

Contractual conditions for petroleum contracts: the condition of stability and non-infringement as a model

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Date of submission: 25/03/2025 - Date of acceptance: 28/05/2025 - Date of publication: 05/06/2025

ABSTRACT:

This study explores the implications of stabilization and non-alteration clauses in international contracts, particularly those between oil-producing states and foreign investors. These clauses offer legal security and stability, encouraging foreign investment by preventing unilateral changes to the contract. However, they also limit the host state's ability to amend its laws, raising concerns about sovereignty and legal flexibility. Through qualitative legal analysis, the study examines the validity and enforcement of these clauses, highlighting their impact on investor confidence and state sovereignty. Key findings suggest that while these clauses enhance legal certainty, they can lead to conflicts with national laws and international obligations. The study concludes that a balanced approach is needed to address these challenges and ensure a stable investment environment.

key words: Stabilization Clauses; Non-Alteration Clauses; Foreign Investment; Sovereignty; International Contracts; International Arbitration ;Petroleum contracts.

Introduction

In the context of international contracts, particularly those between oil-producing states and foreign investors, the inclusion of stabilization and non-alteration clauses has become a widely adopted practice. These clauses are designed to provide legal security for foreign investors by ensuring that the regulatory environment remains unchanged throughout the duration of the contract. However, the incorporation of such clauses also raises complex legal, political, and economic questions, particularly regarding the balance between the protection of foreign investments and the sovereignty of the host state.

The law permits the host state to amend its domestic legislation to reflect its evolving economic interests. Such amendments are crucial for the state to adapt to economic changes, even if these modifications may negatively impact foreign

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investors. A state has the right to repeal or amend its laws without incurring liability, provided these changes do not violate international law. This holds true even when the laws in question are specifically designed to address foreign investors. While unilateral actions by the state can generate international obligations within certain limits, these obligations must be directed toward other subjects of international law with the intention of creating binding commitments. Domestic investment legislation, by contrast, regulates the relationships among domestic legal subjects and remains inherently subject to modification or repeal¹.

Nevertheless, as an exception to this general rule, some legal systems and arbitration rulings allow for the temporary "freezing" of the governing law within a contract. This is typically achieved through the inclusion of a stabilization clause, which explicitly specifies that the law applicable at the time of the contract's conclusion shall remain unchanged, and no future amendments shall be introduced².

Amending legislation is generally a legitimate act, provided it does not contradict fundamental principles of justice and equality. However, foreign investors often seek greater stability in their dealings with host states. The need for stability has led many countries to provide guarantees, ensuring that contracts will remain unchanged for the duration of their term. This stability is usually secured through the inclusion of stabilization and non-alteration clauses, which prevent any alterations to the contract's terms after it has been signed.

While these clauses are designed to protect foreign investors, they also raise important issues regarding the host state's ability to adapt its legal and regulatory framework in response to evolving needs. The dynamic tension between ensuring legal stability for investors and the need for flexibility in governance forms the central theme of this study³.

The primary research problem addressed in this study is the legal and practical challenges posed by stabilization and non-alteration clauses in international contracts. These clauses aim to protect foreign investors, but their implementation presents significant legal, political, and economic challenges. How do such clauses interact with the sovereign powers of states, particularly in terms of their ability to modify laws in response to changing circumstances? To what extent can a state be bound by these clauses, and what are the broader implications for its sovereignty and economic policies?

This study is significant for several reasons. Firstly, it highlights the complex relationship between the protection of foreign investments and the sovereignty of states, particularly in oil contracts, which play a crucial role in the global economy.

¹Al-Mamouri, M. G. O. (n.d.). The legislative stability clause and its role in arbitration in petroleum contracts. *Journal of Legal Message*, College of Law, University of Karbala, 1(02), 173

²Nolan, J. (2013). *Environmental law and governance in international investment treaties*. Routledge

³ Al-Namaq, I. (2020). The legislative stability clause and the best law for investors and their role in attracting foreign investments. *Journal of Kuwait International Law College*, 8(Special Supplement, 08), 343

Secondly, the study examines the practical consequences of these clauses, offering insights into how they impact both foreign companies and states, particularly in the energy sector. Understanding these clauses is critical for legal practitioners and policymakers who must navigate the intricate interplay between international investment agreements and national legal systems¹.

This study is guided by the following hypotheses:

- While designed to protect foreign investors, stabilization and non-alteration clauses may result in legal and economic rigidity, restricting the state's ability to adapt to changing political or economic conditions.
- The implementation of these clauses can undermine national sovereignty by preventing the state from enacting new laws that may be necessary for domestic development or compliance with international obligations.
- Despite their protective function, these clauses may lead to conflicts in international relations, particularly when they conflict with domestic law or contradict other international commitments.

II. Section One: Stabilization Clauses and Non-Alteration Clauses in Contracts

Foreign companies contracting with oil-producing states or their public institutions often seek to include two types of clauses in their agreements: stabilization clauses and non-alteration clauses.

The inclusion of these provisions by foreign contracting parties stems from concerns regarding the sovereign privileges enjoyed by the state party to the contract. Due to its legislative authority, the state has the power to amend or modify its legal framework in ways that may disrupt the contractual balance initially established upon the conclusion of the contract. Additionally, as a public authority, the state can unilaterally modify or terminate the contract.

In this section, we will first define stabilization clauses and non-alteration clauses, then proceed to analyze their legal significance and potential consequences. Each topic will be addressed in a separate subsection for clarity².

1.1 Definition of Stabilization and Non-Alteration Clauses in Contracts

We begin by defining stabilization clauses, followed by an explanation of non-alteration clauses.

1.1.1 Definition of Stabilization Clauses

A stabilization clause is a contractual provision that prevents the state from altering the governing law of the contract in ways that would disadvantage the other party, thereby disrupting the legal framework established at the time of

¹ Barker, R., & Hart, J. (2011). International contracts and the control of sovereign powers. *Journal of International Law and Politics*.

² Abbas, W. M. (2010). *Arbitration in administrative disputes of a contractual nature*. New University House. 2022.p(86).

signing. Essentially, the applicable law must ensure fairness between the contracting parties, thus preserving the contractual balance¹.

One notable example of a stabilization clause can be found in oil contracts between states and foreign companies. For instance, Article 41 of the contract signed between Ecuador and Texaco Petroleum on February 21, 1964, states:

"The parties are bound by the petroleum and mining laws in force at the time of signing the contract. These laws have been incorporated into the contract and shall govern all operations conducted between the parties in any area not explicitly regulated by the contract."

Similarly, Article 4 of the contract signed between Mauritania and Texaco Mauritania on January 1, 1971, contains similar provisions:

"The government guarantees the company the stability of the legal, economic, financial, and tax conditions under which the company operates, as derived from the legislation and regulations in force at the time of signing the agreement. Furthermore, the mining law applicable throughout the duration of the agreement is included in Annex No. 01, which forms an integral part of the contract. The government commits, for the entire duration of the agreement, not to apply or enact any legislation that directly or indirectly modifies the legal provisions in force at the time of signing the agreement²."

Another example can be found in Article 15 of a contract between Cameroon and an oil exploration company, stating:

"Amendments to the provisions listed below cannot be applied to the company without its prior consent during the duration of the agreement."

1.1.2 Non-Alteration Clause

A non-alteration clause is a contractual provision in which the state commits not to unilaterally modify the contract without the consent of the other party. This provision ensures the protection of the foreign company's interests against administrative risks (*L'aléa administratif*). In some legal systems, administrative authorities may have the right to unilaterally amend contract terms when they are a party to the agreement³.

Non-alteration clauses are common in oil contracts. For example, Article 41 of the contract signed between Iran and a consortium of oil companies on October 1, 1954, states:

"No general or specific legislative action, administrative measure, or any other act of any kind issued by Iran or any governmental authority

¹ Sheiba, A. (1992). Industrial facility contracts between states and foreign private companies. Dar Al-Nahda Al-Arabiya.

² Crawford, J. (2002). The international law of state responsibility. Cambridge University Press

³ Pech, L. (2012). The role of stabilisation clauses in international investment agreements and their effect on state sovereignty. Journal of International Dispute Settlement

in Iran (whether central or local) shall annul or amend this agreement or obstruct or prevent its effective implementation. The annulment or modification of the agreement shall only occur with the mutual consent of the parties¹."

Similarly, Article 21 of the contract signed on December 21, 1964, between the Saudi General Petroleum and Mineral Organization (Petromin) and the Italian company Agip states:

"The contract is final and binding upon both parties from the moment it is signed, and it cannot be amended or altered except through mutual written agreement."

Additionally, Article 30 of the contract signed on October 23, 1963, between the Egyptian government, the Egyptian General Petroleum Corporation, and Pan American Company stipulates:

"The rights and obligations of the corporation, Pan American, and the government, as outlined in this agreement and valid throughout its duration, shall be governed by the terms of this agreement and cannot be modified or altered except through mutual consent between the contracting parties."

1.2 Legal Distinction and Practical Considerations

Although, in theory, stabilization clauses differ from non-alteration clauses, the distinction between them is not always clear in practice. Stabilization clauses primarily aim to prevent any changes to the contract by excluding the application of new legislative rules. However, these clauses only provide legal security if they themselves cannot be altered.

Therefore, the fundamental issue in both cases remains the same: **to what extent can a state modify a contract in which it is a party, either directly or indirectly, by altering the legislation governing the contract?**

The answer to this question hinges on the legal validity and enforceability of stabilization and non-alteration clauses, as well as the potential consequences of their enforcement. This issue will be explored in the next section of our discussion.

I. Section Two: The Validity of Stabilization and Non-Alteration Clauses and Their Legal Consequences

Legal scholars have examined the validity and implications of stabilization and non-alteration clauses, particularly their enforcement. Additionally, arbitration tribunals have addressed these clauses in disputes between oil-producing states and foreign companies concerning their contractual agreements. In this section, we will explore both legal doctrine and arbitration rulings on the matter.

¹ Hindi, A. H. K. (2010). Petroleum concession contracts and methods of resolving their disputes. Dar Al-Fath for Printing and Publishing

² Al-Arian, H. D. (n.d.). The privileges created by oil contracts and their terms. Iraqi University Journal, (45), Part 01, 375

2.1 The Legal Perspective on the Validity of Stabilization and Non-Alteration Clauses

The legal validity of stabilization and non-alteration clauses, as well as their implications, has sparked significant debate among legal scholars. In this regard, three main perspectives can be identified¹.

2.1.1 First Perspective

According to this view, stabilization and non-alteration clauses included in contracts between states and foreign entities, including oil contracts, are considered valid and enforceable. These clauses prevent the contracting state from unilaterally terminating or modifying the contract or introducing legislative changes that could affect the contract's terms, except in cases explicitly outlined in the contract itself. Such exceptions may include clauses that allow the state to amend or terminate the contract or references to a legal system that permits such modifications.

Supporters of this perspective argue that these clauses are inherently valid, independent of any specific legal system, as they are considered objective rules of private international law or material rules of direct application. They compare stabilization and non-alteration clauses to arbitration clauses in international contracts, which have been recognised as independent and autonomous from the contracts in which they appear. Similarly, stabilization clauses should be regarded as separate from national legal frameworks².

However, this perspective has been criticised on several grounds:

- **Exemption from Legal Frameworks:** Stabilization clauses effectively exempt the contract from being subject to any legal framework, potentially resulting in a lack of legal oversight.
- **Inflexibility Over Time:** Given that state contracts with foreign entities often last for many years, these clauses require the state to maintain outdated legal frameworks throughout the contract's duration. This creates isolated legal regimes (*des îlots de régime exorbitant*) that are disconnected from the country's evolving legal system. Moreover, denying the state the right to modify its legal provisions (*stabilisées*) through contractual obligations forces the country into a state of legal rigidity (*l'immobilisme juridique*), undermining its role in legal and economic development³.
- **Unproven Assumptions:** This perspective relies on an unproven assumption. It draws a parallel between the autonomy of stabilization clauses and the autonomy of arbitration clauses. While the principle of the independence of arbitration clauses from the contracts in which they appear is widely accepted

¹ Hassan, M. N. (n.d.). Arbitration in settling international administrative contract disputes (comparative study). New University House

² Jameh, S., & Al-Kafrouni, A. M. (2021). The legislative stability clause in state contracts. *Tishreen University Journal, Economic and Legal Sciences*, 43(05), 61.

³ Kingsbury, B. (2005). The international legal order and its impact on national sovereignty. *American Journal of International Law*

in international arbitration, the claim of the autonomy of stabilization clauses has not been sufficiently demonstrated.

Furthermore, the rationale behind recognising the independence of arbitration clauses does not apply to stabilization clauses due to the fundamental differences in their purposes. The autonomy of arbitration clauses in international contracts, particularly state contracts, aims to distinguish between the state as a contracting party engaging in administrative actions (*Jure Gestions*) and the state as a sovereign power (*Puissance Publique*), which is prohibited from altering its contractual obligations through sovereign acts (*actes d'autorité*). In contrast, recognising the independence of stabilization clauses would infringe upon the state's sovereign jurisdiction—an authority that foreign contracting parties often seek to leverage for their benefit. Unlike arbitration agreements, where the contracting party interacts with the state in its administrative capacity, foreign investors typically engage with the state to benefit from sovereign privileges such as tax, customs, or monetary advantages.

Additionally, some legal scholars argue that stabilization clauses contradict fundamental principles of private international law concerning conflict of laws. Recognising stabilization clauses would mean granting contracting parties the authority to determine the applicability of legal provisions over time. However, the authority to define the temporal scope of legal provisions belongs to the legislature of the state whose law applies to the contract, not to the contracting parties themselves. Therefore, the applicable law must be determined by the legal system of the state issuing it. Furthermore, while private international law recognises the right of parties to choose the applicable law for their contract, this right is limited. Once the applicable law is selected, it is the role of the judiciary to interpret and apply it, and the parties have no further influence over this process¹.

2.1.2 Second Perspective

According to this view, stabilization and non-alteration clauses included in contracts between the state and foreign entities, including oil contracts, hold no legal value and produce no binding effect. These clauses are seen as mere contractual terms, similar to any other provisions in the contract, and do not carry any greater legal force than the contract itself. Consequently, stabilization and non-alteration clauses remain subject to the sovereign authority of the state (*au pouvoir souverain de l'État*), just like any other contractual terms.

Moreover, the state cannot relinquish its sovereign right as a legislator (*son droit souverain de législateur*) or abandon the privileges of public authority essential for fulfilling its obligations. Therefore, under this view, the state retains the right to intervene—either to terminate or modify the contract unilaterally—if

¹ Khaloud, B. (2012). Oil concession contracts and their applications. University Modern Office.

the public interest so requires, regardless of whether the contract contains stabilization or non-alteration clauses. These clauses do not restrict the state's sovereignty in terminating or amending such agreements.

However, this perspective has faced criticism. Some legal scholars argue that it is difficult to outright reject any legal value for a state's commitment not to alter the rights and obligations of its contracting partner. The frequent inclusion of stabilization and non-alteration clauses in contracts clearly indicates that the parties view these provisions as valid and effective, rather than meaningless (*inopérantes*). If a state agrees to include such clauses while believing they have no legal effect on its sovereign powers, this would be a clear violation of the principle of good faith¹.

Moreover, claiming that stabilization clauses have no greater binding force than the contract itself is seen as mere wordplay (*jouer sur les mots*). These clauses are fundamental provisions that should not be subject to state interference, similar to arbitration clauses. In most cases, foreign investors would not have entered into contracts with the state had they not relied on the stability guaranteed by such clauses. The insistence of foreign investors on including these provisions stems from their belief that the mere right to compensation in the event of state intervention is insufficient—they seek greater legal protection.

Regarding the claim that the state cannot renounce its sovereign powers, this argument might be valid from the perspective of domestic law but does not necessarily hold under international law. A state can limit certain sovereign privileges through treaties and contractual agreements².

2.1.3 Third Perspective

A group of legal scholars argues that the validity and legal value of stabilization and non-alteration clauses depend on the legal system underpinning the contract. This legal system is not merely the substantive law governing the contract but rather the system from which the contract derives its validity and which determines the applicable legal rules. This legal framework can either be the national legal system of the contracting state or international law, depending on the contractual provisions that designate the applicable law. Based on this perspective, there are two possible scenarios:

First Scenario: The Contract is governed by the National Law of the Contracting State

In this case, the contract is subject to the domestic law of the contracting state, including the principle of immediate applicability of new legislation. Consequently, the national law determines whether stabilization clauses are valid

¹ Fayad, M. (2013). The role of the legislative stability clause in protecting foreign investors in energy contracts between hypotheses and implementation challenges. 21st Annual Energy Conference on Law and Economics, United Arab Emirates University, 20-21 May 2013, p. 23.

² Abu Zaid, S. H. (2010). Arbitration in petroleum contracts. Dar Al-Nahda Al-Arabiya for Publishing

or should be disregarded. To argue otherwise would mean exempting these contractual provisions from the legal framework governing the entire contract, which is untenable. There is no justification for allowing stabilization clauses alone to escape the authority of the law governing the contract as a whole¹.

Since stabilization clauses are subject to the national law of the contracting state, their legal effects vary across different legal systems. Some legal systems recognise and uphold these clauses, while others prohibit and invalidate them. In cases where domestic law forbids such clauses, they are deemed void, and any state action contradicting them does not entail liability toward the other party.

However, proponents of this perspective argue that a state's disregard for stabilization clauses based on national legislation prohibiting them may still constitute an unlawful act under international law, thereby triggering the state's international responsibility toward the foreign investor's home country. This liability could arise due to the state's bad faith in agreeing to include a stabilization clause despite knowing its legal system prohibits it, or based on the concept of willful negligence.

Second Scenario: The Contract is governed by International Law

This scenario arises when the contracting parties agree to subject the contract to an international legal framework, even if the contract remains partially governed by the national law of the contracting state².

Under this framework, stabilization clauses are considered valid and enforceable in full. Thus, parties have the right to agree that the contract will be governed by the legislation of the contracting state as it stood at the time of signing. The stabilization clause undermines the presumption that new laws apply immediately and universally, as this presumption is merely rebuttable, and the parties are free to agree otherwise.

In summary, the validity of stabilization clauses in this scenario results from the internationalisation of the contract. It does not constitute a waiver by the contracting state of its legislative powers, but rather, the clause maintains binding force. Any violation of this provision by the contracting state could result in international liability.

2.2 The Impact of Stabilisation and Non-Alteration Clauses on International Relations and National Economy

Stabilisation and non-alteration clauses continue to have complex effects on the relationships between states and foreign companies. These clauses, which aim to protect foreign investments in oil-producing states, may have unforeseen consequences for the political and economic stability of these countries.

¹ Al-Arian, H. D. (n.d.). The privileges created by oil contracts and their terms. *Iraqi University Journal*, (45), Part 01, 375

² Haji, M. K. (2022). Legislative stability as a guarantee for foreign investors in investment law. *Journal of Sustainable Studies*, Soran University, Law, Political Science, and Administration, 4(04), 119

2.2.1 Impact on Economic Policies

By guaranteeing the stability of tax and financial legislation, such clauses can encourage companies to invest in countries with emerging economies, thus contributing to economic growth. However, conversely, these clauses may create a state of "legislative inertia", where the state finds itself compelled to enforce laws that may no longer be suitable given local or international economic changes. This may limit the state's ability to adapt its economic policies to keep pace with developments or to improve the domestic economic situation¹.

2.2.2 Impact on National Sovereignty

On the other hand, stabilisation clauses may affect the national sovereignty of the state. If a state is bound to maintain the stability of the legislation in place at the time of signing the contract, it may be precluded from amending its laws to achieve new economic or social objectives. Moreover, this could lead to the erosion of sovereignty in making sovereign decisions that concern its national interests, particularly in areas relating to the environment or public health².

2.2.3 Impact on International Relations

On the international stage, these clauses can influence the relationships between different states. For instance, foreign investors may feel more secure in countries whose contracts include legal stability clauses, thereby enhancing trade and investment exchanges between these countries. However, a state's commitment to stabilisation and non-alteration clauses may lead to diplomatic issues if such clauses require amendments to national laws that conflict with other international agreements. (Pech, 2012; Chaisse, 2015).

2.2.4 Impact on Environmental and Social Justice

The inclusion of stabilisation clauses in contracts can also raise issues related to environmental and social justice. For example, the state may find it difficult to amend environmental protection or labour laws if these conflict with the interests of foreign companies covered under the agreements. This could result in the disregard of environmental rights or social rights in favour of corporate interests. (Nolan, 2013; McAuslan, 2015).

While these clauses provide foreign companies with a certain level of legal security, they may simultaneously reduce the state's flexibility in adapting to new economic or social changes, thereby exposing the state to long-term risks. These considerations are crucial and should be taken into account when negotiating such clauses³.

¹ Sornarajah, M. (2010). The international law on foreign investment. Cambridge University Press

² Fitzmaurice, M., & Merkouris, P. (2012). Treaties and subsequent practice. Oxford University Press

³ Sami, F. M. (n.d.). International commercial arbitration: A comparative study of international arbitration provisions. University of Amman.

II. Conclusion

This study has thoroughly explored the implications of stabilization and non-alteration clauses in international contracts, particularly within the context of foreign investment agreements between oil-producing states and foreign companies. The research examined the legal, economic, and political ramifications of these clauses, highlighting their potential to affect the sovereignty of host states and the protection of foreign investors. The study has shown that while these clauses offer significant advantages in terms of legal security, they also present challenges regarding legal flexibility and international relations.

The law permits host states to amend their domestic legislation to reflect national interests and respond to economic changes. While the state can amend its laws without liability, such amendments must not breach international law. Despite the ability of states to modify laws, certain regulations, including stabilization and non-alteration clauses, offer an exception by freezing the governing law of a contract at the time of signing. This guarantees legal certainty to foreign investors, providing stability in often volatile investment environments, especially in the petroleum sector. However, the introduction of such clauses must strike a balance between safeguarding foreign investments and preserving state sovereignty.

The findings of this study underline the crucial role that stabilization and non-alteration clauses play in providing legal security to foreign investors. These clauses help mitigate concerns regarding the potential risks of legal instability and sovereign interference. The research also demonstrated the widespread use of these clauses in energy contracts, given their long-term nature and the direct link between investments and sovereign natural resources. Despite ongoing jurisprudential disagreements over the validity of such clauses, the study confirms that respecting these clauses can significantly enhance legal certainty, which in turn positively influences the flow of investments into the host country.

Moreover, the study acknowledges that while there is divergence in legal opinions, with some scholars questioning the validity of stabilization and non-alteration clauses, practical reality suggests that their enforcement provides greater legal security. This, in turn, fosters a more attractive investment environment for foreign companies, especially in the energy sector, where long-term commitments are integral.

Findings:

1. Stabilization and non-alteration clauses effectively balance the contract and alleviate the investor's concerns about legal insecurity, contributing to a stable investment environment.
2. These clauses are particularly prevalent in energy contracts, which are long-term and closely tied to the management of sovereign natural resources, thus making them essential in mitigating disputes in this sector.

3. The academic debate on the validity of these clauses reveals three main perspectives: one supports their validity, another rejects their legal value, and a third seeks a middle ground. However, despite the ongoing debate, these clauses do not diminish the host state's sovereignty. The state's regulations and decisions issued after the contract remains applicable and binding on the foreign party. If such regulations impose additional burdens, the state is required to compensate the other party.
4. Violating the terms of stabilization and non-alteration clauses could result in an adverse environment for foreign investors, undermining the country's appeal as an investment destination.

Recommendations:

1. Incorporate stabilization and non-alteration clauses in investment contracts, as they play a crucial role in enhancing legal security and fostering investor confidence.
2. The host state should introduce specific rules and facilitate measures concerning these clauses, especially in petroleum contracts, to encourage investment in this vital sector.
3. Remove any ambiguities or complexities in legal procedures related to petroleum contracts, ensuring that the investment environment remains stable and attractive to foreign investors.

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