ARTICLES

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A LEGAL EXAMINATION OF STABILISATION CLAUSES IN PETROLEUM CONTRACTS IN CAMEROON

DOI: 10.30729/2541-8823-2025-10-1-6-24

Abstract. *The aim of this study is to shed light on the legal examination of stabilisation clauses in petroleum contracts in Cameroon. Stabilisation clauses forms one of the pillars in protecting the interest of foreign investors in petroleum contractual arrangements. These clauses act as a shield to investors as they protect oil companies from attempts by the host government to modify the agreement through subsequent changes in legislation. Their legal validity in the Cameroonian petroleum industry has been guaranteed by the Petroleum Law of the country. However, the findings of this paper reveals that the applicability of these clauses remains questionable as the Cameroonian government can implement nationalisation and expropriation on the grounds of public utility, security or national interest, subject to appropriate compensation. Furthermore, the study reveals that the Cameroonian government can introduce new legislative or regulatory changes in the petroleum contracts, the terms of which must be agreed by both parties. In case where an agreement is not reached, the matter will be referred to arbitration. This study concludes that the State can continue enacting new legislations, and in some arbitration cases to breach an agreement, which defeats the essence of stabilisation clauses in petroleum contracts.*

Keywords: *stabilisation clauses, petroleum contracts, legal examination, nationalisation, expropriation, compensation.*

1. Introduction

Cameroon is a midsized, lower-middle-income country endowed with substantial natural resources. Cameroon has natural resources that include oil, gas, coal, minerals, a large hydroelectric potential, and an excellent condition for forestry and agriculture[1]. The presence of these resources especially oil has a great role to play in the economic development of the country. To attain this growth, there is a need for the country to put in place policies aimed at attracting foreign investors who can finance its future oil projects. The relations between oil producing countries and oil companies, especially international oil companies (IOCs) are often contained in long-term agreements. As with the case of Cameroon, these agreements are in the form of concessions, production sharing contracts, risk service agreements and joint venture agreements[2]. It is worth noting that even though the Petroleum Law in Cameroon makes no reference to joint venture contracts, these contracts have been in practiced in the country over the years. In this light, a joint venture contract covering the management of the Kombe-Nsepe petroleum block was signed in 2008 between SNH and Perenco oil and gas (Cameroon) and Kosmos Energy (Cameroon)[3].

These agreements are high-risk, capital intensive and long-term, involving activities of the investor in the host country, from exploration to the development and finally decommissioning of oil fields. The risks involved in upstream petroleum exploration include the geological, commercial, technical, managerial, natural disaster risks and political risk[4]. The risks involved in exploration and production of hydrocarbons necessitates host governments to provide incentives to IOCs. One of such incentives is the insertion of stabilising and renegotiating clauses in the petroleum contracts in order to attract foreign direct investment. These clauses serve as a contractual risks management tool to protect oil companies from attempts by the host government to modify the agreement through subsequent changes in legislation. The clauses provide that, neither party may change the terms of the agreement without the consent of the other. However, in a situation where changes are irresistible, the parties to the contract may also accept readjustment of the original contractual provisions to permit both parties fulfill their respective obligations in the contract.

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1 World Bank Group, (2022), Creating Markets in Cameroon: Unleashing Private Sector Growth, Washington DC. 136 p.

2 Section 15, 16 and 18 of Law no. 2019 /008 of 25 April 2019 to Institute the Petroleum Code of Cameroon.

3 www.respurcecontracts.org // [Electronic resource]. — URL: https://www.respurcecontracts.org/content/ocds-591adf- (date of address: 08.09.2024).

4 *Newcombe A.P.,* (1999). Regulatory Expropriation, Investment Protection and International Law: When is Government Regulation Expropriatory and When Should Compensation Be Paid?, A Dissertation Submitted in Partial Fulfillment of the Requirements of an Award of a Master's Degree at Law at the University of Toronto, p. 93.

These clauses further protects the multinational oil companies, as private investors by restricting the legislative or administrative power of the host state, as sovereign in its country and legislator in its own legal system, from amending the contractual regulation or even to annul the agreement[1]. Developing countries like Cameroon also offer stability provisions to attract investment in the oil sector, whereby contractual stability is used as a bargaining chip to increase the country's credibility in international markets and to compensate for existing risks[2]. To guarantee their effective implementation in the Cameroon's oil sector, they have been articulated in the petroleum laws of the country.

In this light, the Petroleum Law adumbrated that, petroleum contracts may provide for special regimes with regard to the stabilisation of economic conditions, particularly where conditions for execution of the said petroleum contract are aggravated by the introduction, in the Republic of Cameroon, of laws or regulations after its effective date[3]. This article is focused on the rationale of stabilisation clauses in petroleum contractual arrangements, the types of stabilisation clauses practiced in petroleum contracts in Cameroon, the legal status of such clauses in Cameroon, the approaches to interpretation of Stabilisation clauses in petroleum agreements and the intricacies with the application of stabilisation clauses in Cameroon.

2. Meaning and Rationale of Stabilisation Clauses

2.1. Meaning of Stabilisation Clauses

Stabilisation clauses are specific commitments by the host State not to alter the terms of the international petroleum agreements by legislation or other means, without the consent of other contracting parties. Stabilisation clauses are designed to shield foreign investors from, political risks and, in particular, subsequent adverse legislative or regulatory change in a host State[4]. They are found in investment contracts, and are a common device in respect of significant natural resource and energy projects.

Stabilisation clauses are provisions inserted in international petroleum contracts to restrain a host government from exercising state power to abrogate or otherwise intervene in agreements concluded with foreign companies. Such clauses aim to insulating the relationship from changes in the content of the law of the host

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1 *Bernardin A., et al*, (2012). Oil Wealth in Central Africa: Policies for Inclusive Growth. IMF Working Paper, p. 102.

2 Ownership of mineral resources in sub-Saharan Africa // [Electronic resource]. — URL: https//www.sovereignt (date of address: 01.10.2021).

3 Section 124 of the 2019 Cameroonian Petroleum Code.

4 *Maniruzzann A.,* (2008). Damages for Breach of Stabilisation Clauses in International Investment Law: Where Do We Stand Today? // International Energy Law and Taxation Review, Vol. 12, p. 251.

country. By agreeing to the insertion of a stabilisation clause, the host state makes a commitment to refrain from unilateral actions that may modify the terms of the agreement entered into with a foreign investor[1]. It is essentially a popular risk management tool that can create some feeling of security when faced with adverse governmental measure that purports to alter international contracts.

Stabilisation clauses aim to protect the IOCs, by restricting the legislative or administrative power of the host State, as sovereign in its country, from amending the PSC or even to annul the agreement. The long duration of investment contracts makes them susceptible to political and economic influences which may not be foreseeable when the contract was concluded, but which can affect the terms of the contract. It is for this reason that IOCs seek reassurances that the host state are willing to abide by the sanctity of contract[2].

One commentator has traced the origin of stabilisation clauses to the period between World War 1 and World War 2 when US companies began to include them in concessionary agreements because of nationalisations in Latin America[3]. In his separate opinion in the *Government of the State of Kuwait v. the American Independent Oil Company*,[4] Sir **Gerald Fitzmaurice** pointed out that, during this period, there were increasing instances where foreign investors with concessionary contracts had their investments taken over by host governments, especially in Latin America. He therefore explained:

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

Stabilisation clauses, however, became popular from the late 1960s following several high-profile international arbitrations triggered, in particular, by various acts of nationalisation and expropriation of petroleum industry assets by some oil producing nations who wanted to benefit from the rise in oil prices. Stability clauses may cover a broad range of host country laws including, among others, those relating to: labour; the environment; government control over production decisions and share participation; the obligation to provide local infrastructure; and the possibility of nationalisation.

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1 *Macedo J.,* (2011). From Tradition to Modernity: Not Necessarily an Evolution-The Case of Stabilisation and Renegotiation Clauses // Oil and Gas Energy Law, Vol. 2, Issue 1, p. 119.

2 *Nwaokoro J.,* (2010). Enforcing stabilization of international energy contracts // Journal of World Energy Law and Business, Volume 3, Issue 1, March 2010, p. 103.

3 *Bishop R.,* (2008). International Arbitration of Petroleum Disputes: The Development of a Lex Petrolea // Foundation of International Energy and Minerals Arbitration Law Series 2, Issue18, p. 1133.

4 (1982), ILM, 976, 1005/1006.

2.2. Rationale of Stabilisation Clauses

The inclusion of stabilisation clauses in petroleum contractual arrangements can be looked upon from the State and investors angles. Stabilisation clauses aim at rendering an agreement and a project's physical term immune from any subsequent adverse act of the government, whether administrative or legislative[1]. Thus, ensuring that the law of the host State, in so far as it impacts on economic and financial performance of an investment venture, remains unchanged throughout the duration of the investment venture is based on the agreement between the parties[2]. Similarly, the interest of oil and gas investors depends not only on the level of tax, but also on the extent to which the government shares the project's risks, though companies, unlike governments, have the means to diversify certain levels of risk. Governments, however, can minimise one important risk-that is the fiscal risk-by providing fiscal stability.

A tax system subject to continuous tinkering tends to undermine investors' confidence in government policy, resulting in a higher discount rate to compensate for increased risk, thereby reducing the value placed on future income streams and increasing the barriers to investment[3]. Investors attempt to neutralize these uncertainties by putting in place stabilisation clauses; these come in different forms, but their main objective is to lock in fiscal terms for the duration of a project. The term stabilisation refers to the attempt to avoid potential conflicts or risks with respect to the alteration of the regime in which the project takes place[4].

Long term resources and energy projects such as oil and gas exploration and mining have a serious need for stability that goes beyond short-term projects. It would seem that major financial requirements of these investors consist of swift investment recovery through step-up depreciation and pay-back, long loss carry-forward periods, reasonable royalty rates receptive to the mineral prices and a flexible system of income or cash flow-based taxation generated merely after investment recovery[5]. To therefore be sure that their investment will be secured, there is the need for stability clauses.

Furthermore, the involvement of the State as the sovereign owner of the resource and as a contracting party in a petroleum contract always raises the possibility of unilateral change or premature termination, by virtue of the State's sovereign legislative

1 *Maniruzzann A.,* (2008), Op. cit., note 8 (p. 122).

2 *Mukwasa M.,* (2010). When is Compensation Payable for Breach of Stabilisation Clauses the Case For the Cancelled Mining Development Agreement in Zambia // A Dissertation Submitted in Partial Fulfillment for the Requirements of the Award of a Master's Degree of in Law, University of Pretoria, p. 16.

3 *Nackhle C.,* (2016). Fiscal Stabilisation in Oil and Gas Contracts: Evidence and Implications // OIES Paper, SP 37, p. 6.

4 *Sornarajah M.,* (2012). The International Law on Foreign Investment, 3rd Ed., London, Cambridge University Press, p. 101.

5 *Hadiza T.,* (2012). Role of Stability and Renegotiation in Transnational Petroleum Agreements // Journal of Politics and Law, Vol. 5, p. 34.

power[1]. Although the principle of *pacta sunt servanda*[2], or strict sanctity of contract, is widely accepted, under no legal system has the principle been found to be absolute, and contractual rights can be expropriated[3]. In an attempt to neutralise the political risk, investors typically push for a legally binding guarantee, in order to safeguard the terms that were originally agreed upon for the duration of a project and to protect their investment from the unilateral exercise of state power aimed at changing the terms of the contract by legislation or administrative discretion.

A stabilisation clause is a contractual risk-mitigating device to protect investments from variations in the legal environment. This would include risks deriving from a possible exercise of host State sovereignty such as: expropriation, the obsolescence bargain, or any other change which the government might utilize in order to impose new requirements on investors[4]. The stabilisation clause is essentially a phenomenon of long-term state contracts, in contrast to private contracts, commercial contracts and short-term state contracts, which are not usually vulnerable to political or regulatory risk[5].

Stability provisions are vital to the petroleum industry; without them, the scope and effectiveness of petroleum agreements are often limited. Oil companies are so vulnerable to potential changes in fiscal terms that they behave much more conservatively if they cannot limit this risk. Conversely if they can mitigate, reduce or eliminate certain elements of risk they can be more aggressive in their investment efforts.

3. Types of Stabilisation Clauses in Petroleum Contractual Arrangements in Cameroon

There are different types of stabilisation clauses. The four principal categories of stabilisation clauses namely: freezing, prohibition on unilateral change, balancing and allocation of burden are of importance in this article[6].

3.1. Freezing clauses

The freezing stabilisation clause also referred to as stabilisation clause *stricto census* is a quite common occurrence in older petroleum arrangements. It constitute a classical form of stabilisation clause. These clauses ordinarily preclude the host

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1 *Faruque A.*, (2006). Validity and Efficacy of Stabilisation Clauses: Legal Protection vs. Functional Value" Journal of International Arbitration, Vol. 23, Issue 4, 12 p.

2 Pacta sunt servanda is a fundamental principle of law, whereby contractual obligations must be respected.

3 *Daniel F., et al*, (2008). Sovereignty over Natural Resources Versus Right under Investment Contracts: Which one Prevails? // Transnational Dispute Management Journal, Vol. 5, Issue 1, p. 14.

4 *Emeka J.*, (2008). Anchoring Stabilizing Clauses in International Petroleum Contracts, Int'l Law, Vol. 42, Issue 4, p. 1317.

5 *Faruque A.*, (2006), Loc. cit., note 18 (p. 335).

6 *Cameron P.*, (2010). International Energy Investment Law: Pursuit of Stability, OUP Catalogue, p. 62.

State from changing its legislation. It is designed to restrict the legislative and administrative powers of a host State to take unilateral action to the effect of altering or annulling the provision of the oil agreement[1]. A fiscal freezing stability clause will usually cover all tax policy changes that could affect the tax situation of a project, whether such taxes are included in the contract or are externally determined[2].

Although freezing stability clauses are still been used today in some host state's, their popularity has substantially waned due to the criticisms that has been raised in regards to the effect they have in limiting the HC's power[3]. They are criticised as an encumbrance on the host state's sovereign legislative prerogative and the permanency of sovereignty over its natural resources[4]. It has come under scathing attacks from civil society organisations and is frowned upon by most governments. In the alternative, any changes in host state legislation subsequent to the petroleum agreement do not apply to the specific project. PSA terms take precedence in the event of a conflict with new legislation.

3.2. Prohibition on unilateral changes

They are commonly dubbed intangibility clauses. It is sometimes considered as a sub-category of the freezing clauses. These clauses freezes the contract rather than the law[5]. It is built on the premise that the terms of petroleum agreements may not be modified or abrogated except with the contracting parties' mutual consent[6]. Instead of indirectly restraining the State's legislative capacity to intervene at a later date by freezing the law applicable at the time of the contract signature, this form of stabilisation tries to limit the state's capacity directly by requiring mutual consent to contract changes[7]. By requiring mutual consent, this approach has the advantage that it establishes a procedural framework mechanism for discussion and most likely negotiation between the parties about the future for discussion.

3.3. Balancing clauses

The modern alternative to freezing clauses is economic equilibrium clauses. They are commonly dubbed the economic stabilisation clauses or economic equilibrium

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1 *Tshegofatsa M.,* (2017). Fiscal Stability Assurance in Petroleum Agreement: Finding the Best Practice Model for the Modern Fiscal Stabilisation Clause: A Thesis Submitted in Partial Fulfillment for the Requirements of an Award of a Doctoral Degree in Law, University of Pretoria.

2 *Nackhle C.,* (2016), Op. cit., note 15, p. 14.

3 *Adams K.,* (2018). Contract Drafting: Revisiting Materiality-The Ambiguity at the Heart of a Fundamental Concept, 4th Ed., Illinois, Defending Liberty Pursuing Justice Press, p. 57.

4 Ibid.

5 *Peter D. Cameron* (2020). Stabilisation clauses: Do They have a Future? // Bahrain Chamber of Dispute Resolution International Arbitration Review, Vol 7, Issue 1, pp. 109–132.

6 *Adams K.,* (2018), Op. cit., note 27.

7 *Peter D. Cameron* (2020), Op. cit., note 29.

clause[1]. This clause seeks to address more deftly the issues concerning the exercise of the sovereign authority by the host State by allowing the host State retain full authority to enact new laws that may impact the project but at the same time, keeping the same financial position of the investor as provided for under the contract on the date it was signed[2]. So the new law will apply to the projects but the investor will be compensated. This law did not aim to freeze law but aim to maintain the economic equilibrium of the project[3].

They provide for automatic adjustments or negotiations to restate the initial economic balance of the PSA should legislative changes be introduced after signature. Such clauses allow for the application of new laws, regulations and interpretation to the petroleum agreement with proviso that the investor will be compensated for or indemnified from the cost of complying with them[4]. This is achieved through the use of a number of various mechanisms such as automatic adjustments, renegotiation and adaptation. In Cameroon for instance, the Petroleum Code provides for special regimes with regards to the stabilisation of economic conditions, particularly where conditions for the execution of the said petroleum contract are aggravated by the introduction, in the Republic of Cameroon, of laws or regulations after its effective date[5].

The automatic economic balancing provides for automatic adjustment of the contract terms in a stipulated manner. This can be achieved, for example, by a way of specified percentage readjustment of profit petroleum split in the case of production sharing agreement[6]. The negotiated economic balance (NEB) requires that the parties to come together to negotiate and agree to the amendments to the contract[7]. The economic balance clause can be an effective tool in extending the life of the petroleum agreement by giving the agreement a degree of flexibility to deal with changing circumstances. In this regard,

Maniruzzann posit:

The breach of freezing clause may result in only lump sum damages, which could be far below what the company considers, would be necessary to keep it whole. Under an economic balancing clause, however, the government would have to indemnify on an ongoing basis[8].

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[1] *Garcia-Amador F.,* (1993). State Responsibility in Case of Stabilisation Clauses // Journal of Transnational Law and Policy, Vol. 2, Issue 23, p. 30.

[2] *Daniel V.,* (1990). Petroleum Development Agreements: Forms and Drafting // Journal of Energy and National Resources Law, Vol. 8, Issue 1–4, p. 248.

[3] *Lauterpatcht E.,* (1990). Issues of Compensation and Nationality in the Taking of Energy Investments // Journal of Energy and National Resources Law, Vol. 8, Issue 1–4, p. 241.

[4] Ibid.

[5] Section 124 of the 2019 Cameroonian Petroleum Code.

[6] *Maniruzzann A.,* (2008), Op. cit., note 8.

[7] Ibid.

[8] Ibid.

The clause allows the parties to modify the agreement instead of terminating the relationship considering changes which could happen during the life of the contract- particularly the NEB clause which could bring both parties to the negotiation table with the view of working harmoniously and in a collaborative manner to reach beneficial equilibrium. The NEB clause can be utilized to ensure the equality of treatment of both parties in respect of economic balance of the contract by allowing for renegotiation in cases where not only the interests of the investor has deteriorated, but also in instances where the host State has negative impacts on itself[1]. For example, if the tax rate goes up, the investor's interest will deteriorate whereas, if the tax rate goes down, the investor's profit will improve[2]. In the latter instance the NEB clause would allow the host State to negotiate an amendment to secure the same result as if the tax rate not gone up.

Generally, this technique is costly since achieving economic equilibrium of the parties involves financial considerations in the form of damages, compensation[3], and specific performance. Further, failure to come to a mutual agreement, may lead to dispute before the international tribunals on ground of impossibility of performance.

3.4. Allocation of burden

These clauses seek to allocate the fiscal and related burdens created by a unilateral change in the law. It is common for the resultant burden to be borne by the National Oil Company or the state[4]. In the Egyptian model concession agreement for instance, it exempts the NOC and the foreign investor from all taxes and duties[5], except for income tax, which the NOC pays on behalf of the foreign investor[6]. The above clauses can be sub-categorized into full stabilisation clause and limited stabilisation clauses depending on the scope of laws covered. Full stabilisation clauses apply to all laws and actions impacts the provisions of the petroleum agreement while the limited stabilisation clauses focus on specific laws and actions to the exclusion of others[7].

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1 *Cotula L.,* (2008). Reconciling Regulatory Stability and Evolution of Environmental Standards in Investment Contracts: Towards a Rethink of Stabilisation of Stabilisation Clauses // Journal of World Energy and Business, Vol. 1, Issue 2, p. 158.

2 *Tshegofatsa M.,* (2017), Op. cit., note 25.

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

4 *Paasivirta E.,* (1989). Internationalisation and Stabilisation of Contracts vs State Sovereignty // The British Year Book of International Law, Vol. 60, Issue 1, p. 315.

5 Article XVIII(c) of the Egyptian Model Concession Agreement.

6 Article III(g) of the Egyptian Model Concession Agreement.

7 *Blitzer C., et al*, (1985). An Analysis of Fiscal and Financial Impediments to Oil and Gas Exploration in Developing Countries // Energy Journal, Vol. 6, p. 72.

4. Legality of Stabilisation Clauses in Petroleum Contractual Arrangements

4.1. Legal dimensions of stabilisation clauses in petroleum contractual arrangements in Cameroon

The legal value of stabilisation clauses has generated heated debate over the decade. To answer the question of how valuable these clauses are, commentators have focused on two key aspects: the validity of stabilisation clauses under domestic law and its validity under international law. Many host State claim to have their sovereign legislative power encumbered by stabilisation clauses whereas others have been amenable to the demands of foreign investors to include these in petroleum agreements.[1] The consuses amongst different scholars is that the contractual assurance of stability contained in an investment agreement between the host State and an investor will be valid under that state's domestic laws if the legislative power and constitutional framework provides for them[2]. The validity of stabilisation concluded outside the parameters of that State's legal framework will undoubtedly be invalid.

Clauses negotiated under the shadow of ultra vires and constitutional invalidity cannot generate rights simple by appearance or legitimate reliance on the State agency's contracting parties. Even if a stabilisation clause is concluded in observance to all perquisite legal requirements, it must be borne in mind that every country will retain its sovereign authority to enact laws that will triumph previous laws in spite of existing laws or agreements to the contrary[3]. This authority could be used to render the stabilisation clause invalid *ex post facto* in terms of domestic law. The United Nations Guiding Principles are a significant step toward a full integration and application of stabilisation clauses in contractual arrangements. Through the principle of Responsible contract, contractual stabilisation clauses if used, should be carefully drafted so that protections for investors against future changes in law do not interfere with the State's bona fide efforts to implement laws, regulations or policies in a non-discriminatory manner in order to meet its human rights obligations[4].

The validity of stabilisation clauses have been upheld in the Cameroonian Petroleum Code. In this light, the Code provides that: *Petroleum contract may provide for special regimes with regard to the stabilisation of economic conditions, particularly where conditions for the execution of the said petroleum contract are aggravated by the introduction, in the Republic of Cameroon, of laws or regulations after its effective date*[5].

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[1] *Kakembo D.,* (2014). Stabilisation Clauses in International Petroleum Contracts Illusion or Safeguard? // Deloitte Working Paper, p. 10.

[2] *Bartels M.,* (1985). Contractual Adaptation and Conflict Resolution, 1st Ed., Netherlands. Kluwer Publishers. 187 p.

[3] Ibid, p. 215.

[4] Principle 4 of the United Nations, Principles for responsible contracts, 25 May, 2011.

[5] Section 124 of the 2019 Cameroonian Petroleum Code.

This has been purported by the Mining Law which holds that*; the stability of the tax and customs regime shall be guaranteed for legal persons holding industrial mining and quarry operation licences and permits for a limited period…and during this period, the amounts, rates and base of taxation specific to the sector, especially fixed fees, State land concession fees or area based royalty, ad valorem tax and the extraction tax, as well as tax and customs benefits on imports granted, and no new levy or tax whatsoever shall be applicable to permit or licence holder or beneficiary during this period*[1].

It is worth noting that the Cameroonian Model Production Sharing Contract gives the oil contractors two months from the date of a significant modification of the contractual terms to address to the Minister in charge of hydrocarbons written notification stating that the legislative or regulatory change in question would have a significant detrimental effect on contractor's economic equilibrium as guaranteed in the contract[2]. Within a two month period starting from receipt of the contractor's notice, the Minister in charge of hydrocarbons may either: accept in writing the reasons of the contractor and make arrangements so that the legislative or regulatory provision in question no longer applies to the contractor nor to any entity comprising contractor or reject in writing the contractor's justifications[3].

If the Minister in charge of hydrocarbons cannot make arrangements within stated time, the parties will endeavor to make such readjustments to the contract as to reestablish the economic equilibrium of the contract as it had been agreed to on the effective date, taking into account the new legislative or regulatory provision in the notice. The parties will make their best efforts to agree upon revisions to be made to the contract within ninety days as from the notification of the rejection of the above-mentioned request by the contractor[4]. The revisions to be made to the contract may not in any event diminish the rights or increase the obligations of the contractor as had been agreed to as of the effective date. If agreement cannot be reached between the parties within the time frame provided, the dispute may be submitted by either party to the arbitration procedure.

The Chad-Cameroon project is one of those contracts where stabilisation clauses were instituted. This project was governed by several agreements. However, for the purposes of this study, the four key documents are the 1988 Convention Agreement, the 2004 Convention Agreement replacing it, the 1997 COTCO Convention of establishment (COTCO-Cameroon)[5], and the TOTCO Convention

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1 Article 149(1)(2) of Law no 2023/014 of 19 December 2023 relating to the Mining Code in Cameroon.

2 Section 29(2) of the 2007 Cameroonian MPSC.

3 Ibid, Section 29(3).

4 Ibid, Section 29(4).

5 Convention of Establishment between the Republic of Cameroon and the Cameroon Oil Transportation Company (hereinafter referred to as Cameroon-COTCO Convention).

of establishment (TOTCO-Chad)[1]. The stabilisation clauses in these agreements differ in the way in which they are drafted. However, each contains a combination of stringent freezing and economic equilibrium clauses protecting the investors for the entire duration of the project[2]. The governments in the project agreed that, they shall not modify such legal, tax, customs, and exchange control regime in such a way as to adversely affect the rights and obligations of the investors[3]. In addition, no legislative, regulatory or administrative measure, which is contrary to the provisions of the Convention, shall apply to the investors without their prior written consent.

4.2. The approaches to interpretation of stabilisation clauses in petroleum agreements under international law

One of the contentious matters in international investment law surrounds the validity and construction of the stabilisation clauses in the petroleum agreements. This has been subject to litigation before the international tribunal where host states changed laws regardless of the existing stabilisation clauses, and thereby causing financial loss to the investors. Generally, this point is addressed under two distinct approaches. The first approach is based on theory of internationalization of stability contract, which argues that presence of stability clause gives it an international character. This signifies capitalist school of thought on validity of stability clauses[4]. It holds that states are bound by stability clauses which are concluded under valid states' authority and governed by either international law or domestic law. The host state is estopped from repudiating its signification of consent to be bound.

The above legal position was substantiated in the case of *Texaco Overseas Petroleum and Others v. the Libyan Arab Republic*[5] whereby it was held that reference to general principles of law in the international arbitration context is a sufficient criterion for the internationalization of a contract, and thus private contracting party was protected against unilateral and abrupt modifications of law in the host state. Thus, nationalization of Texaco's properties according to Libyan law was unlawful. Consequently, Libya‘s defense based on lawful sovereign act was refused by the International Court of Justice (ICJ) on ground that it was bound to observe contractual obligations in good faith in accordance with both national and international laws.

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[1] Convention etablisséments between the Republic of Chad and the Chad Oil Transportation Company (TOTCO), 10 July 1998.

[2] The duration of each agreement and contract is between 25 and 35 years with option of renewal for the same period.

[3] Article 24.2 COTCO-Cameroon Convention.

[4] *Faruque A.,* (2006), Op. cit., note 18.

[5] 17 I.L.M 1 (1977).

The similar decision was also observed in the case *of Libyan American Oil Co. (LIAMCO) v. Libya*[1] whereby it was held, inter alia, that the right of a State to nationalize was held to be sovereign, subject to indemnification for premature termination of concession agreements. Further, nationalization of concession rights, if not discriminatory and not accompanied by a wrongful conduct was not unlawful, but constituted a source of liability to compensate the concessionaire for said premature termination of the concession agreements. Thus, though the concession agreements were to be governed by and interpreted in accordance with the 'common principles of Libyan and international law', it was observed that any part of Libyan law in conflict with the principles of international law was to be excluded. Apart from judicial precedents, the internationalization of contract approach is accommodated under a number of international law instruments.

The Vienna Convention on the Law of Treaties, 1969 (to be referred to as VCLT) requires the state to observe terms and conditions of an agreement in good faith, also known as *pacta sunt servanda*[2]. This means that States and investors should be bound by the letters of the agreement no matter how cumbersome it may prove to be. It means Cameroon ought to be bound by provisions of the stability clause in the existing petroleum agreements regardless of their fairness and validity, and that using internal amended law to avoid liability cannot be justified[3]. However, States may be precluded from performing the contract containing stability clause due to valid grounds. The first ground is fundamental change of circumstances (*rebus sinc stantibus)* of the contract[4]. Here, a State may request for renegotiation of contract as a result of change of conditions that existed at the time of conclusion of an agreement, which were not foreseeable by the parties. Such conditions must have been regarded by the parties as essential basis of consent and the change should radically affect the nature of obligations under the contract. Secondly, the state may seek for renegotiation on ground of impossibility of performance of contract due to permanent disappearance or destruction of the object considered essential for performance of contract[5].

However, the State should not have actively caused or influenced the impossibility of performance, and such impossibility should not be of a temporary character. In the latter case, a State may suspend the contract subject to lawful procedure, inter alia, giving three months' notice in writing to the other party[6].

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1 17 I.L.M 3 (1978).

2 Article 26 of the Vienna Convention on the Law of Treaties, 1969.

3 Ibid, Article 27.

4 Ibid, Article 62.

5 Article 61 of the Vienna Convention on the Law of Treaties, 1969.

6 Ibid, Articles 65 and 67.

Likewise, the sanctity of stability clause is guaranteed under the UNIDROIT Principles of International Commercial Contracts (hereinafter referred to as UNIDROIT Principles) which applies in agreements between states, and agreements between states and investors[1]. It states that; a contract validly entered into by the parties is binding, and that it can be modified or terminated in accordance with its terms or by agreement. This suggests that States and investors are bound by the stability clause in a contract which may be changed subject to renegotiation clause. Consequently, States and investors are obliged to act in good faith and fairly in accordance with international trade[2].

However, parties may be discharged from contractual liability on reasons of hardships and force majeure, which impede performance of the contract[3]. This same position has been held in Cameroon in the Indian production sharing contract between the Republic of Cameroon and Kosmos Energy Cameroon PLC which provided that no party shall be liable for the non-performance or the partial performance of its obligations, if the responsible party is prevented by reason of force majeure[4]. Thus, the capitalist approach regard stability clause to be a valid instrument of securing investors' interests against sovereignty prerogatives of States.

Unlike the Capitalist approach, the sovereignty approach which is based on "relocalisation of contracts" argues that states have inherent and unrestricted powers to control the exploitation of resources located within their territories. Hence, stability clause should be interpreted and construed in accordance with national law of the host state. Consequently, if the stabilisation clause provides for matters that contravene fundamental principles of the host state, such clause will have no legal effect. The, the purported freezing effect of the stability clause will not be regarded as manifestation of the host state's intention to provide immunity to the investors' operations. This approach requires an investor to make thorough appropriate due diligence and feasibility study before it makes decision to invest[5]. It is always assumed that investors subject themselves to political risks, including change of political environment and laws, which are usually addressed through risk insurance.

The logic behind this approach is that most aspects of petroleum agreements are governed by the law of the host State, for instance, matters of recruitment of

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1 Article 1.3 of the UNIDROIT Principles of International Commercial Contracts, 2016, These Principles are not binding provisions but they are regarded as lex mercatoria.

2 Ibid, Article 1.7.

3 Ibid, Article 7.1.7.

4 Article 24 of the Indian Production Sharing Contract Between the Republic of Cameroon and Kosmos Energy Cameroon PLC.

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

expatriate staff, employment of local labour, customs and exchange regulations, income tax and other forms of charges, and regulation of capital flow[1]. Consequently, the stability clause which to a large extent addresses the above matters should be construed in accordance with the law of the host State. The stability clause in an international contract which contravenes a "rule of internal law of fundamental importance" will be regarded as invalid, hence unenforceable[2]. Accordingly, the host State has competence to enact laws on regulation of aspects covered by the stability clause, provided the State acts fairly, reasonably and equitably[3]. It is important to note that regardless of the approach taken, the host State and the investors need to come to terms through renegotiation of the contracts.

Usually, the concern of the parties during renegotiation process is maintaining an economic equilibrium of the parties. Where the host State and investors are unable to arrive at mutual agreement, it becomes a dispute which should be addressed through agreed appropriate forum. The general law and practice on investment matters is such that disputes should be determined through arbitration or reconciliation by an umpire, and using the agreed law (international law or national law). Regardless of the law applicable, a harmonized interpretation of the stabilisation clauses should be sought in order to balance the investors' interests and national interests.

5. Intricacies Associated with the Application of Stabilisation Clauses in Petroleum Contractual Arrangement in Cameroon

United Nations General Assembly (UNGA) Resolution No. 1803 (XVIII) not only recognises the rights of peoples and nations to permanent sovereignty over their natural wealth and resources, it further declares that nationalisation and expropriation can be implemented on the grounds of public utility, security or national interest, subject to appropriate compensation[4]. This has been buttressed by the preamble of the Constitution which holds that; *the State has resolved to harness our natural resources in order to ensure the well-being of every citizen without discrimination, by raising the living standards, proclaim our rights to development as well as our determination to devote our efforts to that end and declare our readiness to co-operate with all States desirous of participating…with due respect for our sovereignty and the independence of the Cameroonian State*[5].

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[1] *Faruque A.,* (2006), Op. cit., note 18.

[2] *Katja Gehne, Brillo Romulo*, (2006), Loc. cit., note 73.

[3] *Maniruzzann A.,* (2008), Op. cit., note 8.

[4] UNGA Resolution 1803 (XVIII) 14 December, 1962.

[5] Law no.96-06 of 18 January 1996 to Amend the Constitution of 2 June 1972.

Similarly, the Petroleum Law firmly affirms that, *all deposits or natural accumulations of hydrocarbons located within the soil or sub soil of the territory of Cameroon, whether or not discovered, are and shall remain the exclusive property of the environment and the State shall* exercise sovereign rights over the entire territory for the purpose of petroleum operations[1]. The intricacies with the readings of the above provisions are: what do we consider as public utility, security or national interest? To answer this, a major setback with our national laws is that it does not define the terms, leaving authorities with significant discretion. This lack of clarity can only increase nationalisation and expropriation.

Another complexity with the application of stabilisation clauses in relation to the above provisions is: can the Cameroonian government to still go ahead to nationalise and expropriate the property of oil companies in spite the presence of stabilisation clauses in their contracts? If the answer is in the affirmative as held by the author, then, stabilisation clauses can therefore not abrogate the State's sovereignty over her natural resources. Thus, the State can continue enacting new legislations, and in some arbitration cases to breach an agreement, without compensation. Arbitrations like *Aramco and Agip*[2] reflect the view that a State exercises its sovereignty when it binds itself with clauses in an investment agreement[3]. Similar cases where seen in the Libyan expropriation cases of BP Exploration, Topco and Liamco[4], *Aguaytia Energy, LLC (AEL) v. Republic of Peru*[5] *and Duke Energy International Peru Investments No 1, Ltd v. Republic of Peru*[6], where the presence of Stabilisation Clauses cases though held to be valid did not stop the various government from acting contrary to the Stabilisation Clauses which was the reason for the case.

Furthermore, the insertion and application of stabilisation clauses has resulted to human rights violation in many circumstances. Human rights groups have voiced concerns that Stabilisation clauses in the Baku-Tbilisi-Ceyhan (BTC) and the Chad-Cameroon pipeline project hinders the rights of HC's to meet their international human rights obligations and limit the application of new laws protecting human rights[7]. This phenomenon is in contradiction with the Cameroonian Constitution

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1 Article 3(1) (2) of the 2019 Petroleum Code.

2 21 ILM 735.

3 Saudi Arabia v. Arabian American Oil Company (1958) 27 ILR 168; Agip v. Popular Republic of Congo (1982) 21 ILM 735.

4 BP Exploration Company (Libya) Ltd. v. Government of the Libyan Arab Republic 53, I.L.R.

5 ICSID case No. Arb/06/13 p. 41–43 and 53–54. (Award dated 11 December 2008).

6 ICSID case No. Arb/03/28 227. (Award dated August 18 2008).

7 They are grave concerns that the agreement between (BP) the pipeline consortium leader and the Turkish government creates a huge disincentive for Turkey to protect human rights because Turkey has agreed to pay compensation if pipeline construction or operation is disturbed. Amnesty international warns that this could mean 40–60 years of serious risk to human rights of those who protest. The SC

which provides that every person shall have a right to a healthy environment… and the State shall ensure the protection and improvement of the environment[1].

6. Conclusion

Given the pressures on developing countries especially Cameroon to attract foreign investors in their oil industry, it becomes imperative for them to offer clauses that seek to stabilise a bargain struck with international investors. These clauses will shield investors against host countries who might attempt to change legislations and as a result lose attractiveness for foreign investors. From the discussions of this study, stabilisation clauses have a legal validity under the Cameroonian petroleum law. These clauses can take the traditional or modern forms. However, the applicability of these clauses in the Cameroonian petroleum industry is faced with several complexities. The findings of this paper has revealed that the applicability of these clauses remains questionable as the Cameroonian government can implement nationalisation and expropriation on the grounds of public utility, security or national interest, subject to appropriate compensation. Furthermore, the study has revealed that the Cameroonian government can introduce new legislative or regulatory changes in the petroleum contracts, the terms of which must be agreed by both parties. In case where an agreement is not reached, the matter will be referred to arbitration. This study concludes that the State can continue enacting new legislations, and in some arbitration cases to breach an agreement, which defeats the essence of stabilisation clauses in petroleum contracts.

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[1] Preamble of Law no. 96-06 of 18 January 1996.

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Recommended citation

Baiye E.G. A legal examination of stabilisation clauses in petroleum contracts in Cameroon. Kazan University Law Review. 2025; 1 (10): 6–24. DOI: 10.30729/2541-8823-2025-10-1-6-24.