Book Review

Jola Gjuzi, Stabilization Clauses in International Investment Law: A Sustainable Development Approach (Springer Publishing, Switzerland, April 2018), E-document, ISBN 978-3-319-97232-9, 545 PP, Price 117.69 £

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This book which narrates the inherent contradiction between stabilization clauses and the regulatory power of the host states tries to reconcile the conflict using the principle of sustainable development.[1] The book is of typical significance for students, academics, practitioners of law and policy makers engaged in the field of international investment arbitration. The book explores the rationale why stabilization clause emerged in international investment contracts, why multinational companies prefer them and why host states adhered to insert them. It then analyzes how stabilization clauses began to defeat the regulatory rights of the host states and how their right to regulate in the public interest particularly in the areas of environmental protection and human rights are at stake. The book then suggests the reconceptualization of sustainable clauses and application of the "Principle of constructive Sustainable Development", whose international legal status is controversial and whose meaning is yet to be clear, as a reconciliatory concept to mitigate the effects of stabilization clause on the regulatory space of the host states and to iron out the stabilization/ regulation controversy.[2]

The book is divided in to three parts. The first part which contains three chapters attempts to analyze the antinomy between stabilization clause and host states regulatory right in the public interest in the context of sustainable development. Under chapter I of part I, the author tries to examine the repercussions of stabilization clauses on the international duties of host states such as environmental standards and human rights and eventually its potential impact on the right to sustainable development of host states and the role that the concept of sustainable development itself can play to challenge the might of stabilization clause. In Chapter II, the author had thoroughly and exhaustively elaborated the concept of stabilization clause by discussing the meaning, origin, rational, sources, and categories of the

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[1] Jola Gjuzi, *Stabilization Clauses in International Investment Law, A Sustainable Development Approach,* Springer Publisher, (2018),p. 6, 383.

[2] Ibid, pp. 162- 173 and 451-483

concept. In this chapter, attempt is made to enlighten why stabilization clauses emerge in international investment contracts, why multinational investors heavily rely on them and why developing countries adhere to them voluntarily, and how they progressively and gradually migrated from strict "freezing clauses" to a more moderate "economic equilibrium clauses". Chapter three of her book narrates the implications of broad stabilization clauses on the host states rights to regulate in the public interest and the role of sustainable development in addressing the problem. The author discussed three possible impacts on host states' right to regulate and concluded that broad stabilization clauses might affect the right to regulate in the public interest of host states. Then the author went on to discuss the meaning, relevance, contents, legal significance, and the controversial nature of the concept of sustainable development. Furthermore, the book addressed how essential integrating and balancing the three pillars of sustainable development that is (economic, social and environmental development) could be the goal of every host state. The author explains that applying the concept of sustainable development might intensify the stabilization and regulation contradiction further. Here, the author also explained the interactions between sustainable development and stabilization and regulation paradox and the constraints of the former in solving the antinomy.

Under chapter IV, the author assessed the legal status of stabilization clauses *vis-a-vis* national laws. Here, the author discussed how investment contracts including the stabilization clause could be subjected to national law using the choice of law clause contained in the contract. The author then analyzed the legal validity and effectiveness of stabilization clauses in light of constitutional principles and doctrines such as separation of powers, *ultra virus*, rule of law, etc.

Chapter V of the book explored the discourse on legal status of stabilization clauses under international law focusing on the traditional perspective and the debates in favor and against the validity and effect of stabilization clauses under international law. It discusses how the supporters of internationalization theory employ various interpretative techniques to make stabilization clauses valid and effective in the eyes of international law and how the opponents of the internationalization theory argue to render the clause invalid and ineffective. Then she went on to explain how the substantive principles of international law such as *pacta sunt servanda* is used by the proponents of internationalization theory and the principle of permanent sovereignty is used by the opponents of the same to make it invalid. Her analysis reveals that there was a continued controversy over the internationalization of investment contracts with "a confident strand of doctrine rejecting the notion of the contract subject to international law, while an equally confident strand continuing to affirm and embrace it".

In chapter VI, the writer scrutinized the current practice on the legal status, validity and effect of stabilization clauses under international law. She reckons that the traditional debates on the validity or invalidity of stabilization clauses under international law using internationalization theory are gradually abandoned and replaced by other international investment treaty clauses. In this chapter she shaded light on how stabilization clauses of investment contracts are easily transformed into internationally valid and effective provisions having the force of law using clauses in the bilateral investment treaties such as provisions on expropriation, fair and equitable treatment, most favor nation treatment, full protection and security, and umbrella clauses. Because of the concept of legitimate expectations, the violation of stabilization clauses amounts to an international investment treaty violation. She vividly put it that the legal value and effect of stabilization clauses is enhanced by the presence of the aforesaid investment treaty provisions. Besides she had brought to light the contemporary arbitral practice on the validity and extent of application of stabilization clauses and the fears associated with them in relation to the right to regulation of host states.

Chapter VII focused on the role of sustainable development approach in reconciling the conflict between stabilization clauses and host states regulatory power. Jola concedes that the concept of sustainable development is highly vague and blurred with no agreed meaning among the international community. Besides, she had made it clear that there is no general consensus on the legal normative nature of the concept in the international law system.

Nevertheless, the author had analyzed and searched for ways to find some degree of applicability of sustainable development approach to reconcile the conflict between stabilization clause and regulatory power at international law, contractual law and domestic law levels. She had also analyzed the four possibilities of manifestations of sustainable development in the international law level. She argues that sustainable development can play a reconciliatory role if it is indirectly invoked by applying the rules of systemic integration or through conceptualization of sustainable development either as being inherent in judicial reasoning or as being a logical necessity.

Chapter VIII suggested for the reconceptualization of stabilization clauses in the light of constructive sustainable development approach. The author admitted that the sustainable and sustainable development related provisions in international investment agreements are too weak to overcome the predominant perception that makes stabilization clauses the exception to the host states regulatory power in the public interest. The author zoomed in on the idea of reconceptualizing stabilization clauses. She suggested that it should be in a way that these clauses do not impinge on the “legitimate” regulatory practices of host states in relation to environmental,

human rights and social welfare issues[3]. Her assertion is that the principle of integration of constructive sustainable development approach can be applied to reconcile the competing economic, social and environmental norms and values regulated by different international regimes by taking the analogy from article 31(3) (c) the Vienna Convention on the Law of Treaties (VCLT) which aims at "finding an appropriate accommodation between conflicting values and interests in international society". As an alternative, she urged the use of sustainable development as a meta-principle that must be inherent in judicial reasoning so as to strike the balance between the competing objectives.

In short the Its overall organization, scholarly depth, the quality and quantity of table of cases used, the books and articles she referred to, the detailed nature of her analyses on the topics she raised and, the coherence and logicality of her arguments are all worth appreciating. The author dealt with every specific issue relating to the topic in a commendable way. In this effort of substantiating arguments, she had used all the available evidences and sources both primary and secondary. In addition to the diverse literature cited, the book has referred a handful of cases (including of the PCIJ, ICJ, and ICSID etc.), Reports of GATT and WTO Panels, Treaties, International Instruments, National Legislation, and Investment Contracts, Model BITs and IIAs. The other strength of the book is that the author had stated arguments of both sides when she analyzes arguable issues.

Coming to the weaknesses, I hereby set out the following observations. Firstly I think the book is not successful in meeting its desired objective as stated in the book's introduction. The author's aim in writing the book was to reconcile the stabilization clause and host states regulatory power antinomy using sustainable development principle.[4] Nevertheless, finishing the book, I realized that her logic, theories, principles and evidences she used are not sufficient to solve the inconsistency the way she aspired. Her arguments could not convince me to reach a conclusion similar to her. Firstly, she couldn't unequivocally prove the existence of antinomy between the two. I say this because there are people who correctly argue that there is no legal inconsistency which puts investors and states in to dispute except for only policy dispute of the host states themselves.[5] Her allegation that stabilization clauses restrict the right to regulate in the public interest is not supported by appropriate evidence since protective value of a stabilization clause lies not in barring the state from exercising legislative power for public interest, but

[3] Supra note at 1

[4] Jola Gjuzi, *Stabilization Clauses in International Investment Law, A Sustainable Development Approach, P. 6*

[5] Katja Gehne &Romulo Brillo, *Stabilization Clauses in International Investment Law: Beyond Balancing and Fair and Equitable Treatment,* NCCR Trade Working Paper, No 2013/46 (January 2014), P. 20 available at: www.nccr-trade.org

in guaranteeing compensation for any breach that change the equilibrium.[6] The dilemma by host states as to what policy to choose is what is impliedly revealed throughout Jola's book. Secondly, the author could not prove how a concept which is vague, controversial whose international legal status is unknown itself can play a reconciliatory role.[7] The author had admitted that the concept of sustainable development might intensify the antinomy between the two.[8] How could it reconcile while it deepens the antinomy is a kind of paradox. Her suggestion of reconceptualization of stabilization clause in a way that limits their scope is also less convincing since it is not clear whether investors will accept such an underprivileged position and whether host states will apply such a concept with a risk of reduced foreign investment inflow. Besides, she can't prove us whether the tribunals will put aside the clear language of the provisions and use a new idea which was not intended by the contracting parties at the time of making the investment contract. Regarding her recommendation about using sustainable development integration principle to accommodate its three pillars by taking analogy from the vienna convention on the law of treaties, her proposition is still weak in that not all the three pillars of the principle are part of international legal obligation. Hence, signing an investment contract containing stabilization clause is a clear international legal obligation, but host states may not have an international legal obligation on social development and environmental development. Hence, there is no need to refer to VCLT with a view of integrating the three pillars for integration principle since this come in to picture only when two or more international legal obligations occur simultaneously. Her last suggestion of applying sustainable development principle as a meta-principle in judicial reasoning also does not hold much sway as tribunals are not expected to ignore the clear provisions of the contract in favor of a concept whose legal status and meaning is controversial under the guise of judicial reasoning. Besides, foreign investors came to host states not to worry about the sustainable development of the states, but to maximize their own profit. Hence, they are not expected to be governed by a concept which does not exist in the contract and to set aside the clear provisions and intentions of the contracting parties with a view to replace them with such a vague principle.

To conclude, the book has a tremendous value for students, academics, practitioners of law and policy makers engaged in the field of international investment dispute resolution in broadening the horizon of knowledge about stabilization clauses and the controversial issues surrounding it. It provides a thorough appraisal and analysis

[6] Abdullah Al Faruque,Validity and Efficacy of Stabilization Clauses, Legal Protection versus Functional Value, *Journal of International Arbitration* (2006), 23(4), PP.317-336.

[7] Jola Gjuzi, *Stabilization Clauses in International Investment Law, A Sustainable Development Approach.*P,106,163

[8] Jola Gjuzi, *Stabilization Clauses in International Investment Law, A Sustainable Development Approach*. P.V

of stabilization clauses and sustainable development. Nevertheless, it is difficult to say that it has realized the main objective the author intended to achieve; that is reshaping stabilization clauses to the benefit of foreign investors, while at the same time mitigating their negative effects on the host state's power to regulate in the public interest using constructive sustainable development approach. The principle of sustainable development, based on its current condition and understanding cannot reconcile the contradiction between stabilization clause and the regulatory power or regulatory space of host states in the manner the author set out in her book; that is to say integration and reconciliation imperatives of the concept of sustainable development as well as the application of principles of law such as non-discrimination, public purpose, due process, proportionality, and more generally, good governance and rule of law cannot be easily applied for granted to reconcile the contradiction between stabilization clause and regulatory rights.