Issues of Stability in Ghana's Model Petroleum Agreement

Abstract

Owing to the news of promising oil and gas discoveries made in Ghana in the year 2007, she has joined the ranks of Africa’s oil producers and received a lot of media attention. Ghana, as a developing country with a liberal investment climate, has chosen the Production Sharing Agreement as the arrangement by which she seeks to attract the requisite foreign investment to develop her petroleum industry while maintaining sovereignty over her resources. This paper identifies the issue of stability in Ghana’s Model Petroleum Agreement and limits the scope of its argument to the stabilisation and renegotiation clause in Article 26 of the Agreement.

This paper argues that the stabilisation clause is well drafted and based on previous cases is fit for the purpose of stabilising the contract. On the other hand, the renegotiation clause contains vague provisions that are susceptible to broad interpretation by the parties on which they may disagree. This leads to conflicts and subsequent instability of the contract. The author suggests that whereas the stabilisation clause is fit for purpose, more detailed guidance is required for the renegotiation process. Better guidance as to what events could trigger renegotiation, the effect they would have on the contract and how they should be revised would contribute to the stability of the contract.

CHAPTER ONE: INTRODUCTION

In June 2007, exploratory activities by oil companies Kosmos Energy and Tullow Oil off the Republic of Ghana’s Atlantic Ocean coast uncovered commercially viable quantities of crude oil and natural gas, the largest find in Africa’s recent history. Ghana’s oil and gas industry has since become a focus of global interest. Dr. Kwabena Duffuor, Minister of Finance and Economic Planning in Ghana, has been reported to have described Ghana’s oil and gas sector as attractive
for foreign investment. In this regard, one of the investors’ major concerns is stability. Given that the principal form of long-term stability is contract-based, the main objective of this paper is to appraise the use of the stabilisation and renegotiation clause under Article 26 of Ghana’s Model Petroleum Agreement (MPA) to attain stability of the contract. It concludes that notwithstanding the stabilisation clause guaranteeing investors stability, the vague provisions contained in the renegotiation clause produce counteraction. It is imperative to register a disclaimer that this argument is not purported to apply to negotiated Production Sharing Agreements. Cognizant of the fact that the provisions of Ghana’s MPA may be modified during negotiations, the object of this paper is to highlight stability as an issue to be addressed during such negotiations.

The MPA is a Production Sharing Agreement (PSA). Such contracts are the oldest form of risk contracts which require the contractor, whose compensation and reward are expressed and paid in deliveries of oil and gas production, to fund the authorised petroleum exploration, development and production operations. Sections 1 and 2 of the Petroleum (Exploration and Production) Law, 1984, P.N.D.C.L. 84, require petroleum exploration or production to be governed by a Petroleum Agreement. The Act provides the basic terms and conditions of every Petroleum Agreement negotiated and executed in Ghana and spells out the rights and obligations of each party to the Agreement, as well as sanctions that may be applied for any breach of obligations assumed under the Petroleum Agreement. Even though there is no specific prescription for it, according to the management of the Ghana National Petroleum Corporation (GNPC), the Model Petroleum Agreement as a standard document to be used, flows from the Act because it employs the provisions of the Act to guide the process of negotiating the terms and

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conditions of a Petroleum Agreement among the Government of Ghana, GNPC and foreign oil company.\(^5\)

It is challenging for the drafters of these contracts to anticipate and deal appropriately with the many contingencies which may arise during the course of their trading relationship,\(^6\) such as a change in geology, government and economic fortune of the project and regulatory and environmental risks.\(^7\) The foreign oil company which invests in a host country is exposed to these risks, which may have a detrimental effect on the company’s investment by affecting the profitability of the venture as well as its ability to service debts. Absence of a provision to control the aforesaid risks renders the PSA less attractive to the oil company that performs exploration and production at its sole risk and robs the host state of its opportunity for foreign investment.

In order to remedy this, draftsmen can build into the contract a mechanism for revising the terms of trade as each party receives information about benefits and costs.\(^8\) This mechanism is known as renegotiation. It should be noted that this is not the only scenario that can trigger the need for renegotiation. The need for renegotiation can arise where one party is deemed to ‘suffer’ as a result of the occurrence of certain events not limited to the receiving of information. In addition to renegotiation clauses, stabilisation clauses, Bilateral and Multilateral Investment Treaties, among others are employed in attaining contractual security for the parties.\(^9\) While stabilisation clauses attempt to neutralise the host state’s power to unilaterally change the terms of an already concluded agreement,\(^10\) investment treaties grant the added protection of allowing investors to bring claims against the host state for violations of the treaty directly to legally binding

\(^{5}\) GNPC (n 4).


\(^{8}\) Hart and Moore (n 6) 776.


international arbitration. Consequently, the oil company’s investment is protected and, provided the appropriate safeguards are inbuilt, the host state gains the opportunity for an economic advantage by making its investment climate more competitive and favourable to the foreign investor thereby attracting foreign investment into the petroleum sector.\textsuperscript{11}

Focusing solely on the stabilisation and renegotiation clauses in Ghana’s Model Petroleum Agreement, this dissertation is arranged as follows. Chapter 2 broadly introduces Production Sharing Agreements and why they are chosen with a particular focus on Ghana’s MPA. The author argues that Ghana chose to adopt Production Sharing Agreements in order to uphold and maintain sovereignty and to have the opportunity to set up a domestic petroleum industry by making use of the financial and technical resources of foreign oil companies which she lacks. Chapter 3 briefly describes the background of stabilisation clauses before specifically looking at how the stabilisation clause in Ghana’s Model Petroleum Agreement is drafted and how it provides stability to investors. Chapter 4 looks in depth at the renegotiation clause in Ghana’s MPA and argues that the Agreement is not stable because many disputes may arise in relation to the meaning of its vague provisions. Finally, Chapter 5 provides final remarks and a summary of the author’s argument.

\textbf{CHAPTER TWO: PRODUCTION SHARING AGREEMENT}

\textit{2.0. INTRODUCTION}

It is established by the Center of Energy Economics that state parties plan to maximise wealth from hydrocarbon resources by encouraging appropriate levels of exploration and development, while the oil companies aim at building equity and maximising wealth by finding and producing oil and gas at the lowest possible cost and highest possible profit margin.\textsuperscript{12} Despite the disparity in objective, both parties can make a range of arrangements to achieve mutual satisfaction. These

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would be aimed at maximising returns on investments and resources and include modern concessions, production sharing agreements, joint ventures and service contracts.\textsuperscript{13}

PSAs are distinguished from other types of contracts in that the foreign oil companies carry the entire exploration risk (should no oil be found by the company, it receives no compensation) while the government owns both the resource and the installations\textsuperscript{14} Nonetheless, it has been argued that the above-named arrangements produce the same economic result despite their unique philosophical backgrounds.\textsuperscript{15}

Thus, the importance of the distinction is really a matter of law and politics when it comes to the sensitive issues of title, ownership and sovereignty.\textsuperscript{16} Owing to the fact that PSAs address the important issue of ownership of oil reserves, this contract form is politically acceptable in most developing countries.\textsuperscript{17} Perhaps, this is because of the belief that the oil sector can become integrated into the economy of the country, subsequently contributing to growth and development.

\textbf{2.1. Features of Ghana}

According to the World Bank, overall poverty in Ghana has declined from 52\% in 1992 to 28\% in 2006 and the nation is on course to exceed the 2015 Millennium Development Goal (MDG) of halving poverty.\textsuperscript{18} Despite this progress, 78.5\% of the population lives on less than $2 a day.\textsuperscript{19}

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\textsuperscript{14}Kirsten Bindemann, \textit{Production-sharing Agreements: An Economic Analysis} (Oxford Institute for Energy Studies, Oxford 1999) 1.  \\
\textsuperscript{15}Daniel Johnston, \textit{International Petroleum Fiscal Systems and Production Sharing Contracts} (Penwell, Tulsa 1994) 24; Likosky (n13).  \\
\textsuperscript{16}Nana Adjoa Hackman, \textit{Was Ghana Right in Choosing Royalty Tax System for the Oil Sector?} <http://danquahinstitute.org/docs/OilSectorUnderScrutiny.pdf> accessed 14/04/12.  \\
\textsuperscript{17}Bindemann (n 14) 85.  \\
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Therefore, Ghana’s position as a developing country combined with the uncertainty and high expense associated with offshore exploration and production makes PSA an appropriate contracting model for maximum returns.

Ghana also has a liberal investment climate.\(^{20}\) One of the yardsticks of effectiveness of a liberal investment regime is its emphasis on longevity of investment agreements in order to yield expected benefits from such agreements.\(^{21}\) Article 23 of Ghana’s MPA states that on completion of the thirty year term the parties may negotiate a further agreement provided that the Agreement has not been terminated earlier. With exception of assets mentioned in Article 19.1 (b),\(^{22}\) it also states that assets acquired by the Contractor, may only be retained by the GNPC where a reasonable and mutually agreed fee has been paid.\(^{23}\) Additionally, Ghana’s Model Petroleum Agreement stipulates that disputes between investors and the Government may be submitted at the option of the aggrieved party to international arbitration if parties fail to reach an amicable settlement.\(^{24}\)

Agrawal submits that investment climates like that of Ghana provide the impetus for PSAs to succeed as investment protection particularly within the legal framework is associated with improvements in operating performance.\(^{25}\) The Petroleum Law of Ghana, for example, Section 3 of P.N.C.L. 84 and Article 7.1 of the Model Petroleum Agreement of Ghana, also provides the legal framework for monitoring and control of oil companies which is designed to ensure that

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\(^{21}\) Al Faruque (n 11).
\(^{22}\) According to Article 19.1 (b) of the Model Petroleum Agreement of Ghana, GNPC shall be sole and unconditional owner of all assets all physical assets ... which are purchased, installed, constructed or used by Contractor in Petroleum Operations as from the time that full cost is recovered in accordance with the provisions of the Accounting Guide or the Agreement is terminated and Contractor has not disposed of assets prior to such termination, whenever occurs first.
\(^{21}\) Article 19.4 of the Model Petroleum Agreement of Ghana.
\(^{24}\) Article 24.1 of the Model Petroleum Agreement of Ghana.
operators adopt best practices aimed at greater accountability and maximisation of returns to all Contracting Parties.²⁶

As a developing country, it is necessary for the Government of Ghana to create a liberal investment climate, in order to attract foreign investment. The PSA is the means by which Ghana has opted to attract foreign investment in the petroleum sector. The author suggests that Ghana chose to adopt the PSA with a view to uphold and maintain sovereignty and gain the opportunity to set up a domestic petroleum industry.

2.2. Benefits of the Production Sharing Agreement

2.2.0. Sovereignty

As stated by Richard Osei-Hwere,²⁷ the state ownership factor which is at the heart of PSAs strengthens the state in control of its hydrocarbon resources. However, according to Asante, ownership,²⁸ although of political significance,²⁹ has little significance in economic terms unless translated into effective control.³⁰ He argues that even where management responsibility is on the National Oil Company (NOC) its practical significance is diminished by the fact that the operational responsibility is entrusted to the contractor.³¹ Where managerial and technological skills are lacking, designating the NOC as manager may still not establish effective control but present an excellent opportunity for learning the operational techniques and skills of the

²⁶ Richmond Osei-Hwere, ‘Can a Developing Country like Ghana Control its Oil and Gas Resources through Production sharing agreements?’ OGELE 4 (2010) <http://www.ogel.org/article.asp?key=3062> accessed 14/04/12.
²⁷ Osei-Hwere (n 25) 3.
²⁸ According to page 1 of Ghana’s MPA and section 1(1) of P.N.D.C.L 84, all petroleum existing in its natural state within Ghana is the property of the Republic of Ghana and held in trust by the State.
³⁰ Asante, ‘Restructuring Transnational Mineral Agreements’ (n29) 369.
petroleum companies which will ultimately strengthen the supervisory functions and consequently the control of the NOC.\textsuperscript{32}

According to the MPA,\textsuperscript{33} the Contractor is appointed the exclusive entity to conduct Petroleum Operations in the Contract Area, however the GNPC is empowered to participate in the management of Petroleum Operations. Therefore, the management responsibility of the GNPC, although lacking practical significance, presents the National Oil Corporation with the opportunity to develop its operational capability for achieving its vision of a nationally led oil and gas industry which contributes positively to national development.\textsuperscript{34}

It should also be recognised that the exercise of sovereign rights of ownership and control by states under PSAs is limited by stabilisation and international arbitration clauses.\textsuperscript{35} Stabilisation clauses undermine the State’s control by exempting investment contracts from changes in the applicable law while international arbitration clauses undertake to settle disputes between the investor and the state in a neutral forum.\textsuperscript{36} It is often the case that under International investment arbitration, decisions are made on commercial grounds alone, and without considering national interests or the national law of the state party.

For example, in Texaco Overseas Petroleum Company/California Asiatic Oil Co. v The Government of the Libyan Arab Republic which relates to a dispute over Libyan nationalisation of the petroleum concessions, Prof. René-Jean Dupuy applied international law in the arbitral award against Libya although the concessionary agreement was between Libya and two United States companies.\textsuperscript{37} Although such an agreement should not be regarded as a treaty between

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\footnote{Asante, ‘Restructuring Transnational Mineral Agreements’ (n29) 365-367.}
\footnote{Article 2.2 of the Model Petroleum Agreement of Ghana.}
\footnote{Nana Boakye Asafu-Adjaye, GNPC: Partnering the Best in Class for Continued Exploration Success <http://www.gnpcghanahome.com/home/> accessed 15/04/12.}
\footnote{Paul Comeux and N. Stephan Kinsella, ‘Reducing Political Risk in Developing Countries: Bilateral Investment Treaties, Stabilization Clauses, and MIGA and OPIC Investment Insurance’ (1994) 15 New York Law School Journal of International and Comparative Law 1.}
\footnote{(1979) use brackets: [date] instead of (date) 53 ILR 389.}
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states to warrant the application of international law, it has been observed that this is an emerging trend in international arbitration. In view of this, state parties are hardly successful in international investment arbitration against private corporations, particularly multinational corporations, rendering assent to international arbitration clauses a surrender of state sovereignty. Yet these clauses are important in mitigating the additional risk involved with investing in developing countries where political instability and lack of judicial independence are major challenges. They also promote stability of the foreign oil companies’ entitlements under the contract and the necessary incentive to persuade them to undertake actions that will enhance the state’s interest.

In any case the problems which arise from stabilisation and international arbitration clauses can be dealt with through the insertion of renegotiation clause in the agreement. This is exactly what Ghana has done in Article 26 of the MPA in order to readjust the contractual relationship to suit changing circumstances and in effect ease the tension between state sovereignty over its natural resources on one hand and sanctity of contractual terms on the other hand.

2.2.1. Petroleum Industry and Economic Growth

An important aspect of the Production Sharing Agreement is the opportunity offered to developing countries to attract foreign investment into the oil and gas sector while maintaining control over the resources. Governments of less developed countries quite properly regard these agreements as major instruments of public policy—a prominent feature of their development strategies, hardly distinguishable from a development plan. Due to financial and technical inability, developing countries like Ghana normally avoid high risk and cost ventures in petroleum exploration which are even more pronounced in the development of offshore fields.

38 ‘Such an agreement should be governed by the law of the host state and not public international law.’ Samuel Asante, ‘International Law and Foreign Investment: A Reappraisal’ (1988) 37 ICLQ 588, 611-612.
42 Asante, ‘Stability of Contractual Relations in the Transnational Investment Process’ (n 41) 403; Taverne (n 3) 57-58.
Consequently, they tend to adopt PSAs where the state may not make any significant investment outlay but derives benefit from the revenue generated, technology transfer and infrastructural development opportunities created by the foreign oil company.\textsuperscript{43}

The MPA of Ghana contains provisions about transfer of technology, patronage of locally manufactured goods and local services and training of state party’s personnel in Articles 19, 20 and 21. Furthermore, the state has the right to expropriate the assets of the investor when national interest demands, followed by appropriate compensation.\textsuperscript{44} PSAs are also essential to the state for national economic interest. The oil revenue expected from such deals helps in effective planning and execution of government budgets leading to economic growth. The Petroleum Revenue Management Act, 2011, Act 815 provides for the collection, allocation and management of upstream petroleum revenue in Ghana and to ensure that there is no foul play, the Act requires the publication of receipts and payments in national media and mandates a public oversight committee and auditor general reports.

This growth can be seen as an illusion as critics argue that PSAs are actually a hindrance as they contain stabilisation clauses that lock governments into economic terms that cannot be altered for decades.\textsuperscript{45} On the contrary, the actual aim of a stabilisation clause is to ensure that full compensation is paid to the investor by the host state where it undertakes unilateral action to change the contract.\textsuperscript{46} This divergence of opinion suggests that stabilisation clauses are ambiguous and as such should be subject to the rules of construction of contract in order to ascertain its proper meaning in context.\textsuperscript{47} Thus, the surrounding circumstances of the contract (the long duration coupled with high level of uncertainty and risk associated with the contract)

\textsuperscript{43}Osei-Hwere (n 25) 7-8.
\textsuperscript{44} Article 19.4 of the Model Petroleum Agreement of Ghana.
\textsuperscript{47} In Investors Compensation Scheme Ltd. v West Bromwich Building Society [1998] 1 WLR 896, Lord Hoffman sought to re-state the principles by which contractual documents are to be interpreted and came up with five principles basically saying that all the relevant background must be considered before reasonable meaning can be determined.
give meaning to the words of the contract.\textsuperscript{48} It is therefore, inconceivable for the host state not to make any legislative changes over decades in accordance with changing times.\textsuperscript{49} Consequently, a more acceptable position would be to see stabilisation clauses as a deterrent rather than a ban on unilateral action by the host state to change the contract.\textsuperscript{50}

2.3. CONCLUSION

Regardless of the fact that it does not matter what arrangement is chosen from a fiscal point of view, from the foregoing argument it is evident that Ghana, as a developing country with a liberal investment climate, chose the PSA in order to exert maximum control over its oil and gas resources. With the opportunity to set up a domestic petroleum industry by making use of the financial and technical resources of foreign oil companies which it lacks in order to generate revenue while maintaining sovereignty, Ghana has made a suitable choice. What remains to be seen is whether the oil companies can also maximise wealth by finding and producing oil and gas at the lowest possible cost and highest possible profit margin in the desired stable conditions the stabilisation clause intends to achieve.

CHAPTER THREE: STABILISATION CLAUSE

3.0. INTRODUCTION

The discrepancy between the foreign oil company preoccupied with stability and predictability in contractual relations and the host government’s determination towards a more flexible contractual regime is a principal source of conflict.\textsuperscript{51} In their quest for certainty and stability of contractual provisions, transnational corporations qualify stabilisation clauses as a species of

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\item \textsuperscript{48} Under the second principle in Investors Compensation Scheme (n 46) 912-913, meaning cannot be reasonably ascertained except in context.
\item \textsuperscript{49} According to Lord Hoffman’s fourth principle in Investors Compensation Scheme (n 46) 913, the words of a contract do not always mean what they say.
\item \textsuperscript{50} Lord Hoffman’s fifth principle in Investors Compensation Scheme (n 46) 913, provides that if the conclusion from the background evidence is that something must have gone wrong with the language, the law does not require the courts to attribute to the parties an intention they did not have.
\item \textsuperscript{51} Asante, ‘Stability of Contractual Relations in the Transnational Investment Process’ (n 41) 404.
\end{itemize}
traditional contract rooted in the free will of the parties, departure from which contradicts the ‘sanctity of contract’. Some jurists have argued that the peculiar features of an investment agreement between a government and a foreign company make it analogous to an international agreement and therefore subject to such international legal doctrines as pacta sunt servanda—agreements must be kept at all costs. Some believe that an investment agreement is an independent and self-sufficient system of law regulating the entire range of relations between the host government and the foreign company without reference to any municipal law. It could also be argued that unilateral modification or abrogation of such agreements constitutes an international delict imposed by international law irrespective of the effect of private international law on the contract.

However, host governments usually agree to stabilisation clauses to reassure oil companies, who would otherwise be subject to the host government’s unimpeded ability to exploit its power to renegotiate the agreement under some contrived concept and encourage investment and development of their resources.

3.1. Stabilisation Clause Defined

A stabilisation clause can be defined as a clause seeking to secure the contract against future government action or changes in the law, without consent of the other contracting party, by

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52 Asante, ‘Stability of Contractual Relations in the Transnational Investment Process’ (n 41) 404; The concept of sanctity of contract is based on the 19th century classical contract theory founded in the Aristotelian virtue of promise keeping and liberality. James Gordley, *The Philosopohical Origins of Modern Contract Doctrine* (Clarendo, Oxford 1991) 162-163; According to the theory, a contract is an expression of the parties’ free will or choice and should be honoured and not interfered with by the court. Kolo and Wälde (n 7).

53 Asante, ‘Stability of Contractual Relations in the Transnational Investment Process’ (n 41) 405.

54 Asante, ‘Stability of Contractual Relations in the Transnational Investment Process’ (n 41) 405.

55 R. Y. Jennings, ‘State Contracts in International Law’ (1961) 37 British Yearbook of International Law 156, 163-166; Jennings quotes on page 181 from page 991 of International Law by Hyde that where a state alters or destroys its contractual obligations to the detriment of the alien party, it also constitutes tortuous conduct that possesses an internationally illegal quality.


stabilising or freezing the essential provisions. Stabilisation clauses aim to protect the investor against the risk of financial uncertainty. Oil companies maintain that such projects cannot be mounted without solid financial backing from banks and other institutions, and that such institutions will not provide financing in the absence of unequivocal guarantees from host governments in respect of the financial package for the entire duration of the agreement. Among the non-financial concerns are that the foreign country would expropriate or nationalise the company’s operation through legislation or interference with the investors’ freedom to control the enterprise and make a profit. According to Wälde and Ndi, the issue of most concern is the imposition of new environmental obligations, whereas, Coale believes that they particularly address political risk.

A stabilisation clause can be an intangibility clause where a government may not unilaterally modify or terminate the contract, except by mutual consent of contracting parties. It can also be a stabilisation clause stricto sensu where the governing law of the contract shall be that of the contracting state at the time the contract was executed, thereby preventing the application of subsequent changes in the contracting state’s law. Finally, there can be a provision that the agreement shall be performed consistently with ‘good will’ or in ‘good faith’ thus precluding unilateral modification or termination. Whether or not an obligation of good faith is contractual or merely moral is a debate which lies beyond the scope of this paper. However, good faith is defined a fundamental principle derived from the rule pacta sunt servanda, and other legal rules, distinctively and directly related to honesty, fairness and reasonableness, the application of which is determined at a particular time by the standards of honesty, fairness and reasonableness.

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62 Wälde & Ndi (n 60) 230-231.
63 Coale (n 57) 220.
64 Curtis (n 57) 346.
65 Curtis (n 57) 346.
66 Curtis (n 57) 346-347.
prevailing in the community which are considered appropriate for formulation in new or revised legal rules.

3.2. **Ghana’s Stabilisation Clause**

3.2.0. **Drafting**

According to the stabilisation clause in Ghana’s Model Petroleum Agreement:

‘The State guarantees Contractor the stability of the terms and conditions of this Agreement as well as the fiscal and contractual framework hereof specifically including those terms and conditions and that framework that are based upon or subject to the provisions of the laws and regulations of Ghana (and any interpretations thereof) including, without limitation, the Petroleum Income Tax Law, the Petroleum Law, the GNPC Law and those other laws, regulations and decrees that are applicable hereto...and...may not be modified, amended, altered or supplemented except upon the execution and delivery of a written agreement executed by the Parties...’ 68

It has a comprehensive scope which attempts to completely insulate contractual undertakings from any change of applicable law by a host state. 69 According to Faruque, 70 it is an intangible clause as it satisfies the following requirements:

1. It restricts the administrative capacity of the host state to change the terms and conditions of a petroleum contract by stating that ‘...the State guarantees Contractor the stability of the terms and conditions of this Agreement as well as the fiscal and contractual framework...’ 71

2. It also allows accommodation of changes of contract terms by mutual consent for the greater interest of the parties, ‘This Agreement and the rights and obligations specified

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69 Al Faruque (n 11).
70 Al Faruque (n 11).
herein may not be modified, amended, altered or supplemented except upon the execution and delivery of a written agreement executed by the Parties’. 72

3. A breach of the clause is to be treated as a breach of contract as follows, ‘Any legislative or administrative act of the State or any of its agencies or subdivisions which purports to vary any such right or obligation shall... constitute a breach of this Agreement by the State’. 73

Accordingly, compensation should be paid by the State to the oil company. 74 Because of the compensatory nature, the stabilisation clause serves as a deterrent for states against actions that will violate the agreement.

According to Professor Maniruzzaman, defective drafting causes stabilisation clauses to be ineffective and the author points out some common pitfalls and how to avoid them. 75 The first pitfall is restricting unilateral action by both parties rather than just the host state. The second pitfall is the absence of a procedure by which consent may be given in relation to changing the terms of the contract. Article 26.2 of the MPA neither falls prey to first nor second pitfall as it only prevents unilateral action by the host state and requires consent to be evidenced in a written document.

Another pitfall can be found in Amoco International Finance Corp v Iran where it was held that there was no stabilisation clause resulting from the absence of express prohibition of any future inconsistent laws and regulations. 76 Even though it is unclear as to whether Ghana’s stabilisation clause accounts for this, the author argues that the purposive interpretation of the phrase ‘shall take no action’ intends to cover such future actions. 77 In Judge Browers opinion, it does not make a difference whether or not the state is mentioned as the adjudicative task is to determine, on the

74 Al Faruque (n11).
76 Amoco International Finance Corp v The Islamic Republic of Iran (1987) 15 Iran US. CTR 189.
77 ‘The State, its departments and agencies, shall support this Agreement and shall take no action which prevents or impedes the due exercise and performance of rights and obligations of the Parties hereunder’ (Article 26.2 of the Model Petroleum Agreement of Ghana).
basis of the entire record, whether the sovereign undertook a binding legal obligation.\(^7\)\(^8\) It was also argued in Amoco that where the state is not mentioned, the guarantee provision may be only enforceable against the named body and therefore is not binding on the state. However, it must be noted that Ghana’s stabilisation clause avoids this situation as the Government of Ghana is mentioned as party to the Agreement.\(^7\)\(^9\) Finally, based on the provision that ‘... the State guarantees Contractor stability...without limitation, the Petroleum Income Tax Law, the Petroleum Law, the GNPC Law and those other laws, regulations and decrees that are applicable hereto’, it can be safely said that the last pitfall-legal and constitutional constraints on the stabilisation clause- may not be a problem. Based on the drafting of the stabilisation clause in Ghana’s MPA, its aim of providing stability seems achievable. It is necessary however to assess how it will achieve this aim.

3.2.1. How Stabilisation Clauses are interpreted

According to Coale, the precise language used in stabilisation clauses has not been particularly significant. Rather, they are generally analysed from a policy-based perspective that considers the limitation on sovereignty expressed by such a clause in light of all the circumstances surrounding the transaction.\(^8\)\(^0\) The effectiveness of a stabilisation clause hinges on its enforceability; therefore it needs to be positioned within the framework of the arbitration clause.\(^8\)\(^1\) Since it has come to be accepted that international law governs PSAs, the foreign company needs to internationalise the contract ensuring that dispute resolution is not under the control of the state party.\(^8\)\(^2\) An express choice of law provision like that in Article 24 of Ghana’s MPA that ‘The arbitration tribunal shall conduct the arbitration in accordance with the arbitration rules of the United Nations Commission on International Trade Law (“UNCITRAL”) of December 15, 1976, except as provided in this Article’ may settle the question.\(^8\)\(^3\)

\(^7\) Amoco (n76) 295-296.
\(^8\) Page 1 of the Model Petroleum Agreement of Ghana.
\(^9\) Coale (n 57) 236-237.
\(^10\) Nwaokoro (n 56) 103.
However, it should be borne in mind that the subjection of a state contract to a non-municipal law is not by itself a complete guarantee of contractual stability, since international law recognises the host state’s legislative and regulatory competence and to nationalise the private party’s contractual rights, notwithstanding any guarantees contained in the contract.  

Although all-out nationalisation or expropriation scenarios are rare now-a-days, the principles established in those cases are still relevant today, and as such a review of how they were decided will give insight as to how Ghana’s stabilisation clause will provide stability to investors.

In Saudi Arabia v Arabian American Oil Co. (Aramco) the validity of stabilisation clauses was recognised and the government was held to have violated its agreement with Aramco. In BP Exploration Company (Libya) Ltd v Government of the Libyan Arab Republic, nationalisation was held by the arbitrator to be a fundamental breach of the concession as by virtue of the stabilisation clause because Libya had limited its freedom to change or terminate the concession by unilateral act unless it could be shown that the changes was truly in the public interest. In the National Iranian Oil Company v Sapphire Petroleum case, Judge Cavin took the position that a State cannot rely on its domestic law to nullify subsequently the provisions of a contract it has entered into. This position was followed in Texaco Overseas Oil Petroleum Co. /California Asiatic Oil Co. v Government of the Libyan Arab Republic (TOPCO) where it was held that in respect of the international law of contracts, a nationalisation cannot prevail over an internationalised contract containing a stabilisation clause entered into between a State and a private foreign company because the parties act as equals.

84 Christopher Greenwood, ‘State Contracts in International Law-The Libyan Oil Arbitrations’ (1982) 53 British Yearbook of International Law 27, 53.
86 (1963) 27 ILR 117.
87 (1979) 53 ILR 297.
88 Coale (n 57) 232.
89 (1963) 35 ILR 136.
90 (1979) 53 ILR 389.
91 Coale (n 57) 233-234.
Doubt has been raised however, as to validity of the theory of internationalisation even though support has been shown for it, for example, by a domestic tribunal in the United States. In Revere Copper and Brass Inc. v. Overseas Private Investment Corp,\textsuperscript{92} the tribunal found that a contract between the Jamaican Government and a United States company for bauxite mining was basically international in as much as such contracts are entered into as part of a contemporary process of development, particularly in the less developed countries. Yet, in Sornarajah’s criticism, he suggests that the theory of internationalisation which seeks to secure investment protection through contractual means is defective.\textsuperscript{93} He further suggests that there ‘does not appear to have been sufficient time for any international law to have grown through traditional methods of custom and treaty which applies to treaties,’\textsuperscript{94} and ‘the attempt to construct such an international law through various means by such a coterie of scholars of the developed countries must be recognised to be a farcical failure which contained too many distortions of principle.’\textsuperscript{95}

The case of Serbian Loans and Brazilian Federal Loans also appears to contradict this theory of internationalisation.\textsuperscript{96} The Permanent Court of International Justice firmly established that ‘any contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country. The question as to what this law is forms the subject of that branch of law which is at the present day usually described as private international law.’\textsuperscript{97} That being the case, it may be suggested that Dupuy’s assertions has no basis in international law and lacks evidential support.

Furthermore, in Aminoil,\textsuperscript{98} the Arbitral Tribunal in its award appeared not to follow the approach adopted by ArbitratorDupuy in Texaco, which they took not to correspond to reality ‘under any contemporary system of law.’ In the view of the Tribunal, ‘the contract of concession has undergone great changes….of profound and general transformation in the terms…that occurred in the Middle East, and later throughout the world….These changes…brought about a

\begin{itemize}
\item \textsuperscript{92} (1978) 56 ILR 257.
\item \textsuperscript{94} Sornarajah (n 93).
\item \textsuperscript{95} Sornarajah (n 93).
\item \textsuperscript{96} [1929] P.C.I.J., ser. A., Nos. 20/21, 40 (Judgment of July 12).
\item \textsuperscript{97} \textit{Serbia Loans} (n 96).
\item \textsuperscript{98} (1982) 21 ILM 976.
\end{itemize}
metamorphosis in the whole character of the concession. The contract of concession thus changed its character and became one of the contracts in regard to which, in most legal systems, the State, while remaining bound to respect the contractual equilibrium, enjoys special advantages.’

Significantly, emerging state practices exemplified by petroleum agreements, appears to be moving toward giving effect to stabilisation clauses through the promulgation of special laws granting supremacy to the contractual provisions of concession agreements over the exercise of any legislative powers. It is further observed that such ‘freezing of the applicable system’ governing the contractual relation, effected by virtue of the promulgated special law, is currently considered by international lawyers as the most effective legal method for securing the stabilisation of the regime created by the provisions of the petroleum agreement. At the same time, by issuing the special empowering law, the State avoids those eventual conflicts which mostly emerge as a result of introducing future legislation increasing taxes or imposing other obligations affecting the financial balance on which the contractual equilibrium had been initially conceived. In this light, the theory developed by arbitral tribunals on stabilisation clauses seems to have influenced this emerging practice. These tribunals have been generally inclined to support the protection of investor interests even significantly beyond the legitimate sovereign prerogatives of States in regulating their relationships with private foreign investors. This, however, begs the question – whether stabilisation clauses can preclude all adversely impacting sovereign powers, in all circumstances, even if exercised in good faith.

In Libyan American Oil Co. (LIAMCO) v Government of the Libyan Arab Republic, it was held that the stabilisation clause is a guarantee against the possibility not of the exercise of lawful sovereign powers impliedly retained, but of the arbitrary alteration or abrogation by the State of its contractual obligation. Thus, nationalisation that complies with the public policy is non-discriminatory and accompanied by the payment of adequate compensation is not a wrongful

99 (1982) 21 ILM 976 [1023]-[1024].
101 El-Kosheri (n 100) 277.
102 Maniruzzaman (n 85) 140.
103 (1977) 62 ILR 140.
breach of the stabilisation clause. Rather, it constitutes a ‘source of liability to compensate’ the foreign investor. Additionally, in AGIP v Popular Republic of Congo, it was held that stabilisation clauses freely accepted by the Government do not affect the principles of its sovereign legislative and regulatory powers since it retains both in relations with persons not party to such clauses and as such are valid and enforceable under international law. 

Therefore, on a review of the above cases, it is apparent that stability is almost certainly achieved as the stabilisation clauses are usually upheld unless there is overriding public interest to the contrary. In the LIAMCO case, besides the need for public interest, unilateral acts on the part of the government need to be accompanied with adequate compensation. In light of this, governments can still enforce changes. Therefore, stability is not absolute. However, the author is convinced that a stabilisation clause does not intend to function as complete ban on unilateral government action, but serve as a deterrent by guaranteeing compensation will be paid to the disadvantaged investor.

### 3.3. Conclusion

Albeit the stabilisation clause in Ghana’s MPA does not expressly forbid future unilateral action by the state, it is a well drafted provision with an express choice of law provision. It specifically binds the state; avoids the practical problems associated with the absence of a procedure by which consent should be given in case of unilateral action by the state; and guarantees against legal and constitutional constraints on the clause.

It has been argued that, ‘despite the inclusion in original contracts of stabilisation clauses designed to anticipate and counter the risk implicit in the obsolescing bargain, this outcome is inevitable. Stabilisation clauses have been argued to rarely be effective since producer

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104 Maniruzzaman (n 85) 140.
106 Coale (n 57) 235.
107 This is because the sovereign prerogative to take unilateral action for common welfare and benefit is inalienable. (R. Geiger, ‘The Unilateral Change or Economic Development Agreements’ (1974) 23 ICLQ 73,103).
governments still enforced changes in contractual terms to reflect their perception of their right to capture additional rent.\textsuperscript{108}

However, the effectiveness of the stabilisation clause is unaffected as the author argues that based on previous cases, stabilisation clauses were never intended to capture any sovereignty from the host country, but rather to make clear that a unilateral change of contract would make the state responsible for full compensation for harm caused to the foreign investor.\textsuperscript{109} Hence, the stabilisation clause is definitely fit for purpose in its role.

**CHAPTER FOUR: RENEGOTIATION CLAUSE**

4.0. \textit{Introduction}

Contrary to the argument in favour of an agreement between a host state and a foreign company being analogous to an international agreement, it has been argued that on well-settled principles of private international law, such an agreement should be governed by the law of the host state and not public international law.\textsuperscript{110} Therefore, subsequent changes in the law of the host state which modify the agreement cannot be a breach of contract.\textsuperscript{111} However, the preceding chapter proves this not to be the case. Still even when the agreement is subject to public international law, it is argued that international law does not ordain absolute immutability of agreements because the doctrine of pacta sunt servanda would be qualified by the international legal principle, clausula rebus sic stantibus, which sanctions the revision of international agreements on the basis of a fundamental change of circumstances.\textsuperscript{112} Not to mention, the general principles recognised by the representative major legal systems of the world (France, Germany, UK and USA) do not support the doctrine of sanctity of contract treated as an absolute and an unqualified


\textsuperscript{109} Macedo (n 46) 4.


\textsuperscript{111} Mann (n 110).

\textsuperscript{112} Asante, 'Stability of Contractual Relations in the Transnational. Investment Process' (n 41) 406.
principle.\textsuperscript{113} Exceptions to the principle include: public policy, terms implied by law, standard of reasonableness and good faith, fairness and equity, as well as filling of gaps by courts through contract interpretation.\textsuperscript{114} Hence, where there is a change of circumstances,\textsuperscript{115} the government is permitted to call for a renegotiation of the agreement either on its own initiative or in response to overwhelming political pressure.\textsuperscript{116} Investors may also call for renegotiation, probably where the project is no longer economically viable on the negotiated terms of the PSA.\textsuperscript{117}

\textbf{4.1. Renegotiation Clause Defined}

Renegotiation clauses are provisions that require all parties to return to the bargaining table to renegotiate the terms of their agreements, in response to a certain event or set of events.\textsuperscript{118} Some believe that renegotiation clauses aim to protect the investor by making the contractual framework flexible and dynamic throughout the duration of the contract in case the host country changes the economic circumstances by ‘sovereign’ acts.\textsuperscript{119} Nevertheless, these clauses are often provided for the benefit of the two parties to the contract, very rarely solely for the benefit of the investor.\textsuperscript{120} A renegotiation clause may both protect a state’s sovereign right to change laws that may affect the agreement and provide a measure of protection to the private investor as he would

\begin{footnotesize}
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\item \textsuperscript{113} R. Geiger (n 107) 78; Zeyad Al Qurashi, ‘Renegotiation of International Petroleum Agreements’ (2005) 22 Journal of International Arbitration 261, 299.
\item \textsuperscript{114} Kolo and Wälde (n 7).
\item \textsuperscript{115} For example, during the negotiations between the Ghana Government and Shell International Ltd. for the On-Shore Petroleum Prospecting and Production Agreements, where the fiscal impositions agreed to early in 1973 were virtually nullified by the energy crisis in the later part of that year. (Asante, 'Stability of Contractual Relations in the Transnational. Investment Process' (n 41) 412).
\item \textsuperscript{116} Asante, 'Stability of Contractual Relations in the Transnational. Investment Process' (n 41) 410-411; For example, Shell was persuaded to accept a renegotiation clause to the effect that the terms of the agreement would be reviewed if the fundamental economic bases of the agreement changed, having regard to the world market prices in the petroleum industry and all other relevant economic facts. (Asante, 'Stability of Contractual Relations in the Transnational. Investment Process' (n 41) 412).
\item \textsuperscript{117} This was the case between Columbia and BP in 1966 as well as between BHP Petroleum, the Australian-based multinational company, and Petro Vietnam, the Vietnamese state oil company, over the Dai Hung Petroleum Development contract signed in April 1993.
\item \textsuperscript{120} Jean-Marc Loncle and Damien Philibert-Pollez, ‘Stabilisation clauses in investment contracts’ (2009) 3 I.B.L.J. 267.
\end{itemize}
\end{footnotesize}
then have the right to renegotiate or adapt the contract with the aim of restoring the original equilibrium between the parties.\textsuperscript{121}

There are two types of renegotiation clauses. The first type provides that if future laws or regulations enacted by the host State affect the foreign investor’s contractual position, negotiations shall be entered into in good faith in order to reach an equitable solution to maintain or restore the economic equilibrium of the agreement.\textsuperscript{122} Some agreements additionally provide that the State shall indemnify the foreign party for any loss or damage ensuing from the change of circumstances.\textsuperscript{123} This renegotiation process is triggered by a pre-defined change of circumstances caused by new legislation negatively affecting the private investor’s interest and is directed to protect only the latter’s interests.\textsuperscript{124}

The other type of renegotiation clause is an adaptation clause of general application, leading to the renegotiation of the agreement upon initiative of either the State (or the State entity) or the investor. The clause is triggered by supervening events which are beyond the control of the parties and which negatively affect the contractual equilibrium to the detriment of either of them.\textsuperscript{125} Some adaptation clauses provide that rather than being implemented on occasion of a change of circumstances, a process of consultation between the parties is to take place at periodic intervals, such as every 3 years, to consider whether modifications to the agreement would be appropriate in the light of a change in the parties’ expectations.\textsuperscript{126} This device was adopted in the renegotiation of the Ghana-Valco Agreement where the fiscal arrangements were stabilised for five years at a time and then reviewed.

4.2. \textit{Ghana’s Renegotiation Clause}

\textsuperscript{121} Berger (n 119) 1349-1351.
\textsuperscript{122} Article 34.12 of the Model Exploration and Production Sharing Agreement of 1994 of Qatar under the heading ‘Equilibrium of the Agreement’.
\textsuperscript{123} Petroleum Production Sharing Agreement concluded on 10 November 1995 between the State Oil Company of the Azerbaijan Republic and a consortium of oil companies.
\textsuperscript{125} Bernardini (n 124) 104.
\textsuperscript{126} Bernardini (n 124) 104.
The renegotiation clause in Article 26 of Ghana’s MPA satisfies the criteria for an adaptation clause as either party can call for renegotiation, and the clause is triggered when ‘a significant change of circumstances’ negatively affects ‘the economic balance of the Agreement’ to the detriment of either party. According to Bernardini, a workable renegotiation clause of this kind presupposes the definition of the change of circumstances triggering the renegotiation; the effect of the change on the contract; the objective of the renegotiation; the procedure for the renegotiation; and the solution in case of failure of the renegotiation process. However, this paper is only concerned with the first four, with brief comments on the solution in case of failure of the renegotiation.

4.2.0. Definition of the Change of Circumstances

Article 26.3 of Ghana’s MPA defines the change of circumstances as ‘a significant change in circumstances’. The difficulty here is what exactly this provision means. Such an open-ended criterion is open to extensive interpretation and may give rise to fears of instability and frequent conflicts. It may be argued that ‘a significant change in circumstances’ may be understood according to the actual industry perspectives and precludes trivial changes in circumstances. Therefore, the parties may not be open to such extensive interpretation as has been anticipated.

Nevertheless, previous cases show that there has been inconsistent interpretation on a case by case basis of what constitutes a ‘change in circumstances’. In the Questech case, Iran successfully invoked the radical political change in the country for a contract involving the sensitive area of national security and it was held that Questech could not expect that the contract

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127 Article 26.3 of the Model Petroleum Agreement.
128 Bernardini (n 124) 104.
129 Bernardini (n 124) 104.
130 These issues have also been identified by Walde, Macedo and Mato as areas of concern to be dealt with in order for a renegotiation clause to work properly (Thomas Wälde, ‘Revision of Transnational Investment Agreements: Contractual Flexibility in Natural Resources Development’ (1978) 10 Lawyer of the Americas 265, 283-284; Macedo (n 46); H.T. Mato, ‘The Role of Stability and Renegotiation in Transnational Petroleum Agreements’ (2012) 5 Journal of Politics and Law 33, 35-36).
131 Al Qurashi (n 113) 289.
would remain unaffected by changes in such a highly sensitive military domain.\textsuperscript{133} However, in Gabcikovo-Nagymaros,\textsuperscript{134} political changes were not considered as ‘changed circumstances’. The changed circumstances advanced by Hungary, in the court’s view, were not of such a nature, either individually or collectively, that their effect would radically transform the extent of the obligations still to be performed in order to accomplish the project.\textsuperscript{135} Additionally, it was held that a fundamental change of circumstances must have been unforeseen.\textsuperscript{136}

It is argued that even when the contract is speculative by nature and the parties have contemplated certain risks, good faith prevents a party from insisting on contract performance as originally agreed when such claim would be abusive in the light of the change in circumstances.\textsuperscript{137} This may be the reason why in a case where the discovery turns out to be of lesser value to the company hence not economically viable on the negotiated terms of the PSA,\textsuperscript{138} such a ‘change in circumstances’ may invoke renegotiation. Moreover, the nature of the change would radically transform the extent of the obligations still to be performed in order to accomplish the project since oil companies require financial backing from banks and other institutions, which they cannot pay back if the project is no longer economically viable. However, the standard proposed in Gabcikovo-Nagymaros only acts as guidance and is not to be rigidly followed. To this end, parties may still use such broad clauses as a lever to force changes in provisions that, strictly speaking, are not open to revision.\textsuperscript{139} As such, the more precise the

\begin{itemize}
\item \textsuperscript{133} Questech (n 132) 123.
\item \textsuperscript{134} (1998) 37 ILM 162; Although the case involved two states, it provides a perfect analogy: the nature of the project in dispute (a long-term development of natural resources) is typical of the type of agreements between host states and private foreign investors. (Kolo and Wälde (n7)).
\item \textsuperscript{135} Kolo and Wälde (n7).
\item \textsuperscript{136} Kolo and Wälde (n7); Arbitrators of the Japan Shipping Exchange similarly stated: ‘In contracts such as the present one, of a commercial base, where the cost may be set arbitrarily and which has a speculative nature to a degree, it is not possible to decide that there existed a situation to which so-called change in situation principle could be applied’. (Arbitration Court of the Japan Shipping Exchange, award September 20, 1975, Volume VIII – 1983 YCA 153, 155).
\item \textsuperscript{137} Hans van Houtte, ‘Changed Circumstances and Pacta Sunt Servanda’ in Gaillard (ed) Transnational Rules in International Commercial Arbitration (ICC Publishing Paris 1993) 119-120.
\item \textsuperscript{138} This was the case between Columbia and BP in 1996; and Petroleum, the Australian-based multinational company, and Petro Vietnam, the Vietnamese state oil company, over the Dai Hung Petroleum Development contract signed in April 1993.
\item \textsuperscript{139} Jeswald Salacuse, ‘Renegotiating International Business Transactions: The Continuing Struggle of Life Against Form’ (2001) 35 Int’l L 1507, 1514.
\end{itemize}
drafting of such provisions, the easier it will be to ascertain whether renegotiation is to occur, and how the review process should be carried out.\textsuperscript{140}

According to Walde examples of precise definitions include world market price change, change of ownership and control of the transnational company or change in home country legislation.\textsuperscript{141} This perspective may also be criticised as creating some uncertainty arguing that where, for instance, the change in circumstances is defined as a change in tax laws, it is unclear what category of tax laws are covered. Aware of the fact that it is impossible to anticipate all the future circumstances which might necessitate renegotiation, the author borrows a textual canon from statutory interpretation to show how such uncertainty may be avoided. The eiusdem generis rule states that where specific words are followed by a general expression, the general expression is limited to the shared characteristics of the specific words, even though the general expression may ordinarily have a much broader meaning.\textsuperscript{142} Therefore to avoid the impossible task of enlisting all the possible changes in circumstances, a few examples may be given followed by a more general indicator such as tax laws to provide more certain guidance as to the changes intended to trigger renegotiation.

In the Jamaica/ ALCOA bauxite agreement (1976) the change of circumstances specifically related to the tax regulations of the transnational corporation’s home country:

\begin{quote}
Subject to the provisions of any Income Tax Treaty between Jamaica and the United States which hereafter may be concluded and which includes provisions for relief from double taxation, in the event of double taxation arising from actions by Jamaica or the United States with respect to any of the matters covered by this Article VIII of this 1976 Agreement then Alcoa may request a review and discussion of the action giving rise to such double taxation and the Government shall take such reasonable action as the parties thereto may deem proper and appropriate in the circumstances to endeavour to avoid or reduce such double taxation.\textsuperscript{143}
\end{quote}

\begin{flushleft}
\textsuperscript{141} Wälde (n 130).
\textsuperscript{142} This is what Justice Rice of the Court of Appeal wrote of \textit{eiusdem generis} in \textit{Watt v Trail}, a New Brunswick case, (2000) 190 DLR 4th 439.
\textsuperscript{143} Wälde (n 130).
\end{flushleft}
In comparison with the clause in Article 26.3 of Ghana’s MPA, it is clear that ‘a significant change of circumstances’ is not precise enough. This can lead to wide discretion on the part of the parties as to what ‘a significant change of circumstances’ entails, making it susceptible to broad interpretation. This is because the phrase is entirely subjective and what is significant to one party may not be to another; it is a matter of opinion. The extended scope for a range of interpretations makes it more likely for the parties to disagree and such incongruity as to the meaning of the contractual provisions is antithetical to the purpose of drawing up a contract.\(^\text{144}\) What is needed is a sufficient guidance directing interpretation of the contract to reveal the true meaning of the provisions therein. The author proposes that the example quoted above gives such sufficient guidance.

4.2.1. Effect of the change on the contract and the objective of renegotiation

Adaptation clauses should only apply in exceptional circumstances.\(^\text{145}\) In Ghana’s MPA, the change must affect ‘the economic balance of the Agreement’.\(^\text{146}\) According to Bernardini,\(^\text{147}\) the parties’ disagreement may relate to:

(i) The existence of the conditions set by the contract for the renegotiation, namely whether a new law or regulation adversely affects the economic balance of the Agreement as in Ghana’s MPA.\(^\text{148}\)

(ii) The terms and conditions which should be made subject to revision and the extent of such revision in order to re-establish the economic balance of the parties.\(^\text{149}\) The MPA allows parties to ‘effect such changes in, or rectification of, these provisions as they may agree are necessary’.\(^\text{150}\)

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\(^{144}\) According to the author, the purpose of a contract is to express the mutual agreement of parties to a contract. Such common understanding is considered a necessary requirement to the formation of a contract.

\(^{145}\) Bernardini (n 124) 104.

\(^{146}\) Article 26.3 of the Model Petroleum Agreement of Ghana.

\(^{147}\) Bernardini (n 124) 106.

\(^{148}\) Bernardini (n 124) 106.

\(^{149}\) Russi (n 140) 92.

\(^{150}\) Article 26.4 of the Model Petroleum Agreement of Ghana.
Apart from the fact that disputes may arise as to what constitutes ‘a significant change in circumstances’, there may also be misunderstanding as to whether such a change in circumstances affects the economic balance of the Agreement. When can it be argued that the economic balance has been distorted?

A possible response is that the whole object of the agreement is in relation to achieving a balance between an investor who deploys capital to undertake exploration and deserves fair returns on the investment and the State whose resources, when found, are to be exploited over a long period into the uncertain future. Thus in negotiating the fiscal terms of the agreement both the oil company, on the one hand, and the State and its national oil company, on the other, make projections about likely scenarios such as size of discovery, capital requirements and oil prices and project what are likely to be their respective shares of future discoveries. Consequently, a certain economic balance is established from these well known, verifiable factors in the industry. Some assumptions are, of course, involved in the projections, notably about oil prices. Therefore, if in the future there are significant changes in the oil price environment, which affect the ‘economic balance’ that was achieved in the sense that one party now has much more of the benefit or the loss, there is a reasonable basis for renegotiating.

Another reaction is that in order to establish that the economic balance has been distorted, the contract must give express guidance to the factors to be considered rather than assume that all verifiable factors in the industry are relevant. This is because ‘Commercial contracts cannot be arranged by what people think in their inmost minds. Commercial contracts are made according to what people say’.\(^{151}\) It is argued that where such guidance is given, there is less room for manipulation of the contractual relations and curbs the possibility of disputes over whether or not a trigger event has occurred. The following example is illustrative of what guidance the author deems sufficient in this regard.

In the Supplemental Agreement to the Concession Agreement between the State of Kuwait and Aminoil, Article 9 provides that

\(^{151}\) As per Lord President Dunedin in *Muirhead & Turnbull v Dickson* (1905) 7F 686.
If, as a result of changes in the terms of concessions now in existence or as a result of the terms of concessions granted hereafter, an increase in benefits to Governments in the Middle East should come generally to be received by them, the Company shall consult with the Ruler whether in the light of all relevant circumstances, including the conditions in which operations are carried out, and taking into account all payments made, any alterations in the terms of the agreements between the Ruler and the Company would be equitable to the parties.¹⁵²

The Agreement between the State of Kuwait and Aminoil gives specific examples of the factors to be taken into account of renegotiation, that is, conditions in which operations are carried out and all payments made. This helps to identify which terms and conditions should be subject to revision whereas the provision in Ghana’s MPA is silent on this. Accordingly, there is room for manipulation according to the parties’ discretion as to which terms and conditions should be revised. Conflict on this matter, contributes to the instability of the Agreement.

Furthermore, Article 26.4 allows parties to ‘effect such changes in, or rectification of, these provisions as they may agree are necessary’. Again, there is a lot of discretion on the part of the parties as to what is ‘necessary’ leading to broad interpretation and subsequent disagreement affecting the stability of the contract. It may be argued that it can be inferred that what is ‘necessary’ is to re-establish the economic balance. However, this leads back to the question as to when the economic balance is affected. Therefore, imprecision of the contract terms makes interpretation subject to a vicious circle.

4.2.2. The procedure for renegotiation

Whenever all conditions are met for implementing the adaptation clause, a negotiation phase is open, normally for a specified period of time, in view of restoring the contractual equilibrium.¹⁵³

¹⁵³ Bernardini (n 124) 104.
In Ghana’s MPA this period is thirty days.\textsuperscript{154} According to Bernardini,\textsuperscript{155} the parties’ obligation during this phase should be precisely defined. Berger lists nineteen obligations to which parties to a renegotiation clause are subject which lie beyond the scope of the paper.\textsuperscript{156} There is no provision in Ghana’s MPA that defines the parties’ obligations but even where there is an obligation to use their best endeavours or to do their outmost to reach an agreement, there is no implication that an obligation exists to conclude an agreement on the revised terms.\textsuperscript{157} Failure to agree is not therefore a breach of contract for which either party might be held responsible.\textsuperscript{158} However according to Aminoil,\textsuperscript{159} failed negotiations can be regarded as a breach of contract and thus entail responsibility if such failure can be attributed to one of the parties.

The clause may leave open by its wording whether the objective of restoring the original equilibrium implies, in the parties’ common intent, that full compensation should be paid to the aggrieved party or that some consideration should also be given to the public party’s interest, particularly when the clause sets as a target the reaching of an equitable solution.\textsuperscript{160} The clause in Ghana’s MPA makes no requirement for an equitable solution but provides that after 30 days, the award of the tribunal shall be final and binding upon the Parties.\textsuperscript{161} A common feature of any process of renegotiation is that it should be conducted in good faith as lack of good faith will be taken into consideration by a judge or an arbitrator called upon to settle the dispute resulting from the failure of the renegotiation process.\textsuperscript{162}

It may seem as though the lack of a duty to agree may contribute to instability, however after thirty days, the parties may resort to arbitration.\textsuperscript{163} Therefore, whether or not the parties agree

\textsuperscript{154} Article 24.1 of the Model Petroleum Agreement of Ghana.

\textsuperscript{155} Bernardini (n 124) 104.

\textsuperscript{156} Berger (n 119) 1365-1366.

\textsuperscript{157} In the award of 24 March 1982, settling the dispute between the American Independent Oil Company (Aminoil) and the Government of the State of Kuwait, the Arbitral Tribunal considered the extent of the obligation to negotiate contemplated in Article 9 of the Supplemental Agreement, concluding that ‘an obligation to negotiate is not an obligation to agree’ (the award is published in (1982) 21 ILM 976).

\textsuperscript{158} Bernardini (n 124) 104.

\textsuperscript{159} (1982) 21 ILM 976.

\textsuperscript{160} Bernardini (n 124) 104.

\textsuperscript{161} Article 24.6 of the Model Petroleum Agreement of Ghana.

\textsuperscript{162} Bernardini (n 124) 104; Russi (n 140) 90.

\textsuperscript{163} Again too much discretion is left to the arbitrators to fill in the gaps, review or rewrite the contract with little or no guidance, or criteria (Berger (n 119) 1466). This also leads to instability due to uncertainty of outcome.
becomes irrelevant after that fixed period of time. Per contra, it may be argued that ultimately leaving it up to the tribunal to decide on the various points where the parties cannot agree, leads to the uncertainty of the contract as there is doubt as to whether the arbitrator is able to fill in the gap, review or rewrite the contract for the parties with little or no guidance, or criteria.\textsuperscript{164}

Be that as it may, such a decision may provide a strong incentive towards compromise because both parties may be very unwilling to let a third-party decide the content of a renegotiated agreement.\textsuperscript{165} For example, in the case of Jamaica-Alcoa where the likelihood of an adverse award coupled with the bad publicity, could have weakened the negotiation position of the Jamaican government and strengthened that of the foreign investors; and that probably influenced the government towards a compromise.\textsuperscript{166}

4.3. \textit{Conclusion}

It is well known that difficulty exists in formulating a renegotiation clause that defines specifically when a change of circumstances and its impact is serious enough to invite renegotiation.\textsuperscript{167} However, the stipulation of precise conditions, procedures, and criteria for renegotiation is preferable to a reliance on controversial and rather vague principles.\textsuperscript{168} This is because a renegotiation clause tends to undermine the expectation of stability of the contractual arrangement as it invites spurious claims for renegotiation at any moment.\textsuperscript{169}

As can be seen from the above examination of the renegotiation clause in Ghana’s MPA, the definition of the change of circumstances as ‘a significant change in circumstances’, effect of change as affecting ‘the economic balance of the Agreement’ and the objective of renegotiation as ‘effect such changes in, or rectification of, these provisions as they may agree are necessary’

\textsuperscript{164} In the \textit{Aminoil} Arbitration, when the question of whether an arbitrator has the power to impose the agreement which the parties were unable to reach arose, it was decided that an arbitral tribunal could not, by way of modifying or completing the contract, prescribe how a provision such as the Abu Dhabi Formula must be applied. For that, the consent of both parties would be necessary.
\textsuperscript{165} Wälde (n 130) 284.
\textsuperscript{166} Kolo and Wälde (n 7).
\textsuperscript{167} Kolo and Wälde (n 7); Berger (n 119) 1362.
\textsuperscript{168} Wälde (n 130) 272.
\textsuperscript{169} Kolo and Wälde (n 7).
as well as the absent definition of the parties’ obligations during the procedure for the renegotiation leads to broad interpretation. Broad interpretation is mainly attributed to the wide discretion on the part of the parties when interpreting such provisions resulting in conflicts. This runs contrary to the investor’s quest for stability despite the assurance given by the host state in the stabilisation clause of contractual stability.

CHAPTER FIVE: CONCLUSION

As a developing country, Ghana made a fitting decision to adopt production sharing agreements for the exploitation of her newly found oil and gas resources. This find has the potential to greatly accelerate Ghana’s trajectory on the development path. Yet she lacks the financial and technical resources to set up a domestic petroleum industry. Therefore, she would need to make use of the financial and technical resources of foreign oil companies. The production sharing agreement allows the state who has not any significant investment outlay to derive benefit from the revenue generated, technology transfer and infrastructural development opportunities created by the foreign oil company while she maintains sovereignty over her resources. Her attraction as a potential for investment may be attributed to her liberal investment climate but this paper solely focuses on the stability of Ghana’s Model Petroleum Agreement. This paper finds that even though the stabilisation clause functions to warrant stability, the renegotiation clause consists of vague provisions whose broad interpretation leads to conflicts resulting in the instability of the contract.

Having a well drafted stabilisation clause with an express choice of law provision, the stabilisation clause is capable of guaranteeing the investor’s stability as it serves as a deterrent against unilateral government action to the detriment of the other contracting party by giving rise to a claim for compensation when there is such breach of Agreement.

Renegotiation clauses, however, are intended to promote flexibility. So from the outset, the flexibility that renders these clauses their main strength is their own Achilles’ heel, that along
with it brings the high price of uncertainty.\textsuperscript{170} Regardless of the fact that the principle rebus sic stantibus can be regarded as a radical exception to the principle of sanctity of contracts,\textsuperscript{171} and as such is generally applied with strict and narrow interpretation, renegotiation clauses limit the stability of contracts.

On construction of the renegotiation clause in Ghana’s MPA, it is concluded that the vagueness of its provisions leaves too much to the discretion of the parties in interpreting the clause. This results in broad interpretations on which the parties may disagree leading to conflicts and subsequent instability of the contract.

The renegotiation clause may benefit from additional guidance as to what exactly is meant by a ‘significant change in circumstances’. Furthermore, the parties should clearly define the conditions which would ‘affect the economic balance’ of the Agreement’. An enhanced renegotiation clause should also make lucid which terms and conditions should be made subject to revision and to what extent such revision should be made to re-establish the economic balance of the parties. Provisions such as ‘effect such changes in, or rectification of, these provisions as they may agree are necessary’ should be avoided because what is regarded as necessary is subject to debate. Instead stating the defined changes that should be made to re-establish the economic balance would suffice. The author does not propose that this is an exhaustive list of things to consider during negotiations. These examples are only intended to illustrate how the renegotiation clause can render the agreement instable. Therefore it will be prudent for investors to be cautious of such provisions and pay particular attention to how they are drafted in order to achieve the desired result.

The author’s position accords with that of Bede Nwete that where the essence is to protect the investment from the hostile acts of the host government, stabilisation clauses can still be relied upon as a better option in light of the limitations the renegotiation clause imposes.\textsuperscript{172} It should also be noted that the stabilisation clause gives the investor a stronger and more certain right to

\textsuperscript{170} Macedonia (n 46).
\textsuperscript{172} Bede Nwete, ‘To what extent can renegotiation clauses achieve stability and flexibility in petroleum development contracts?’ (2006) 2 IELTR 56.
claim compensation for breach of contract. The renegotiation clause, on the other hand, does not guarantee such a right as a failure to agree as a breach of contract and as such, the award of compensation by the tribunal cannot be guaranteed.

Nevertheless, it has also been proposed that in order to dispose of any pretensions of the transnational corporation to a rigid legal enclave fortified by traditional legal and commercial concepts, it may well be that another possibility in regulating the relations between host governments and transnational corporations is to dispense with the investment agreement or its equivalent altogether.\(^\text{173}\) This would mean that the transnational corporation and its operations would be brought under the normal regime of the municipal law of the host country, subject of course to such concessions as would be appropriate in the circumstances.\(^\text{174}\) In this regard, it is noteworthy to add that domestic contractual law recognises changes to contractual obligations if they affect the equilibrium of the contract which might be more conducive towards a stable relationship over a period of time.\(^\text{175}\)

Even though this essay is a good assessment of the stability of Ghana’s Model Petroleum Agreement, the idea that perhaps the way forward is to do away with such agreements altogether is one that deserves to explored in greater detail. However it is beyond the scope of this paper to undertake this task. Therefore, having come this far, this paper concludes that where the right to renegotiation is circumscribed by detailed guidance, the renegotiation clause may provide parties with the flexibility to modify their agreement. This will ultimately reduce the likelihood of a dispute between the parties resulting from broad interpretation of the vague provisions contained therein. In this way, the renegotiation clause may be seen as a means of stabilising the relationship between the parties rather than weakening it as is currently the case in the Model Petroleum Agreement of Ghana.

\(^{173}\) Asante, ‘Stability of Contractual Relations in the Transnational Investment Process’ (n 41) 420.

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