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INVESTMENT PROTECTION AND GOVERNMENT CONTRACTS – CHANCES

STABILIZATION CLAUSES

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Purpose of Stabilization Clauses

- Aim is protection of the investment from disadvantageous changes to the legal and fiscal framework of the host state.
- Stabilization Clauses are typically incorporated in the investment contract.
- Individual wording to assure that:
 - The legal positions granted in the contract are not changed by the host state
 - In a way that would be a disadvantage of the investor.

Types of Stabilization Clauses

Freezing Clauses

- Aim is to preserve the law over the entire term of the investment contract as it is in force on the day of the conclusion of contract.
- Host state assures that future changes in domestic law after the conclusion of contract will not apply to the investor.

Economic Equilibrium Clauses

- Aim is to preserve the economic basis of the investment.
- Changes in the law of the host state that are made after the conclusion of contract applies to the foreign investor but the host state indemnifies the investor regarding the cost of complying with the new laws.

Hybrid Clauses

- Combination of Freezing Clauses and Economic Equilibrium Clauses.
- Investors are not automatically exempted from application of new legislation.
- Clauses provide that investor *may be granted* exemption.
- Possibility of compensation for specified changes in law of the host state.

Examples of Stabilization Clauses (1/4)

Kaiser Bauxite Company v. Jamaica (ICSID Case No. ARB/74/3)

- Background: In 1957, Kaiser Bauxite Company and the Government of Jamaica entered into an investment agreement regarding the ownership and operation of bauxite mining facilities in Jamaica.
- Two amendments to the Principle Agreement of which the latest says that:
“(...) no further taxes will be imposed on bauxite, bauxite reserves or bauxite operations or any assets used in bauxite operations or dividends on bauxite operations. ‘Further Taxes’ shall include all taxes, burdens, levies, excises and imposts on bauxite operations and all assets used in a connection therewith in Jamaica or its territorial waters (...)”.

Examples of Stabilization Clauses (2/4)

Libyan American Oil Company (LIAMCO) v. Libyan Arab Republic, ILM 20 (1981), p. 1

- Background: Libya's 1955 Petroleum Law, introducing a concessionary system for the exploitation of petroleum products.
- "Deeds of Concession" granted to LIAMCO contains the following provision:
"This provided, as above set forth, that the contractual rights expressly created by the concession shall not be altered except by mutual consent of the parties."

Examples of Stabilization Clauses (3/4)

AGIP S.p.A. v. People's Republic of the Congo (ICSID Case No. ARB/77/1)

- Background: In 1962, AGIP founded a company incorporated under Congolese law for the purpose of oil distribution activities. Such company was exempted from the nationalizations in 1974.
- In Article 11 of the Agreement the Government undertook to preserve the company's legal status:

“...adopt appropriate measures to prevent the application to the Company of future amendments to company law affecting the structure and composition of Company bodies...”

Examples of Stabilization Clauses (4/4)

Aminoil v. Kuwait, ILM 21 (1982), S. 976

- Background: In 1948, Aminoil is granted concession for exploration and exploitation of petroleum and natural gas in Kuwait for a period of 60 years.
- Article 13 of the Concession:

“No alteration shall be made in the terms of this Agreement by either the Shaikh or the Company except in the event of the Shaikh and the Company jointly agreeing that it is desirable in the interest of both parties to make certain alterations, deletions or additions to this Agreement.”

Areas of Application

- Investments that are sensitive to particular legislation
 - Tolls
 - Taxes
 - Corporate Laws
 - Highly regulated industries
- What type of Stabilization Clause serves the interest of the specific investment best?
 - Freezing Clauses
 - Economic Equilibrium Clauses
 - Hybrid Clauses

Thank you for your attention!



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