

5-1-2011

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Recommended Citation

Ng'ambi, Sangwani (2010) "Stabilisation Clauses and the Zambian Windfall Tax," *Zambia Social Science Journal*: Vol. 1: No. 1, Article 7.

Available at: <http://scholarship.law.cornell.edu/zssj/vol1/iss1/7>

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Stabilisation Clauses and the Zambian Windfall Tax

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Over the past decade, Zambia has seen an increase in the flow of foreign direct investment; a large quantity of which went into the copper mining industry. The price of copper increased radically, which prompted the Zambian government to reconsider the preferential tax regime that foreign mining companies enjoyed to ensure that Zambia benefited from this change in circumstances.

The tax regime was originally implemented to encourage the inflow of foreign capital, and to revive an industry that had been crippled by previously low copper prices. The concession agreements between the Government of Zambia and the mining companies contained Stabilisation clauses which constitute a promise on the part of the host government not to amend its laws in a way that adversely affects the economic rights contained within that particular concession agreement.

The article examines Stabilisation clauses in concession agreements and their legal effect on a host state's power to amend its laws unilaterally. This issue is discussed in light of the Kuwait v Aminoil case which seems to suggest that "Stabilisation clauses" do not outrightly prohibit states from modifying their laws when economic circumstances change. Finally the article looks at a legal framework that ensures that neither the rights of the investor on one hand or the state on the other take precedence over the other.

1. Introduction

Over the past decade, Zambia has seen an increase in the flow of foreign direct investment (FDI)¹. A large quantity of this FDI has gone into the copper mining industry on which the Zambian economy is heavily dependant. The price of copper has increased dramatically since 2006, a few years after the industry had been privatised . This radical change prompted the Zambian government to reconsider the preferential tax regime that had been negotiated for and agreed to by the foreign mining companies and government. This was arguably so that the Zambian society could benefit from the high copper prices. The preferential tax regime was originally implemented to encourage the inflow of foreign capital, which in turn would revive an industry that had been previously crippled by low copper prices and mismanagement.

The concession agreements between the Government of Zambia and the mining companies included Stabilisation clauses. Stabilisation clauses essentially constitute a promise on the part of the host government not to amend its laws in a way that adversely affects the economic rights of the investor contained within

that particular concession agreement (Garcia-Amador 1993:23). In other words, even if the government amended its national laws, the new laws would not, in theory, apply to the concession agreements.

This article examines Stabilisation clauses in concession agreements and their legal effect on a host state's sovereign right to amend its laws without the prior consent of the investor. Of particular interest, is whether the Zambian government is precluded from unilaterally amending its tax laws contrary to Stabilisation clauses contained within the concession agreements. The issue is discussed in light of the *Aminoil v Kuwait*² case which suggests that "Stabilisation clauses" do not outrightly prohibit states from modifying their laws when economic circumstances, which rarely remain static, change. However, the arbitral tribunal, in this case, also hinted that there may be instances where Stabilisation clauses may apply. In this case, they do raise legitimate expectations which in the event of a breach must be taken into account by a tribunal in assessing damages. In this article we propose a legal framework that strikes a balance between the commercial rights of the investor and the sovereign rights of the state; which is likely to encourage the government to uphold its contractual obligations.

The rest of the article proceeds as follows: In section 2 we look at sovereignty and Stabilisation clauses. We examine whether or not these clauses are valid and whether or not the clauses infringe on the state's sovereign rights. In so doing, we first attempt to define sovereignty and then examine arbitral tribunals' decisions on Stabilisation clauses. In section 3 we look at the Zambian windfall tax imposed by the government in 2007 and the Stabilisation clause. The windfall tax was removed in 2009 and has since not been re-imposed. We conclude the article in section 4.

2. Sovereignty and Stabilisation Clauses

It is clear that ordinary contracts between the state and individuals are governed by the municipal law of the host state and not by international law³. As such, when investors enter into agreements with governments, there is no real guarantee that the latter will uphold the contractual obligations contained therein. This is because governments may change the law as and when they please to override the rights contained in investment contracts. Stabilisation clauses attempt to rectify this predicament by ensuring "that future changes in the legislation of the host state did not vary the terms of the contract on the basis of which entry is made" (Sornarajah, 2008:407; Paasivirta,1989: 315). They essentially do this by "freezing" the law so that future changes in the law will not affect the rights contained in the contract.

Sovereignty is very difficult to define especially in a world that is more globalised than ever before. As Dunoff et al (2006) correctly observe, "[s]overeignty is a concept regularly invoked in international discourse, but its meaning is very difficult to pin down." These difficulties notwithstanding, some attempts have been made to define what encapsulates this illusive concept. In the United Nations debates over Cyprus the representative of Morocco contended that:

[T]he concept of sovereignty must at the very least include the total

freedom of a free and independent country to be the sole architect of its constitution and to ensure that its content reflects, in the best possible way, the rights and guarantees of communities and private citizens alike – this of course is in the absence of any kind of constraint or interference from abroad (United Nations, 1964:1097) .

Turkey's response to this was "We are all sovereign countries here in the United Nations, but all of us have international commitments and we do not consider that to be curtailment of sovereignty" (United Nations, 1964:19).

Henkin (1995) contends that sovereignty is perhaps outdated. He argues that: "For legal purposes at least, we might do well to relegate the term sovereignty to the shelf of history as a relic from an earlier era." In his view the term sovereignty dealt more with the relationship between a prince and his subjects and is therefore "not a necessary or appropriate external attribute for the abstraction we call a state. Nor is it the appropriate term or concept to define the relation between that abstraction and its counterpart abstractions, other states" (Henkin, 1995:10-12).

Trying, therefore, to define sovereignty in a globalised world is not an easy task. However, we would not subscribe to the view that it is an outdated concept. Rather than trying to define sovereignty, it is, perhaps, most useful for one to look at sovereignty as a corpus of basic principles. These principles, among others, would include, inter alia, the ability to enter into agreements, the ability to pass laws and the ability to declare war. These principles are, however, limited by the state's international obligations. Sovereignty cannot, therefore, be a defence for a state's failure to uphold its international obligations. In the *SS Wimbledon*⁴ case, the Permanent Court of International Justice held that "the right of entering into international engagements is an attribute of state sovereignty". Therefore any limitations a state accepts when it enters into a treaty cannot later be renounced as an encroachment of their sovereignty.

Myriad arbitral awards support the contention that Stabilisation clauses are in fact binding and as such preclude governments from unilaterally amending their laws in a way that adversely affect the contractual rights contained in concession agreements. In *Sapphire International Petroleum Ltd. v. National Iranian Oil Co.*⁵, for example, the sole arbitrator found that the premature termination of the concession agreement did impose a duty on the state to compensate the Sapphire International. The arbitral tribunal relied upon the principle of *pacta sunt servanda* to arrive at their decision which dictates that "contractual undertakings must be respected".

Arguably, the idea that a contractual agreement precludes a state from amending its laws as and when pleases militates against its sovereignty. However, as the case of *Saudi Arabia v. Arabian American Oil Co.*⁶ illustrates, arbitral tribunals do not look upon such contentions kindly. In this case, for example, the arbitral tribunal concluded that "[b]y reason of its very sovereignty within its territorial domain, the state possess the legal powers to grant rights [by] which it forbids itself to withdraw before the end of the concession." These sentiments are shared by Weil (1974) who states:

What would be the purpose of having a state renounce the exercise of certain of its prerogatives of sovereignty if, at the first difficulty, that state could free itself from this promise by invoking precisely these same prerogatives. (Weil, 1974 :326).

He goes on to say that:

In subscribing to a protection clause, the host government has thus created to the benefit of the other contracting party a legitimate expectation, which the government may not subsequently frustrate without infringing the principle of good faith. Certainly authors refer to the principle of estoppel which forbids the state to take a position contrary to that which it took in the contract and on the faith of which the investor has obligated himself. (Weil, 1974:326).

Further, in *AGIP v. Popular Republic of Congo* the government of Congo nationalised the oil distribution sector in 1974. Only AGIP, who entered into an agreement for the sale of 50% of AGIP's capital to the government, remained unaffected. This agreement contained several Stabilisation clauses. In 1975 AGIP was nationalised by Congo. The arbitral tribunal opined that:

These Stabilisation clauses, freely accepted by the Government, do not affect the principle of its sovereign legislative and regulatory powers, since it retains both in relation to those, whether nationals or foreigners, with whom it has not entered into such obligations, and that, in the present case, changes in the legislative and regulatory arrangements stipulated in the agreement simply cannot be invoked against the other contracting party⁷.

The arbitral tribunals in the cases of *BP v Libya*⁸ and *Texaco Overseas Oil Petroleum Co./Califorina Asiatic Oil Co. v Libya*⁹ which dealt with the nationalisation of oil companies in Libya were equally as unsympathetic to the sovereignty argument. In both cases Libya had entered into agreements that contained Stabilisation clauses. In *BP v Libya* case the arbitral tribunal said very little about the Stabilisation clause contained in the concession agreement. It instead focused on the fact that the nationalisation was confiscatory. On the other hand, in *Texaco Overseas Oil Petroleum Co./Califorina Asiatic Oil Co. v Libya* the arbitral tribunal focused on the principle of *pacta sunt servanda* and ruled that it was, in fact, possible for a sovereign state to bind itself to a contract with an investor. In this particular case the Stabilisation clause read as follows:

The Government of Libya will take all steps necessary to ensure that the company enjoys all the rights conferred by the concession. The contractual rights expressly created by this concession shall not be altered except by the mutual consent of the parties.

The arbitrator held that the clause did not "in principle impair the sovereignty of the Libyan State". This was essentially because all its sovereign powers still remained intact and could still be exercised on persons other than those to whom it owed contractual obligations. His view on the validity of Stabilisation clauses was as follows:

Thus, in respect of the international law of contracts, a

nationalisation cannot prevail over an internationalised contract, containing Stabilisation clauses, entered into between a state and a foreign private company. The situation could be different only if one were to conclude that the exercise by a state of its right to nationalise place that state on a level outside of and superior to the contract and also to the international legal order itself, and constitutes an act of government which is beyond the scope of any judicial redress or any criticism.

Coale (2002) contends that the arbitrator interpreted the Stabilisation clause as a basis to internationalise the contract. She further states that:

In other words, the arbitrator held that when the contract is internationalised, the parties act as equals and the state host is bound by the guarantees it has offered to the investor.

Thus far we have seen case law that leans more in favour of the rights of the investor to the detriment of State sovereignty. However, the decision in *Texaco* can be contrasted with *LIAMCO v Libya*¹⁰ where the arbitral tribunal held that Stabilisation clauses do not affect the state's sovereign right to expropriate a contract. To hold otherwise, in their view, would amount to an intolerable interference with a state's sovereignty. This case represents a recognition that arbitral tribunals can take into account the sovereignty argument. However, the effect of this case was to uphold the sovereign rights of the state to the detriment of the investor. In addition, the arbitral tribunal in *Amoco International Finance v Iran*¹¹ took the view that internationalizing a contract is elevating the status of a contract to that of a treaty. Internationalizing a contract essentially involves the insertion of a choice of law clause that expressly states that international law will be the applicable law. The arbitral tribunal contended that doing this would elevate the status of a private corporation to that of a state. The arbitral tribunal asserted that a private corporation should not be elevated to the status of a state. They further opined that:

As a fundamental attribute of state sovereignty, this right, commonly used as an important tool of economic policy by many countries, both developed and developing, cannot easily be considered as surrendered.

A better balance between the rights of the investor and the rights of the State seems to have been sought in *Aminoil v Kuwait*. In this case the Government of Kuwait had granted the American Independent Oil Company (AMINOIL) a concession for 60 years to explore and exploit oil and gas resources Kuwait holds of the neutral zone between Kuwait and Saudi Arabia. Within this agreement was a Stabilisation clause which read as follows:

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

The agreement was amended in 1961; essentially to conform with the 50-50

profit sharing pattern that had become more common in the Middle East since the time of the original concession. When the Organisation of Petroleum Exporting Countries (OPEC) became more powerful throughout the Middle East, pressure mounted on AMINOIL to agree on greater participation by the government as well as the imposition of higher taxes by the Kuwaiti government. AMINOIL gradually agreed to these changes.

Oil prices quadrupled after the October War of 1973, which meant that AMINOIL's profits increased despite the fact that tax and royalty rates had been increased. Negotiations continued and AMINOIL proposed a revised agreement. The proposed agreement was that AMINOIL's profits would amount to 70 cents per barrel or US\$18-20 million per year.

The government of Kuwait on the other hand – which by this point had, by agreement, taken over a vast bulk of AMINOIL's other oil concessions in the country offered a plan that would mean that AMINOIL would gain profits of about 25 cents per barrel or about US\$7.5 million per year. Both parties continued negotiating. However, in 1977 the government issued a decree law terminating the concession and providing that all property should revert to the state.

Kuwait did not deny that it had to pay compensation. In fact, that decree law established a Compensation Committee whose task it was “to assess the fair compensation due to the Company as well as the Company's outstanding obligations to the State or other parties”. AMINOIL refused to appear before the committee and demanded arbitration in London pursuant to the 1948 agreement.

The arbitral tribunal considered whether the Stabilisation clause rendered the nationalisation decree unlawful. The tribunal conceded that “a straightforward and direct reading of [the Stabilisation clause] can lead to the conclusion that they prohibit any nationalisation”.

However, Kuwait contended that nationalisation was not even mentioned in the Stabilisation clause and as such, the Stabilisation clause did not apply to the nationalisation decree. Although this argument was not fully accepted by the tribunal, it did carry substantial weight.

The arbitral tribunal opined that, although there was a stabilisation clause in the agreements between the Kuwaiti government and AMINOIL, these Stabilisation clauses in themselves did not amount to an express agreement not to nationalise. What Stabilisation agreements are there to do instead is to protect against confiscatory termination and take over. If the takeover is not confiscatory, it would not amount to a breach of the stabilisation clauses. Since the government had made an offer of monetary compensation, the takeover was not confiscatory. Fitzmaurice¹² disagreed. He contended that:

It is an illusion to suppose that monetary compensation alone, even on a generous scale, necessarily removes the confiscatory element from a take-over, whether called nationalisation or something else. It is like paying compensation to a man who has lost his leg. Unfortunately, it does not restore the leg. When a company such as Aminoil procures the insertion in its concession of a clause like Article 17, its aim is not to

obtain money if the article is breached, but to guarantee if possible that it is not breached...nationalisation, or any form of take-over, is necessarily confiscatory in the sense that, irrespective of the wishes of the legal owner, it dispossesses him of his property and transfers it elsewhere. Nationalisations may be lawful or unlawful, but the test can never be whether they are confiscatory or not; because by virtue of their inherent character, they always are.

Even though the tribunal in AMINOIL held that that the Stabilisation clauses did not apply they at least recognised that the government of Kuwait would have to pay some form of compensation. This is in stark contrast to the other awards which held that Stabilisation clauses do not apply and as such the governments in LIAMCO and Amoco were not liable to paying anything. However, the tribunal did recognise that legislation abrogating a Stabilisation clause breaches a contract and that the Stabilisation clauses did create a legitimate expectation on the part of AMINOIL vis-à-vis how long they could do business in Kuwait. The tribunal opined that legitimate expectations ought to be taken into account in assessing damages.

Thus far it has been established that as a general rule the sovereignty argument is not looked upon by arbitral tribunals kindly. This is essentially because governments freely enter into these contracts; an action which in itself is an attribute of sovereignty. Governments cannot suddenly turn around and invoke the principle of sovereignty in order to abdicate responsibility for their actions.

3. Zambia's Windfall Tax and International Responsibility

The state-owned mining companies were privatised in 2000. Most of the Development Agreements between the government and the foreign mine owners were concluded at that time. The price of copper at the time averaged US\$ 1, 814 per tonne per annum (Bank of Zambia(BOZ) 2009). However, between 2003 and 2008, the price of copper increased dramatically. It increased from US\$1, 779 per tonne in 2003 to US\$ 6, 438 per tonne in 2008. It peaked at US\$ 7,126 per tonne in 2007 (BOZ 2009). The rate of increase was somewhat moderated during 2008 and 2009. This was due in large part to a reduction in the demand for copper which in turn was caused by the global financial crisis. In December 2008, it hit a price of US\$3,105 per tonne. However, during 2009 the price of copper has begun to recover and has increased substantially. In September 2009, it was estimated at about US\$ 6,000 per tonne.

This has led to calls that the Zambian government should reintroduce the windfall tax which it imposed on the copper mining companies in 2007 and abolished in the 2009 national budget. Suffice to say that, the re-introduction of the windfall tax will be seen by some investors as an unstable tax regime and could be one of the factors that could hinder foreign investment.

However, most of the development agreements between the government of Zambia and foreign mining companies contain Stabilisation clauses. In addition to this, the agreements contain specific "Taxation Stability" clauses. For example, Clause 14.1 of the agreement between Kansanshi Mines and the government of

Zambia states that for a period of 15 years the government of Zambia were precluded from increasing the corporate income tax, VAT or impose any new taxes “so as to have, in each case, a material adverse effect on the Company’s Distributable Profits or the dividends received by its shareholders.” (www.minewatchzambia.com/reports/KANSANSHI.pdf)

The agreement between the Government of Zambia and Konkola Copper Mines seems to have gone further. In addition to a “Taxation Stability” clause; the contract also contained a general Stabilisation clause. Clause 13 of Part D of the development agreement between the government of Zambia and Konkola Copper Mines reads as follows:

GRZ further undertakes, during the Stability Period, it shall not by general or special legislation or by administrative measures or decree or by any other action or omission whatsoever (other than an act of nationalisation such as is referred to in Clause 0) (“GRZ Action”) vary, amend, cancel or terminate this Agreement or the rights and obligations of the Parties under this Agreement, or cause this Agreement or the said rights and obligations to be varied, amended, cancelled or terminated, or prevent or hinder performance of this Agreement by any party thereto, provided always that this Agreement and the rights and obligations of the Parties under this Agreement may be varied, amended, cancelled or terminated as expressly provided herein. GRZ undertakes that KCM and its officers, directors, employees and shareholders shall be held free and made exempt from any GRZ Action or any change in the law of Zambia which would, but for such freedom or exemption, adversely affect KCM’s rights under, or KCM’s ability to comply with its obligations under, this Agreement. (www.minewatchzambia.com/reports/KCM2004.pdf)

It is clear from the cases that we have earlier considered that, with the exception of the awards in *LIAMCO*, *Amoco* and *AMINOIL* cases, that arbitral tribunals do not entertain the sovereignty argument. Furthermore, even the arbitral tribunal in *AMINOIL* hinted that if the Stabilisation clause was applicable for a more reasonable period than 60 years, it might have been valid even in that case.

In comparison to the *AMINOIL* case, what has transpired in Zambia is different in the sense that, while in the *AMINOIL* case the government of Kuwait attempted to negotiate with *AMINOIL* before ultimately nationalising the company, the Zambian government, on the other hand, unilaterally amended its tax laws without consulting the mining companies. In addition, the concession agreements in the *AMINOIL* case were to last for a very long period of 60 years and were concluded prior to the independence of Kuwait. The concession agreements in Zambia’s case were to last for 15 years only. Moreover, in *AMINOIL* the government of Kuwait was willing to compensate for the fact that they had nationalised the oil company. It was for this reason that the tribunal held that the takeover was not confiscatory and as such the Stabilisation clause – which was only designed to protect against a confiscatory takeover – did not apply¹³. In Zambia’s case there was no evidence of an intention to compensate the mining companies for an imposition of the windfall tax. An arbitral tribunal may as such conclude that the Stabilisation clause applies in this case because the government of

Zambia was effectively acquiring the rights contained in the development agreements which may in itself amount to creeping expropriation (Sornarajah, 1994).

Furthermore the concession agreement in *AMINOIL* was signed in 1948; prior to Kuwait's independence. Kuwait only sought to amend the terms of the concession in 1961. In contrast, most of Zambia's concession agreements affected by the windfall tax were signed after independence and by the current government, which is the same government that sought to impose the windfall tax in 2007.

Yet another important difference is that while the *AMINOL* concessions were to last for 60 years, the Stabilisation clauses in Zambia's case were only applicable for 15 years which could be considered as reasonable. In addition, there was no mention of compensation. It could thus be concluded that Stabilisation clauses will be binding on the Zambian government and that they may be liable to pay the mining companies some amount of compensation should the latter choose to initiate arbitral proceedings. Although the *AMINOIL* case seems to illustrate that there are instances where Stabilisation clauses will not apply, they will generally apply where they are applicable for a reasonable period of time and where the acquisition of contractual rights is not confiscatory. That is to say that some compensation for the takeover will be furnished by the host government.

4. Conclusion

It could thus be concluded, as a general rule, that Stabilisation clauses are binding on governments. Awards rendered by arbitral tribunals clearly illustrate that sovereignty is not an excuse for a government's failure to fulfil its contractual obligations. This contention is based on the international law principle *pacta sunt servanda* which dictates that agreements entered into must be observed. Furthermore, entering into agreements is in itself an attribute of sovereignty. Therefore, a state cannot argue that preventing it from amending its laws is an intolerable interference with its sovereignty.

However, as Sornarajah (1994: 87) observes, "where windfall profits occur, particularly in extractive industries, governments will see those profits as being made without any inherent merit on the part of the foreign party." In such instances, governments are unlikely to abide by contractual agreements. The problem, however, is that if a sovereign state were to breach agreements whenever it wished then this would discourage foreign investment. In the case of Zambia this would have adverse effects on the mining industry which relies heavily on outside financing, and which is situated in a continent that attracts only 2% of the world's foreign direct investment (UNCTAD, 2008). For a country like Zambia, which faces stiff competition in attracting foreign investment, there is need to ensure that the country enjoys a favourable investment climate. In order to do so Zambia must eliminate factors that would deter foreign investment. This would include upholding rights contained in contracts freely entered into, no matter how disfavourable they may later seem to be.

In order to strike a balance between the commercial rights of the foreign investor and the sovereign rights of the state, we would propose that government officials drafting development agreements should insert renegotiation clauses in

future agreements. In our view a renegotiation clause is the best way to balance the sovereign rights of a state with the contractual rights of the foreign investor. In addition, because renegotiation clauses would take into account the vicissitudes of such factors as the copper price, governments are more likely to abide by contracts which contain them. An example of such a clause is contained in the Model Exploration and Petroleum Sharing Agreement of the Sheikdom of Qatar. Article 34.12 of this agreement provides as follows:

Whereas the financial position of the Contractor has been based, under the Agreement, on the laws and regulations in force at the Effective Date, it is agreed that, if any future law, decree or regulation affects Contractor's financial position, and in particular if the customs duties exceed... ..percent during the term of the Agreement, both parties shall enter into negotiations, in good faith, in order to reach an equitable solution that maintains the economic equilibrium of this Agreement. Failing to reach agreement on such equitable solution, the matter may be referred by either Party to arbitration pursuant to Article 31 (Bernardini 1998: 411,416; Berger 2003:1347).

It is our view that, in theory, renegotiation clauses are good because they are a lot more flexible than Stabilisation clauses. However, how they will in reality operate still remains to be seen. As Dolzer and Schreuer (2008) observe:

The concept of an "economic equilibrium" remains to be defined in legal terms. Moreover, a duty to renegotiate relies on the continued good will of both parties during a dispute. Therefore, the clause may not prove to be helpful in the context of a dispute. Thus, it is far from clear whether a duty to renegotiate will serve the practical needs of a long-term investment. If the clause should fail to produce useful results, the search for effective mechanisms for Stabilisation will continue (Dolzer and Schreuer, 2008:78).

There should be no cynicism about the effects of a renegotiation clause until one has had a chance to see it in effect, which Dolzer and Schreuer readily admit that they have not had. We would, however, argue that one would more readily abide by a contract that contains within it a renegotiation clause as opposed to a contract that contains a Stabilisation clause. This is owing to the fact that these clauses take into account the mercurial nature of natural resource industries. Stabilisation clauses do not. We would, therefore, propose that technicians drafting development agreements on behalf of governments should insert renegotiation clauses clause in future agreements.

Notes:

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- 1 See generally http://www.fdi.net/country/sub_index.cfm and Muweme Muweme 2001. "Foreign Direct Investment: What Difference for Zambia?" *JCTR Bulletin*, Number 50, <http://www.jctr.zm/for-di-invest.htm>
- 2 21 ILM 976 (1982)
- 3 See the case Concerning the Payment in Gold of the Brazilian Federal Loans Issued in

- France (France v Brazil) 1929 PCIJ (ser. A) No. 20/21 at 121
4 (1923) P.C.I.J. (Ser. A), No. 1
5 35 I.L.R. 136 (1967)
6 27 I.L.R. 117 (1963)
7 21 I.L.M. 726 (1982) at Sec. 86
8 53 I.L.R. 297
9 17 ILM (1978) 1
10 62 ILR 141
11 15 Iran-US Claims Tribunal Reports 189 (1987)
12 See separate Opinion of Judge Fitzmaurice, 21 ILM 1043
13 See *AMINOIL v Kuwait*, paras.88-102.

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