Scientific Research Publishing

Beijing Law Review, 2023, 14, 515-532
https://www.scirp.org/journal/blr
ISSN Online: 2159-4635
ISSN Print: 2159-4627

Stabilization Clause, Unilateral Variation of Terms and the Petroleum International Agreement

Adebisi Arewa

Nigerian Institute of Advanced Legal Studies, Lagos, Nigeria
Email: bisi_arewa@rocketmail.com

How to cite this paper: Arewa, A. (2023). Stabilization Clause, Unilateral Variation of Terms and the Petroleum International Agreement. *Beijing Law Review, 14,* 515-532.
https://doi.org/10.4236/blr.2023.142026

Received: February 7, 2023
Accepted: May 3, 2023
Published: May 6, 2023

Abstract

The objective of this study is to highlight the multiplicity of scenarios regarding issues of stability and underscore certain stability stipulations in the contemporaneous application, and certain developments, which gives a great cause for concern to parties to Petroleum International Agreements (PIAs) Amongst which are the recurrent problem of the impossibility of performance occasioned by supervening circumstances and disequilibria in relationships occasioned by events, which render the possibility of performance onerous. The study found that *pacta sunt servanda* cannot apply in absolute terms when ranged against the consideration of sovereignty of the state party over the natural resources *in situ* within its territorial sovereignty. It concluded that it is inconceivable to have immutable PIAs whose terms are frozen in time and or incorporate stabilization clauses that are contrived to freeze the HC's laws; or remove the PIA from the purview of the municipal law of the HC.

Keywords

Petroleum International Agreements, *Pacta Sunt Servanda*, Impossibility of Performance, Supervening Circumstances, Stabilization Clauses, Permanent Sovereignty over Natural Resources, Transnational Investment

1. Introduction

This paper argues the thesis that the notion of stabilization and internationalization of petroleum international agreements flounders in the face of considerations of sovereignty and proprietary rights of the host country over the natural resources in its jurisdiction. It posits that the stipulation of applicable law may not guarantee the stability of expectations under a PIA. A choice of law will be

otiose in the face of a fundamental change, which willy-nilly alters the expectation under the agreement.

The study adumbrates that the right to development emanates from the right to life. If the right to development were denied as emanating from peremptory norms of international law by any curious syllogism, then, it could be posited that genocide which is the premeditated denial of the right to life of nations is not an act of outlawry at international law. It is from the right to self determination that the right to development emanates. It will be contradictory to ascribe the right to self determination of peoples as a peremptory norm of international law while concomitantly understating the importance of the right to development of the people which affirmatively defines their future through invocation of the right to self determination.

The paper posit that stabilization clauses in petroleum international agreements between HCs and transnational oil corporations among other things stipulate that the contracting state shall not modify, abrogate the contract, subject the contract to a law other than that of the contracting state, independent arbitration of disputes arising from the contract and periodical review of terms cannot insulate the transnational oil corporation against the exercise by the state of the permanent sovereignty over its natural resources (Leben, 2010). The study submits that transnational investments involving state entities by their nature are inarbitrable.

Petroleum international agreements are instruments, which govern the long-term relationship between a state subject of international law and international oil companies. The relationship between parties in a PIA is predicated on the consideration that they associate symbiotically in an alliance of resources with a view to mutually optimizing their benefits from the exploitation of natural resources of the HC party to the PIA. Contrary to that consideration of symbiosis, there may be no guarantee that consequent upon a high magnitude of investment exposure by an international oil company in the exploration and exploitation of oil resources of the host state, it may not take unilateral steps which disparages the vested interest of the international oil company.

It is in view of the foregoing that international oil companies evince apprehension of the specter of unilateral acts of states, which may erode their correlative rights under the agreement, and seek to contrive devices to avert the danger of variation of terms and or outright abrogation of the PIA (Lax, 2019; Asante, 1979a). Perhaps the mostly resorted to device by TNOCs to avert that danger was the "stabilization" clauses that are intended to insulate the international oil company from subsequent unilateral variations of term and changes in the municipal laws of the host state (Asante, 1979b).

2. A Perspective on Stability of PIAs vis-à-vis the Right to Economic Development

So much by way of a general consideration of the legal nature of petroleum international agreements. At this juncture, it is pertinent to dwell on some of those

devices which parties to PIAs resort, to avert the danger of variation of terms and or outright abrogation of the PIA. These devices include; stabilization clauses; internationalization clauses; force majeure clauses; and hardship clauses. The paper submits that these clauses aimed at stabilizing expectations under PIAs are of doubtful efficacy. In that regard, the paper shall attempt to examine whether there is indeed a correlation between recourse to these clauses in PIAs and stability of expectations under PIAs (Smith & Wells, 1976). The study is however obliged to dwell considerably on the right to development with a view to establishing its legal basis and range it against the notion of stability of PIAs (Arts & Tamo, 2016; Ibhawoh, 2011).

With humanity faced with the specter of environmental degradation of planet earth, which resources are fast dwindling in contrast to its population which is growing at geometric rate, and a skewed resource allocation modality, where the affluent nations relate unequally with peoples who are in virtual penury, the jury is out as to whether there is a "right to development" of peoples. It follows therefore that if the right to development of peoples is invokable and held fitfully as inalienable, then the magnitude of deprivation in the world's poorest nations cannot be rationalized without generating strong rebuttals. Contrary, to the foregoing, if it holds without contradiction, that man is the indivisible unit of development, then his inalienable right to development must necessarily exist at the highest echelon of the hierarchy of rights. It is a fundamental right and absolute in nature, as to be inconceivable to qualify it, circumscribe and or limit it as it is at the very core of the being and essence of man (Karimova, 2016).

That granted the most effective device for upholding a nation's right to development is arguably to remove those obstacles of global international economic relations, which inhibits its ability to deliver the right to development to its nationals and constitute a drain on its scarce resources, which are siphoned abroad. It is necessary therefore to avoid the pitfall of the *reductio ad absurdium* of the paper's holistic position, by adumbrating argument strictly within the human rights perspective, which is too narrow and individualistic for the far reaching changes at the international plane needed to jump start the economies of the world's poorest nations (Ibid).

However, there is a need to resist the trivialization of the development problematic, through the ascription of those causes too often, adumbrated in certain quarters and of course their apologists as the chief causes of underdevelopment. Without prejudice to those causes that are being adumbrated in such quarters as responsible for underdevelopment in these nations; the paper posits that underdevelopment is a structural criterion which has nexus with a particular paradigm of international economic relations, and a given mode of international division of labor, reinforced of course, by a certain super structure of global *real politik* (Ngang et al., 2018).

Underdevelopment is an effect, of this global division of labor, which is the antecedent condition, without which underdevelopment could not have been an effect. The world is replete with examples of well intentioned governments, in

nations endowed prodigiously with both human and natural resources, where the international division of labor, through the device of the international economic order, inevitably frustrate and even oust such governments, while concomitantly superintending over the plunder of such nations (Ngang & Kamga, 2020).

2.1. The Nature and Foundation of the Right to Development

The right to development emanates from the right to life, there is incontrovertible evidence supporting the existence of the right to development, and that the right to development emanates from the right to life. If the right to development were denied as emanating from peremptory norms by certain curious sylogy, then it could be positioned that, genocide, which is the premeditated denial of the right to life of nations, is not an act of outlawry at international law (Okafor & Ngwaba, 2020).

It is from the right to self determination that the right to development emanates. It will be contradictory to ascribe the right to self determination of peoples as a peremptory norm of international law while concomitantly understating the importance of the right to development of a people that affirmatively defined their future through invocation of the right to self determination. The right to self determination encompasses the right to development. Thus when linked in this manner to the right of states to self determination, the right to development becomes more determinate and by establishing a nexus between the right to development and the right to self determination, which is *stricto sensu* an attribute of states, the study would have circumvented the pitfall of individualizing the right to development (Desai, 2014; Lorenzini, 2019).

Structural lopsidedness of the world order, suggest total solutions rather than treating issues in isolation and stabilizing the world economy. The far reaching measures needed would require the restructuring of the world economy in its totality, while taking into consideration the impact of world *real politik*, demography and natural and human resources. A distinction must be made between development and growth (Iqbal, 2012).

Any assistance and or trade concession issuing from a developed country to a developing country is an act of self-interest. For economic dislocations, caused by huge debt overhang, unequal terms of exchange, arbitrary fluctuation in prices of commodities and neo-colonialism via the agency of transnational corporations would only, further weaken these nations, and disparage their abilities to develop (Desierto, 2022).

A corollary to the foregoing is that there is a group of very poor nations, whose economies are overwhelmingly dominated by transnational corporations to the extent that the political sovereignty of the state is negated by the brazen undermining of its economic sovereignty. Such states suffer the illusion of equating political independence with sovereignty. In view of the foregoing, sovereign equality of states would remain an ideological criterion for states cannot

be deemed to be equal unless they have attained the same level of economic development. The repudiation by a state of permanent sovereignty over its natural resources through unequal terms and acquiescence with foreign domination of its economy will only serve to accentuate dependency and undermine its sovereignty. At the core of the existence and being of a state, is the permanent sovereignty over its natural wealth and resources, which is a basic constituent of the right to self determination, and to repudiate that right is to strike lethally at the very heart of state sovereignty (Ikejiaku, 2020; Selwyn, 2020).

Therefore, permanent sovereignty over the natural resources *in situ* in the territory of a state is a condition precedent, necessary and sufficient for its being a sovereign and independent state properly so called. A corollary to the foregoing is that large scale brazen transgression of the permanent sovereignty of states over their natural resources will invariably lead to severe economic and social dislocation in these states, and constitute real, clear and present danger to world peace and collective security. It is not a platitude to say that economic conflict engendered by prolonged exploitation of resources of developing states constitutes a threat to peace and security of the world as distinct from political and military conflicts which in themselves are not causes but effects of other antecedent conditions which, as history of human armed conflict have shown are economic.

There is an evolutionary nexus between the right to development and sovereignty, which derives from peremptory norms of international law. Permanent sovereignty over natural resources, the right to development and state sovereignty all constitute links in this chain, which is as strong as its weakest link; the links are reciprocally reinforcing, weakness of one results in the weakness of all (Vandenbogaerde, 2013).

The expropriation of the assets and operations of transnational corporation on ground of over riding national interest is perhaps the ultimate espousal of state sovereignty and the right to development; provided it is non-discriminatory and with prompt, effective and adequate compensation. It facilitates the integration of TNOCs into the national economy, and restructuring them in the light of the economic aspirations of the nationalizing state. It suffices to posit that development; especially all-encompassing development of developing states is a phantom notion, a mythical ideal. The study cannot but highlight the ideological representations implied in the discourse regarding development and development law. We will attempt in the next section to range the right to development against the notion of stability of PIAs pursuant to determining the efficacy of those measures which TNOCs take to achieve stability of expectations in PIAs with state parties.

2.2. Stabilization Clauses

Perhaps the most resorted to stabilization device under PIAs is the stabilization clause. Stabilization clauses are incorporated in PIAs because of their rather long gestation, which necessitates the need for certain built in mechanism of stability,

which will deter the state from willfully disparaging the interest of the private party to the PIA. Transnational Oil Corporations are particularly wont to insist on the incorporation of stabilization clauses in the PIA, where the adjectival law of the contract is the national law of the contracting state. The TNOC by so doing seek to insulate itself from the vagaries of the dangers of willful, unilateral and arbitrary alteration by the state of its laws in such a manner as to disparage the interests of the TNOC and disrupt its expectations fundamentally (Lax, 2019; Asante, 1979a).

Stabilization clauses may take either of two forms, they may be aimed at rendering the law of the host state immutable and or frozen at the time the legal relationship subsists between the TNOC and the host country or at the time the agreement was signed and consummated. Under this dispensation, the adjectival law of the agreement is defined and embodied in the agreement and frozen as it were at the time of signing the contract (Maniruzzaman, 2008; Mann, 1944).

A contractor (TNOC) who enters into a long-term agreement may reasonably expect a fairly clear definition of its rights at the commencement of the contract. Certain measures therefore become necessary so as to determine whether the contract will reach maturity, or whether its terms would be truncated. The national law of the contracting state may become inapplicable by reason of its inconsistency with the terms of the agreement made between parties thereto. To that connexion it is necessary to distinguish between forms of incongruity, which stabilization clauses seek to address. These are present inconsistency, emanating between a PIA and a prior legislative provision, and those inconsistencies that derive from the incongruity of a PIA with a subsequent legislation (Dias, 2010; Amerasinghe, 1964).

In the case of present inconsistency, it is clear, at least with respect to a PIA, which receives legislative approval and thereby acquires the force of law that in the event of conflict between the terms and conditions of such PIA and any prior statutory provisions, the former will prevail. That rule suffices in itself to permit that the terms and conditions of the PIA takes precedence over and above any prior statutory provision, which is incongruous therewith. It is not however uncommon to find certain PIAs incorporating provisions which envisage future conflicts between the terms and conditions of PIAs and statutory provisions. (Article 43 of the Iranian Offshore Concessions, 1965) provides:

> The provisions of the Mining Act of 1957 shall not be applicable to this Agreement, and any other laws and regulations which may be wholly or partly inconsistent with the provisions of this Agreement shall, to the extent of any such inconsistency, be of no effect in respect of the provisions of this Agreement.

In a similar vein, Article 37(1) of the concession granted to Phillips (Phillips Concession, 1963) by the U.A.R. provides as follows:

> The EGPC and Phillips shall be bound by Law No. 66 of 1953 as amended by Law No. 86 of 1956, and by the executive regulations thereof to the ex-

> tent that said law and regulations are not contrary to or inconsistent with the provisions of this Agreements.

The inconsistency between a PIA and a subsequent statutory provision can sometimes be problematic. Certain agreements and statutes stipulate that no future legislation or regulatory provisions shall affect the rights granted by the PIA. Several PIAs contain stipulations that the state shall not modify or abrogate the PIA and that no alteration shall be made therein except by mutual consent of parties. Such stipulations were embodied in (AIOC's Concession, 1933); (KOC's Concession, 1934); (The consortium's Agreement, 1954); (Iran's offshore agreements, 1965) and (Kuwait's Concessions to Arabian Oil Company, 1958) and (Shell, 1961).

The foregoing provisions are affirmations of the principle implied in the maxim, *pacta sunt servanda.* The Libyan Petroleum Law provides in Article 24 that no regulation issued for the implementation of the law:

> Shall be contrary to or inconsistent with, the provisions of this law or adversely affect the contractual rights expressly granted under any permit or concession.

Article 16 of the Libyan concessions also declares that:

> The contractual rights expressly created by this concession shall not be altered except by mutual consent of the parties.

Subsequent amendments made to the Libyan Petroleum Law after its promulgation did not apply to concessions already granted except to the extent of changes, which were made by mutual agreement. Although the amendments made to the Libyan Petroleum Law on July 3, 1961; November 9, 1961 and April 26, 1962 did not affect previous concessions yet they embodied inducements for concessionaires to amend their agreements in accordance with the provisions of the amended laws.

The Iranian Petroleum Act states in Article 11 that:

> No changes adverse to the conditions, privileges or circumstances provided in, or recognized by, any agreement as of its date or of its renewal, shall be applicable to such agreement during the period of its existence or renewal.

Furthermore, Article 16 of the same act declares that:

> Any laws or regulations, which are wholly or partly inconsistent with this act, shall be of no effect to the extent of that inconsistency.

The practice of the U.A.R. in that regard is somewhat similar. The U.A.R.'s concession to Phillips stipulated in Article 45:

> This agreement shall be governed by the provisions herein contained, which can only be amended by agreement between the contracting parties.

The foregoing contractual and statutory provisions are designed to protect

conventional rights against supervening legislation. In the event that there are no such stabilization clauses either contractual and or statutory, or where inspite of their being expressly provided for, subsequent legislation is promulgated by the contracting state such as to disparage the rights under the PIA and generally at variance with the terms and conditions of the agreement. The scenario which is enacted thereafter, present a hydraheaded problem both at the international and municipal plane (Fawcett, 1948).

On the one hand, international law provides considerable leeway for the state to take unilateral steps to review and or outrightly abrogate agreements between it and Transnational Oil Corporations when it finds the spirit of such relation tangential to its long-term survival as a sovereign entity (Texaco Overseas Pe Texaco Overseas Petroleum Company, California Asiatic Oil Company v. Libya, I.L.R. (1977) 389; Kurdistan Region, 2007).

On the other, international law on consideration of equity, justice and good reason also frowns at revisions of terms and conditions of contracts and or outright abrogation of agreements, which are discriminatory and confiscatory in nature (Aminoil Case, 1982, 21 ILM, 976).

A consideration of inconsistencies between the terms and conditions of PIAs and statutory provisions will suffice.

Liberia, Amended Mittal Mineral Development Agreement, The Mineral Development Agreement between the Government of the Republic of Liberia and Mittal Steel Holdings N.V. dated August 17, 2005, and the Amendment thereto dated December 28, 2006. As a result of financial differences between Iran and Anglo-Iranian Oil Company over the latter's concession of April 29, 1933, Iran enacted on May 1, 1951 the Oil Nationalization Act, which nationalized the oil industry in the country. In consequence, Iran took over AIOC's assets and installations and put an end to its concession. AIOC claimed that its concession could not be affected by subsequent legislation and requested arbitration of the dispute in accordance with the terms of the concession agreement. Upon Iran's refusal to arbitrate the dispute, the government of the United Kingdom espoused the cause of AIOC and instituted proceedings before the International Court of Justice against the government of Iran. The government of the United Kingdom asked for a declaration that Iran was under a duty to submit the dispute to arbitration in accordance with the terms of the concession and alternatively sought various other declarations and remedies. However, no decision was given on the merits as the Court found that it had no jurisdiction to entertain the case. Eventually, the agreement reached in 1954 between Iran and NIOC on the one hand and a consortium of oil companies settled the dispute. That agreement was accompanied by another agreement made on the same date between Iran and NIOC on the one hand and AIOC on the other whereby the respective claims and counterclaims of the parties were settled by the payment of a certain sum by Iran to AIOC (Bernardini, 2008; Anglo-Iranian Oil Co. Case (United Kingdom v Iran), ICJ Reports 1952).

In Saphire International Petroleum Ltd v National Iranian Oil Company, arbitral award of March 15, 1963 (Cameron, 2021; ILR 35, 1963); the Swiss arbitrator held that an agreement relating to a joint venture arrangement between the National Iranian Oil Corporation an agency of the Iranian government and Sapphire Petroleum, Ltd., an Ontario company, was in the absence of an express stipulation of applicable law, but in view of the general provisions according to which the parties undertook:

> To carry out the terms and provisions of this Agreement in accordance with the principles of mutual goodwill and goodfaith and to respect the spirit as well as the letter of the said terms and provisions.

The provision removed the contract from the application of Iranian law. In effect, no such removal could have been intended since the agreement was not silent on the subject and made a careful assessment of the role of Iranian law in relation to the respective rights and obligations of the parties.

A distinction must be made, to the effect that; stabilization clauses are normally circumscribed to a considerable degree, with caveats, defining its scope. The usual practice is to isolate and underscore the specific aspect of the host state's legislation, which impinges on the terms, and condition of the contract.

In the furore between AGIP Spa and the government of the People's Republic of the Congo, the investment agreement between the parties contained a stabilization clause freezing Congolese law at a material time. Subsequently, the Congolese government nationalized AGIP. The dispute was submitted to an ICSID arbitral tribunal, which held that the measures of nationalization were contrary to the stabilization clause and that, consequently, AGIP was entitled to damages (Agip Spa v Peoples Republic of Congo, ICSID Case No. ARB/77/1, 1979).

In contradistinction to the AGIP Spa. Case, a different modality was used in the resolution of the Aminoil/Kuwait Arbitration. In 1948, the ruler of Kuwait granted a 60 year oil concession to Aminoil, a United States corporation (Aminoil Case (The Government of the State of Kuwait v The American Independent Oil Company), 1982). The concession agreement contained a stabilization clause (Article 17), which provides:

> The Sheik shall not by general or special legislation or by administrative measures or by another act whatever annul this Agreement. No alteration shall be made in the terms of this Agreement by either the Sheik or the company except in the event of the Sheik and the company jointly agreeing that it is desirable in the interest of both parties to make certain alterations, deletions or additions to this agreement (Ibid).

In 1961, a supplemental agreement, amending the 1948 concession was concluded. It gave additional financial advantages to Kuwait by increasing the payments to be made by Aminoil, it also included a "renegotiations" clause providing for consultation between the parties in the event of changes in the terms of concessions in the Middle East (Article 9 based on the "Abu Dhabi formula"). In

the early 1970s; Kuwait sought to obtain additional payments from Aminoil and in 1973 Aminoil accepted a draft agreement, but the agreement was never formally executed. The terms of this agreement were modified unilaterally by Kuwait on several occasions and to its advantage. Negotiations followed but were unsuccessful. In 1977, Kuwait promulgated a decree-law terminating the concession agreement. In 1979, the parties agreed to submit their dispute to an ad hoc arbitral tribunal. Acknowledging at the on set that *restitutio in integrum* was not a realistic solution, the parties agreed to limit their respective claims to compensation and damages. Aminoil claimed that the concession agreement had been wrongfully terminated in violation of international law, (alleging that it was confiscatory and discriminatory) and of the stabilization clause. Kuwait argued that since the stabilization clause had been agreed upon when Kuwait was still a "colonial" entity, the clause had no effect. This argument did not succeed since the tribunal found that Kuwait had reconfirmed the clause after attaining full independence. The arbitrators, however, did not agree as to the exact significance of the stabilization clause. The majority held that the clause did not cover nationalization, whereas the third arbitrator took the opposite view.

The majority considered that a limitation on the sovereign rights of a State could not be presumed and that the language of the stabilization clause was not specific enough to include nationalization. According to the majority, the stabilization clause was intended to protect Aminoil against confiscatory measures. Since after the nationalization, Kuwait had made an offer for compensation, the nationalization was not intended to be confiscatory and was consequently, outside the scope of the stabilization clause. The majority also considered that as a result of the many readjustments of the arrangements between the parties, including those of a financial nature, the original concession had in effect been transformed into a kind of association with the result that the original stabilization clause had lost its former absolute character.

In the TOPCO Awards, Libya in 1973 and 1974 nationalized all of the properties, rights, assets and interests of two claimant United States companies under certain concession contracts made between Libya and the claimants for the exploitation of oil in Libya (Texaco Overseas Petroleum Company, California Asiatic Oil Company v. Libya, I.L.R., 1977). Each contract (clause 16) provided that:

> The contractual rights expressly created by this concession shall not be altered except by mutual consent of the parties (Ibid).

Each indicated the law of the contract (clause 28):

> This concession shall be governed by and interpreted in accordance with the principles of law of Libya common to the principles of international law and in the absence of such common principles then by and in accordance with the general principles of law including such of those principles as may have been applied by international tribunals (Ibid).

The contracts provided for the reference of any dispute arising under them to "two arbitrators, one of whom shall be appointed by each such party, and an umpire who shall be appointed by the arbitrators. In the event of either party failing to appoint an arbitrator, a sole arbitrator was to be appointed by the President of the ICJ. In this case, Professor Dupuy was appointed as a sole arbitrator after Libya had failed to act. Libya did not participate in the proceedings at any stage, except by way of memorandum to the President of the ICJ objecting to the proceedings.

The arbitrator held that the reference to the general principles of law in its proper law clause is always regarded to be a sufficient criterion for the internationalization of a contract. The arbitrator next applied the law of the contracts in clause 28 and held that the concessions were binding. According to the arbitrator, because both Libyan and international law accepted that the contracts were binding, *pacta sunt servanda.* Concluding that in respect of the international law of contracts, nationalization cannot prevail over an internationalized contract, containing stabilization clauses, entered into between a state and a foreign private company.

Nothing, however can be farther from the truth than that position, it has been impugned and questioned by a considerable number of western jurists and completely unacceptable to developing countries, when ranged against the award of the tribunal in *Aminoil case*, that the take over of Aminoil enterprise was not in 1977, inconsistent with the contract of concession, provided always that the nationalization did not possess any confiscatory character. The Aminoil awards remains the *locus classicus* of nationalization and underscores the new thinking that a nation state can expropriate a foreign concern when such measure is necessitated by public interest, security and legitimate aspiration of the nationalizing state to economic development.

Stabilization clauses cannot in the strict sense forbid nationalization, the only consequence they have when embodied in a contract of concession (PIA) is to merely prohibit any measures that would have confiscatory character. It is difficult to achieve absolute stability in petroleum international agreement. For one, the volatility of the international oil industry precludes the reaching of immutable contracts which terms remain frozen in time. The subject matter of PIAs constitutes an inalienable natural resource upon which the HC exercises sovereignty.

The interplay of a combination of macroeconomic variables of price, demand and supply on the one hand and the geo-politics of international oil on the other, all engender a configuration in an intricate matrix, which render the international oil industry highly dynamic. A sudden shift in the price structure could trigger far-reaching fundamental changes in supply and erode margins. Political upheavals of cataclysmic proportions in host countries will invariably impact on the sanctity of PIAs.

It is generally acknowledged that relief for non-performance may be granted if, without fault on the part of the obligor, the performance is frustrated by su-

pervening events. Frustration may result from physical or material impossibility to perform, such as the destruction of the subject matter of the contract or from legal impossibility, such as subsequent illegality. Frustration could be from a fundamental change of circumstances, which would destroy the purpose of the contract and make performance pointless or fundamentally different from what the parties had envisaged. Assuming that frustration occurs, it is not simply considered as a cause of excuse for the non-performing party. It releases both parties from further performance and puts an end to the contract. That is subject to the proviso that the obligor establishes that the events relied upon as a cause of excuse were unforeseeable, insurmountable and external, in the sense that they would make performance impossible for everybody and not the obligor alone.

Any event that has the potential for altering the economic expectations of parties in a PIA is enough cause or excuse for the host country to alter the terms of the contract and or abrogate the contract. The Soviet-Israel Oil Arbitration illustrates the nature of the foregoing consideration: In July 1956, the Soviet oil-exporting agency agreed to sell oil f.o.b. Black Sea ports to an Israeli company. The seller had applied to the Ministry of Foreign Trade for an export license, which, however, was refused, following the outbreak of the Israeli-Egyptian conflict (USSR v Israel, 1958). Thereupon, the seller informed the buyer that the contract was cancelled because the denial of a license constituted force majeure under clause 7 of the contract.

In subsequent proceedings before the Soviet Foreign Trade Arbitration Commission, the buyer argued among other things that since the refusal of an export license was not mentioned in the foregoing provision, it could not be invoked by the seller as an excuse for non-performance. This argument, which finds a solid basis in contract practice in international trade, did not succeed. In the opinion of the Arbitration Commission, the denial of a license, though not specifically listed in the force majeure clause, was nevertheless covered by the catchall provision at the end of the clause.

In contrast, in an ICC award, an African state enterprise (X) had purchased oil from an Algerian state oil corporation (Y) (*Algerian State Enterprise v African State Enterprise*, 1979).

The sales contract contained a force majeure clause. Oil was delivered but no payment was made because the Central Bank of the country of X refused to grant to X the necessary foreign exchange license. X relied on the force majeure clause and claimed that the denial of the license was a cause of excuse under that clause. That contention did not succeed. The arbitral tribunal found that both X and the Central Bank operated under the control of their government who's Head of state had been responsible for initiating the negotiations and had been intimately involved in their conclusion. In other words, the tribunal found that neither entity was truly independent from the government. Furthermore, the tribunal also held that X was not itself blameless for the situation.

Stability must be viewed within the purview of certain factors. The nature of the subject-matter of the PIA, as inalienable resource of the host country; the le-

gal capacities of the parties thereto, the nature of the HC as a subject of international law and the lack of legal capacity of the TNOC at international law to espouse its rights at the international plane and finally, PIAs are strictly speaking economic development agreements, because they stricture the exploitation of a vital resource which invariably constitute the mainstay of the host country and whose husbandry is crucial to the survival of the nation. The HC can alter within the constraints of norms of international law, qualify, vary and make distinctions regarding the terms of the PIA in accordance with the principle *clausula rebus sic stanti bus* when such terms have become onerous and disparaging to its survival. It can within the purview of international law abrogate, repudiate and outrightly nationalise the assets of the TNOC if it deems its further association with it as constituting an albatross to its economic growth, development and survival as a sovereign nation.

As a corollary to the foregoing, the United Nations Organization highlighted and underscored the right of developing nations to economic self-reliance and development. The United Nations Resolution on Permanent Sovereignty over Natural Resources 1962, G. A. Resolution 1803 (XVII) is one of such affirmative actions of the United Nations Organization aimed at addressing the issue of the economic development of developing nations.

The General Assembly declared inter alia:

> The rights of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the wellbeing of the people of the state concerned.
> In cases where authorization is granted, the capital imported and the earnings on that capital shall be governed by the terms thereof, by the national legislation in force, and by international law. The profits derived must be shared in the proportions freely agreed upon, in each case, between the investors and the recipient state, due care being taken to ensure, that there is no impairment, for any reasons, of that state's sovereignty over its natural wealth and resources.
> Nationalization, appropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest, which are recognized as overriding purely individual or private interests, both domestic and foreign.

However, there are exceptions to acts of states in the exercise of permanent sovereignty over natural resources that are confiscatory in nature. In *Texaco v. Libya*, it was held the recognition by international law of the right to nationalize is not sufficient ground to empower a state to disregard its commitments, because the same law recognizes, the power of the state to commit itself internationally especially by accepting the inclusion of stabilization clauses in a contract entered into with a foreign private company. On the basis of the circumstances of adoption and by expressing an *oponio juris communis*, Resolution 1803 (XVII), according to the arbitral tribunal reflect the state of customary law ex-

isting in this regard, the consensus by a majority of states belonging to the various representative groups indicate without slightest doubt universal recognition of the rules incorporated in the resolution, that is, with respect to nationalization and compensation, the use of the rule in force in the nationalizing state, but all this in conformity with international law.

The Arbitrator, having found no justification for Libya's acts, held subsequently that the appropriate remedy was *restitutio in integrum* as claimed by the concessionaire (Texaco Overseas Petroleum Company) so that Libya was legally bound to perform the contracts, in fact the claimants subsequently accepted the offer of compensation in full settlement of their claim.

Contrary to the decision in *Texaco v. Libya case* (53 ILR (1977) 389), *in the Aminoil case* (66 ILR (1984) 518-627), the tribunal arrived at the conclusion that the "take over" of Aminoil's enterprises was not inconsistent with the contract of concession, provided always that the nationalization did not possess any confiscatory character.

To be taken alongside Resolution (1804) (XVII) is the Charter of Economic Rights and Duties of States 1974, General Assembly Resolution 3281 (XXIX). The Charter declares inter alia: Every state has and shall freely exercise full permanent sovereignty including possession, use and disposal over all its wealth, natural resources and economic activities. Has the right to regulate TNOCs, nationalize with the proviso that adequate compensation is paid.

The Charter in itself underscores the aspirations of the emergent developing nations, and their call for a new international economic order.

It is not contradictory to extend the notion of impossibility of performance to cases of impracticability. Where the causes of impossibility results from economic hardships rather than physical and or legal, the HC may qualify, revise and or alter the terms of a PIA when such changes become necessary for the economic development of the HC. Economic hardship suffered by the HC may be enough justification for a review or outright abrogation of the contract. That position is based on the consideration that, when such a scenario is enacted, insistence by the transnational oil company upon continued performance would be contrary to the requirement of good faith, which is a general principle of contract law. Economic hardship may thus result in the adjustment of the contract.

The foregoing scenarios may enact in a PIA, after the conclusion of the contract. Unforeseeable economic, political, legislative or administrative and technical measures may disrupt the equilibrium of the relations between the parties, rendering performance of the contract very onerous for the HC. It reserves the right to revise, qualify and repudiate the terms of the contract when necessary. It is therefore submitted that, it is inconceivable to have immutable PIAs whose terms are frozen in time. Stabilization clauses, which are contrived to freeze the HC's laws; or remove the PIA from the purview of the municipal law of the HC are otiose. Such expectations of stability are based on mythical notions of the sanctity of contracts, which are pristine and outmoded. It is in the mutual interest of parties to PIAs to allow for a high degree of anticipatory flexibility and

adaptiveness in their PIAs.

3. Conclusion

The study has proved by means of formal analysis that the notion of stabilization and internationalization of PIAs though theoretically passable, flounders when ranged against considerations of sovereignty and proprietary rights of the host country. The paper demonstrated that the right to development of the host country is on the highest echelon of the hierarchy of peremptory norms of international law, and that no derogation from it is permitted. Consequently, the efficacy of stabilization and internationalization clauses will remain indeterminate and *brutum fulmen.* The evolving norms from which they draw their authority are in themselves yet to reach an organic state.

Furthermore, stabilization and internationalization clauses are redundant in view of the rapid development of legal infrastructure of host countries, which is organic enough to provide an internationally acceptable framework for petroleum international agreements.

The parties to petroleum international agreements would do well to take cognizance of the fact that a stipulation of applicable law may not guarantee the stability of expectations, under the agreement. A choice of law will be superfluous in the face of fundamental change which willy-nilly altars the expectations under the agreement.

It is illusory and self deluding to overstate the stabilizing authority of the proper law of a PIA, such notions of stability are based on the erroneous assumption of frozen contracts, under which terms remain sacrosanct and immutable irrespective of the effluxion of time and fundamental changes in circumstances which necessitates variation of the term of the contract.

Applicable law can only apply and operate within the logic of the instant circumstances in which it subsists; it can not stand immutably for all times as it stood at the time of the agreement.

Strictly speaking, in a petroleum international agreement, the host country has the leeway to reserve the right to fundamentally alter its law, and transnational oil companies seek to insulate themselves from the vagaries of such changes to no avail.

Allied to the inorganic state of the proper law of petroleum international agreements is an important consideration that it is impracticable to envision all possible circumstances and outcomes *ex ante.* Supervening circumstances may render the performance of the contract so onerous as to necessitate the extinction of the agreement or fundamental variation of its terms.

Peremptory norms of international law and municipal law acknowledge the doctrine that supervening circumstances which render performance onerous or impossible are enough ground for non-performance or outright abrogation where the continued discharge of obligations under the contract disparages public interests. However, such measures by state must not be of a confiscatory or dis-

criminatory nature. Stabilization clauses in PIAs between host countries and international oil companies amongst other things stipulate that contracting state shall not modify, or abrogate the contract; subject the contract to a law other than that of the contracting state; provide for independent arbitration of disputes arising from the contract and periodical reviews of the terms, have proved inadequate against the exercise by the state of permanent sovereignty over the natural resources within its territory.

The HC can alter within the constraints of norms of international law, qualify, vary and make distinctions regarding the terms of the PIA in accordance with the principle *clausula rebus sic stantibus* when such terms have become onerous and disparaging to its survival. It can within the purview of international law abrogate, repudiate and out rightly nationalize the assets of the TNOC, if it deems its further association with it as constituting an albatross to its economic growth, development and survival as a sovereign nation, endowed with the inalienable right to development.

It is submitted that it is inconceivable to have immutable PIAs whose terms are frozen in time and or incorporate stabilization clauses which are contrived to freeze the HC's laws; or remove the PIA from the purview of the municipal law of the HC. Such expectation of stability is based on mythical notions of the sanctity of contracts, which are pristine and outmoded. It is in the mutual interest of parties to PIAs to allow for a high degree of anticipatory flexibility and adaptiveness in their PIA.

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

References

Agip Spa v Peoples Republic of Congo, ICSID Case No. ARB/77/1, Award of 30 Novedmber, 1979.

Algerian State Enterprise v African State Enterprise, ICC Case No. 3099 and 3100, Award of 30 May, 1979.

Amended Mittal Mineral Development Agreement, The Mineral Development Agreement between the Government of the Republic of Liberia and Mittal Steel Holdings N.V. Dated August 17, 2005, and the Amendment Thereto Dated December 28, 2006.

Amerasinghe, C. (1964). State Breaches of Contracts with Aliens and International Law. *American Journal of International Law, 58,* 881-913. https://doi.org/10.2307/2196034

Aminoil Case (The Government of the State of Kuwait v The American Independent Oil Company), I.L.M. 21 (1982), 976.

Anglo-Iranian Oil Co. Case (United Kingdom v Iran), Judgment of 22 July 1952, ICJ Reports 1952, 93.

Arts, K., & Tamo, A. (2016). The Right to Development in International Law: New Momentum Thirty Years down the Line? *Netherlands International Law Review, 63,* 221-249. https://doi.org/10.1007/s40802-016-0066-x

Asante, S. (1979a). Stability of Contractual Relations in the Transnational Investment

Process. *International & Comparative Law Quarterly, 28,* 401-423. https://doi.org/10.1093/iclqaj/28.3.401

Asante, S. (1979b). Restructuring Transnational Mineral Agreements. *American Journal of International Law, 73,* 335-371. https://doi.org/10.2307/2201140

Bernardini, P. (2008). Stabilization and Adaptation in Oil and Gas Agreements. *Journal of World Energy Law and Business, 1,* 98-112. https://doi.org/10.1093/jwelb/jwn001

Cameron, P. (2021). *International Energy Law: The Pursuit of Stability.* Oxford University Press.

Desai, M. (2014). *The Paradigm of International Social Development: Ideologies, Development Systems and Policy Approaches.* Routledge. https://doi.org/10.4324/9780203743997

Desierto, D. (2022). Coming Full Circle on Human Rights in the Global Economy: International Economic Law Tools to Realize the Right to Development. *Loyola University Chicago International Law Review, 18,* 1.

Dias, D. (2010). Stability in International Contracts for Hydrocarbons Exploration and Some of the Associated General Principles of Law: From Myth to Reality. *OGEL Journal, 4.*

Fawcett, J. (1948). Legal Aspects of State and Trading. *British Yearbook of International Law, 45,* 50.

Ibhawoh, B. (2011). The Right to Development: The Politics and Polemics of Power and Resistance. *Human Rights Quarterly, 33,* 76-104. https://doi.org/10.1353/hrq.2011.0001

Ikejiaku, B. (2020). International Law, Western States, Third World States, and the Principles of Right to Economic Self-Determination. *The Groningen Journal of International Law, 7,* 195-215. https://doi.org/10.21827/GroJIL.7.2.195-215

Iqbal, K. (2012). *The Right to Development in International Law.* Routledge.

Karimova, T. (2016). *Human Rights and Development in International Law* (pp. 31, 57). Routledge. https://doi.org/10.4324/9781315665283

Kurdistan Region (2007). *Model Production-Sharing Agreement.* http://www.macleoddixon.com/documents/Draft_Kurdrdistan_Region_Production_Sharing_Contract_June 2007.pdf

Lax, H. (2019). *Political Risk in the International Oil and Gas Industry.* Routledge. https://doi.org/10.4324/9780429302312

Leben, C. (2010). *Hans Kelsen and the Advancement of International Law* (pp. 165-188). Hart Publishing.

Lorenzini, S. (2019). *Global Development: A Cold War History* (pp. 9-21). Princeton University Press. https://doi.org/10.23943/princeton/9780691180151.003.0002

Maniruzzaman, M. (2008). The Pursuit of Stability in International Energy Investment Contracts: A Critical Appraisal of the Emerging Trends. *The Journal of World Energy Law & Business, 2,* 121-157. https://doi.org/10.1093/jwelb/jwn012

Mann, F. (1944). The Law Governing State Contracts. *British Yearbook of International Law, 20,* 60.

Ngang, C. et al. (2018). *Perspectives on the Right to Development.* Pretoria University Law Press.

Ngang, C., & Kamga, S. (2020). *Insight into Policies and Practices on the Right to Development.* Rowman & Littlefield.

Okafor, O., & Ngwaba, U. (2020). International Accountability in the Implementation of the Right to Development and the "Wonderful Artificiality" of Law: An African Pers-

pective. *The Transnational Human Rights Review, 7,* 40-74.

Saphire International Petroleum Ltd v National Iranian Oil Company, *Arbitral Award*, *I.L.R* 35 (1963), 136.

Selwyn, B. (2020). Economic Growth and the Ideology of Development. In B. Dunn (Ed.), *Critical Political Economy* (pp. 35-46). Edward Elgar Publishing. https://doi.org/10.4337/9781789903072.00007

Smith, D., & Wells, L. (1976). Conflict Avoidance in Concession Agreements. *Harvard Journal of International Law, 17,* 51.

Texaco Overseas Petroleum Company, California Asiatic Oil Company v. Libya, I.L.R. (1977). 389.

U.S.S.R. v. Israel, I.L.R 27 (1958), 631.

Vandenbogaerde, A. (2013). The Right to Development in International Law: A Call for Its Dissolution. *Netherland Quarterly of Human Rights, 31,* 187-209. https://doi.org/10.1177/016934411303100204