NATIONALISATION OF FOREIGN ASSET BY HOST STATE: A FAILURE OF STABILIZATION CLAUSE?

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ABSTRACT: *The risk of expropriation of foreign assets by host states constitutes a major hindrance to foreign investments. The fact that the world has become a global village makes the exchange of global socio-economic resources imperative in the face of multi-faceted global social and economic challenges especially in the developing countries. The foregoing presents the platform on which this paper will consider the issue of expropriation of foreign assets in the hydrocarbon industry by host states in the face of stabilisation clauses. This research paper covers the reasons for expropriation and the implications for both parties. The paper additionally considers the purposes of stabilisation clauses generally and the extent to which a stabilisation clauses can safeguard foreign assets from unilateral acts of expropriation in exercise of the right of permanent sovereignty over natural resources by a host state. Put differently, the central question sought to be answered here is whether the inclusion of a stabilisation clause in an agreement between a foreign investor and a host state can effectively oust the host state's power to 'freely use, exploit and dispose its natural wealth/resources'. Finally, recommendations are made on the best practical way(s) to preserve the economic interest of a foreign investor.*

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AJIL	American Journal of International Law
CERDS	Charter of Economic Rights and Duties of States
CEPMLP	Centre for Energy, Petroleum and Mineral Law and Policy
CTR	Iran-US Claims Tribunal Reports
ILM	International Legal Materials
ILR	International Law Reports
IOC	International Oil Company
IOCs	International Oil Companies
MNE	Multinational Enterprises
MOCs	Multinational Oil Companies
NIEO	New International Economic Order
OECD	Organisation for Economic Cooperation Development
PCIJ	Permanent Court of International Justice
TOPCO	Texaco Overseas Petroleum Company
UN	United Nations
UNGA	United Nations General Assembly
US	United States
USA	United States of America

1.0 INTRODUCTION

The principle of Permanent Sovereignty over Natural Resources (permanent sovereignty) is generally considered a recognised principle of modern International Law.[1] This principle has acquired remarkable relevance and has also been used as the basis to justify acts of States in their business relations with foreign investors. However, this paper will adopt a narrower approach in considering this principle with respect to foreign investments in the oil and gas industry.

Although accepted in International Law, the application of permanent sovereignty is nebulous and unlimited in scope.[2] This has been attributed partly to the fact that permanent sovereignty is a principle of International Law undergoing gradual implementation and partly due to its nebulous character making it adaptable to 'creative' uses particularly by developing countries.[3]

Permanent Sovereignty emerged as a principle of International Law in the 1950s[4] and essentially applied to natural resources of the hydrocarbon family. The principle affirmed the right of states to freely use exploit and dispose their natural wealth unimpeded. However, following the New International Economic Order (NIEO Declaration) and the adoption in December 12, 1974 by the United Nation, of the UN Charter of Economic Rights and Duties of States, the principle was extended to cover all economic activities involving a state and a foreign investor. One intractably controversial application of this provision is the power of expropriation of foreign assets by a host state (mostly developing countries).

The principle of permanent sovereignty has become synonymous with nationalization of foreign assets. The foregoing will constitute the background upon which issues such as the reasons and implications of nationalization will be examined. The paper will also consider the effect or the practical value of inserting stabilisation clauses in investment agreements between a foreign investor and host state. In other words, the writer will critically examine the question as to whether a Stabilization Clause can prevent or effectively limit the powers of a host state to nationalize foreign property pursuant to the right of Permanent Sovereignty.

[1] Hossain, K. and Chowdhury, S.R., Permanent Sovereignty over Natural Resources in International Law (eds.) (London, England: Frances Pinters Limited, 1984).
[2] Ibid., @ p 8
[3] Ibid., @ p 8
[4] Ibid., @ p 10

This question is of prime relevance for some reasons mentioned hereinafter- investment in the Oil and Gas industries is still very attractive and will remain so as long as hydrocarbon resources remain commodities of high value. Secondly, Multinational Oil Companies (MOCs), and other International Oil Companies (IOCs) are granted exploration and exploitation permits for the development of natural resources in foreign countries almost on daily basis. Effectively, these permits will be embodied in contractual arrangements containing Stabilisation Clauses designed to protect and preserve the economic interests of foreign investors. So, the risk of nationalization of foreign property remains a live issue under International Law. Finally, this paper will draw the necessary conclusions and make recommendation(s) on the best practical way(s) to engage contractual terms to protect the economic interest of foreign investors in the most volatile environment.

1.1 The Principle of Permanent Sovereignty over Natural Resources: An Overview

The principle of Permanent Sovereignty owes its origin (officially) to the United Nations (UN) resolution 1803 (XVII) of 14 December 1962. The UN General Assembly prior to this date established, (by resolution 1314(XIII) of 12 December 1958) the Commission on Permanent Sovereignty over Natural Resources and directed it to conduct "a full survey of the status of permanent sovereignty over natural wealth and resources as a basic constituent of the right to self-determination".[5] The Committee's report was adopted on December 14th 1962 as the principle of 'Permanent Sovereignty over Natural Resources'.

The purpose of this Resolution was simple. To accord all states the inalienable right freely to dispose off their natural wealth and resources in accordance with their national interests.[6] It emphasized in article three thereof that in any transaction between an investor and a state, due care should be taken to ensure that there is no impairment, for any reason, of that State's sovereignty over its natural wealth and resources. In other words, the intention was to secure economic independence for every state but with particular focus on developing countries and countries which had just gained political independence by according them the firm opportunity to utilize their natural wealth and resources in their own national interests and for the benefit of their peoples.

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[5] General Assembly Resolution 1803 (XVII), "Permanent Sovereignty over Natural Resources", (14 December, 1962) >http://www.unhchr.ch/html/menu3/b/c_natres.htm (accessed on the19th Jan. 2009).
[6] Ibid., Art. 4.

Additionally, it is the view of some scholars[7] that such a resolution became necessary because of the wide spread opinion, particularly held by developing nations concerning the economic inequalities inherent in most concession arrangements negotiated during colonial era.[8] Another important mission of this Resolution can be found in paragraph four. It recognised officially, for the first time the right to nationalize. It is however noted that the rights to 'nationalize, expropriate or requisition' was qualified, and to be based only 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*.

Not sure that it has accomplished the avowed mission to secure and guarantee the economic self-determination for every state recognised by International Law; the UNGA proceeded in 1974 to adopt the Charter of Economic Rights and Duties of States (CERDS). Article 2 of CERDS again reiterated the desire to guarantee complete permanent sovereignty allowing each and every state to become the sole authority to decide on the possession, use and disposal of all its respective wealth, natural resources and economic activities. Furthermore, Article 2 (2) (c) amplified the earlier right[9] granted to nationalize, expropriate "*or transfer ownership of foreign property"* and once again made the rights subject to the obligation to pay *appropriate compensation.* With these resolutions, the tides appeared to have turned against foreign investors. Also, it is worthy of note that Article 2 (2) (c) expressly favours the use of domestic legal processes of the host state in expropriation related disputes.[10]

1.2 The Legal Status of the CERDS (the Charter)

The legal status of the Charter is still a matter of controversy among legal scholars. While some maintain that the Charter is a non-binding resolution of the UN, others posit that the principle of permanent sovereignty as espoused in the Charter has acquired a binding force and thus become a part of customary international law.[11] In this regard, Brownlie[12] has noted that although the general rule is that resolutions belong to a class of non-binding decisions of the UN, however, the proceedings and the resolution themselves may amount to evidence of the emergence of principles of customary international law. He believes that that was the case with this principle in the Charter. The author of this paper supports the latter view and the

[7] See Hossain, supra note 1 @ 6.
[8] Ambassador Baroody, Saudi Arabia Representative to the UN in his statement before the 10th Session of the UNGA, (UN General Assembly, 10th Session, Official Records, 3rd Committee, 672d meeting, p.240.
[9] See Art. 4, General Assembly Resolution 1803 (XVII), supra note 5.
[10] See Hossain, supra note 1 @ p.6
[11] Ibid., @ 7.
[12] Brownlie, I., *Recuel des cours,* I- 261 (1979).

reason for this can be gleaned from the long process that brought about the Charter, state practice on nationalization, the fact that no latter resolution has been able to alter that aspect of the Charter and the fact that the principle of Permanent Sovereignty as encapsulated under Article 2 (2) (c) has become an intrinsic part of the binding international law norm on the right of each state/people to self-determination[13].

2.0 Expropriation of Foreign Assets

An Overview

Expropriation, nationalisation and 'taking of property' is used interchangeably in this paper. To expropriate means to acquire foreign owned assets into public ownership and be managed by the expropriating host state.[14] Expropriation may also be effected to transfer ownership and control to a third person other than the state. Taking of foreign properties may be with respect to all sectors of the economy of the state or an industry specific taking[15]. It is determined by the policy of the host state. Again, the author focuses on expropriation in the oil and gas industry. Furthermore, expropriation may involve the taking of the whole assets or a 'creeping expropriation'.[16] Creeping expropriation is achieved through regulation and done in a manner not seen as a legitimate exercise of a host states power to make policy generally. For example, the non-discriminatory application of competition law which affects the interest of an investor would be considered to be within the policy competence of the host state. Additionally, policy measures of a host state with temporary adverse effect on the property rights of an investor will be insufficient to ground a claim of regulatory taking of foreign property. On the contrary, policy measures which completely or considerably diminish the economic benefit which accrues to a foreign investor under an investment agreement or limits the rights of use and disposal of property will constitute a regulatory taking.[17]

2.1 Why Expropriate?

It is a fact that globalisation makes global economic interactions necessary for some reasons.[18] The need for concerted efforts in tackling the ever increasing global social and

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[13] See Hossain, supra note 1 @ p.3

[14] Muchlinski, P.T., Multinational Enterprises & The Law, (2nd Ed.) (Oxford, England: Oxford University Press, 2007).

[15] Ibid, @ 588.

[16] 'The slow and incremental encroachment on one or more of the ownership rights of a foreign investor that diminishes the value of its investment'. (Domke 55 AJIL 585 @ 588 (1961).

[17] See Muchlinshi, Supra note 14, @ 589.

[18] Bhagwati, J., In Defense of Globalisation, (New York, United States of America: Oxford University Press, 2004).. 19

economic challenges makes global economic integration more important[19]. In the circumstance of economic challenges, the natural expectation will be the elimination of barriers to free flow of investment locally and internationally. But on the contrary, expropriation of foreign property which constitutes a barrier to foreign investments has continued to be part of national economic policies in many countries. Venezuela, Argentina, Mexico, Ecuador and Iran are current examples.

The important question then is why should countries engage in nationalization of foreign property in the face of the obvious adverse implications? To address this question properly, it will be important to first consider the reason behind the call for economic self determination which gave rise to the 1974 Charter. The substantive reason for the agitation for economic self- determination was the unequal economic relations between the established economies and the developing nations. Decolonization of some former colonies saw the emergence of many independent states after the Second World War. These new states soon realised that they could not compete economically because of some economic arrangements which predated their independence. The general opinion amongst these new states was that concessions and other legal arrangements for the exploitation of their natural resources by foreign entities were unfavourable and had the capability to stifle their economic advancement. So, the call for alteration of the status quo began[20]. In fact, Bedjaoui views the strong and persistent assertion of the right of States to be in control of their natural resources as an instrument of defence against the 'violent reaction by the imperialist to counter their demand for a new economic order'[21].

Thus, it can then be seen that nationalization is viewed as a way of asserting a country's rights to economic self-determination. In Latin America for instance, there was in the 1940s and the 1950s, this growing uneasiness against the dominant influence of the United States of America (USA) in the economic environment in Latin America.[22] This led to some takings of properties belonging to US nationals. And for nation-states still under colonial rule, the call was for the use of their natural wealth[23] for their own benefit. This is ideal situation which the Charter appears to support. Conversely, foreign assets may be nationalized to score

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[19] Havana Charter for an International Trade Organisation, Wilcox (1949). P.49

[20] Schrijver, N., Sovereignty over Natural Resources: Balancing Rights and Duties, (Cambridge,England: Cambridge University Press, 1997).

[21] Ibid., @ p 24.

[22] Ibid., @p 6.

[23] Defined as those components of nature on the basis of which economic activities can be based.

a political point. That is, discriminatory in application and carried out solely to 'punish' a foreign investor or its country of nationality.[24]

Capital exporting countries like USA while challenging the right to expropriate inserted a caveat to any exercise against its nationals of such right- the obligation to full, prompt payment of just compensation.

2.2 The Effects of Expropriation

Taking of foreign property by a host state comes with implications for the parties. A host state which takes a foreign property gains ownership of foreign capital and appropriates such asset to its economic advantage. So, subject to the obligation to pay compensation, the appropriated asset comes as 'profit' which cannot be taxed.[25] And unless the Multinational Enterprise (MNE) is sufficiently compensated for the nationalized asset, it loses its investment and other costs in relation to the appropriated asset. But apart from the above, the relevant host country stands to lose in the long run. A host state noted for its propensity for nationalizing foreign properties will most probably scare foreign investors and consequently loose the opportunity to attract needed foreign capital.[26] However, despite the scale of nationalization of foreign direct investments in the oil and gas industry, it is hard to identify a country which has been boycotted by foreign investors because of its nationalization policy.[27] Countries like Libya, Argentina, Iran, Venezuela, Russia, France and Ecuador, have at one time or another nationalized asset of some international oil companies without noticeable decline in the level foreign investments. The absence of a predictable behaviour by IOCs in this respect is occasioned by non-availability of alternative investment environments.[28] The foregoing thus highlights the risks which direct foreign investments are vulnerable to in foreign territory. It also points to the imperativeness of practical contractual provisions capable op protecting the economic interest of a foreign investor against the adverse effects of expropriation.

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[24] See Schrijver, supra note 20 @ 346

[25] Anderson, T., Multinational Investment in Developing Countries: A Study of Taxation and Nationalization, (London, England: Routledge, 1991).

[26] Ibid, @ pp 102-103

[27] Kolo, A., Managing Political Risk in Transnational Investment Contracts 1994 (CEPMLP-Seminar Paper No. PP11) Dundee: CEPMLP University of Dundee, 1994).

[28] See Anderson, supra note 25 @ p115

2.3 Legality of Expropriation

2.3.1 Under the Law of Host State

To determine the legality of a taking is determined principally by the laws of the host state, it is material that the act of expropriation is made pursuant to statutory prescription of the host state. A taking of foreign property is illegal and unlawful except authorized by statute[29]. The statute will necessarily provide for the procedure to be followed, the amount of compensation to be paid and such other issues like right of investor to seek judicial review or challenge the legality of such action in the local courts. Thus, statutory backing is crucial to prevent acts which may be construed as executive rascality.[30]

2.3.2. Under International Law

Legality of nationalization of foreign property under international is somewhat contentious.[31] Some capital importing countries insist that expropriation is lawful provided the taking was done for clear public purpose, without discrimination and upon payment of prompt adequate and effective compensation. This is also known as the international minimum standard test[32]. On the other hand, some capital importing countries have frequently challenged this standard for what they consider as serving just the parochial interests of the proponent and therefore lacking the requisite popular acceptance to qualify as a norm of customary international law[33]. Put differently, opinions are strongly divided on the subject. However, subject to payment of compensation, taking of foreign property is not unlawful or prohibited in international law.[34]

2.4 Duties of Host States

However, the Charter stipulates that a taking must be public and for the good of the people. A taking must additionally not be discriminatory, observing due process of the host state and

[29] William Pereira Associates, Iran v. Iran 5 Iran-US CTR 198 (1984); Sola Tiles Inc. v. Iran 14 Iran-US CTR 223 (1987).

[30] Ibid, @ P 597

[31] Lipson, C., Standing Guard: Protecting Foreign Capital in the Nineteenth and Twentieth Centuries (Part I) (Berkeley, United States of America: University of California Press, 1985).

[32]Hull, C., US Secretary of State, 'Taking US agricultural interest by Mexico' Official note dated 21st July 1938; See Hackworth Digest of International Law 655-61 (1942).

[33] Dolzer, R., *New Foundations of the Law of Expropriation of Alien Property*, 75 AJIL 553 (1981).

[34] Knahr, C., *Indirect Expropriation in Recent Investment Arbitration, (pp.11-12): >* *http://www.transnational-dispute-management.com/members/recentlypublished/ (accessed on 22nd Jan. 2009).*

backed by compensation.[35] Both the Charter and the General Assembly Resolution 1803[36] emphasized public utility, or the need to safeguard the natural resources of the expropriating state the permissible conditions for lawful expropriation. It must be noted that these provisions are very wide and allow a host state a margin of discretion but must be exercised in line with the conditions.[37] In **BP Exploratory Company v. Republic of Libya**, the British government successfully challenged the taking by Libya as being actuated by political considerations and therefore having nothing to do with the well being of the Republic. [38] Also, in the **Chorzow Factory case** (1928)[39] the public purpose requirement was recognised by the Permanent Court of International Justice (PCIJ).

Similarly, the taking must not discriminate between a national of one country and one from another country. It has also been argued that the state taking should not discriminate between its nationals and foreigners.[40]

Additionally, the taking must not be lacking in due process. Although there is no formal procedure under international law to be observed in taking a foreign property, the provision of Article 2 (2) (c) of the Charter alludes to the fact that the right of IOCs or foreign investors should not be ousted under the expropriation laws. An IOC should be free to explore all possible legal remedies to which it may be entitled.

Lastly, the foreign investor should be entitled to compensation. The host state, in taking, has an obligation under international law to pay compensation or otherwise make financial reparations.[41] It has been noted that compensation serves two purposes namely to indemnify the foreign investor for their losses and to ensure that the taking is not tantamount to unjust enrichment.[42] However, it is important to point that a question of the parameters for accessing or arriving at the amount of compensation is a controversial question in which divergent views abound. This will be touched briefly in the next section of this paper.

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[35] Ibid, @ p 12.

[36] See Art.3, UNGA Resolution, supra note 5.
[37] See Schrijver, supra note 20 @ p 344
[38] See 13 ILM (1974), @ p 769
[39] See Schrijver, Supra note 20 @ p 345
[40] Ibid.
[41] Muchlinski, P., et al., The Oxford Handbook of International Investment Law, (Oxford, England: Oxford University Press, 2008).
[42] Ibid, @ p 1053

3. 0 STABILISATION CLAUSES IN INVESTMENT AGREEMENTS

3.1 Meaning and Scope

A Stabilisation Clause is said to be "contract language which freezes the provisions of a national system of law chosen as the law of the contract as at the date of the contract in order to prevent the application to the contract of any future alterations of this system"[43] A stabilization clause is meant to act as a bar against any subsequent act of the government which may have the effect of varying the terms of the contract or taking a foreign asset, comprising the subject matter of the contract.[44]

Petroleum industry investments are vulnerable essentially for two reasons; Contract duration and huge capital involvement. Petroleum industry agreements for the exploration and exploitation of resources may come by way of concession, production sharing contracts, service contract or a combination of one or more of these. The common denominator is the contract length or duration. [45] Additionally, petroleum industry contracts are concluded between a State or a State entity, (the latter contracting on behalf of the State and having the responsibility to administer the petroleum resources in the interest of the public). The above features of oil industry contractual arrangements present series of contractual challenges like how to bind the State party to the terms it has voluntarily agreed for the duration of the term and how to manage a material supervening circumstance after the date of the agreement.

Insertion of stabilisation clauses is one way to look at it. So, a stabilisation clause is used to exclude latter provisions or alterations of the host government's law from applying to the contract. It can further operate to exclude the application of host State law or to make international law the governing law to the contract. The aim is to preserve the original contract terms from subsequent events.[46] The terms of an exploration and development agreement can be affected in a variety of ways. A host state may seek an increase in the initial fiscal obligation of the IOC or introduction of onerous environmental, health and safety obligations on the IOC which could gives rise to a claim of creeping expropriation.

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[43] Amaco International Finance v. Iran, 15Iran –U.S. C.T.R. 189, 239.

[44] Waelde, T. W., and Ndi, G., *Stabilising International Investment Commitments: International Law Versus Contract Law,*31 Texas International Law Journal 215-267 (1996);> **http://www.dundee.ac.uk/cepmlp/journal/html/Vol1/article1-9.html** (accessed 23 Jan. 2009).

[45] Bernardini, P., *Stabilisation and Adaptation in Oil and Gas Investments*, Journal of World Energy Law & Business, Vol. 1, No.1, P. 1 (2008).

[46] See Muchlinski, supra note 40 @ 1053.

However, relevant for this purpose is the use of stabilisation clauses to *freeze* the expropriatory powers of the host state.

3.2 Historical Developments

The origin of stabilisation clauses began after the first and second world wars in the USA.[47] The introduction of stabilisation clauses in concession contracts involving USA companies was because of the spate of nationalisation of US companies in Latin American Countries in the 1970s.[48] The important aim of inserting such a clause was to *defend* the companies from expropriation by making any taking by a host state unlawful. The assumption is that by agreeing to a stabilisation clause, a State accepts to *freeze* its executive and legislative powers during the life of the agreement. In other words, the presence of such a clause evinces the will of the parties to respect the sanctity of the contract.[49] In **Texaco Overseas Petroleum Company (TOPCO) v. Libya**[50] the arbitration tribunal relying on this reasoning held that Libya, having submitted to a stabilisation clause in the agreement cannot violate the special contractual undertaking on grounds of exercise of right of permanent sovereignty. However, it must be noted that some subsequent arbitration awards[51] took a different view from that expressed by Professor Dupuy in that case.

3.3 Typologies of Stabilisation Clause

A stabilisation clause in its strict sense operates to put an absolute bar on the legislative powers of the host state and shields the contract from subsequent laws[52]. This is the traditional form of the earlier operation of stabilisation clauses. The crucial question therefore is whether a sovereign state can limit or surrender its *sovereign powers* to make legislation in respect of its inalienable natural resources in favour of any entity whether private or

[47] Cameron, P.D., *Stabilisation in Investment Contracts and Changes of Rules in Host Countries: Tools for Oil & Gas Investors,* (Unpublished Association of International Petroleum Negotiators (AIPN), Final Report, 5 July, 2006).
[48] Ibid
[49] See Bernardini, supra note 44 @ p.2
[50] 17 ILM 3, 24 (1978).
[51] Libyan American Oil Company (Liamco) v. Libyan Arab Republic, 20 ILM 1 (1981); BP v. Libya 53 ILR 297 (1974); Kuwait v. American Independent Oil Company (Aminoil), 21 ILM 976 (1982).

[52] Faruque, A.A., *Typologies, Efficacy and Political Economy of Stabilisation Clauses: A Critical Appraisal,* > *http://www.transnational-dispute-management.com/members/recentlypublished/* *(accessed on 22nd Jan. 2009).*

corporate? In the words of Justice Jimenez de Arechaga[53] the description of the full sovereignty as *permanent* shows that 'the territorial state can *never* lose its legal capacity to change its destination or the method of exploiting those resources (regardless of) whatever arrangements have been made for its exploitation and administration.' It was further stated that a state can still alter the existing position even where a predecessor state or a previous government had bound itself through treaty or contract. This is view supported by what has been said earlier in this paper in respect of the implications of the rights of permanent sovereignty. That is, the right of a state to use and exploit its natural resources is inherent in its sovereignty. The writer's view is that this right is inalienable and indivisible and in line with international law.

And having found themselves unable to enforce the *freezing* right, the IOCs are beginning to redirect stabilisation clauses to more practical and sustainable objectives. This new version of stabilisation clause is called *equilibrium* or *balancing* or *adaptation* clauses.[54]

These types of clauses can assume two main forms:

- They may provide that where there is a change in the law which diminishes the economic interest of the IOC, the parties will adapt the altered circumstance to conform to the benefits initial contemplated, or
- They can also provide that in the event of such change in law, the agreement will be re-negotiated so as to re-create economic equilibrium.

It is submitted that the above is a more practical and less dogmatic in stabilising contractual terms. This view is supported by recent tribunal decisions. They are increasingly recognising the host state's inalienable right to exercise its legislative sovereignty and the right to make alter or repeal its laws at its own discretion.[55]

Furthermore, some governments particularly the OECD[56] countries do not offer stabilisation clauses. It is noted that this has not diminished the flow of investment into these countries. So, expropriation or threats of same may is not proven to impede the flow of global economic resources especially where the above duties of states are adhered to.

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53 See Chowdhury, supra note 1 @ p51

54 Mackenzie, W., & CEPMLP, *Contract and Fiscal Stability: Rhetoric and Reality, >:* http://www.dundee.ac.uk/cepmlp/gateway/index.php?news=29422 (accessed on 23rd Jan. 2009).

55 Ibid, @ p 5.

56 See, eg. The United Kingdom, USA, Norway

In any event, it is submitted that the interest of any investor is primarily economic. The state of law in a host is secondary. And if IOCs engage stabilisation provisions towards the practical aim of protecting their economic interest, expropriation will matter less to them. Thus, negotiators of international petroleum agreement are expected to act smarter and more practical in their approach to contractual terms in the industry.

3.4 Effect of a Stabilisation Clause on the Right to Expropriate

> "....compelling a state by an arbitral award to annul the measures that it has taken may be seen as an undue interference with its sovereignty; thirdly, the situation may have evolved in such a way that restoration becomes impracticable or impossible...Compensation is the one remedy that is traditionally seen as the least intrusive into sensitive areas of government sovereignty because the international tribunal does not order the government to follow a particular course of conduct but rather requires {it} to pay in the fungible currency of money for the harm done. The idea behind this traditional notion is that *for individuals and companies, money is the best and most fungible expression of their interests...*"[57]

Thus, where it is apparent that the court or tribunal cannot reverse a state party's decision to expropriate or otherwise alter the terms of an agreement. It is also clear that treaty obligations prescribing standards of treatment of foreign investors are shown to be ineffective. Can it then be argued that there is viable practical value in freezing terms of a contract? The author answers this question in the negative. In other words, a 'stabilisation clause' is practically useful only where its purpose is to balance or maintain the economic equilibrium of the contract in favour of the IOC despite changes. Nothing substantial may be achieved by insisting on a particular set of law. The paramount duty of international petroleum contract negotiations should therefore be to condescend to particulars. Detailed provisions covering all conceivable risks and the balancing provisions must be specially provided for to ensure that no matter what happens in the political or legal environment, the economic interest is apparent and adequately protected. This, in the author's opinion is a more viable and useful

[57] See Muchlinski, supra note 40 @ 1059

safeguard to the business interest of an investor before a tribunal than the dogmatic insistence on the status of laws or the many controversial[58] treaty-based standards of treatment embodied in different treaties which at times are incapable of dealing with the peculiar issues inherent in each contract.

4.0 CONCLUSION

Thus, a host state that expropriates foreign owned assets pursuant to conditions stated in the Charter and adheres to legal and procedural due process in a taking cannot impede the flow of foreign investment. On the other hand, a well negotiated contract with stabilisation clause structured to maintain contractual equilibrium at any given time and circumstance should provide complete protection to the interest of an IOC. This kind of stabilisation clause should solemnize a befitting marriage between the principles of *pacta sunt servanda* and *Clausula rebus sic stantibus*. In order words, expropriation is not and should not be seen as evidence of failure of stabilization. A good stabilisation provision ought to be galvanized towards the real objective- preservation of the actual interest of the investor without attempting a limitation of sovereign powers of a host state.

Finally, it is recommended that:

- ✓ Rhetoric be substituted by reality by avoiding the notion of using stabilization clauses to achieve the impossible.
- ✓ If complete insulation from political/legal risk is desired, exhaustive provision should be made in the agreement to that effect.
- ✓ International petroleum negotiators should bear in mind that a better way to contract stabilization is by appreciating the real interest of an investor and preserving the same through the insertion of requisite clauses without attempting to play God.

[58] Ibid, @ pp. 301-302

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