International Journal of Research in Education Humanities and Commerce

Volume 04, Issue 06 "November - December 2023"

ISSN 2583-0333

RENEGOTIATION VERSUS STABILISATION CLAUSES IN PRODUCTION SHARING AGREEMENTS, (PSAs) AND THE SOVEREIGN RIGHTS OF HOST COUNTRIES: A LEGAL APPRAISAL

TOSIN EZEKIEL AYO*
ADERONKE ABIMBOLA OJO Ph.D**

https://doi.org/10.37602/IJREHC.2023.4608

ABSTRACT

Host States are found in the habit of shifting the goal post of commercial oil and gas transactions they have with International Oil Companies in the middle of the game. Legal Draftsmen have therefore found ways of holding the host States in concession and production sharing contracts to their word, barring incidences of political instability. One of the most notable ways of doing this is by the insertion of a 'stabilisation clause' in the Production-sharing Agreement which attempts to freeze the rights and provisions of a national system of law chosen as the law of the contract as to the date of the contract in order to prevent the application to the contract of any future alterations of this system by the host States. This clause has been observed to be rendered largely ineffective due to the defiance of host States who willfully renege on contractual agreements and circumvent simple contracts. This paper therefore seeks to examine the viability of the insertion of a renegotiation clause as a suitable replacement to a stabilisation clause in Production Sharing Contracts between (IOCs) and Host countries as a way of securing the balance of maximizing IOCs' profits and retaining the host State's sovereign rights.

Keywords: Renegotiation, Stabilization, IOCs, PSAs, Sovereign rights, Host States.

1.0 INTRODUCTION

Most developing countries at the discovery of Hydrocarbons beneath their soil think of the revenue to accrue from the sales of the crude oil and gas produced. They are mostly incapable of embarking on the capital-intensive exploratory drilling of these 'liquid money' otherwise known as crude oil due to lack of expertise, technical know-how and limited funds. Thus, they have to depend on an International Oil Company, (IOC) to produce the oil by entering upon an agreement to produce the oil in an arrangement whereby the contractor invests its own money, bears all the risks but becomes consequently rewarded with a portion of the oil as compensation for its investment to offset exploration and production expenses incurred, share profit oil and pay an agreed royalty to the Host country[1].

* LL.B (Hons), B.L, LL.M(Aberdeen), Former Lecturer, Department of Jurisprudence and International Law and PhD Candidate, Faculty of Law, Ekiti State University, P.M.B 5363, Ado-Ekiti, Nigeria. Email: simeonps@yahoo.com or tosin.ayo@eksu.edu.ng

 Copyright © IJREHC 2023, All right reserved

Volume 04, Issue 06 "November - December 2023"
ISSN 2583-0333

A Production Sharing Agreement, (PSA) entails a contract whereby an IOC undertakes to embark on the exploratory drilling of the hydrocarbon resources of a host country at its own expense and risk with a view to sharing the production (cost oil for compensating for the company's expenditure and profit oil at an agreed ratio in accordance with the terms of the contract)[2].

1.1 Scope and Objective of this Paper

This paper is within the precincts of production sharing contracts in oil and gas law. It examines primarily the insertion of a renegotiation clause as a suitable replacement to a stabilisation clause in Production Sharing Agreements between IOCs and Host countries. The focus of this paper is on the mechanisms of Production Sharing Agreements in a developing country's oil production and exploration, in particular, it examines the stabilisation clauses in petroleum contracts between host governments and IOCs and its seeming propensity to reduce the host country's control over its hydrocarbon resources through erosion of State's sovereignty. The discussion also addresses the possibility that the insertion of a renegotiation clause in the contract might be a more suitable solution on the long run than a stabilisation clause which is largely one-sided, circumvented and unenforceable.

1.2 The Objective of the Stabilisation Clause

The fact that most investments in the international oil and gas industry presuppose the vulnerability of the foreign investor to unilateral alteration of the petroleum contract by the host government at some moment during the execution of the long-term contract and it is hoped that a guarantee for stability in the contract will reduce the risk occasioned thereby by making a form of stability. This is its major attraction for investors such as IOCs and their bankers. Stabilisation has been defined as "the contract language which freezes the provisions of a national system of law chosen as the law of the contract as to the date of the contract in order to prevent the application to the contract of any future alterations of the system"[3].

What this means in essence is that the host State is prevented by the inserted stabilization clause in the Production Sharing Contract from unilaterally altering its laws and policies in such a way as to materially affect its contractual obligations under the contract it entered into with the IOC and to also deem the law and policy in motion as at the time the oil production sharing contract was willfully entered into, as the recognized operative law and policy applicable throughout the pendency of the production-sharing contract.

A foreign contractor intending to invest in another country of different socio-economic ideologies and legal system always has to bear the risk that his economic expectation may be frustrated by the host government during the pendency of a Production Sharing Contract, PSC.

** LL.B (Hons), BL, LLM (Ibadan), PhD (Ado-Ekiti), Senior Lecturer and Head of Department, Private and Property Law, Faculty of Law, Ekiti State University, Ado-Ekiti, Nigeria. Email: ronkeadvocate@gmail.com or aderonke.ojo@eksu.edu.ng

[1]Bernard Taverne, 'Production Sharing Agreements in Principle and Practice' (Sweet and Maxwell 1996).

[2]Bernard Taverne, 'Petroleum,Industry and Governments: An introduction to Petroleum Regulation, Economics and Government Policies', (Sweet and Maxwell 2000) p 89.

[3]F.A Alexander, 'The Three Pillars of Security of Investment Under PSCs and Other Host Government Contracts' <http://Internationalinvestmentlaw/us/sga/doc.log_alexander Accessed 15th March, 2021.

 Copyright © IJREHC 2023, All right reserved

Volume 04, Issue 06 "November - December 2023"
ISSN 2583-0333

They generally expect a change in the government and thereby ideologies, programs and policies of successive governments which may adversely affect the agreement they willfully enter into. Against such unpredictable risks, the foreign investor, who needs to commit a substantial amount of capital and technical know-how for a long period of time in the host country, naturally demands legal guarantees.[4] This is the need for some form of stabilizing influence and procurement of legal guarantee conundrum that often leads to the lingering duel concerning the competing interests of international oil companies and the host States in the maximization of resources and achieving their overall corporate objectives.

The fear of such risk is also shared by third parties such as banks that bankroll the capital-intensive projects despite the involvement of monumental risk, so far there is an assurance of profit undeterred by national or legislative encumbrance. They desire to see stability in the contractual regime like the foreign investor(s) too. Thus, in order to seek security of their investment during the lifetime of the agreement, IOCs seek to have a stabilisation clause inserted into their agreements with host governments[5].

The origin of stabilisation clauses lie in the period between the first and second World Wars, when American companies began to include them in concession contracts due to acts of nationalisation by Latin American governments[6]. The essential goal of such provisions was to ensure that the concession contracts remained in force throughout the period stated in the contract. From the mid-20th century to the 1970s, the thrust of stabilisation clauses in petroleum contracts was to act as a form of veritable defense against all kinds of victimization and national moves of compulsory indigenisation and expropriation by the host States. They did not invalidate a nationalisation but they did consequently have the effect of making it unlawful, and thereby affecting the amount of compensation that a tribunal might award in the circumstance, giving room however for the interest of justice.

An example of this is the role of a stabilisation clause in a petroleum contract in Libya, which was reviewed by a tribunal in the context of a nationalisation of the investor’s interests. This was expressly spelt out in *TOPCO v Libya*[7] where the clause in contention for judicial interpretation stipulated that the host government shall among other things:

> *…take all the steps that are necessary to ensure that the Company enjoys all the rights conferred upon it by this concession, and the contractual rights expressly provided for in this concession shall not be infringed upon, except by the agreement of both parties.*[8]

Further, the concession was to be interpreted according to the laws and regulations in effect at the time it was concluded and amendments were only permitted with the investor’s consent. The arbitration tribunal held that Libya could not exercise its sovereignty to nationalise the

[4]T. W. Walde, ‘Renegotiating Acquired Rights in the Oil and Gas Industries: Industry and Political Cycles meet the Rule of Law’. [2006] JWELB 1, 1.
[5]*Ibid.*
[6]*Kuwait v Aminoil*, 21 ILM 976, 1052 n.7 (1982), 9 YB Com Arb 71, 95 (1984) (Separate Opinion by Sir G Fitzmaurice) 15.
[7]17 ILM 3, 24 (1978), 4 YB Com Arb 177, 178, 183 (1979).
[8]*Ibid.*

 Copyright © IJREHC 2023, All right reserved

Volume 04, Issue 06 "November - December 2023"

ISSN 2583-0333

investor's interest in violation of these specific contractual undertakings, and therefore that such nationalisation was a breach of the Deeds of Concession[9].

This period had ended by the early 1980s, following highly confrontational revisions of petroleum contracts and nationalisations of petroleum industry assets, which triggered several arbitral awards. It was a period unduly populated by an analysis of stabilisation commitments in terms of state responsibility, protection of foreign property against nationalisation and breach of proprietary contractual interests by the State: what might be called the classical approach, highly dependent upon public international law concepts rather than international economic law[10]. It was thereafter contended that the ensuing years were filled with incidences of pragmatism where mutuality of interests was better understood and the rules obeyed, especially by the host States[11]. In this conceptualisation of understanding and mutual reasonableness, it might be thought that concerns about contract stability would become subdued and perhaps even invisible in negotiations over petroleum contract terms, but this was an impossible realization as there were continued reported incidences of IOCs' contractual rights violation by host governments[12].

Consequently, according to Cameron[13], two broad-based patterns of governmental reaction became decipherable with respect to stabilisation. First, a substantial number of countries especially Saudi Arabia, Nigeria or Indonesia with significant proven oil reserves did not regard it as necessary to provide such guarantees to foreign investors and as such, they chose not to provide commitments on contract stability at all. Among the OECD countries, many petroleum regimes provide for a static, relatively inflexible, fiscal regime, which made no specific provision for stabilisation clauses. These countries include Norway, Canada, United Kingdom, Australia and the United States of America.

In these few cases, the content of such contracts is scarcely affected by any negotiations between IOCs and host governments, since the terms on offer are largely standardised. The other reaction is thata huge percentage of mostly developing countries, eager to attract foreign investment in a competitive international and global market place, offered stabilisation commitments to investors as further statutory guarantees for the safety and protection of their foreign investments in the host States and many of them still continue to give such stability guarantees.

However, the form of these provisions is frequently different from those in the period largely referred to as 'classical'. For instance, there were expected ingredients of balancing or (re)negotiation introduced, and sometimes a combination of these with the familiar element of

[9]*Topco V Libya*17 ILM 3, 24 (1978), 4 YB Com Arb 177, 178, 183 (1979).

[10]TW Walde and G Ndi, Stabilising International Investment Commitments: International Law versus Contract Interpretation, in*Texas International Law Journal* (1996), 215, 219.

[11]R Brown, `Contract Stability in International Petroleum Operations', The CTC Reporter, No. 29 (spring 1990), 56-60.

[12]*Saudi Arabia v Arabian American Oil Company (Aramco),* 27 ILR 117 (1963); *Sapphire Petroleum Ltd v National Iranian Oil Company*, 35 ILR 136 (1967); *Texaco Overseas Petroleum Company/California Asiatic Oil Company v Libyan Arab Republic*, 17 ILM 1 (1977)

[13]PDCameron/AIPN/Final Report. 5 July 2006.

 Copyright © IJREHC 2023, All right reserved

Volume 04, Issue 06 "November - December 2023"

ISSN 2583-0333

‘freezing’ of some of the contract terms[14]. This group included a number of the so-called transition economies in the 1990s, as well as African states, and in Latin America, it included Bolivia, Ecuador and Peru.

Contract stability was also affected and arguably enhanced for the IOCs by the growth of NOCs since the 1980s. This means that sometimes the contract for exploration and production is made between the foreign investor(s) and the NOC rather than the State itself, and on other occasions between the NOC and the host government[15]. A stabilisation clause may therefore be negotiated with the NOC rather than by the State itself. This is not in practice a complicating factor and may make it easier to reach an agreement. It has a bearing on situations where, in the case of PSCs, the host government pays additional fiscal obligations on behalf of the IOC (Azerbaijan, 1980s Qatar model PSC) or does so only to the extent of the host government’s share of profit oil[16]This effective tax exemption is only applicable to the extent of the NOC’s (or host government’s) share of profit oil[17].

With respect to its impact on fiscal stability, the host government seems to be effectively granting a specific tax exemption in the event of a change in the overall tax regime. However, in cases where the NOC or host government share of profit oil is insignificantly little, this mechanism is therefore capable of providing only a modest ‘assurance regulatory regime’ against increased taxes, especially where the PSC regime provides for royalty and/or state participation. In some PSCs in Trinidad and Tobago for instance, the host government’s share of profit oil has been reportedly used up in the face of additional fiscal obligations[18].

Furthermore, in instances where the stabilisation provision in a contract provides for a rebalancing of the fiscal provisions in case a unilateral or draconian decisionis taken by the host State, not all of the fiscal obligations would therefore be necessarily included in the re-balancing that the contract envisages in such an occasion. Some may address only increases in taxes. As a result, the IOC is left with a significant exposure to the imposition of other forms of fiscal obligation- this is the failure of stabilization guarantee conundrum. With respect to enforcement of a stabilisation provision, the NOC as signatory to the contract might also improve the likelihood of the IOC obtaining specific performance and not just lump sum damages from a tribunal[19].

Nevertheless, there seems to be reportedly no known arbitral awards for these more modern stabilisation mechanisms that integrate some re-balancing of the economic interests of the parties in the event of a unilateral change by the host States[20]. This is largely because the awards

[14]T. W. Walde, *Ibid* n (4).
[15]Shell Petroleum Development Corporation may have such contracts with Nigerian National Petroleum Corporation.
[16]Current PSCs in Trinidad and Tobago and Egypt
[17]PDCameron, *Ibid* n (13).
[18]*Ibid.*
[19]*Ibid*.
[20]RD Bishop, ‘International Arbitration of Petroleum Disputes: The Development of a Lex Petrolea’ (2017) *Lex Juris* 15 Vol 12.

 Copyright © IJREHC 2023, All right reserved

Volume 04, Issue 06 "November - December 2023"

ISSN 2583-0333

that are instantly available are concerned with expropriation and with ‘freezing’ of contractual provisions, where only lump sum damages are readily available[21].

Moreso, it should be noted that the recent generation of petroleum contracts seem to be much more complex than the previous generation of old style concessions that contained provisions like the ‘anti-expropriation’ stabilisation clauses. A major reason why the contracts have become more difficult has been adduced to the fact that the parties are attempting to ensure that the agreement concluded will as far as is possible respond to changing or unpredictable circumstances[22]. The way in which the contract has been negotiated and drafted will therefore determine just how adaptable it is in practice especially now that the subjects too that a petroleum agreement will attempt to address have considerably broadened in recent years, with a considerable increase in the impact made by non-fiscal issues such as novel unenvisaged consequences of the petroleum contract including environmental and social impacts integrated into the document.

4.0 RATIONALE FOR HOST GOVERNMENTS’ CONSENT TO STABILISATION

On the host government’s part, its motive of consenting to the inclusion of a stabilisation clause in the PSC is not only to attract foreign investment, but also to show its seriousness to respect its commitments given to the IOC in lieu of the risk it has taken in making the investment[23]. Moreover, the host country easily receives a substantial part of the oil produced without investing her own funds and technological expertise into exploration and production. This is therefore an easy route they take as a necessary compromise evil in maximizing their natural resources’ production without necessarily allegedly jeopardizing their sovereignty, control and ownership rights over their natural resources.

5.0 STABILITY VERSUS SOVEREIGNTY IN PRODUCTION SHARING CONTRACTS

There is an attempt by stabilisation clauses to limit the State’s inalienable prerogatives and sovereign powers by the instrumentality of a mere contract. This seems to contribute to the ineffectiveness of this clause in achieving long-term contract stability. It is a principle of Public International law that States may not renounce Sovereign prerogatives, the exercise of which is pivotal to the exercise of its important public objectives. Therefore, any clause in a contract (stabilisation) negating the mandatory rules of this International law doctrine (*jus cogens*) would seem to undermine the inalienability of the Permanent Sovereignty of the host State over her natural resources[24].

Host States through their governments thus feel unhindered by any unconventional undertaking made by their predecessors in office with other States or any Investor. The presumptive concept that no government can bind its successor empowers the State to disobey the Agreement,

[21]PDCameron, *Ibid* n (13).
[22]PDCameron, *Ibid* n (13).
[23]P.D Cameron, ‘Stabilisation in Investment Contracts and Change of Rules in Host Countries: Tools for Oil and Gas Investors’. AIPN, *Final Report* [2006]ch 3 <http://iba.legis.state.ak.us/sga/doc_log/cameron> Accessed 08 March, 2021.
[24]UNGA Res 1803(XVII) 14 December, 1962, UNGA Res 3171(XXVIII) 12 December 1973, Charter of Economic Rights and Duties of States (adopted 12 December 1974 UNGA 3281(XXIX).

 Copyright © IJREHC 2023, All right reserved

Volume 04, Issue 06 "November - December 2023"

ISSN 2583-0333

although, this is mostly applicable in developed countries.[25] The State also acts on the conceptualization that contracts are only valid *rebus sic stantibus* i.e as long as circumstances remain the same.

6.0 STABILISATION AND A RELATED TERM

Maniruzzaman distinguished between 'stabilization clause' and 'the intangibilite (inviolability) clause', but concluded that the aim of both clauses is to ensure the stability of the contract regime[26].The stabilisation clause seeks to protect the investor against the modification of the contractual regime by a legislative Act, thus, limiting the legislative competence of the State,[27]whereas, the '*intangibilite clause*' is devised to avert the effect of the exercise by the State of its public authority in contractual matters[28]. An illustration of an *'intangibilite clause'* is in the Togolese Petroleum Concession Contract of 1977. The relevant provision in Article 30 provides:

> *The Republic further guarantees that no action, ordinance or other measure whatever by it or by any State service, authority, Municipality, Community or other agency will be taken and applied to the effect of jeopardizing, restricting or aggravating in any way or form, contractor's rights and obligations under the Agreement.*

The absence of Stabilisation clauses does not prevent IOCs from taking the plunge. IOCs still invest in unmitigated risk-reward climes, but this decision has mostly been justified by the evidence of due diligence prior to contract on the State's part, prevalent balancing consequent on price, cost, probability and profitability forecasting[29].

Opinion is however divided on the effectiveness of stabilization clauses in Production Sharing Agreements and other concession oil contracts. The contention is whether stabilization clause is the most effective way of preventing host countries from interfering with the Agreements made for a long time, whether the major objective of a stabilisation clause is to minimise political risks or to undermine the State's rights over its hydrocarbon resources[30] or to prevent a State from changing its laws for a certain period because of the apprehension that it might adversely affect the IOC's investment in the host State.

There are many contract-stability legal mechanisms apart from the stabilization clause. They include amongst other things: 'Ensuring that International Arbitration jurisdiction is provided for in the contract; embarking on the legislative ratification of any alteration to International Petroleum contracts; and effecting the application of international law and other non-national laws as the regulatory framework for the contract observance in order to prevent easy

---

[25]*Winstar v U.S* (1996) 116 SCt 2432.

[26] M.A.F.M Maniruzzaman 'Damages for breach of Stabilisation Clauses in International Investment Law: Where do we stand today?' [2007] IELTR 11.

[27]T.W Walde and D N'Di, 'Stabilising International Investment Commitments: International Law versus Contract Interpretation' [2005] OGEL 3.

[28] M.A.F.M Maniruzzaman 'Damages for breach of Stabilisation Clauses in International Investment Law: Where Do We Stand Today?' [2007] IELTR 11.

[29]T.W Walde and G N'Di, 'Stabilizing International Investment Commitments: International Law versus Contract Interpretation' (1996) TILJ 215.

[30]D.M Sornarajah, *The International Law on Foreign Investment* (Cambridge Publishing 2004).

 Copyright © IJREHC 2023, All right reserved

Volume 04, Issue 06 "November - December 2023"

ISSN 2583-0333

manipulation or alteration like the host State's domestic laws'. Interestingly, the Energy Charter Treaty, ECT now vests the investor's State Arbitration rules with the jurisdiction to apply when investors/developed market economies are ploughed into other States[31]. Other legal mechanisms include: International investment protection treaties,[32]; equating the contractual undertakings with Treaty provisions as provided under the Bilateral Investment Treaties, BITs and Multilateral Investment Treaties, MITs under the instrumentality of the umbrella clause;[33] and a contractual adaptation mechanism otherwise known as a renegotiation clause.

7.0 IS RENEGOTIATION THE SOLUTION?

The last measure; renegotiation being a major concern in this paper as a form of legal preparedness in the ilk of the doctrine of necessity in the eventual breach of an Agreement is contended as a viable alternative. A renegotiation clause usually operates in the presence of change of circumstances that are beyond the control of the parties which causes a substantial modification of the economic equilibrium of the contract[34]. In the event of the failure of the Stabilisation clause which intends to 'freeze' the parties' rights and obligations on the principle of *pacta sunt servanda*[35], a renegotiation clause brings the parties back to the roundtable in the event of change of circumstance under the legal rule of *rebus sic stantibus,* i.e as long as circumstances remain the same[36]. This then inadvertently caters to the need and aspirations of both parties in the wake of extenuating circumstances.

A good renegotiation clause should be couched to state the envisaged change of circumstance; "causing a disproportionate prejudice or substantial economic imbalance to the interests of one of the parties" and the objective should entail removing the unfairness or adopting an equitable revision", consequently "restoring the original contractual equilibrium."[37] Renegotiation demands arise more profusely where the original Production Sharing Agreement or other contracts do not provide for a balanced internal adaptation system capable of yielding a favourable outcome for the host State[38]. This is an aftermath of several issues ranging from inequality of bargaining power at the time of negotiation, the incapacity of internal adjustment mechanism to envisage all possible future host State demands, taking into consideration profitability and rate of returns on prospective financial regimes[39].

Furthermore, lack of adequate translation of prevalent oil price explosion into skyrocketing increase in Government revenue have contributed to resource nationalism, expropriation, re-orientation from private ownership to State control. Walde posited that there is a growing tendency for the conceptualisation of law as a tool in the power play during the change of

---

[31]Energy (Charter Treaty) Article 26.
[32]T. W. Walde, 'Renegotiating Acquired Rights in the Oil and Gas Industries: Industry and Political Cycles meet the Rule of Law'.[2006] JWELB 1,1.
[33]T. W Walde, 'The Umbrella Clause in Investment Arbitration: A Comment on Original Intentions and Recent Cases' [2005] JWIT 183.
[34]PieroBernadini, 'Stabilization and Adaptation in Oil and Gas Investments' [2008] JWELB, Vol.1, Issue 1, 106.
[35]*Sapphire V National Iranian Oil Company* (1963) ICC 1512.
[36]*Ibid* n (18).
[37]Model Exploration and Production Sharing Agreement (Qatar), 1994.
[38]T. W. Walde, 'Renegotiating acquired rights in the Oil and Gas industries: Industry and Political Cycles meet the rule of law'. [2006] JWELB; Vol 1,1.
[39]Walde, *Ibid* 32.

 Copyright © IJREHC 2023, All right reserved

Volume 04, Issue 06 "November - December 2023"

ISSN 2583-0333

relationship between the IOCs and the host country, thus affecting the existing contracts, the State's rights and consequently the element of renegotiation is sought in other to provide some leverage with the Government[40].

Renegotiation or exit negotiation for compensation therefore takes place under the hidden cloak of possible legal recourse, costs, risks and consequences for the State and the contractor.[41]A classic example of this scenario took the form of voluntary consent like the relinquishment by BP and Shell of their majority shares in large upstream oil projects in Russia under Environmental Enforcement Pressure.

A setback that a renegotiation clause might equally encounter includes the host State's unwillingness to comply,[42]just like the Libyan Government did not comply with the 3 awards that were the outcome of the 1970 Libyan concession disputes, but allegedly secretly resolved with cash payments and the colossal insincerity of government officials, political 'muscle-flexing' and a reoccurrence of the issues earlier resolved at the inception of a new Government and vice versa, like the contract cancellations under President Garcia's first Government in Peru in the 1980s which were compensated by his successor head of government; President Fujimori as part of its economic agenda.[43]

8.0 DO INTERNATIONAL OIL COMPANIES TRULY ERODE STATE SOVEREIGNTY?

There is a lingering controversy regarding whether or not IOCs erode State sovereignty. It has been contended that the increasing domination of the world economy by IOCs and Transnational Corporations, TNCs directly challenges national sovereignty[44]. Historically, the sovereignty and therefore the power of a nation-state lie in its ability to achieve compliance with whatever it commanded its territorially-defined space. Borderlines physically defined what was territorially sovereign and what was not. If a State's sovereignty was challenged from outside its territory, it could resort to force to maintain control. However, as a result of various technological developments, the idea of a physically bounded and sealed State is not now only open to question, but a raging controversy[45].

These developments underlie the transnational corporate threat to State sovereignty along dimensions ranging from permeability of borders and reduction of State control over its natural resources. Borderlines between nation-states for instance have been rendered permeable and porous in a number of innovative ways, erasing many of the traditional distinctions between inside and outside. For example, several raging questions like- 'What borders do electronic communications and atmospheric pollutants observe? Under whose borders do oil and gas reserves lie? Who has ownership and possession of the natural resources that are subjects of the PSAs between host States and IOCs? Do space satellites invade territorial integrity?' would

[40]Walde, *Ibid* 37.
[41]Bernadini, *Ibid* n35.
[42]Cameron, *Ibid* n24.
[43]Taverne, *Ibid* n2.
[44]Kapfer I (2006) Multinational Corporations and the Erosion of State Sovereignty. ICC 1512 <https://pol.illinoisstate.edukapfer2006.html> Accessed 12th March, 2021.
[45]*Ibid*.

 Copyright © IJREHC 2023, All right reserved

Volume 04, Issue 06 "November - December 2023"

ISSN 2583-0333

repeatedly be asked. The new permeability of borders therefore diminishes the capacity of nation-states to distinguish and determine what occurs inside their territory.

It is equally instructive to note that due to increased incidence of mobility across borders, there seem to be no clear-cut distinction to trans-boundary sanctity any longer. Developments in transportation, communication, and information technology not only have increased the rate of cross-border mobility among IOCs but also have increased the speed or velocity with which cross-border transactions take place[46]. Therefore, concurrently measuring both the location and the velocity of IOCs' activity often produces uncertain results, thus generating indeterminacy for a State.

Another debilitating factor is the issue of Border Straddling. To the extent that IOCs operate simultaneously in different sovereign jurisdictions, which jurisdiction has precedence over which corporate activities at what time? This complex issue blurs the legal boundaries between States and seems to erode the entire concept of State sovereignty to an extent. It also confuses the notion of citizenship and its attendant rights and responsibilities[47].

Through the use of these and other innovative strategies, TNCs and IOCs have manipulated the concept of borders to their advantage. What exactly is the advantage that TNCs achieve through their cross-border flexibility? They gain between-border variability. The fact that different States have different laws and standards regarding all aspects of economic activity contributes to the power of TNCs and IOCs that strategically play off one country's set of rules against another's. For example, variations in national laws on tariffs, financing, competition, labour, environmental protection, consumer rights, taxation, and transfer of profits are all carefully weighed by TNCs and IOCs in deciding where and how to conduct business. Together, these considerations form what has come to be known as "the policy environment."[48] In the international competition to attract foreign investment by creating a "favorable policy environment," between-border variability encourages a 'race to the bottom'[49] and resulting in a continuing erosion of sovereignty. Whereas TNCs operate in a de facto borderless world created by technological ingenuity, *de jure* political and legal distinctions still mark the boundaries on a world map composed of nation-states. This represents the crux of the inherent conflict between TNCs and nation-states as they are currently structured[50].

It is equally noted that never before has there been a situation in which foreign organizations have been granted license almost as a matter of course to operate freely within the legally defined boundaries of a sovereign state as currently being experienced. This, together with the fact that IOCs and nation-states are different organizational forms, established for different purposes, administered by different principles, and loyal to different constituencies, means that structural problems are bound to arise.

[46] *Ibid.*

[47] Walde, *Ibid* 32.

[48] United Nations Centre for Trade and Development Business Profile Document, PP 173-175.

[49] T.S Chamberlain, Between Transnational Corporations and Sovereign States: The Dilemma of Uncertain Business Borders. 1982 ESLJ 126 Vol 11. P. 126.

[50] *Ibid.*

 Copyright © IJREHC 2023, All right reserved

Volume 04, Issue 06 "November - December 2023"

ISSN 2583-0333

One swift response orchestrated by the stakeholders to stem the tide in the distant past was to take steps geared towards reducing economic development[51]. Kentor analyzed a fifty-year data set consisting of seventy-five developing countries to determine whether the modernization thesis (i.e., FDI in developing countries promotes 'economic growth by creating industries, transferring technology, and fostering a 'modern' perspective in the local population' or dependency theory (i.e., FDI results in disarticulated economic growth, repatriation of profits, increased income inequality, and stagnation) better explains the long-term results of foreign direct investment[52]. He summarized his findings in the following words:

'The results of his study confirm that peripheral countries with relatively high dependence on foreign capital from transnational corporations exhibit slower economic growth than those less dependent peripheral countries. These findings have been replicated using different measures of foreign investment dependence, GDP data, countries, time periods, and statistical methods. This is a significant and persistent negative effect, lasting for decades. Further, a structure of dependency is created that perpetuates these effects. The consequences of these effects, as described in the literature, are pervasive: unemployment, over-urbanization, income inequality, and social unrest, to name a few"[53].Given current conditions, it would however appear that over reliance on foreign investment by developing countries will widen the already huge global rift between rich and poor nations.

Another contributory factor to the erosion of State sovereignty is the purported failure of regulation of transnational corporations. In the late 1960s, the United Nations (UN) reached the opinion that transnational corporations had come to play a central role in the world economy and that their role, with its transnational character, was not matched by a corresponding understanding or an international framework covering their activities.[54]. In the 1970s, the UN produced a draft Code of Conduct on Transnational Corporations, However, twenty years later, after much political wrangling, UN delegates concluded in 1992 that no consensus was possible on the draft Code and thus, the process of trying to achieve some effective legal reconciliation between the goals of TNCs and those of host governments was brought to a formal end[55].

Currently, although several international voluntary guidelines monitor the activities of TNCs, generally they have not been very successful (Hedley 1999). As of 1997, 143 countries had legislation in effect that specifically governs foreign direct investment[56], although initially most of those laws were framed to control the entry and regulate the activities of TNCs, legislative changes increasingly have become more favourable to foreign investment. For example, from 1991 to 1997, of the 750 changes to foreign investment policy made by countries worldwide, Ninety four percent, (94%) were in the direction of liberalization[57]. In the year 1997, in attempts to ease high debt loads and survive a worldwide economic downturn, seventy-six developed and developing countries introduced legislative inducements along the following lines: more liberal operational conditions and frameworks, more incentives, more sectoral liberalization,

[51]A. S Kentor, The Limits of Foreign Direct Investment: Reducing Economic Development. 1998 TSTPJ 11 R 126. P.1025.
[52]*Ibid* @ 1042.
[53]*Ibid.*
[54] 1970 United Nations' Code on Transnational Corporations; 1990 UNCTC, p 3.
[55]United Nations Centre for Trade and Development, UNCTAD 1993, P 33.
[56]United Nations Centre for Trade and Development, UNCTAD 1998, P.53.
[57]United Nations Centre for Trade and Development, UNCTAD 1998, P. 57.

 Copyright © IJREHC 2023, All right reserved

Volume 04, Issue 06 "November - December 2023"
ISSN 2583-0333

more promotion (other than incentives), more guarantees and protection and more liberal entry conditions and procedures.[58]In their competition to attract foreign investment by creating favourable policy environments, these countries are yielding ever more control to TNCs and IOCs.

Given the increasing dominance of transnational corporations in the global economy, the reasons why corporations become transnational, the diminishing sovereignty of nation-states, and the long-term effects of FDI on world development, one may question whether the move toward liberalization is in the interests of the countries and people who are encouraging it. What is called for is nothing short of a revolution in world governance. To regulate transnational corporations, it is necessary to introduce Trans or supranational legislation. To maintain national sovereignty in a global economy, authority must be coordinated and shared across borders[59]. Legislative harmonization, although entailing an initial loss of sovereignty for participating states, can restore their authority over IOCs operating within their jurisdictions. By these means, corporate accountability can be imposed according to the needs and wishes of civil society. Whether or when such legislative harmonization will occur is open to question. However, in the view of the U.S. Tariff Commission, 'It is beyond dispute that the spread of multinational business ranks with the development of the steam engine, electric power, and the automobile as one of the major events of economic history'[60].

Apart from the above, transnational corporations and international oil companies seem to erode the sovereignty of host States in a number of ways. The sheer size of MNC's create potential problems for national governments on a range of issues like location of production, creation of jobs for local citizens in lieu of the expatriates employed by transnational corporations, local content agitation, welfare and security of citizens, technology transfer, managerial expertise and indigenisation policies. This altogether increases the conflict and raises tension as the goals of transnational corporations are at variance with the goals of sovereign national governments. Whilst the former is mostly profit-seeking, the latter is welfare, sustainable development and stability-seeking.

Although, only about 30% of FDI stock is in developing countries,[61] because of the immense power of many TNCs, great concern has arisen about the impact of TNCs on world development. Because the goals of transnational capitalist enterprise and indigenous national government are fundamentally different, many scholars have debated whether TNCs are an aid or a hindrance to world development. According to a Scholar[62], the major points of contention in this debate are the degrees to which TNCs and IOCs are responsible for a net outflow of capital from developing countries, displace indigenous production, engage in technology transfer, introduce capital-intensive, labour-displacing technologies, encourage elite-oriented patterns of consumption, produce divisiveness within local social structures owing to competing loyalties to TNCs and nation-states, and exacerbate unequal distributions of income.

[58]United Nations Centre for Trade and Development, UNCTAD 1998, P. 57.
[59]Kentor, *Ibid* 52.
[60]United States' Tariff Commission, 1977, Lall and Streeton Reports, 1977. P. 15.
[61]United Nations Centre for Trade and Development, UNCTAD 1998, P. 373.
[62]B. Biersteker, Transnational Corporations and Global Economic Development: The Dilemma of Unbridled Control, 1978 TSAJ 104, P. 143.

 Copyright © IJREHC 2023, All right reserved

Volume 04, Issue 06 "November - December 2023"

ISSN 2583-0333

In a similar vein, from a practical point of view, where some of the transnational corporations and multinational oil companies operate in ways that do not conform to International Best Practices (Using the Extractive Industry as a case study) in the jurisdiction of the host state, this amounts to an infringement and an erosion of the sovereignty of the host state.

9.0 CONCLUSION

However, irrespective of these setbacks and consequent discontent with the renegotiation clause and the reasoned position of host states that IOCs' economic activities have the capacity to erode and altogether undermine their sovereignty, it is hereby contended that renegotiation is more desirable, realistic and more enforceable irrespective of its pitfalls, because it secures the protection of both parties' interest against the hardship caused to either of them by the inevitable change of circumstance which was not present at the time and contractual conclusion of the Production Sharing Agreement. It is thus a new purposive approach which when followed diligently and enforced honestly by the host State, will enable it to renegotiate in good faith and consequently bind itself to further negotiate with the IOC, rather than unilaterally altering the terms of the Agreement. It is also a suitable alternative to a stabilization clause that affords a 'win-win' opportunity for both parties in lieu of the 'winner-takes-it-all' mantra that jeopardizes the investment interests of IOCs as there will be no fear of threat to the effectiveness of the host State's flexibility of laws and sovereign rights over her natural resources.

10.0 RECOMMENDATIONS

Host States must endeavor to obey their contractual obligations to foreign investments irrespective of the presence or absence of stabilization and renegotiation clauses. This would encourage more foreign direct investment and secure the protection of IOCs' investment in their host countries.

States which renege on their contractual agreements should be sanctioned by International Investment Tribunals and the International Court for the Settlement of Investment Disputes.

States which have the consistent habit of contractual violation should be proscribed, stigmatized, black-listed and altogether red-flagged by the international investment community to serve as deterrence to other States who might want to rely on their flexible local laws and policies to renege on their contractual obligations to International Oil Companies under Production Sharing Contracts.

Fair treatment clauses should be inserted in the contractual agreements entered into by parties in energy investment transactions of international dimension and the parties must imbibe the culture of contractual integrity, accountability, probity, trustworthiness and sustained confidence in carrying out their contractual obligations irrespective of changing circumstances.

Further and better research on the subject matter of stabilization mechanisms and renegotiation paradigms in the context of international petroleum contracts, and related legal instruments made with respect to petroleum exploration and exploitation in developing countries which are mostly Host States which carry on petroleum exploration and petroleum pipeline infrastructure projects and development must be encouraged. The requisite mechanisms adopted by the

 Copyright © IJREHC 2023, All right reserved

Volume 04, Issue 06 "November - December 2023"

ISSN 2583-0333

parties to provide a form of stability during the term of the contracts in the long term investment agreements must also be set out from the inception of the contract and a ‘non-variance of terms’ clause should be inserted.

Beyond the insertion of stability mechanisms in international petroleum profit sharing Agreements, the culture of trust and the enforcement of sanctions for the breach of contractual agreements must be included in the contractual theme of the transactions as part of the potentially wide range of legal instruments.

More research grants should be given to researchers in the areas of international investment arbitration, oil and gas law, environmental law, petroleum law, foreign investment law; sub-surface international trade law, international commercial arbitration law, energy law; taxation law and international law focusing on sustaining the legal implication of international contractual transactions.

A new purposive approach legal instrument that would harmonise stabilisation clauses with a renegotiation clause means that the emphasis falls largely on mechanisms that are designed to maintain the position of the IOC and the host government in the petroleum contract itself should be designed. The interest of both parties can therefore be accommodated through project financing.

Author’s Profile

Tosin Ayo is qualified to practice Law in Nigeria. He is a Legal Practitioner and was a Law Teacher and Faculty Staff Adviser at the Department of Jurisprudence and International Law, Ekiti State University, Ado-Ekiti, Nigeria where he taught Oil and Gas Law and Environmental Law. He holds a LL.B, University of Ado-Ekiti, BLand LL.M Energy Law from the University of Aberdeen. He is currently a PhD Candidate at the maturity stage of his PhD program at the Ekiti State University, Ado-Ekiti, Nigeria.

Aderonke Abimbola Ojo, PhD is a Senior Lecturer and Head of the Department of Private and Propery Law at the Faculty of Law, Ekiti State University, Ado-Ekiti, Nigeria. She holds a LL.B (Hons) of the University of Ado-Ekiti, BL, LL.M of the University of Ibadan, Nigeria and a PhD of the Ekiti State University, Ado-Ekiti, Nigeria.

 Copyright © IJREHC 2023, All right reserved