

Reflections on Sovereignty over Natural Resources and the Enforcement of Stabilization Clauses

Peter D Cameron

Summary

In recent years, there has been a revival of scholarly interest in the role of stabilization clauses in long-term investment contracts between states and foreign investors, often called state contracts. This has been particularly evident in those industries centered on the extraction of oil, gas and hard minerals, characterized by long duration, high economic rents and high, albeit volatile, commodity prices. So far, much of the debate has focused on the negative attributes of stabilization clauses, particularly as a result of the human rights critique of stabilization clauses, and more generally with a variety of high profile interventionist and regulatory measures associated with the “return of the state” in international law. Yet such clauses continue to play a pervasive role in international investment, both in their presence in investment contracts and the protection they give to investors in the face of an exercise of sovereign power. In addition to acting as a risk-mitigation tool for the foreign investor, they are included in contracts to give the host state an economic advantage in the attraction of foreign investment “by making their investment climate more competitive and favorable to the foreign investor.” This article suggests that we as lawyers need to shift the discourse about their negative attributes to one that centers on how their analysis is situated in the current global context on the retrenchment of sovereign rights among countries.

The revival of the debate is a welcome development in a discourse which began at least as early as the 1960s and which has attracted some of the keenest minds in international law. It is occurring at a time when assertions of sovereignty in international investment relations are no longer the preserve of what were once generically called “developing countries,” and when the participation of the state in natural resource development is much greater than at any time previously. International flows of capital also operate on a scale and in a manner that bears little comparison with the post-colonial investment regime in place when this debate first began. In addition to such wide-ranging contextual changes, two important legal developments have occurred to give urgency to this debate: Firstly, there is widespread

agreement that an element of flexibility has become common in the design of modern stabilization clauses, but little consensus on its implications for their efficacy; secondly, there has been a process of “treatification” of international investment law, but its implications, if any, for the pursuit of contract claims based on stabilization clauses have as yet only rarely been discussed.

There has also been growing attention given to what might be called a “legitimacy” issue. Stabilization clauses in state contracts remain near-standard practice around the world but are rarely ever conceded by governments in OECD countries in their attempts to attract investment in their natural resources. The linkage between such clauses and the notion of “fetters” on the sovereignty of the growing number of countries that are using the natural resource industries as a motor for wider economic development – to “catch up” – remains as sensitive today as it was half a century ago. Legitimacy concerns have broadened recently to embrace the idea that stabilization clauses may interfere with a country’s efforts to implement laws, regulations or policies to meet its human rights obligations.

In this chapter I shall critically review the changing trends in the design of stabilization clauses and particularly how they have been understood in the recent literature; further, I shall consider whether there is a shift in response to state sovereignty that would justify a more liberal interpretation of the host country’s obligations; finally, where countries have indeed chosen to exercise their sovereign rights to revise the economic core of a petroleum contract, I consider what protection a stabilization clause may provide for the investor concerned in such circumstances. Essentially, I shall argue that the much noted “flexibility” in the design of modern stabilization clauses is part of a climate of realism by investors about the limits they can impose upon future actions of a host country. Contrary to the dominant view in the literature, this shift in contractual practice has been a gradual, evolutionary one in which the investors as much as countries have engaged in the development of more sophisticated ways of stabilizing long-term investment contracts. Countries have indeed defined their sovereignty ever more confidently, asserting public interest arguments where they asserted a narrow form of resource sovereignty in the past. However, the result is not indicative of a decline in the efficacy of stabilization clauses. Indeed, their continued popularity among investors and wide acceptance by countries suggests they retain a value in preserving the economic core of a long-term resources contract, and implies a presumption of enforceability by tribunals and courts.