allocate rights to an individual and also provide for dispute settlement. Stabilization provisions in the oil and gas industries first found their way into foreign investment legislation through foreign investment contracts as stabilization clauses.[30] Presently, they were included in legislation as stabilization provisions.[31] The development of the customary practice of having stabilization clauses in foreign investment contracts can be traced to the era of decolonization of third world countries and the two world wars.[32] History has shown that "the process of decolonization in the Third World and ideological upheaval in the socialist countries before and after the two World Wars made the prospect of foreign

26 A.F.M. Maniruzzaman, 'The Pursuit of Stability in International Energy Investment Contracts: A Critical Appraisal of the Emerging Trends', p. 126.

27 Kazakh Law Concerning Product Sharing Agreements, Law of 8 July 2005; Brazilian Constitution. *See* <www.anp.gov.br/brasil-rounds/round1/HTML/Questions4_en.htm>. B. Adaralegbe, 'Stabilising Fiscal regimes in Long-Term Contracts: Recent Developments from Nigeria', *JWELB*, No. 1, 2008, pp. 239-246. *See also* L. Cotula, 'Reconciling regulatory stability and evolution or environmental standards in investment contracts; towards a rethink of stabilisation clauses', *JWELB*, Vol. 1, No. 2, 2008, pp. 158-179; Maniruzzaman, 'National Laws Providing for Stability of International Investment Contracts; A Comparative Perspective'.

28 B. Adaralegbe, 'Stabilising Fiscal regimes in Long-Term Contracts: Recent Developments from Nigeria', *JWELB*, No. 1, 2008, pp. 239-246. *See also* L. Cotula, 'Reconciling regulatory stability and evolution or environmental standards in investment contracts; towards a rethink of stabilisation clauses', *JWELB*, Vol. 1, No. 2, 2008, pp. 158-179.

29 A. Sideman, R.B. Sideman & N. Abyesekere, *Legislative Drafting for Democratic Social Change, A Manual for Drafters,* Kluwer Law International, 2001, p.15.

30 M. Sornarajah, *The International Law On Foreign Investment,* Cambridge University Press, 1994.

31 A.F.M. Maniruzzaman, 'National Laws Providing for Stability of International Investment Contracts; A Comparative Perspective', *JWIT*, Vol. 2, No. 2, 2007, p. 233.

32 A.F.M. Maniruzzaman, 'Some Reflections on Stabilisation Techniques in International Petroleum, Gas and Mineral Agreements', *International Energy Law and Taxation Review*, 2005.

investment there very constrained indeed."[33] Past experiences have shown that a foreign investor wishing to set up a long term investment in a foreign country can run into numerable political risks such as having their foreign investment frustrated by the government. "Many things may happen during such long terms - there may be changes in the government and thereby ideologies and policies of successive governments which may have a bearing on the fate of the agreement."[34] The political risks that a foreign investor encountered were usually expropriation or nationalization of the investment venture.[35] Given these risks foreign investors insisted on a legal guarantee that ensured that their foreign investments will be safeguarded from such political risks. This legal guarantee came in the form of a stabilization clause in the foreign investment contract.[36]

In tracing the historical reasons for devising stabilization clauses, Sir Gerald Fitzmaurice provided an interesting footnote in his Separate Opinion to the Aminoil award[37] where he pointed out that between the two World Wars, there were an increasing number of cases, particularly in Latin America, in which governments, having granted a concession to a foreign corporate entity:

> would wait until the undertaking had got past its 'teething problems' and had become a 'going concern' and would step in and take it over. The implication of 'nationalisation' was then not invoked that much but the effect was the same, namely that the state compulsively acquired the undertaking either itself to operate or hand it over to a corporation or local authority.[38]

He went on to say that:

> it was specifically in light of those occurrences that stabilisation clauses began to be introduced into concessionary contracts, particularly because of the Latin American experiences and for the express purpose of ensuring that concessions would run their full term, except where the case was one which the concession itself gave a right to earlier termination.[39]

33 Id.

34 Id.

35 The foreign investor can still encounter these risks as shown by recent economic crisis which resulted in the nationalization of ventures such as Northern Rock, <news.bbc.co.uk/1/hi/magazine/7250668.stm>; Anglo Irish Bank Corporation plc, <www.angloirishbank.co.uk/Your_Questions_Answered/General_Information_on_the_Nationalisation.html>; Orinoco Oil Belt, <www.venezuelanalysis.com/news/2245>; United Kingdom National Express, <www.guardian.co.uk/business/2009/jul/01/national-express-london-to-edinburgh>.

36 *See* C. Kirchner, *Mining Ventures in Developing Countries, Part 1: Interest in Bargaining Process and Legal Concepts*, Kluwer-Deventer, 1979; and K. Hossain, *Law and Policy in Petroleum Development: Changing Relations Between Transnational and Governments*, Frances Printer Ltd., London, 1979.

37 *Kuwait v. American Independent Oil Company (AMINOIL)* Final Award, 24 March 1982. 21 I.L.M.

38 Id., p. 1053, para. 26.

39 Id.

Faced with this plight, foreign investors started relying on stabilization clauses to freeze subsequent laws and actions by the government and protect their investments against such government interference. Governments in an effort to attract foreign investors gradually began promulgating the agreements as special laws in order to guarantee the investor that the government would not interfere with the foreign investment. This practice of promulgating agreements as laws found its way into legislation and legislative drafters provided for the freezing of laws as solid guarantees against government interference.[40]
Stabilization clauses are now found in different varieties in legislation to provide for stability in taxes, labour and environmental issues.

III. Importance of Stabilization Provisions

The functional use of a stabilization provision in legislation ensures the certainty : (a) of the law in force on a given date, this is normally the date the investment contract comes into force;[41] and (b) that the laws in force remain the operating and applicable laws for the duration of the foreign investment contract.
As an illustration, the Peruvian Organic Law for Hydrocarbons[42] provides as follows in Article 63 Tax and Exchange Guarantee:[43]

> "*The State guarantees the Contractors that the tax and exchange systems in force at the time the Contract is entered into, shall remain unchanged during the life thereof*."

The law in force "is the law that will apply between the parties, regardless of future legislation, decrees, or regulations issued by the host state."[44] Therefore, the drafter in framing the provision, as in the illustration above, ensures that

40 A.F.M. Maniruzzaman, 'Stabilisation in Investment Contracts and Change of Rules by Host Countries: Tools for O and G investors', *Association of International Petroleum Negotiators*, 2005, p. 106. *See also* Maniruzzaman, 'National Laws Providing for Stability of International Investment Contracts; A Comparative Perspective', p. 244.

41 Art. 2 of the Timor Sea Petroleum Development (Tax Stability) Act 2003, provides that:
"1. In the case of any long term project (being a project of more than fifteen (15) year expected duration and production from which commences after entry into force of the Timor Sea Treaty) relating to the contract of petroleum activities in the Joint Petroleum Development Area, *the Government may enter into an agreement with a Contractor which guarantees the tax stability of the project by reference to the laws of the Republic in force on the effective date of the agreement in respect thereof*." (Emphasis added).
See also the Resource Contracts Fiscal Stabilisation Act (2000) of Papua New Guinea, <www.paclii.org/pg/legis/consol_act/rcfsa2000409/>.

42 Law No. 26221, Supreme Decree No. 32-95-EF, 27 February 1995, The President of the Republic of Peru issued regulations for the Tax Stability Guarantee and Tax Standards of Law No. 26221. *See also* A.F.M. Maniruzzaman, 'National Laws Providing for Stability of International Investment Contracts; A Comparative Perspective', *JWIT*, Vol. 2, No. 2, 2007, p. 234.

43 Emphasis added.

44 Ibid. p. 293. *See also* C.E. Stewart (Ed.), Commentary 1.1 *in Translational Contracts*, Ocean Publications Inc, 1997.

subsequent amendments in the law in force will not apply to the foreign investment contract.[45]

The stabilization provision more or less guarantees the investor of the exclusion of the possibility of the government enacting legislation or applying administrative measures which will have the effect of nationalizing the foreign investment against the will of the investor. This is in line with Driedger's principle of internal consistency.[46] In ensuring the guarantees of a foreign investor in legislation, the drafters followed the guideline to attempt to draft the law in such a way that in its final form it exhibited an intrinsic harmony and coherence; harmony with the existing statute law and coherence in the express rights guaranteed and the consequences thereof.

IV. Drafting Techniques for Stabilization Provisions

Legislation is a communication of a special kind[47] and therefore the drafting technique of effecting this communication is imperative. A legislative drafter must endeavour to draft in such a way that the law is successfully communicated to the persons who make up the appropriate audience.[48] An effective stabilization provision is one which protects the foreign investment from the application of legislation or administrative measures in the form of regulations or directives, subsequent to the conclusion of the contract.[49] There are several drafting techniques which are used to reach the purpose of a stabilization provision.[50] Some of these techniques are:

1. Use of the Prohibition Element

This is the use of a provision prohibiting subsequent legislative enactments affecting the investor's rights. The provision can also prohibit administrative measures, decrees or orders and can further exclude nationalization of the foreign investment.[51] Maniruzzaman refers to this technique as the insulation of the investment against alteration and annulment.[52]

45 *See* M. Sornarajah, *The International Law On Foreign Investment,* Cambridge University Press, 1994, p. 106.

46 *See* E.A. Driedger, '*The Composition of Legislation*', p. 90.

47 *See* G.C. Thornton, *Legislative Drafting,* p. 47.

48 Thornton classifies the audience in three broad groups, which are, the lawmakers, the persons who are concerned with or affected by the law and members of the judiciary. In this instance, the appropriate audience would be the foreign investors.

49 P. Wolfgang, 'Arbitration and Renegotiation of International Investment Agreements', 2nd Revised and Enlarged Ed., Kluwer Law International, 1995, p. 215.

50 P. Wolfgang, 'Arbitration and Renegotiation of International Investment Agreements', 2nd Revised and Enlarged Ed., Kluwer Law International, 1995.
A.F.M. Maniruzzaman, 'Stabilisation in Investment Contracts and Change of Rules by Host Countries: Tools for O and G investors', Association *of International Petroleum Negotiators*, 2005, pp. 1-251.

51 Id.

52 Id. p. 15.

Below are two examples of a stabilization provision with a prohibition element. Note that these agreements were ratified by parliament and promulgated as law and are therefore part of the national legislation of the country.[53]
Article 17 of the Oil Concessions Agreement between the Sheik of Kuwait and American Independent Oil Company (AMINOIL) 1948 states that:

> The Sheik *shall not* by general or special legislation or by administrative measures or by any other acts whatsoever annul this Agreement except as provided for in Article 11. *No alterations shall be made* in the terms of this Agreement either by the Sheik or the Company except in the event of the Sheik and the Company jointly agreeing that it is desirable in the interest of both parties to make alterations, deletions or additions to this Agreement.[54]

Another prohibiting provision can also be found in Article 14 (c) of the Ertsberg Agreement between Indonesia and Freeport Indonesia Inc, 1967, which states that:

> the Ministry of Mines, acting on behalf of the Indonesian Government, agrees that during the term of this Agreement it and the Indonesian Government and all its instrumentalities and subdivisions will (i) take no action which is inconsistent with the conduct of the Enterprise in accordance with the provisions of this Agreement, including without limitations, any action of the condemnation or nationalisation of the Enterprise or any part thereof.[55]

Driedger states that the use of the word 'shall', in legislative drafting, is used in a directory manner. It is therefore a declaration prohibiting certain actions. It imposes an obligation that can be obeyed or disobeyed.[56] This therefore means that no legislation can be drafted or amended which has the effect of changing the legislation that applies to this special law without attracting litigation. Thornton also points out that the use of the phrase 'shall not' is used in a provision which imposes a prohibition to which a penal sanction is attached.[57] We can already see the dilemma that the government faces when trying to amend its laws to deal with any economic changes, such as global recessions, having an adverse effect on the economy starting to take shape. The government will be duty bound by legislation to ultimately compensate the foreign investor for any changes in legislation affecting the foreign investment.

53 *See* <www.biicl.org/files/3938_1982_kuwait_v_aminoil.pdf>.
54 A.F.M. Maniruzzaman, 'Stabilisation in Investment Contracts and Change of Rules by Host Countries: Tools for O and G investors', *Association of International Petroleum Negotiators*, 2005, p. 16. Emphasis added.
55 Id.
56 E.A Driedger, 'The Composition of Legislation', Department of Justice, Ottawa 1976, p. 14.
57 G.C. Thornton, *Legislative Drafting,* p. 95.

2. Use of the Anti-inconsistency Rule

Another technique is the use of the anti-inconsistency rule in a stabilization provision. The anti-inconsistency rule provides that "the ratified agreement will prevail over future legislation or regulation if there is inconsistency between the two."[58] The rule can further provide that any subsequent legislation which has an adverse effect on the foreign investment should be excluded from application. This will apply even where the subsequent legislation will not be inconsistent with the foreign investment.[59] This kind of technique is tantamount to granting supremacy to the investment agreement as *Les specialis* over subsequent legislative enactments.[60] As stated above, this investment agreement is promulgated as a special law. This means that the agreement will be supreme over any subsequent legislation as long as the subsequent legislation is not inconsistent with the agreement and the agreement will have the force of law just like any other legislation drafted.

An example of a stabilization provision which contains an anti-inconsistency rule can be found in Article 44 of the Selebi Phikwe Agreement,[61] which reads thus:

> *The enactment of any amendments to the existing laws or regulations or the enactment of any new laws* or regulations applicable to the Company or BRST or BCL Sales or any of their shareholders *shall not constitute a breach by the Government of the master Agreement in the event that, such laws or regulations do not contravene the terms and conditions of the master Agreement or any scheduled Agreements*.[62]

Another example can be found in an agreement between Greece and Esso Hellenic Incorporates. The relevant part reads as follows:

> 1) The Greek state guarantees to the Corporation that no general or special law or any administrative measure shall terminate or in any matter amend this Agreement, unless specifically agreed to by the Corporation.
> 2) [...] Should such a conflict exist, either today or in the future, the terms and conditions of this Agreement shall prevail and the stipulations of the abovementioned laws and regulations which are in conflict with the terms and provisions of this Agreement shall have no effect as far as the Corporation and its operations and property in Greece are concerned.[63]

58 H. Cattan, *The Law of Oil Concessions in the Middle East and North Africa*, Oceana Publications Inc., Dobbs Ferry, New York 1967, p. 47.

59 P. Wolfgang, *Arbitration and Renegotiation of International Investment Agreements*, 1995, p. 216.

60 *Supra* (note 36) p. 17.

61 Agreement between the Republic of Botswana and Bamangwato Concessions Ltd and Botswana RST Ltd and BCL Sales, 1972. This agreement was ratified by the British House of Lords as Botswana at that time had not yet gained independence from Britain. *See also* <www.bcl.bw/PGContent.php?UID=649>.

62 Emphasis added.

63 *See* G.R. Delaume, *Law and Practice of Transnational Contracts,* New York; London: Oceana, 1988, p. 45.

There is however an ongoing debate by jurists who maintain the view that even though the contract is given the force of law status, it "cannot be treated more than a contract."[64] This therefore would mean that though the agreement is given pseudo legislation character it is still, at the end of the day, an investment contract. The challenge that a drafter faces in this scenario is that the contract has been ratified by parliament and therefore is legislation. Consequently, any amendments to the special law will need to be drafted by a legislative drafter and taken through the parliamentary process of a bill[65] and this is different from the process of amending an ordinary contract.[66]

3. Freezing of Municipal Law

The third technique is usually found in the choice of law provision in the Act.[67] The way the provision works is that it incorporates municipal law into the Act and then freezes that law as of a specific date;[68] an example is in the 'Nchanga' Zambia 1970 Agreement,[69] which reads:

> Any arbitral tribunal [...] shall [...] in interpreting and applying any agreements, documents, legislation, order or other instruments with which the dispute is concerned, apply the law of the Republic of Zambia [...] as it existed on the 24th December, 1969, disregarding all legislation, instruments, orders made, issued or given subsequent to that date, it being the intention of the parties hereto that such decisions shall be made as if decided on that date under Zambian law.

This provision in fact excluded the application of the new Zambian mining law which would have been applicable in 1970.

V. Categories of Stabilization Provisions

Besides the drafting techniques of stabilization provisions, there are also assortments of stabilization provisions available that can freeze certain aspects of legislation in order to achieve the stabilization objective. The following categories of stabilization provisions can be found in national legislation: the provision to stabilize property; the fiscal regime; export-import provisions; free transferability; and the general and contractual framework of the agreement.

64 H. Cattan, *The Law of Oil Concessions in the Middle East and North Africa,* 1995, p. 29.

65 The basis for this argument is that this is the same procedure that is followed when Loan Ratification Bills are being amended. As stated earlier, these Loan Ratification Bills are legislation that is drafted to capture loan agreements entered into by the government of Botswana with another government or international organization.

66 See S. Wheeler, *Contract law: cases, materials and commentary*, Clarendon Press, Oxford; New York, 1994.

67 This is the agreement ratified by Parliament. I have decided to term it so because section 87 (7) of the Botswana Constitution 1966, states that 'All laws made by Parliament shall be styled "Acts"'. *See also* section 49(2) of the 1994 Zambian Constitution for a similar provision.

68 Id.

69 Agreement and Consent to Submit Disputes to the ICSID, 1970. Taken from P. Wolfgang, p. 217.

1. Provision to Stabilize Law Relating to the Investment Property

This type of provision is drafted in such a way that it has the effect of prohibiting the government from applying legislative or administrative measures which results in expropriation (creeping or otherwise), nationalization or confiscation of the foreign investment.[70]

The provision "freezes the host state's inherent power or well-recognised right of sovereignty to expropriate or nationalise property",[71] whether locally or foreign owned. This provision is usually accompanied by a compensation provision.[72] There is, however, a doctrinal debate at the international law level concerned with the right of a state to nationalize or expropriate foreign owned property.[73] In principle, a state's right to expropriate or nationalize foreign owned property is recognized as part of the legal powers inherent in statehood.[74] However, it is also worth noting that these powers have not remained unfettered as under international law, states are required to compensate for any expropriated property and furthermore the expropriation has to be lawful and this means that the expropriation has to be undertaken in the public interest, without discrimination and with compensation.[75]

One will therefore find in most legislation that when a drafter provides for the prohibition of expropriation, there is also a compensation provision or arbitration provision in the event that the government does expropriate. To illustrate this, the Nigeria LNG (Fiscal Incentives, Guarantees and Assurances) Act[76] contains a provision against the taking of property rights[77] and further provides that where this happens there is a guarantee of a dispute settlement process according to the International Centre for the Settlement of Investment Dispute (ICSID) arbitration system.[78]

Another example of a provision freezing the law relating to investment property can be found in an agreement ratified by the parliament of Papua New Guinea. In particular, Article 17 (b) of the Bougainville Copper Agreement2[79] provides that:

70 *AMINOIL case.*

71 S. Baughen, 'Expropriation and environmental regulation: the lessons of NAFTA chapter eleven', *J. Env. L.* Vol. 18, No. 2, 2006, p. 218. *See also* A.F.M. Maniruzzaman, 'Stabilisation in Investment Contracts and Change of Rules by Host Countries: Tools for O and G investors', 2005, p. 49.

72 Zhi Yue Xiao, 'Foreign investment protection – how the law has been shaped', *Comp. Law*, Vol. 7, No. 6, 1986, p. 253.

73 E. Paasavirta, *Participation of States in International Contracts and Arbitral Settlement of Disputes,* Finnish Lawyers Publishing Company, Helsinki, 1990, p. 173. *See* T.W. Wälde, 'Renegotiating Acquired Rights in Oil and Gas Industries: Industry and Political Cycles meet the Rule of Law', *JWELB*, No. 1, 2008, pp. 55-97.

74 *See* Paasavirta, Op. cit., p. 175.

75 Id., *see also* W.E. Butler, *Foreign Investment Law in the Commonwealth of Independent Countries,* Simmonds & Hill Publishing Ltd, 2002.

76 Nigeria LNG (Fiscal Incentives, Guarantees and Assurances) Act of 1990 amended in 1993.

77 Section 1 and 21 Second Schedule to the LNG Act.

78 Section 22 Second Schedule to the LNG Act. *See also* B. Adaralegbe, 'Stabilising Fiscal regimes in Long-Term Contracts: Recent Developments from Nigeria', *JWELB*, No. 1, 2008, p. 241.

79 Ordinance between the Administration of Papua New Guinea and Bougainville Copper Pty Ltd, 1967.

> *The administration [...] shall not resume or expropriate or permit the resumption or expropriation of any asset* (whether movable or not) of the Company used in connection with any of its operations under this Agreement, any products (whether purchased or otherwise) resulting from such operations or business of the Company or any share held or owned by any person of the Company.[80]

A provision that prohibits a government from expropriating a foreign venture is very undesirable because it interferes with state's sovereign rights to expropriate property. However, a drafter should also note that international law allows a state to expropriate foreign owned property, provided the necessary general principles of international law requirements are met. Therefore it might be advisable for the drafter to provide that the government can expropriate and provide for instances where such expropriation can take place and the form of compensation.[81]

2. Provision to Stabilize Law Relating to the Fiscal Regime

As fiscal stability is the rock bottom of investments in the oil and gas industry, there are guarantees in various national laws which provide for the stabilization of the fiscal regime.[82] The fiscal regime can relate to legislation on taxes, rates, fees, levies, charges, duties, income or dividends. Since taxation by the host country is the most important factor determining the profitability of a project for the investor, the foreign investor would be anxious to get the fiscal regime frozen during the tenure of the contract.[83] Such a provision exists in Article 63 of the Peruvian Organic Law for Hydrocarbons.[84] It provides that "*[t]he Sate guarantees the Contractors that the tax and exchange systems in force at the time the Contract are entered into shall remain unchanged during the life thereof.*"[85]

Article 63 of the Bolivian Hydrocarbon Laws (2004)[86] provides that;

> The Minister of State Assets [...] and the Ministry of Hydrocarbons, in a joint manner and in representation of the State, may establish with the investors, prior to the realisation of the investment and the corresponding registration, tax stability agreements of the tax regime in effect at the time of the estab-

80 Id., p. 218, emphasis added. *See also* Art. 19.1 of the Nord-Leyon Agreement 1968 (Agreement between the Republic of Gabon and Nord-Leyon Pty Ltd) reads as follows; "[...] if however the circumstances or a critical situation imperatively requires such measures (nationalisation) the republic of Gabon recognises that in accordance with international law, it shall grant the Association just and equitable compensation in convertible currency at its latest when the nationalisation or confiscation takes effect".

81 E. Khalil, 'A selection of views on the expropriation of interests in the mineral and petroleum extraction industries', *IELR*, Vol. 3, 2008, p. 86.

82 Timor Sea Petroleum Development (Tax Stability) Act 2003, Op. cit., note 26.

83 *See* Thomas W. Wälde and George Ndi, Fiscal Regime Stability and Issues of State Sovereignty, *in* J.M. Otto (Ed.), *Taxation of Mineral Enterprises,* Graham & Trotman, London, 1995, pp. 63-90.

84 Law No. 26221. By way of a Supreme Decree No. 32-95-EF, dated 27 February 1995, The President of the Republic of Peru issued regulations for the Tax Stability Guarantee and Tax Standards of Law No. 26221.

85 Emphasis added.

86 Tax Stability Agreements for Promoting Industrialisation, Law No. 54 of 22 July 1998.

> lishment of the agreements, for a period no more than ten (10) years without extension, these agreements shall be approved by the national Congress.

However, with recent changes in the global economy, stabilization of the fiscal regime for a long period of time is being found to be undesirable as the provision curtails the state's ability to enact legislation or adopt appropriate administrative measures to deal with any unforeseen economic crisis. Therefore, it is my submission that, even though the intention of Parliament was that these laws were to be supreme over laws relating to tax, it is advisable for the legislative drafter to frame this provision in a manner that caters for amendments to be made and also at the same time still provide the assurance and guarantee the investor craves. The way a drafter can achieve this will be discussed in section D on the drafting of economic balancing provisions.

The Agreement between the Government of Jamaica and Revere Ltd, 1967 provides that:

> 12. No further taxes [...] burdens, levies [...] will be imposed on bauxite, bauxite reserves or bauxite operations [...];
> 13. For purposes of taxation and royalties the provisions of this agreement shall remain in force until the expiry of twenty five years [...][87]

It has been found that the above provision is a defective drafting of a stabilization provision.[88] It has further been said that such kind of drafting is made by carelessness and lack of prudence and insight.[89] It must be acknowledged that this form of guarantee is very rare. One writer commenting on this form of provision stated:

If there is one thing that can expose the colonial old wounds it is for a government which is totally dissatisfied with the terms of an agreement to be confronted with a provision which says that its sovereign parliament cannot legislate without the consent of a foreign company.[90]

I further submit that it is advisable for drafters to be wary of such a provision and should endeavour to do away with it as it curtails the efforts of the government to enact legislation, either new or amending, to deal with any unforeseen changes in the economy. These provisions might have been desirable back when expropriations where the order of the day, but they certainly do not have any future in modern drafting.

87 *Revere Copper and Brass Incorporated v OPIC*, Award, 24 August 1978, 17 ILM 1321, pp. 1323, 1332.

88 A.F.M. Maniruzzaman, 'Drafting stabilisation clauses in international energy contracts: some pitfalls for the unwary', *IELTR*, Vol. 2, 2007, p. 23.

89 Id.

90 *See* J. Kinna, 'Investing in developing countries; Minimising of political risks', *JENRL*, 1989 p. 93.

3. Provisions Relating to the Freezing of Export-Import Laws

In order to ensure economic viability in a mining venture, it is usually a prerequisite that there should be, as far as possible, unrestricted duty free importation of technical mining equipment.[91] In light of this, there are provisions that freeze or prohibit the amendment of import and export regulations which apply to a foreign investment. The provision is usually, if not always, drafted in such a way that it provides precisely which goods the special customs regime will cover,[92] for example "equipment and their spare-parts, vehicles [...] or aircraft, vessels and other means of transport, raw materials for plants, office building, employee housing, schools and hospitals, and office equipment and machines".[93] See also Article 47 of the 1996 Petroleum Law of Turkmenistan which states that all materials and equipment used solely in petroleum operations is exempt from customs duties.[94]

It is also advisable that the drafter state in the provision the duration of the customs exemptions or preferably that the goods exempted may be amended from time to time by the government. This caters for any inflations or deflations that may occur on the market affecting the exempted good and allows the government to amend its laws to deal with any unforeseen eventualities.

A drafter should also note that this kind of stabilization provision only applies where the merchandise in question was not available in the host state at a comparable price. In addition to assuring that technical equipment can be imported duty free, the provision can further provide that any machinery or equipment which was imported into the host state for a limited period, after which they will

91 N.E. Terki, 'The freezing of law applicable to long-term international contracts', *JIBL*, Vol. 6, No. 1, 1991, pp. 43-47.

92 These clauses can be quite detailed as illustrated in sections 1 and 2 of Art. XIV on 'Import and Re-Export' of the 'Asahan' Master Agreement between the Government of the Republic of Indonesia and the Investors for Asahan Hydro-electric and Aluminium Project, 7 July 1975. Art. 1 states that;

During the term of this Agreement as provided in Article XXX, the Company, its contractors and sub-contractors may import into and use in Indonesia free of import duties, sales taxes and other levies by any route and by any means of transport, having due regard to existing procedures in accordance with prevailing laws and regulations:

a) all machinery, equipment, tools, spare-parts, supplies, air craft, vessels, building materials, and vehicles (except sedan cars, jeeps, station wagons and trucks) required by the Company for the construction, operation and maintenance of the Project;
b) alumina and carbon products for the smelter, and
c) raw materials and supplies to be consumed in the production of aluminium for export.

2. If the Company imports goods the equivalent of which are being manufactured or otherwise produced in Indonesia and are available to the Company on a competitive time, cost, quality and quantity having due regard to the cost of freight, insurance and other charges borne by the Company in addition to the price of the imported goods, then the Government may require the Company to pay appropriate import duties, sales taxes and other levies on such imported goods.

93 Art. 12 of the Contract of Work for Block 3 Sulawesi between the Government of the Republic of Indonesia and P.T. Rio Tinto Indonesia, 13 June 1977.

94 Law on Hydrocarbons Resources, 30 December 1996. *See also* J.H. Hines; J.B. Varanese, 'Turkmenistan's Oil and Gas Sector; Overview of the Legal Regime for Foreign Investment', *J. Energy Nat. Resources L.*, Vol. 19, 2001, p. 55.

be re-exported, may be re-exported duty free before the expiry of a period determined[95] at the time of importation.

4. Provisions relating to the stabilization of laws on free transferability[96]

It is not unusual for national legislation relating to the mining of oil and gas to have a provision stating that the foreign investor shall be "granted freedom to make payments abroad in foreign currency"[97] or "to hold at banks in foreign countries part or all of foreign currencies received as the proceeds of export sales".[98] The provision will be a financial provision that will exempt the contract from any change of currency legislation in the host state.[99]

It is my submission that the drafting of such provisions hamper the efforts of a government to amend its laws to deal with inflations and deflations in currency values and may have the effect of the government being at the receiving end of a raw deal. This can happen when the foreign venture is doing so well and repatriates its profits at the detriment of the host country's economy. The economy would suffer because all the revenue will be taken outside the country and the host country's central bank would not make any profits from having the revenue banked in a local bank.

5. Provisions Freezing the General Legislative Regime

Petroleum and gas legislation can also stabilize the general legal framework of the investment venture as well as the investment venture itself. The drafter can insert a provision which states that the relevant laws existing at a particular point in time will have a continued binding effect on the investment venture, notwith-

95 Art. 4.c. of the Contrats de inversion extranjera, Estado de Chile con The Superior Oil Company, Falcon-bridge Nickel Mines Limited, Canadian Superior Oil Ltd. y McIntyre Mines - Nevada-Ltd, 7 de julio de 1977; Agreement between Chile and Noranda Mines Limited of 15 July 1977 (in English Translation).

96 Maniruzzaman in 'Stabilisation in Investment Contracts and Change of Rules by Host Countries: Tools for O and G investors', p. 51, refers to this type of provision as stabilization of foreign exchange regulations.

97 The Peruvian Organic Law for Hydrocarbons provides for the guarantee for the free use and availability of foreign exchange. This law provides that;

> The Central reserve Bank of Peru is obliged to guarantee [...] (a) the free availability of hundred percent of foreign exchange generated by their Hydrocarbon export, which they may freely dispose in their local or foreign bank; (b) the free availability and the right to freely convert foreign exchange [...] (e) [...] the right to freely dispose of, distribute, remit [...] profits.

98 *See* Art. 17.3 of the 'UTAH/ARCO' Agreement, Ibid.; Art. 16.3 of the 'Asahan' Master Agreement between the Government of the Republic of Indonesia and the Investors for Ashan Hydro-electric and Aluminium Project, 7 July 1975; Art. 29.d of the Selebi Phikwe Agreement between the Republic of Bostwana and Bamangwato Concessions Ltd. and Botswana RST Ltd. and BCL Sales Ltd. of 7 March 1972; Art. 26 of the 'OK-Tedi' Agreement between Papua-New Guinea and Dampier Mining Company Ltd. of 22 March 1976 and Art. 10 of the 'Tenke-Fungurume' Agreement (Convention entre la République Démocratique du Congo et Amoco Minerals Co., Charter Consolidated Ltd. Mitsui and Co. (USA) Inc., Bureau de Recherches Géologiques et Minières, Leon Tempelsman and Son, Inc., faite le 19 Septembre 1970). *See also* Maniruzzaman, p. 51 and P. Wolfgang, p. 220.

99 *See* P. Wolfgang, *Arbitration and Renegotiation of International Investment Agreements*, p. 221.

standing any changes in the host country's laws.[100] If parties agree, some contracts can even freeze the applicable law with relation to company law. This kind of provision is also used to freeze company laws, for example those provisions relating to formation of the company, change of legal status and dissolution of the company, sale of company shares and selection of managerial staff. This is also an undesirable provision and drafters should try as much as possible to not draft legislation with this kind of provision.

VI. Analysis of Section B.

Stabilization provisions were originally proposed to guarantee the insecure foreign investor that their investment would not be expropriated by the government. This guarantee was done in a number of ways. First, it was through agreements with governments, when these agreements were found not to be binding enough, these agreements were turned into special laws and this meant, amongst other things, that the government was prohibited from expropriating the investment and also amending those laws that applied to the investment.

Slowly but surely, the foreign investors guarantee was firmly established in national laws when legislative drafters began putting provisions in legislation to freeze certain laws and prohibit the amendment of certain laws affecting the investment, such as taxes and import-export regulations among others.

The techniques implemented by drafters for protecting foreign investments from the application of legislation or administrative measures and in the same breath freezing laws has been said to be undesirable in modern drafting as the result is that it makes certain laws supreme over other national laws.

The different categories of stabilization provisions, such as those that freeze the laws relating to foreign investment property, the laws relating to taxes and import-export regulations, curtail the efforts of the government to enact or amend existing laws to deal with unforeseen economic matters because these provisions freeze the law for a number of years. These provisions also have the effect of limiting its power of executive action in the future.

Lastly, laws are what Parliament intends them to be, if Parliament wants to make a ratified agreement or Act to be supreme to subsequent legislation, then that is the intention of Parliament. However, a word of caution to legislative drafters, in modern drafting, provisions that freeze the law should be greatly avoided.

The next section will illustrate in detail how such badly drafted provisions tie the hands of government from enacting or amending existing legislation and also limit future administrative actions.

100 *See* A.F.M. Maniruzzaman, 'International Energy Contracts and Cross-Border Pipeline Projects: Stabilization, Renegotiation and Economic Balancing in Changed Circumstances-Some Recent Trends', *OGEL*, 2006, p. 43.

C. The Interference of Stabilization Provisions with Parliament's Law-Making Powers

I. The Flaws Inherent in Stabilization Provisions

While the different categories of stabilization provisions discussed in chapter two can help protect and shelter the foreign investment from undue government interference, legislative drafters should also be aware of the fact that there are flaws that are inherent in stabilization provisions which distort the pursuit of sustainable development.[101] When drafting foreign investment legislation, a drafter is well aware of the fact that in order to communicate the policy of attracting foreign investment clearly in legislation, therefore the drafter should be familiar with the concept that "regulatory stability is widely considered to important to promote investment in general and to attract foreign investment in particular."[102]

These arrangements (stabilization provisions) in legislation respond well to the foreign investors need for stability on the regulatory framework, designed to minimize political risk and encourage foreign investment, but may also constrain the ability of the government to adopt 'socially desirable' legislation in areas such as economic and environmental protection, where the legislation negatively affects the foreign investment project.

Legislative drafters should also be conscious of the fact that freezing or stabilizing the law relating to taxes or the fiscal regime and also depletion of non-renewable resources is the key issue for stabilization concerns.[103]

It has been argued that the provisions within a stabilization provision that prohibit the taking of a foreign investors property and make it a requirement that a government should pay compensation in the event of expropriation may make it more difficult for governments, particularly the poor ones, to adopt new regulation raising social and economic standards where these new regulations affect the economic equilibrium of the foreign investment.[104]

One should bear in mind that legislation can be used to achieve great changes[105] and therefore legislative drafters should get proper instructions that can best implement the policies of the executive with the most minimum problems.

This chapter will seek to illustrate how stabilization provisions from a drafting point of view are inherently flawed as they hinder the adoption of new legislation or amend existing legislation in the economic and environmental arena.

101 L. Cotula, 'Regulatory Takings, Stabilisation Clauses and Sustainable Development', Paper prepared for the OECD Global Forum on International Investment, 2008.

102 L. Cotula, 'Reconciling regulatory stability and evolution of environmental standards in investment contracts: towards a rethink of stabilisation clauses', *JWELB*, Vol. 1, No. 2, p. 158.

103 T. Wälde & G. Ndi, "Stabilizing International Investment Commitments: International Law Versus Contract Interpretation", 31 *Tex. Int'l L.J.* 215, 230-1.

104 *See* IIED & Partners, 'Lifting the Lid on Foreign Investment Contracts: The Real Deal for Sustainable Development', *International Institute of Environment and Development*, 2006.

105 *See* C. Stefanou, The Policy Process and Legislative Drafting, *in* C. Stefanou & H. Xanthaki., (Eds.), *Manual in Legislative Drafting,* University Press, Cambridge, 2005, p. 4.

II. Implications of Stabilization Provisions for the Government Fiscal Regime

The increasing objections[106] to stabilization provisions are based on the argument that a government cannot fetter its legislative powers either through a contractual provision or subsequent legislation where the exercise of such legislative power is necessary to secure a public benefit.[107] Added to this is also the fact that promises made by a government in one law can be repealed in another law.[108] "What parliament giveth parliament can take away".[109]

Effectiveness constitutes the first requirement of good governance. Drafters must therefore draft laws that the government can and is likely to implement.[110] Consequently, it is imperative that drafters should always take note of the fact that law-makers enact a law to implement a policy because they believe that unless they do so, existing problematic behaviours will persist.[111] Furthermore, it is central for a drafter to think clearly through what it is that the legislation or rule is designed to accomplish.[112] Foreign investment legislation is designed to promote and maintain foreign investment, however, added to that is also the central issue that a government has the power to deal with its natural resources and also enact legislation in a manner it sees fit for public interest and good governance.[113] This clearly does not accomplish a stabilization provision.

A recent judgment in Nigeria is evidence to the controversy surrounding stabilization provisions. The controversy was triggered by a recent Federal High Court judgement that pronounced that the Nigeria LNG (Fiscal Incentives, Guarantees and Assurances) Act[114] is unconstitutional. In that case[115] the Niger Delta Development Commission (NDDC), a newly established body set up to develop the Niger-Delta area, had filed an action against the Nigeria LNG Ltd seeking the payment of certain charges in accordance with Section 14 of the Niger-Delta Development Commission (Establishment) Act of 2002. Section 14 (2) (b) of that law provides that "any oil producing company operating onshore and offshore in the Niger-Delta area; including gas processing companies" shall pay 3% of its annual budget to the body.

106 *See* M. Sornarajah, *The International Law on Foreign Investments,* p. 409.

107 Id., *see also* p. 410 where he states that some authors argue that such ratified agreements are tantamount to treaties but then also argues that treaties seldom contain stabilization provisions.

108 I. Siedl-Hohenveldern, *International Economic Law*, p. 145.

109 *See* D. Johnston, *International Petroleum Fiscal Systems and Production Sharing Contracts,* Penn Well, Tulsa OK, 1994. This position of the government is re-enforced by UNGA resolution 1803 (xvii) of 14 December 1962, "Permanent sovereignty over natural resources".

110 *See* A. Sideman; R.B. Sideman and N. Abyesekere, *Legislative Drafting for Democratic Social Change, A Manual for Drafters*, p. 15.

111 Id. p. 16.

112 *See* R.J. Martineau, *Drafting Legislation and Rules in Plain English*, p. 65.

113 *See* Sornarajah, The International Law On Foreign Investment*, in* K. Hossain & S.R. Chowdhury, (Eds.) *Permanent Sovereignty over Natural Resources in International Law*. *Also* A. Sideman, R.B. Sideman & N. Abyesekere, *Legislative Drafting for Democratic Social Change, A Manual for Drafters*.

114 Nigeria LNG (Fiscal Incentives, Guarantees and Assurances) Act of 1990 amended in 1993.

115 *Niger Delta Development Commission v. Nigeria Liquefied Natural Gas Company ltd*, FHC/PH/CS/313/2005 dated 11 July 2007.

The NDDC filed the suit against the Nigeria Ltd following its refusal to make this payment. In the suit, the NDDC sought a declaration that it was entitled to receive these charges and a direction from the court ordering the Nigeria LNG Ltd to pay over to it the said charges. The Nigeria LNG Ltd had also contended that by virtue of the Nigeria LNG Act it was exempted from the provisions of the NDDC Act. It argued that any application of the NDDC Act to it amounted to the introduction of a new fiscal regime for the investment project and therefore an implied repeal of the fiscal regime guaranteed in the Nigeria LNG Act. According to the Nigeria LNG Ltd, the LNG Act being a special law and one that was earlier in time, the NDDC Act could only over-ride it expressly and this was not the case.[116]
The NDDC contended that such a reading of the law fettered the legislative powers of Nigeria's sovereign parliament and was therefore null and void by virtue of the constitution.[117] The court upheld the NDDC's argument on this point stating as follows:

> However the provision on New Laws under Schedule II paragraph 3, I find and hold is against the tenets of the Rule of Law [...] *This particular provision is very wide and not consistent with the tenets of constitutional provisions which allow the National Assembly to make laws for the good of all people of this country [...] I agree[...] that paragraph 3 of the Schedule II of the Nigeria LNG Act is unconstitutional [...]. This fetters the legislative powers of the National Assembly.*[118]

Enshrined in the Nigeria national law are provisions that create a fiscal regime for the investment project to allow for stability.[119] Section 3 of the Second Schedule to the law states that "Without prejudice to any other provision contained herein, *neither the company nor its shareholders in their capacity as shareholders in the company shall in any way be subject to new laws, regulations taxes duties imposts, or charges of whatever nature* which are not applicable generally to companies incorporated in Nigeria or to shareholders in the companies incorporated in Nigeria respectively.
Section 6 states that:

> in order to afford the degrees of securities required to enable the company's investment to be made, *the Government further agrees to ensure that the said guarantees, assurances and undertakings shall not be suspended, modified or revoked during the life of the venture except with mutual agreement of the government and the shareholders of the company.*

This freezing of the fiscal regime meant that the government could not levy the foreign investment project in order to raise revenue for the economic develop-

116 At pp. 22 and 23.
117 At p. 25.
118 At p. 32, emphasis added. Based on this judgement, the House of Representatives quickly set in motion the process of amending the Nigeria LNG Act.
119 *See* Section 118 First Schedule of the LNG Act.

ment of the Niger Delta region. This is a typical example of an investment project proposing to be superior to legislation and fettering parliament's legislative powers.

Another example of a national law with a fiscal stabilization provision can be found in the Chilean law which only stabilizes taxes. It provides that; "The tax regime, benefits, privileges and exemptions provided in any of the articles hereof, which shall be recorded in the special operation contract, shall remain invariable for the duration thereof."[120]

It is my submission that stabilization provisions such as the ones above that freeze the fiscal regime of an investment project place the government at a disadvantage when the government has to enact legislation to amend its tax laws and increase the tax due from oil and gas investment companies. Such increase in taxes, levies and charges are, in most cases, necessary to raise funds for the government to deal with social and environmental issues. Developing countries need all the money they can get to develop their economies and having provisions that freeze the law and make the government liable to pay compensation to the foreign investor for amending taxes hampers the endeavours of the government to successfully develop their economies.

1. Reasons for Not Freezing the Fiscal Regime

The basic reason for taxation in any economic centre is the need to raise revenue for economic and social development and to guide taxpayers' behaviour.[121] In many Oil Producing Countries (OPCs), oil is treated as a patrimonial inheritance[122] belonging to the whole nation including future generations. Consequently, taxing the oil and gas (or any mining sector for that matter) becomes a way of achieving government's objective of exercising right and control over this public asset. A government may impose (very high) tax as a way of regulating the number of participants in the industry and discouraging its rapid depletion in order to conserve some of it for future generations.[123] This, in effect, will also achieve the government's aim of controlling the oil and gas sector development.

Another reason for not freezing the fiscal regime is that the high profit profile of a successful investment in the oil and gas industry makes it a suitable source for satisfying government's objective of raising money to meet its socio-political and economic obligations to the citizenry.[124] In many OPCs, taxes from the oil industry exceed taxes from other sectors, especially for those developing countries whose economies are not diversified.

120 Decree – Law 1089 of 1975, Art. 12 and 12.1.

121 *See* H. Razavi, 'Financing oil and gas projects in developing countries', <www.worldbank.org>.

122 *See* the preamble to the proposed South African Mineral and Petroleum Royalty Bill of 10 March 2003. *See also* Art. 27 of the Mexican Constitution

123 Bede O.N Nwete, 'Mineral and Petroleum Taxation How Can Tax Allowances Promote Investment In The Nigerian Petroleum Industry?' taken from <www.dundee.ac.uk/cepmlp/car/html/car8_article14.pdf>.

124 Id., p. 7.

An additional reason put forward for not freezing the fiscal regime has to do with the government's objective for re-distributing wealth. Petroleum taxation has become an instrument for wealth re-distribution between the wealthy and industrialized economies where most of the foreign investors come from.[125] The foreign investors own the technology, expertise and capital needed to develop the industry in the poor and emerging economies from where the petroleum resources are extracted. After extraction of the oil or gas, the foreign investors then repatriate their earnings, which are often very huge profits, to their wealthy countries. Therefore, extracting rent from them in the form of taxation is a way of achieving the objective of wealth re-distribution, among these nations.[126]

A further reason put forward for not freezing the fiscal regime is connected to the environment. The high potential for environmental pollution and degradation stemming from industry activities makes it a target for environmental taxation, as a way of regulating its activity and promoting the government's quest for a cleaner and healthier environment.[127] Through the necessary amendments of the tax legislation applicable to the foreign investment project, cleaner production may be achieved by imposing taxes for pollution and other environmental offences.

III. Implications of Stabilization Provisions for Government Environmental Regulation

A growing body of international law on environmental protection is emerging through an increasing number of international treaties.[128] The international law on environmental protection has also increased due to the increasing integration of environmental features in treaties with a broader sphere of activity.[129] The International Court of Justice (ICJ)[130] and other international dispute settlement bodies'[131] have also begun to pay more attention to environmental issues. Because of these developments, one finds that activities that were subject to very limited environmental regulations are now under stricter standards.[132] In light of these developments, it has been argued that it is reasonable to expect that more

125 Id.

126 *See* R. Garnaut and A. Ross, *Taxation of Mineral Rent,* Clarendon Press, Oxford, 1983.

127 Id.

128 These laws reflect the momentum generated by international conferences such as the 1972 UN Conference on the Human Environment in Stockholm and the 1992 UN Conference on Environment and Development in Rio.

129 *See*, *for instance*, Art. 32 of the 2000 ACP-EU Cotonou Agreement, and Art. 19 of the 1994 Energy Charter Treaty.

130 *See*, *for instance*, *the Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, (1997) ICJ rep 92 (25 September), 73 ILM 162 (1998).

131 For instance, *see* the World Trade Organisation case *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, Doc, Ab-1998-4 WT/DS58/AB/R (12 October 1998) 38 ILM 121.

132 On the growing role of environmental regulation in the petroleum and mining sectors, *see for instance* M.A. Bekhechi, 'International Investment and Environmental Protection; Notes on the Environmental conditions of investment in the oil and mining sectors, in International Bureau of the Permanent Court of Arbitration, ed., International Investment and the Protection of the Environment; The Role of Dispute Mechanisms', 2001, pp. 73-90.

stringent international environmental standards are likely to emerge over the next few decades.[133]

Due to the foregoing stabilization provisions, which are a widely used political risk-management device in investment legislation, they may also affect a state's action to implement its international obligations through national laws. Specifically, stabilization provisions can limit the application of new social and environmental regulations to investment activities over the life of the investment. Activities relating to the exploration, exploitation, transportation and distribution of natural resources, such as oil or gas, are known to have a potentially serious impact on the local environment where the foreign investment project is located.[134] Freezing provisions, therefore, establish a more fundamental limitation of state sovereignty[135] and doubts on the ability of freezing provisions to prevent regulation by the government have been expressed by several commentators.[136]

1. Human Rights Relating to the Environment

A study conducted in 2008[137] found that stabilization provisions are sometimes drafted so as to insulate foreign investors from having to implement new environmental and social laws and rights. Problems with stabilization provisions and human rights arose in earnest in 2003.[138] It was argued that, exempting an investment project from new laws aimed at protecting human rights, limited the government's action to draft legislation to implement its obligations under international human rights laws at a national level. Consequently, drafters receiving drafting instructions to amend existing legislation on foreign investment should be aware that there is growing concern that failure to balance human rights interests can make foreign investments exempt from bona fide social and environmental laws that come into force after the effective date of the agreement.

133 *See* Cotula, 'Reconciling Regulatory stability and evolution' p. 168.

134 G. Verhoosel, 'Foreign Investment and Environmental Regulatory Change In Developing And Transition Economies: How To Reconcile The Tension For The Benefit Of Technology Transfer', CEPMLP, Vol. 1, Art. 1.

135 *Supra*, n. 108.

136 N. Nassar, 'Sanctity of Contracts Revisited: A Study in the Theory and Practice of Long-Term International Commercial Transactions', 1995; T. Wälde and G. N'Di, 'Stabilising International Investment Commitments', *Texas Int'l. LJ,*Vol. 31, 1996, p. 215.; P. Bernardini, 'The Renegotiation of the Investment Contract', *I.C.S.I.D. Rev – FILJ*, Vol. 13, No. 1, 1998, pp. 411-425; P. Muchlinski, *Multinational Enterprises and the Law,* 1999; K. P. Berger, 'Renegotiation and Adaptation of International Investment Contracts: The Role of Contract Drafters and Arbitrators', *Vanderbilt Journal of Transnational Law,* Vol. 36, No. 3, 2003, pp. 1347-1380; A.F.M. Maniruzzaman, 'Stabilisation in Investment Contracts and Change of Rules by Host Countries: Tools for O & G Investors, Association of International Petroleum Negotiators', 2007; P.D. Cameron, 'Stabilisation in Investment Contracts and Change of Rules by Host Countries: Tools for O & G Investors, Association of International Petroleum Negotiators', 2007.

137 'Stabilization Clauses and Human Rights, A research project conducted for IFC and the United Nations Special Representative to the Secretary General on Business and Human Rights', 11 March 2008.

138 This was when the oil company BP published its private investment contracts relating to a major cross-border pipeline project (the Baku-Tbilisi-Ceyhan pipeline crossing Azerbaijan, Georgia, and Turkey). *See also* 'Stabilization Clauses and Human Rights', Id. p. 16.

Another note for the drafter is that apparently, the negative effects of stabilization provisions are exacerbated in developing countries, where there need is for rapid legislative development and implementation.[139]

The inherent flaws within stabilization provisions are that governments often see stabilization provisions as a way of encouraging foreign investment and providing a favourable investment climate for such foreign investments, so legislative drafters are instructed to draft stabilization provisions as a way of providing assurances to the foreign investors.[140] However, the tragedy with drafting such sweeping stabilization provisions, along with freezing certain legislation, appears to tilt the law in favour of the foreign investor; in order for the government to secure large foreign investment projects and enticing further investment into the country. This imbalance creates human rights problems relating to the environment as the government will be prohibited from enacting laws to protect the environment where the local people stay.[141]

2. Treaties on the Environment

Problems with stabilization provisions are also more pronounced when a government has to ratify international treaties or amend domestic legislation in order to comply with evolving international obligations on environmental protection.[142] This is particularly the case where regulatory change has the effect of raising the cost of an ongoing investment project – for instance, due to tighter requirements on environmental pollution or increased protection of ecosystems or species affected by the investment project. In this instance, an economic balancing provision in the foreign investment legislation would enable the government to adopt regulations raising environmental standards and also enable the restoration of the economic equilibrium with the foreign investor.

This legal liability to pay compensation may make it more difficult for governments, especially poor ones, to adopt legislation or ratify treaties raising environmental standards as arbitration tribunals usually award huge sums as compensa-

139 Id.

140 T.W. Wälde, 'Stabilising International Investment Commitments: International Law Versus Contract Interpretation', p. 217.

141 *See* 'Stabilisation Clauses and Human Rights', A research project conducted for IFC and the United Nations Special Representative to the Secretary General on Business and Human Rights, p. 45.

142 *See* G. Verhoosel, 'Foreign Direct Investment and Legal; Constraints on Domestic Environmental Policies; Striking a "Reasonable" Balance Between Stability and Change'; G. Verhoosel, 'Foreign Investment and Environmental Regulatory Change In Developing And Transition Economies: How To Reconcile The Tension For The Benefit Of Technology Transfer'; T.W. Wälde & A. Kolo, 'Environmental Regulation, Investment Protection and "Regulatory Takings" in International Law'.

tion.[143] The difficulties are more prominent in Sub-Saharan Africa, which is mostly comprised of developing nations, and therefore has a much higher rate of freezing clauses than other regions.[144] Because they are developing countries, this also means that the laws in the respective jurisdictions are constantly changing to cater for the developments.

In this instance, the inherent flaw in a stabilization provision is that; a particular feature of environmental treaties or legislation is that policies, charges and levies change regularly in order to adapt to constantly changing environmental and economic conditions, therefore freezing changes in environmental legislation means that a government cannot adapt its legislation to modern trends and make the investor more accountable and responsible for damage to the environment caused by pollution from oil and gas extraction or processing.[145]

This will mean that a government that is intent on pursuing sustainable policies will be faced with a conflict between domestic environmental tax regimes and investment stability legislation. Another fact to bear in mind is that those drafters who drafted the kind of stabilization provision that froze the general legislative framework made it a breach for the government to adopt any significant environmental policy measure.[146] In developing countries this would mean that a government would rather not implement any new environmental policies than be liable to pay compensation to the foreign investor.

In recent decades, environmental and social legislation has caused investors to rely on the use of stabilization provisions to protect their investments from costs resulting from changes in environmental legislation.[147] Therefore, the require-

143 *See* the following cases on an extensive discussion on expropriations and compensations, *The Government of the State of Kuwait v. The American Independent Oil Company* ('Kuwait v Aminoil') Yearbook IX (1984) p. 95; *Texaco Overseas Petroleum Co. (TOPCO) & California Asiatic Oil Co. v. Government of the Libyan Arab Republic*, Award of 19 January 1977, 17 ILM (1978) p. 3, Yearbook IV (1979) p. 177; *LIAMCO v. Libya, Yearbook* VI (1981) p. 89*; Amoco International Finance v. Iran*, 15 Iran-US CTR p. 189; *BP v. Libya*, 53 International Law Reports (1979) p. 297, Yearbook V (1980) p. 143; *AGIP v. Congo* Yearbook VIII (1983) p. 133.

144 Id., p. 48.

145 G. Verhoosel, 'Foreign Direct Investment and Legal; Constraints on Domestic Environmental Policies; Striking a "Reasonable" Balance Between Stability and Change', *Law & Pol'y Int'l Bus*, 1997-1998, p. 456.

146 Id.

147 *See* T.W. Wälde and G. Ndi, 'Stabilizing International Investment Commitments: International Law Versus Contract Interpretation,' *Tex. Int'l L.J.*, Vol. 31, 215, 230-1:

> Perhaps most relevant at the moment [as of 1996] is the imposition of new environmental obligations by subsequent regulation or by an administrative/judicial ruling reinterpreting existing law on which the investment decision may to some extent have been based. While environmental liability is seen as a major political risk in transition economies, unforeseen environmental opposition and restrictions constitute, at the moment, a major (and, in natural resources/energy projects, the prime) political risk facing developers of new industrial projects in Western countries. With this experience in mind, it is understandable that foreign investors will wish to protect their position at the moment of their most favourable bargaining power—*i.e.*, when dealing with a weak (developing or transition) government anxious to attract investment before and during the negotiations for an attractive investment

ment in legislation that the government has to pay for compliance costs that a foreign investor incurs for compiling with new environmental laws and regulation is wrong in principle,[148] because it denies the government its proper role as legislator; with powers different and greater than companies. Furthermore, it creates a financial disincentive for the government, thus chilling or hindering the application of dynamic social and environmental standards over the life of a long-term project.

3. Evolving Environmental Policies

An important fact to note for modern drafters is that, the continued use of stabilization provisions in national laws may cause the continued application of environmental regulations below international standards for decades to come.[149]As stated before, this is particularly problematic in poorer developing countries where the national legal framework regulating environmental protection may not be well developed, and where compliance with stabilization provisions may entail the continued application of low environmental standards for decades to come. As a result of this, significant irreversible environmental damage may occur in and around the local area where the foreign investment project is located; what's more, the government faces the risk of currently unknown environmental hazards which may be discovered in the future and which may be prevented or minimized through new environmental regulations.[150]

IV. Analysis of Section C.

Drafters who drafted stabilization provisions were most probably unaware of the fact that there are circumstances that may compel a state, for reasons of public interest, to enact laws to cater for such unforeseen circumstances and also that such new legislation may interfere with rights that have already been conferred. This therefore means that even though there exist stabilization provisions in legislation which purport to stabilize rights to foreign investors such as repatriation, tax holidays, customs reductions, and the freezing of tax and labour legislation, this is not an absolute guarantee that a government will adhere to such legislative

148 *See* L. Cotula, 'Stabilisation Clauses and the Evolution of Environmental Standards in Foreign Investment Contracts.' *See also* 'Heavy Mittal? A State within a State: The inequitable Mineral Development Agreement between the Government of Liberia and Mittal Steel Holdings NV', October 2006, available at <www.globalwitness.org>.

149 *See* Cotula, 'Reconciling Regulatory Stability and evolution', *supra*, n. 5 at page 3, p. 170. He argues that this will result in a 'regulatory chilling' as there will be selective regulation. Meaning that the government in order not be legally liable will adopt environmental standards but exclude the foreign investment from the application of these regulations.

150 *See, for instance,* the considerable importance of the Chad-Cameroon pipeline project for the national economy of Chad and the important concerns raised by civil society on the project's social and environmental standards both in Chad and Cameroon. *See also* the Chad-Cameroon Oil and Pipeline Project; Profit at any cost (2000) available at <web.worldbank.org/external/projects/main?pagePK=64283627&piPK=73230&theSitePK=40941&menuPK=228424&Projectid=P044305>. *See also* 'Stabilisation Clauses and Human Rights', A research project conducted for IFC and the United Nations Special Representative to the Secretary General on Business and Human Rights, p. 41.

promises as has been stated, due to the fact that certain circumstances in the future may compel the government to amend such legislative promises added to the fact that a government has the right to impose tax on anyone resident in its territory and further amend the tax payable as it sees fit in order to raise public revenue.
Modern drafters should also be aware of ongoing debates in the international sphere in order to appreciate why stabilization provisions should not be used. As an illustration, there is an on-going argument that a state has permanent sovereignty over its natural resources and that "a state never loses its legal capacity to change the status or the method of exploitation of such resources, regardless of any arrangements that may have been made".[151] Additional to the foregoing paragraph, there is also the doctrine of parliamentary sovereignty with which most legislative drafters are familiar. One parliament cannot bind its successor.[152] This, therefore, means that the permanence of a stabilization provision in investment legislation will be uncertain as the guarantee that is proposed to be stabilized by the provisions may cease to exist if the statute is repealed by a successor government. Also, a change of government or an alteration of the already existing political ideology of the government of the day may also result in the repealing of the legislation which contains stabilization provisions.[153]

If taxes are stabilized for various foreign investors, an administrative challenge can arise over time. As the underlying tax laws change, each stabilized foreign investment will have a tax regime dating to the time the stabilization agreement was entered into. This means that at any one point in time, different investment projects will be subjected to different tax regimes, and the government agency charged with tax administration will face an increasingly complicated situation of monitoring and enforcing each regime.

Drafters should also understand that the fundamental purpose of taxing any entity within a state's realm is solely to raise public revenue for social and economic developments. Mineral resources are one of the major public revenue sources. Therefore, a state with control over its natural resources should be entitled to tax those exploiting the natural resources for the good of its citizens. Stabilization provisions consequently make it cumbersome for the government to properly control its natural resources and raise public revenue in the way it sees fit to best meet its policies on social and economic development.

151 Proponents of a nation's right to 'permanent sovereignty' are found in the views of several 'formidable commentators' and pronouncements from the U.N. Doc A/Res/1830 (XVII) 19/12/1962; *See also* E. Jimienez de Arechaga, 'State Responsibility for the Nationalization of Foreign Owned Property' *N.Y.U. J. INT'L L. & POL.*, Vol. 11, 1978, pp. 179-180. *See also* N. Schrijver, *Sovereignty Over Natural resources; Balancing Rights Over Duties*, 1997.

152 *See* F.R.A. El Sheikh, *The Legal Regime of Foreign Private Investment in Sudan and Saudi Arabia,* Cambridge University Press, 2003, p. 138.

153 Id.

D. A Possible Solution: The 'Economic Balancing Provision'

Identifying a problem is often relatively easy but finding and implementing a solution is much more difficult.[154] In the case of legislative drafting, the problem of poor drafting caused by stabilization provisions and its causes is discussed in the previous section. Therefore, having put forward the negative implications of the use of stabilization provisions by legislative drafters in national legislation relating to foreign investments, particularly with relation to oil and gas agreements, this section will endeavour to present a solution to address the problems posed by stabilization provisions. This solution will be in the form of economic balancing provisions. The section will explain what an economic balancing provision is, the advantages of an economic balancing provision and also why drafters should endeavour to use this provision to address the problems caused by stabilization provisions.

I. Economic Balancing Provisions

It has been said that the use of drafting principles from the first step in the drafting process imposes a discipline on the analysis that not only produces language and legislation that is simpler and more easily understood, but also a solution to the problem that is itself less complex and more easily understood and implemented.[155] One of these principles that a drafter should impose on the drafting process is the sovereignty of a state or more particularly the sovereignty of parliament.

As the exercise of sovereign authority by a government cannot be restrained by virtue of a stabilization provision in the national laws[156] certain techniques have recently been developed in a way that respects this reality and at the same time protects the economic equilibrium of the foreign investment agreement. This modern technique is known as economic balancing provision or economic stabilization provision.[157]

An economic balancing provision has been defined as; provisions that link the legislation applicable to a foreign investment project to renegotiation of the investment agreement in order to restore the original economic equilibrium due to the introduction of new legislation, amendment of existing legislation or administrative actions which affect the investment project negatively or positively.[158]

154 *See* R.J. Martineau, *Drafting Legislation and Rules in Plain English* p. 6.

155 Id.

156 *See* A.F.M. Maniruzzaman, 'The Pursuit of Stability in International Energy Investment Contracts: A Critical Appraisal of the Emerging Trends', *JWELB*, Vol. 1, 2008, p. 126.

157 Id.

158 *See* L. Cotula, 'Reconciling regulatory stability and evolution of environmental standards in investment contracts: towards a rethink of stabilisation clauses', *JWELB*, Vol. 1. No. 2, 2008, p. 161.

The way in which an economic balancing provision is different from a stabilization provision is that the economic balancing provision is drafted in such a way that it seeks to stabilize the economic equilibrium of the investment agreement itself rather than stabilize the legislative framework applicable to the investment project.

The use of economic balancing provisions by drafters in national legislation on foreign investment as a means of achieving stability and flexibility in oil and gas investment agreements, between the host government and the foreign investor, has gained considerable acceptance in the recent past.[159] It has been projected as a better alternative to the traditional stabilization provision in this respect.[160]

An example of an economic balancing provision can be found in the national laws of Russia. The Russian Production-Sharing Agreement (PSA) Law[161] provides that;

> *If, during the lifetime of the Agreement, the legislation of the Russian Federation*, the legislation of the Russian Federation subdivisions and statutory acts of local self-government bodies *establish regulations adversely impacting Investor's commercial results under the Agreement, the Agreement shall be subject to amendments in order to ensure that the Investor obtains the commercial results which he could have obtained if the legislation of the Russian Federation* subdivisions and statutory act of local self-government bodies, *had applied*. The procedures for making such amendments shall be defined in the Agreement. [162]

Thus, the way that the Russian PSA Law is drafted obliges the Russian authorities to conduct a renegotiation of the PSA when new legislation is drafted which has a

159 *See* C. Cellich, 'Contract Renegotiations, the neglected phase of the process', International Trade Forum, p. 11 (<www.tradeforum.org>); S. Asante, 'Stability of Contractual Relations in the Transnational Investment Process', *ICLQ*, Vol. 28, 1979, p. 413; T.W. Wälde & A. Kolo, 'Renegotiation and Contract Adaptation in International Investment Projects: Applicable Legal Principles and Industry Practices', *OGEL*, Vol. 2, 2003, p. 3. *See also* K. Berger, 'Renegotiation and Adaptation of International investment contracts: the role of contract drafters and arbitrators', *Vanderbilt Journal of Transnational Law*, Vol. 36, 2003, p. 1348. And J. Salacuse, 'Renegotiating International Project Agreements' *Fordham International Law Journal,* Vol. 42, 2001, p. 1370. While some of these writers see it as a panacea to the problem of instability and inflexibility inherent in long-term contracts, others see it merely as a step towards solving the problem caused by stabilisation provisions. *See* J. Gotanda, 'Renegotiation and Adaptation Clauses in Investment Contracts, Revisited', *Vanderbilt Journal of Transnational Law,* Vol. 36, 2003, p. 1461. *See also* W. Fox, *International Commercial Agreement, A primer on drafting, negotiation and resolving disputes,* 3rd edn, Kluwer Law International, The Hague, 1998, p. 224. *See also* the studies by A.F.M. Maniruzzaman, 'Stabilisation in Investment Contracts and Change of Rules by Host Countries: Tools for O and G investors', *Association of International Petroleum Negotiators*, 2005, pp. 1-251 and P.D. Cameron, 'Stabilisation in Investment Contracts and Changes in of Rules in Host Countries; Tools for Gas and Oil Investors', *AIPN*, 2006, pp. 1-116.

160 Id.

161 Approved by the Duma on 6 December 1995. *See* Russian Federation Law; Law on Production Sharing agreements, I.L.M. 1996, 35, p. 1251.

162 Emphasis added.

negative impact on the commercial results of the investor. This allows an economic equilibrium to be achieved between the government and the foreign investor. This economic balancing provision is more effective than a stabilization provision, since the economic balancing provision allows for legislation to be drafted adopting changes in either environmental, labour or fiscal policies. However, in drafting this provision, a drafter must also provide that the changes that are adopted through legislation or administrative actions should be with the aim of brining the environmental, labour or fiscal regimes into line with internationally accepted standards.[163]

Another national law that has an economic balancing provision can be found in Article 25 (2) of Kazakh law concerning Production Sharing Agreements (2005)[164] which provides that:

> If during the effective term of the production sharing agreement other norms are established by legislation of the Republic of Kazakhstan *which deteriorate or improve commercial results of the activity of the contractor* within the framework of the production sharing agreement, *amendments shall be introduced to the production sharing agreement which secure commercial results to the contractor which might have been obtained by the contractor in the event of application of the Republic of Kazakhstan in effect as of the moment of execution of the production sharing agreement*.[165]

The way this provision has been drafted ensures that under the law a balance is struck between the interests of both the government and the foreign investor. Therefore, should government issue instructions to draft legislation to either increase or decrease the tax rate, which legislation might either deteriorate or improve the foreign investor's profits, there will be room for renegotiation to restore the original economic equilibrium.[166] The same also applies for new environmental or labour legislation, or legislation in general. The provision provides the government and the foreign investor an opportunity to renegotiate the agreement to cater for effects of the new or amended legislation.

II. Drafting Techniques for Economic Balancing Provisions

A drafter who receives drafting instructions to draft legislation that has an economic balancing provision should be aware that there are three different categories of economic balancing provisions[167] and these are (i) Stipulated Economic

163 *See* K. Hober, 'Russian Oil Legislation: An Overview', *Parker Sch. J. E. Eur. L.*, Vol. 2, 1995, p. 447.

164 Kazakh law concerning Production Sharing Agreements, Law of 8 July 2005.

165 Emphasis added.

166 A.F.M. Maniruzzaman, 'National Laws Providing for Stability of International Investment Contracts; A Comparative Perspective', *JWIT*, Vol. 2, No. 2, p. 236.

167 *See* F.C. Alexandra, 'The Three Pillars of Security Investment Under PSCs and Other Host Government Contracts', *Institute of Energy Law of the Centre of American Law's Fifty Fourth Annual Institute on Oil and Gas Law*, Publication 640, Release 54, Lexis Nexis Matthew Bender, 2003, s 7.30 [1].

Balancing (SEB); (ii) Non-specified Economic Balancing (NSEB); and (iii) Negotiated Economic Balancing (NEB).
The way in which the drafter will decide which type of provision to use will mostly depend on the drafting instructions and how the government prescribes the different ways of re-establishing the economic equilibrium of the foreign investment agreement.[168]

1. Stipulated Economic Balancing

The Stipulated Economic Balancing provision provides for the automatic amendment of the foreign investment agreement in a stipulated manner. The stipulation can be that the economic balancing will be achieved by re-adjusting the 'profit petroleum split' in the case of production sharing agreements.[169] This provision will have clarity of expression as to expressly and precisely how the amendment will be implemented; and a drafter knows that clarity is important in legislative drafting.[170] Crabbe goes on further to state that a drafter has to consider the concepts contained in the provisions of his or her drafts,[171] that "a concept is vague if in a given context it leaves open too wide a range of borderline cases to delimit precision in that context". In this instance the drafter must ensure that the stipulated economic balancing provision clearly sets out the limits which apply to the re-adjustment of the foreign investment project.
An example of national law that has this type of economic balancing provision can be found in Article 25 (2) of Kazakh law concerning Production Sharing agreements (2005)[172] which provides that:

> If during the effective term of the production sharing agreement other norms are established by legislation of the Republic of Kazakhstan *which deteriorate or improve commercial results of the activity of the contractor* within the framework of the production sharing agreement, *amendments shall be introduced to the production sharing agreement which secure commercial results to the contractor which might have been obtained by the contractor in the event of application of the Republic of Kazakhstan in effect as of the moment of execution of the production sharing agreement*.[173]

2. Non-specified Economic Balancing

This type of provision while also providing for automatic amendment of the foreign investment agreement, does not stipulate the nature of the amendment, nor does it require mutual agreement between the government and the foreign investor. This allows for governments to amend legislation in a manner it deems

168 *See* A.F.M. Maniruzzaman, 'The Pursuit of Stability in International Energy Investment Contracts: A Critical Appraisal of the Emerging Trends', p. 127.
169 Id.
170 *See* V.C.R.A.C. Crabbe, *Legislative Drafting*, p. 42; and R.J. Martineau, *Drafting Legislation and Rules in Plain English*, p. 7.
171 Id.
172 Kazakh law concerning Production Sharing Agreements, Law of 8 July 2005.
173 Emphasis added.

fit in accordance with the principle of good governance and sovereignty over natural resources.[174] An example of such a provision is found in a ratified Azeri production sharing agreement which provides that:

> In the event that any Governmental Authority invokes any present or future law, treaty, inter governmental agreement, decree or administrative order which contravenes the provisions of this agreement or adversely or positively affects the rights or interests of Contractor hereunder, including, but not limited to, any changes in tax legislation, regulations, or administrative practice, *the terms of this agreement shall be adjusted to re-establish the economic equilibrium of the parties [...]*.[175]

3. Negotiated Economic Balancing

A Negotiated Economic Balancing provision requires that the government and the foreign investor negotiate the amendments to the ratified agreement.

The emphasis here is on the careful drafting of provisions that provide for renegotiation or re-adjustment so that there is a detailed provision of the situations that may be counted as having a significant or material effect on the economy or environment necessitating amendments. There has to be appropriate carve-outs so that there are no ambiguities left.[176] Where the provision is drafted in clear unambiguous terms, and also in accordance with the principle of state sovereignty over natural resources, the government will not be prevented from exercising its sovereign powers for public good and in the public interest.[177] This further means that the government can also regulate foreign investors who conduct activities in a manner that is not beneficial to the environment or the citizenry without fear of compensation.

International case law also seems to be responding positively to this recent practice. In the *Methanex* case[178] the tribunal under the North American Free Trade Agreement (NAFTA) had to test the issues of the State's right to regulate for the public good. In this case, a Canadian company sought to hold the US liable for enacting regulations which had the effect to expropriating the company. The company argued that the State of California had destroyed a profitable business by banning the use of a certain fuel additive, methyl tertiary-butyl ether (MTBE). In defence the US argued that the California ban was a legitimate exercise of regulatory power to prohibit the marketing of a production which was dangerous to

174 *See* IIED & Partners, 'Lifting the Lid on Foreign Investment Contracts: The Real Deal for Sustainable Development', International Institute of Environment and Development.

175 *See* A.F.M. Maniruzzaman, 'The Pursuit of Stability in International Energy Investment Contracts: A Critical Appraisal of the Emerging Trends', *supra*.

176 *See* J. Rothchild & A. Reed, 'Drafting material adverse change clauses in light of Delaware case', November/December 2007, Inside M&A [McDermott, Will & Emery], p. 1. *See also* K. Adams, 'Revisiting Materiality – the ambiguity at the heart of a fundamental concept', *NYLJ*, Thursday 16 August 2007, GC New York, <www.almreprints.com>.

177 *See generally* A.F.M. Maniruzzaman, 'Damages for breach of stabilisation clauses in international investment law: where do we stand today?' *IELTR*, Vol. 11/12, 2007, pp. 246-251.

178 *Methanex Corp v. United States of America*, Award of 5 August 2005.

public health. The tribunal decided in favour of the US that "from the standpoint of international law, it was a lawful regulation and not an expropriation [...] that the ban was motivated by the honest belief, held in good faith and on reasonable scientific grounds, and the MTBE (the disputed additive) contaminated groundwater and was difficult and expansive to clean up."[179]
Another decision to take note of is that in *Saluka v. Czech Republic*[180] where the tribunal stated that:

> it is now established international law that States are not liable to pay compensation to a foreign when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner bona fide regulations that are aimed at the general welfare.[181]

III. Why Substitute Stabilization Provisions with Economic Balancing Provisions
One of the major reasons for the growing popularity of economic balancing provisions in national laws has been attributed to their greater flexibility and versatility.[182]
A further argument put forward as a reason why drafters should resort to economic balancing provisions instead of stabilization provisions is that a government which owns mineral rights and enters into an agreement which has the force of law, with a foreign investor to exploit and develop the natural resources at a time when the government is not certain as to the extent, quality, and future prices of the natural resources, will want to have legislation that is flexible and amenable to change with the changing circumstances in both domestic and international political and economic situations.[183]
The other reason[184] is related to the principle of permanent sovereignty over natural resources which allow a government to unilaterally repeal or amend legislation relating to the exploitation of its natural resources. In this instance, an economic balancing provision allows the government to regulate the various matters within its jurisdiction such as the environment, tax, fixing the price levels,[185] production control, labour issues, public health, safety and all other matters that fall within a government's eminent domain and police powers.[186]

179 Id., Part IV, Ch. D, para. 15.
180 *Saluka Investments BV (The Netherlands) v. Czech Republic*, Partial Award, 17 March 2006, <www.investmentclaims.com>.
181 Id., para. 255.
182 *See* Cotula, 'Reconciling Regulatory Stability and Evolution'.
183 *See* T.W. Wälde & A. Kolo, 'Renegotiation and Contract Adaptation in International Investment projects: Applicable legal principles and industry practices', *OGEL,* No. 2, 2003, p. 3.
184 *See* K. Hossain & S.R. Chowdhury (Eds.), *Permanent Sovereignty over Natural Resources in International Law*, Pinter, London 1984.
185 T.W. Wälde & A. Kolo, *supra* n. 156, state that oil companies in the 1970s determined the rate of production and also set the prices at which they sold their products and that the host state had little or no say in the exploitation and management of its natural resources.
186 Id. *See also* A.F.M. Maniruzzaman, 'The Pursuit of Stability in International Energy Investment Contracts: A Critical Appraisal of the Emerging Trends' p. 141.

Compared with a stabilization provision, an economic balancing provision allows the government, in times of low prices for the natural resource or where the investment project is facing difficulties, to amend its tax laws and reduce the fiscal burden on the foreign investor to maintain the foreign investment.[187] The same also applies when there are sudden explosions of prices for the commodity, the government can also amend its tax laws and increase the tax payable by the foreign investor in order to also profit from the increase in prices.

Another reason why drafters should resort to economic balancing provisions in modern drafting is that governments often issue drafting instructions to draft new laws or amend existing laws based on what other jurisdictions are doing or based on recommendations by international organizations.[188] For example, technical standards on environment, labour and safety have the propensity to evolve and these standards are often incorporated in recommendations, guidelines and codes by international organizations[189] and governments instruct that such recommendations be incorporated in the national laws by enacting them in legislation. An economic balancing provision therefore gives the government the flexibility to amend its legislation as and when such recommendations are made from time to time.

Another important fact to note is that an economic balancing provision enables the government to amend the labour laws that are applicable to a foreign investment project so that local labour is not taken advantage of.[190] The government can do this by enacting laws stating the minimum threshold for wages for those employed by the foreign investor. With a stabilization provision that freezes the general law, such amendments will be thwarted by this provision and the local workforce may be disadvantaged. The amended labour laws can also state that local people are to be given preference when the foreign investor is hiring people.[191] This will ensure that the government is working towards its objectives of a prosperous nation.

IV. Analysis of Section D.

Problems with stabilization provisions need a solution which, while ensuring stability in the oil and gas foreign investments, investor protection, and promotion of foreign investment, also allows a government whose natural resources are being exploited to introduce legislation applicable to the foreign investment which addresses changes in the fiscal regime, environmental regulations, labour and other pertinent issues.

This solution is found in an economic balancing provision which has been growing in popularity in the oil and gas industry. These provisions are the legislative framework through which governments can achieve their purposes such as economic, cultural, political and social policies. Economic balancing provisions,

187 *Supra*, n. 156, p. 10.
188 Id., p. 12.
189 Such as OPEC, UN, EU, AU.
190 *See* J.H. Hines and J.B. Varanese, 'Turkmenistan's Oil and Gas Sector; Overview of the Legal Regime for Foreign Investment', *J. Energy Nat. Resources L.,* Vol. 19, 2001, p. 58.
191 Id. p. 59.

especially in developing countries, will become a necessity in order for governments to affect changes in law. Consequently, the limiting effect of legislation on government should be used diligently.

We have seen how stabilization provisions can be so encompassing that they reduce the ability of the government in respect to its legislative powers and administrative acts to such an extent that it becomes difficult for a government to regulate matters in the public interest. We have also see how drafters can use economic balancing provisions in foreign investment legislation instead of stabilization provisions to achieve the same effect of making foreign investment conditions attractive and yet also, at the same time, draft the legislation in such a way that it is conducive to take on board any economic, social and environmental changes that may occur, unforeseen or otherwise.[192]

While legislation on oil and gas in the western economies has generally evolved through socio-economic and political process, the legislative and regulatory development in developing economies must keep pace with, or anticipate, the unprecedented rate of political, economic and social change taking place.[193] This will not be possible if legislative drafters continue using stabilization provisions and freezing legislation as a way of guaranteeing and promoting foreign investment. A government will be more capable of keeping abreast with changes in politics, economies and social changes where economic balancing provisions are used to promote and protect foreign direct investments.

Ultimately, it must be added that current drafting practice has experienced a move away from the traditional and controversial use of stabilization provisions to a more flexible and preferred use of economic balancing provisions have been able to address the ailments presented by stabilization provisions.

E. Summary and Recommendations

I. Summary

As Crabbe stated, a legislative drafter performs an extremely difficult task in turning policy into legislation. There is much that is beyond their control and this is clearly demonstrated by policies on foreign direct investment. Most of the negotiations are conducted in the absence of the drafter and he or she only receives what has been eventually agreed upon without being offered a chance to remark on the legislative ramifications of the agreements. A drafter always has to think of the effect of a provision from many different angles and also think of the problems involved. This is no easy task when one has to consider the constitution, national legislation, and international law and treaty agreements.

Legislative drafters are conscious of the fact that natural resources within a state's territory are controlled by the state for the greatest prosperity and welfare of the people. The state therefore exercises its authority over the natural resour-

192 *See* G. Verhoosel, 'Foreign Direct Investment and Legal; Constraints on Domestic Environmental Policies; Striking a "Reasonable" Balance Between Stability and Change'.

193 *See* T.W. Wälde & J. Gunderson, 'Legislative Reform in Transition Economies; Western Transplants – A short-cut to social market economy status?' p. 29.

ces by enacting laws to regulate the use of such resources. The main purpose for legislation regulating natural resources, such as oil or gas, is the economic benefit of the people, integration, prosperity, welfare security, safety as well as concern for the environment. In order to realize these benefits, the government has the right to oblige foreign investors depleting the natural resources to pay state revenue in the form of tax.
Many governments enacted laws with stabilization provisions as they considered this the best way to promote foreign investments. However, as changing policies in the economic, social and environmental sectors have shown, such laws have proven to be challenging. The increase in the prices and strategic importance of raw materials such as oil, gas, and other minerals makes it problematic to draft stabilization provisions purporting to freeze fiscal or environmental laws applicable to a foreign investment project. Therefore an economic balancing provision is better equipped to address fluctuations in the economic and environmental regulations.

Besides the need to regulate an important industry, the government sees oil or gas as a patrimonial inheritance belonging to the whole nation including future generations. It must therefore keep watch over it at all times. As a result of this, the government will be reluctant to allow the foreign investor to retain any windfall profit or take a higher share of the economic payments accruing from the foreign investment project, and the only way to achieve this is by having legislation that is amenable to the needs of the government.
Legislative drafting involves the attempted solutions to problems faced by governments and by society as a whole. The problems could have been unconsciously caused by the government itself, such as from the discussions above, stabilization provisions hindering progressive development or may be caused by forces beyond the government's control, such as evolutions in environmental and human rights protections.

Where a drafter appropriately understands the problem, a solution will eventually surface. It does help though if drafters have adequate knowledge or basic knowledge in almost every subject matter. This is supplemented of course by research. Policies and law on foreign direct investment, particularly in the oil and gas sector, it is for this reason that drafters should keep as abreast as possible with developing trends in legislative drafting.
This of course does not mean that drafters have the duty to achieve economic stability and protect natural resources for the people. No, this duty falls squarely within the ambit of the executive. The drafter can only legislate on the basis of the purpose and policy directed by the executive. However, through the use of an economic balancing provision in national laws on oil or gas, the drafter can now offer a better solution to the executive's strive to please foreign investors without at the same time depleting the natural resources of their country by allowing legislation to be implemented as and when policy changes take place.[194]

194 I have to acknowledge Dr. Helen Xanthaki's input and comments in this paragraph and that I have used some of her words in the comments, albeit with certain modification.

The fact that stability and predictability are the bedrock of foreign investment, especially relating to oil and gas development, is not in doubt. But these often come into conflict with the needs of the governments for flexibility in the legislative framework to enable it to exercise its regulatory and sovereign powers. To achieve a balance between these two extremes, some legislative drafters often resort to the use of economic balancing provisions from the drafting instructions issued.

Legislative drafters who embark on the use of economic balancing provisions can improve their capacity to achieve the executive's desired level of stability and flexibility depending on how the provisions are drafted. Law does not operate in a vacuum. The content of legislation must therefore take cognisance of the cultural, economic, political and social conditions of the society within which it is intended to operate.[195]

It is necessary that a drafter has a sound knowledge of these conditions as they will eventually determine the effectiveness and implantation of the legislation, furthermore, the use of foreign policies, concepts and legislative choices must be undertaken with the context of a suitable case study.[196] If this is done, legislative drafters will notice that government will not be constrained to implement legislation for social, economic and environmental development as it will not be hard pressed to fear the consequences of, for example, raising taxes on oil and gas investment projects to raise more public revenue.[197]

II. Recommendations

In the final analysis, my recommendations to governments are that:

(a) Stabilization provisions in national laws on oil and gas should not be used to offer the guarantee that investors so greatly crave as these provisions are inherently flawed;
(b) Consequently, governments should not issue drafting instruction to their respective legislative drafting offices but rather should resort to economic balancing provisions;
(c) Economic balancing provisions should be used as they offer the executive the leeway to implement legislation as and when economic, social and environmental policies changes occur; and further

195 Crabbe, V.C.R.A.C., *Legislative Drafting*, p. 12.

196 *See* H. Xanthaki, 'Legal transplants in legislation: defusing the trap', *ICLQ*, Vol. 57, No. 3, 2008, p. 672.

197 *See* A.F.M. Maniruzzaman, 'National Laws Providing for Stability of International Investment Contracts; A Comparative Perspective'; T.W. Wälde and J. Gunderson, 'Legislative Reform in Transition Economies; Western Transplants – A short-cut to social market economy status?' *ICLQ*, 1994; B. Nwete, 'To what extent can renegotiation clauses achieve stability and flexibility in petroleum development contracts?'; N.E. Ojukwu-Ogba, 'Legal and regulatory instruments on environmental pollution in Nigeria: much talk, less teeth'; G. Verhoosel, 'Foreign Investment and Environmental Regulatory Change In Developing And Transition Economies: How To Reconcile The Tension For The Benefit Of Technology Transfer'.

(d) Government should issue drafting instruction containing the drafting of economic balancing provisions so that legislative drafters can better implement the executive's policy on natural resources and also achieve the stability and guarantee needed by foreign investors to invest in the country.