A CASE OF NIGERIA'S MINING SECTOR: THE RIGHT TO LEGISLATE VS. LEGAL EXPECTATIONS OF INVESTORS

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ABSTRACT

The conventional engine of Nigeria's economy, copper mining, was nationalized in the late 1960s and then re-privatised between 1997 and 2000. The Nigerian government entered into Development Agreements with the mining investors during the re-privatization process and incorporated numerous incentives from the Development Agreements into legislation with guarantees that the legal environment would remain unchanged for predetermined amounts of time. Consequently, several pieces of legislation were changed before the deadlines came to an end. This article concentrated on the state's ability to enact laws in contrast to the reasonable hopes of mining investors in light of the Development Agreements. The study, which was grounded in a doctrinal approach, looked at both primary and secondary data collected from a variety of statutes, cases that were decided, mining development agreements, parliamentary debates and reports, policy documents, pertinent international instruments, books, periodicals, journals, reports, and online resources, among others. The Development Agreements contained explicit, unambiguous, and unconditional pledges that gave investors a basis for a legally protected claim of reasonable expectation. This safeguard promotes legal certainty, prevents governmental misuse of power, and promotes fairness between the rulers and the governed. The state, on the other hand, has an unquestionable sovereign right to enact laws however it sees appropriate. Nevertheless, Nigeria's signing of the Development Agreements was unmistakably an act of authority.

Keywords: Mining, Sector, right, Legislate, Legal and Investors

Introduction

As trade and investment liberalization have accelerated in the post-independence period, many low- and middle-income countries have intensified their efforts to attract foreign direct investment. In addition, the ability of foreign direct investment to support or obstruct national and international goals like poverty reduction and the realization of human rights has come under increased scrutiny.

In order to encourage the mobilization and entry of new capital into the mining sector, the Nigerian government entered into Development Agreements (DAs) with the buyers of the mining assets as part of the privatization process between 1995 and 2000. These agreements included a number of incentives for the investors, particularly with regard to the tax regime they would be subject to (Cameron, Peter, 2016). The Nigerian government enacted specific legislation to give force to these incentives, incorporating some of the terms of these agreements. The DAs provided assurances that no legislative action would change the fiscal environment for up to 20 years.

The Mines and Minerals Development Act was amended by the Nigerian Parliament in 2007 with the intention of making development deals subject to the law and only binding when done so. In addition, the government tried to make it clear that no fiscal term or tax schedule would be included in development agreements and that all fiscal issues should be covered by the relevant tax codes with only cross references made in development agreements (Cotula, Lorenzo, 2018). Following a statement by the then-President of Nigeria **Umaru Yar'Adua**, to the National Assembly to the effect that despite a boom in the mining sector, the majority of Nigerians remained poor and that Nigerians ought to benefit more from their mineral wealth, this measure was implemented to prevent any attempts to provide for or negotiate any fiscal terms outside of Nigerian tax laws.

Legal frameworks play a significant role in the total package that a nation can provide to prospective foreign investors. They specify the terms and conditions of foreign investment, how costs and benefits are distributed, and ultimately how much it adds to the nation's development objectives (Cotula, Lorenzo, 2018). Legal agreements are important to investors because they safeguard their rights and property and maintain the stability of the regulatory framework that governs their activities. On the basis of the principle of Permanent Sovereignty over Natural Resources, it is important to note that under international law, host states have the sovereign right to expropriate property and control activities that take place within their borders. (PSNR). A tenet of customary international law, this one was reaffirmed in UN Resolution 1803 and is widely acknowledged as such(United Nations General Assembly Resolution 1803 of 1962). International law, however, also establishes requirements that host states must adhere to when taking assets from foreign companies. Expropriations must, among other things, be done for a public purpose, without discrimination, in accordance with due process, and without payment of recompense.

In the case of Methanex Corporation v. United States of America, the right of states to PSNR was upheld (5th Final Award, 3 August 2005). The arbitrator determined that in this instance the right to nationalize was unquestionable and integral to state sovereignty. The arbitrator also said that agreements not to nationalize were not an alienation of sovereignty but rather their own manifestation and practice. According to the Arbitrator, sovereignty included a state's ability to engage into legally binding agreements and to refrain from exercising their right to nationalize. A non-discriminatory regulation for a public purpose that is enacted in accordance with due process and affects, among other things, a foreign investor or investment was not deemed expropriatory and compensable, according to the tribunal, despite the fact that the case did not involve stabilization clauses. The tribunal stated that under general international law, unless the regulating government had specifically committed to the then-potential foreign investor contemplating investment that it would not be considered expropriatory and compensable.

It has been argued that once a long-term and capital-intensive investment is made, the investor is more or less held captive by the host state, with the financial viability of the project depending on the investor's ability to achieve the projected return on investment on the one hand, and the investor vulnerable to host government action that may undermine such financial viability or even expropriate the investor's assets entirely on the other. In order to promote regulatory stability, the legal arrangements may include clauses like those relating to the regulatory taking doctrine and project-specific commitments included in foreign investment contracts between foreign investors and host states, which are known as stabilization clauses (Vienna Convention on the Law of Treaties, 2016).

Stabilization clauses help manage non-commercial (fiscal or regulatory) risk by stabilizing the terms and conditions of an investment initiative. In other words, a stabilization clause is a contractual mechanism designed to guarantee that, for the duration of the investment venture or for any other time period that may be agreed upon by the host state and the investor, the law of the host state, insofar as it affects the economic and financial performance of an investment venture, remains unchanged (Faruque, A, 2018). It typically takes the form of a governmental guarantee stipulating that the host state won't unilaterally change the terms of the investment agreement through legislative or administrative action. Stabilization clauses typically serve three purposes: to protect against political risk, to guarantee legal certainty, and to promote foreign investment (Supra note 1, pp.5-6).

In stabilization clauses, the host government agrees not to change the rules governing the project through legislation or any other means, subject to the fulfillment of certain requirements, such as the other contracting party's consent, the restoration of the economic equilibrium, and/or the payment of compensation. Stabilization clauses can take many various forms and have changed significantly over time (Maniruzzaman, A. F. M, 2016). Some of the earliest stabilization clauses prohibited nationalization and/or required both contracting parties' agreement before any changes could be made (these were referred to as "intangibility clauses"). The scope of stabilization provisions has tended to expand in recent years in order to cover regulatory changes that don't amount to expropriation or contract modification (Supra note 1, p.8.). This could involve making more general commitments to stabilize the regulatory framework governing the investment8, as well as stabilizing particular elements of the investment project, like the fiscal regime or tariff structure (Vienna Convention on the Law of Treaties). Stabilization clauses typically include provisions stating that the host government will not alter the regulatory environment in a manner that impacts the project's economic equilibrium and will compensate the investor if it does. By mandating that neither party may revoke or alter the terms of the investment agreement without the approval of the other party, a typical stabilization clause also typically offers the host state and an investor the chance to confer. As a result, the stabilization clause may pave the way for future renegotiations of the investment deal that would be advantageous to both the investor and the host state (Revere Copper & Brass, Inc. v. Overseas Private Investment Corporation (OPIC)).

It is crucial to remember that the fact that stabilization clauses are valid under international law does not, however, settle the issue of whether they are legal under the domestic law of the host state, in particular with regard to constitutional principles relating to the division of powers and the authority of the Executive branch of Government to enter into commitments that take precedence over legislation passed by parliament (Leader, Sheldon, 2016). While there may be differences in national legal systems with regard to the legality of stabilization clauses, the fact remains that each state has the authority to enact laws governing the conduct of affairs within its borders, including the prerequisites for investors to enter the domestic market. The well-established rule of international law that states cannot excuse their failure to uphold their international obligations by citing domestic laws may make matters more difficult where stabilization commitments are in reality unconstitutional. In the instance of Revere Copper v. OPIC, this was unquestionably at issue(Cameron, Peter D., 2018) In that case, the arbitral tribunal determined that despite the power of the Parliament and other governmental bodies under the domestic Constitution to override or void such commitments, the commitments made in favor of foreign citizens were binding under international law.

However, by comparing contracts and treaties, we can take conclusions from Article 46 of the Vienna Convention. This provision confirms the general rule that domestic law rules cannot be invoked by states, but it also includes an exception for fundamentally important internal law rules. The host state cannot violate internal rules of fundamental importance by entering into investment contracts, and a cautious investor should be aware of these rules before concluding such contracts with the host state (Kronman, Anthony Townsend, 2013). One such provision is the principle of separation of powers. Because of this, it doesn't seem like a state's fundamental right to enact laws as it pleases has been compromised by agreeing to certain limitations with a foreign company.

Beyond their legality, a crucial problem is how these clauses will be interpreted in court if their terms are broken. Outright theft in violation of an intangibility clause or a change in regulations in violation of a freezing clause are examples of violations. In the case of economic equilibrium clauses, parties are required to engage in good faith negotiations in order to reestablish the economy's equilibrium after regulatory change, but they are not required to come to a conclusion. As a result, failure to reach an agreement does not constitute a violation of the clause; however, violations may include refusal to renegotiate, deliberate obstruction of negotiations, and potentially refusal to compensate if the clause so provides, as was stated in the AGIP case. As a result, the primary legal consequence of violations of stabilization provisions is the payment of compensation. The payment of compensation, however, does not appear to have been ordered solely on the grounds that the host state had violated a stabilization provision in the investment contract in any known published international arbitral judgment.(Cotula, Lorenzo,2017) It would seem that there must be more involved than just a stabilization clause being broken.

A contract is an enforceable promise or collection of promises, regardless of the ramifications of a breach on the law. This obligation is one that the promisor voluntarily accepts by promising to act in a particular manner at a later date. It is self-imposed. A pledge inspires confidence in future performance, not just in the present sincerity. Fried claims that the convention of promising enables one to resolve to a future course of behavior and enables others to rely on one to behave in the manner that was promised. This encourages social interactions that are equally beneficial. In spite of the fact that making promises limits the promisor, doing so is self-imposed in an effort to expand long-term options, which is entirely consistent with the autonomy principle and with respecting both one's own and others' autonomy. Or, to put it another way, those to whom promises are made have a right to anticipate that those who freely make such promises will honor them(Leader, Sheldon, 2016).

Even when there hasn't been any evidence of the promisee's reliance, the expectation that promisors will keep their word is a valid reason to enforce specific promises. This is completely consistent with the idea that the goal of promising as an institution is to promote interdependence among people and that it accomplishes this by safeguarding their reliance interest, which is widely construed to also include their expectation. According to the convention of promising, whether or not there has been any benefit to the promisor or reliance by the promise, the duty to keep a promise is considered to derive from the promise itself. In other words, it is claimed that certain promises should be upheld whether or not the promisee has relied on them, and that keeping promises is generally a legal obligation because it is wrong to reward others' reliance and then fall short of their expectations.

As a result, contracts between host countries and foreign investors give rise to some reasonable expectations from both parties. By the same measure, breaking a promise, like the ones in a stabilization clause in an investment agreement, is a wrong that calls for redress, which is typically in the form of compensation. According to arbitrators in Liamco and Aminoil, among other factors that influence compensation amounts are the investor's reasonable expectations caused by the presence of a stabilization clause and, in the case of economic equilibrium clauses, the restoration of the economic equilibrium.

Methodology

The study used a qualitative doctrinal method, which is based on prose, in-depth analysis, and evaluation of the relevant issues. This method is suitable for the field of law, which necessitates comprehensive information.

Data Gathering

Data were gathered from main and secondary sources. Statutes, court rulings, mining development agreements, parliamentary debates and reports, policy documents, and other pertinent international instruments served as the main sources for the data. Secondary statistics were gathered from books, journals, magazines, reports, websites, and other reliable sources.

Sampling

Purposefully choosing the documents to evaluate ensures that only those with pertinent information will be examined.

Data Analysis

Utilizing the motifs found in the research questions, data were analyzed thematically.

Results

The main conclusions of the study were that while the inclusion of a stabilization clause in the DAs gave rise to some valid investor expectations, it did not revoke Nigeria's sovereign right to enact a new fiscal regime for the mining industry. Furthermore, the protection of the investors' private interests must be put aside for the Nigerian government to fulfill its obligations under international law related to the fulfillment of human rights in terms of providing for the basic requirements of its people. Furthermore, it was unlikely that the investors would receive restitutio in integrum for the breach of the stabilization clauses in these conditions; instead, they would likely receive compensation, the amount of which would be decided by the tribunal based on a number of variables.

Discussion

It is clear from a number of studies and arbitral decisions that the presence of stabilization provisions in investment contracts does not restrict the host state's ability to enact laws. However, the presence of such stabilization provisions leads to some reasonable expectations among investors. Nevertheless, a careful and conscientious investor would be expected to exercise due diligence to make sure that the promises being made by the host government—typically represented by the Executive branch—do not go beyond the scope of that authority's authority and competence. In actuality, every investor is aware that regulations will change over time. It is forbidden for a State to employ its legislative authority in an unfair, unreasonable, or inequitable manner(Leader, Sheldon, 2018). As a result, it would be dangerous for an investor to base their decisions on the idea that the Executive Branch of a government can force the Legislature to refrain from changing the law for a predetermined amount of time, as this would violate fundamental state principles like the division of powers.

Choosing between private and public interests is necessary when addressing questions relating to the scope, interpretation, and implementation of stabilization clauses. Stabilization commitments, on the other hand, give investors a tool to protect their interests from arbitrary host state action that could have an impact on the investment project or even completely undermine its economic viability. However, if host states are forced to pay investors for even small regulatory changes, it may be more difficult for them to act in the public interest, especially in poorer nations where the state of the public finances may be a major concern. This is especially true for those nations (Supra note 21, p. 31). As a result, it is crucial to clearly define what is included in and excluded from stabilization obligations in order to safeguard investments from arbitrary host state action without compromising the host state's ability to pursue its development objectives.

Furthermore, it must be acknowledged that states are unable to use contracts to evade their legal responsibilities under international law. In fact, it is a well-established principle of international law that state sovereignty is limited by a variety of international commitments, including those relating to the fulfillment of human rights and environmental preservation. States cannot bind themselves to refrain from exercising rights they do not possess, such as the right to exercise sovereignty in a manner that disregards international responsibilities. In other words, states cannot promise not to perform the actions that international law requires them to. State sovereignty is constrained by the international obligation to realize fundamental human rights, particularly with respect to human rights. The host state cannot violate the human rights of people and groups that could be impacted by the investment initiative in its commitments to the investor. Stabilization clauses are therefore legitimate and enforceable under the law, but their application is limited in that they cannot violate the human rights of others and cannot stop an actual host state from taking steps to gradually realize those rights (Supra note 21, p. 33). This justification leads to the conclusion that a "compliance with international law" exception, whether stated expressly or not, restricts the applicability of stabilization clauses.

Furthermore, stabilization clauses in these awards targeted expropriation or a similar confiscatory measure, even though compensation was ordered in a number of significant arbitration awards from the 1970s and 1980s in which tribunals upheld the validity of stabilisation clauses, including, among others, in the AGIP and LIAMCO cases. Therefore, it is plausible to claim that compensation was ordered in these arbitral awards not because a stabilization clause had been violated but rather because, according to customary international law, a state has the right to expropriate property owned by a foreign investor as long as, among other requirements, the state pays the foreign investor compensation(Leader, Sheldon, 2016). Therefore, it is unclear how these arbitral awards apply to stabilization clauses that do not address expropriation. Modern stabilization provisions, which seem to be nothing more than agreements to agree, are not mentioned in any public awards, and expropriation claims are unlikely to be taken into consideration as a foundation for compensation.

Conclusion

Investor protection and the sovereign right to govern have long been at odds with one another. It is asserted that a state's unassailable right and privilege to exercise its sovereign legislative authority also includes the right to pass, alter, or repeal a law as it sees fit. Nothing about the change made to the regulatory environment that existed when an investor made its investment is objectionable, barring the presence of a contract, whether it be in the form of a stabilization clause or another arrangement. Furthermore, states are not permitted to disregard their duties under international law to realize human rights in the name of enforcing a contract with an investor. Furthermore, it has been claimed that stabilization commitments must be explicitly stated and cover a relatively brief period of time because they involve an especially serious limitation on the exercise of state sovereignty. While the stabilization clauses in the case of Nigeria were explicitly stated, they covered a very long period of time; in some instances, it has been argued, they went beyond the anticipated life of the mining assets. The Nigerian government asserted that it changed the fiscal regime for the mining industry as a result of the sector's extremely low addition to national revenues and the high level of poverty in the nation. This statement implies that the tax breaks provided in the DAs were a contributing factor in the government's inability to fulfill its duties to meet the requirements of its citizens.

Although there is no mandatory precedent in international arbitration, tribunals frequently cite previous judgments. In this regard, it is proposed that while the stabilization clauses in the Nigerian DAs were valid and legal, it is unlikely that the Tribunal would award an investor restitutio in integrum for Nigeria's violation of the terms of these clauses based on the ratio decidendi in prior arbitral awards such as the AMINOIL case. It is more probable that the Tribunal will grant compensation while acknowledging the legal significance of stabilization devices but interpreting them narrowly. In disputes over the adoption of legitimate social and environmental measures, this seems to achieve a compromise between the need for stability of the legitimate investor and the sovereignty of the host state.

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