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MOZAMBIQUE PETROLEUM LEGAL FRAMEWORK: COMPARATIVE ASSESSMENT OF MOZAMBIQUE STABILIZATION CLAUSES

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ABBREVIATION LIST:

CRM	Constituição da República de Moçambique de 2004 (the Mozambican Constitution of 2004, as amended and republished by Law 1/2018 of 12 June 2018).
BIT	Bilateral Investment Treaty.
EG	*Exempli gratia*, which means "for example".
ENH	Empresa Nacional de Hidrocarbonetos, EP.
EPC	Petroleum Exploration & Production Contract.
FDI	Foreign Direct Investment.
FRELIMO	Frente de Libertação de Moçambique (the Mozambique Liberation Front).
HSE	Health, Safety and Environment.
HG	Host Government.
IE	*Id est*, which means "such as".
INP	Instituto Nacional de Petróleo (the Petroleum National Institute).
IOC	International Oil Company.
LNG	Liquified Natural Gas.
MIREME	Ministério dos Recursos Minerais e Energia de Moçambique (the Ministry of Mineral Resources and Energy of Mozambique).

MODEL EPC	Mozambique Model Exploration and Production Contract, approved by Resolution 25/2016 of 3 October 2016.
NOC	National Oil Company.
PSA	Production Sharing Agreement.

ABSTRACT

This study identifies and critically analyzes the evolution of stabilization clauses in international petroleum contracts entered between the Host Government ("**HG**") and International Oil Companies ("**IOCs**") with a focus on Mozambique. It then compares Mozambique's stabilization provisions to those in three other African countries that have an active oil and gas industry. All four countries seek foreign investment in their oil and gas sectors. Foreign investors, in turn, seek to mitigate the many legal risks that arise in contracts signed with HGs as sovereigns. Investors look for stabilization and arbitration provisions in Petroleum Exploration & Production Contracts ("**EPCs**") that increase the security of their investments. The article finds that Mozambique offers considerable security in its contracts compared to Angola, Ghana and Tanzania. Only Ghana offers a similar degree of stabilization in its contracts as Mozambique offers. The Angolan government does not resort to many of these stabilization mechanisms, probably because of the maturity of its petroleum industry, despite presenting quite a risky profile when compared to the other countries. Tanzania still has a long way to go in offering security to investors through stabilization clauses.

I. INTRODUCTION

1.1. Methodology

The present article reviews the literature on contractual mechanisms that offer security to an investor seeking to develop long-term and costly oil and gas projects in foreign jurisdictions. The article identifies and classifies a foundational set of stabilization clauses that offer investor protection. It then describes the evolution of stabilization provisions in Mozambique within the oil and gas industry. Finally, it assesses the strength of the stabilization provisions offered by Mozambique and identifies gaps where stabilization provisions continue to impair their full effectiveness within this jurisdiction.

As a developing country rich in natural resources[1] (and more specifically in natural gas[2]), Mozambique is a desired destination for foreign investment (with an expressive impact in the country's economy[3]). Foreign investment has increased recently, given that it has only become

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[1] "Political Economy Analysis of the Petroleum Sector in Mozambique", International Law and Policy Institute, 2013, pp. 19-23.

[2] The third-largest holder of proved natural gas reserves in Africa after Nigeria and Algeria. See: https://www.eia.gov/international/analysis/country/MOZ.

[3] Vezina, Pierre-Louis. "Resource Discoveries and FDI Bonanzas: an Illustration from Mozambique". University of Oxford, 2017, p. 4, Figure 1.

independent from Portugal in 1975, followed by a civil war from which emerged in 1992, with the Mozambique Liberation Front ("**FRELIMO")** as the ruling party since the first elections until this day. Only within the last 10 years, with the news of large natural gas reserves discoveries in the North of Mozambique and political stability, Mozambique registered a major increase in foreign direct investment ("**FDI**")[4].

This background translates into an openness and willingness to provide for a more attractive framework to the IOCs, as it is crucial for the country to be able to monetize on its resources[5]. Given the IOCs experience and the high-risk environment, the demand for these types of clauses is certain.[6]

To offer for a better context, the next section (Part II) addresses the legal regime governing the oil and gas sector in Mozambique, including the EPCs, identifying its main features under Mozambican law, and outlining the evolution of the Mozambican petroleum industry throughout the past years. Under Part III, an overview of the main tools of risk mitigation in EPCs is presented, prior to addressing the main types of stabilization clauses and the other two mechanisms, arbitration and choice of law. This section ends with an analysis of these risk mitigation tools under Mozambican law. Part IV provides for a comparative study of Mozambique's stabilization clauses with other African countries that produce petroleum or have proven undeveloped reserves. Finally, Part V provides for a conclusion.

Therefore, the present analysis aims at studying the evolution of the stabilization clauses in Mozambique, whilst comparing them with other African countries with a stronger oil and gas industry and greater experience with stabilization clauses. The countries of comparison include Angola, Ghana and Tanzania (the latter being very similar to Mozambique, i.e., taking the first steps in the industry).

This Paper does not discuss or analyses literature on administrative/public contracts and other civil law doctrines that allow changes to be made to EPCs, apart from the terms agreed under the contracts and the regime governing stabilization clauses.

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[4] Despite the 2010s hype around the exploration of Mozambican natural resources, in 2016 the corruption scandal around the government's hidden debts put a halt on many ongoing projects, with direct impact on the economy given the country's dependance on international funds and foreign investment. See: https://www.transparency.org/en/publications/grand-corruption-and-the-sdgs-the-visible-costs-of-mozambiques-hidden-debts . For a risk assessment of Mozambique please refer to section 2.3. below.

[5] "Mozambique, Invest in the Energy Sector of Mozambique, Special Report." Africa Energy Series, 2020.

[6] Oshionebo, E. "Stabilization Clauses in Natural Resource Extraction Contracts: Legal, Economic and Social Implications for Developing Countries." 10 Asper Rev. Int'l Bus. & Trade *L*, 2010, p. 1-2.

II. THE PETROLEUM INDUSTRY IN MOZAMBIQUE

2.1 General overview of the legal regime and the industry

2.1.1. Chronology of the applicable legislation

With the declaration of Mozambique's independence on the 25th June of 1975, the first Constitution of the Republic of Mozambique (back then, the People's Republic of Mozambique) was enacted. The Constitution established under Article 8 the State's sovereign power over the natural resources located within the Mozambican territory[7].

The first legislation governing petroleum operations was approved in 1981, by way of Law 3/81, of 3 October 1981 (which approved the 1981 Petroleum Activities Law). Under this law the Mozambican Government granted exclusive rights of exploration and production to the State-owned company *Empresa Nacional de Hidrocarbonetos*, EP ("**ENH**"), taking the role of Mozambique's national oil company ("**NOC**").

ENH was created that same year by the Mozambican Government[8] and was granted the right to enter into partnerships with foreign entities (representing the State's interests), to conduct petroleum exploration and production activities through either a joint venture, a Production Sharing Agreement ("**PSA**") or a risks service contract.[9] This demonstrated that the Mozambican Government was opened to any form of partnership, probably in an attempt of attracting foreign investment to this industry, so important then as continues to be nowadays.

The legal regime was profoundly reviewed in 2001 and 2004 with the approval of a new Petroleum Law (Law 3/2001, of 21 February 2001 – the 2001 Petroleum Law) and its Regulations (Decree 24/2004, of 20 August 2004 – the 2004 Petroleum Law Regulations). The new legal regime no longer permitted different types of partnerships between the private

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[7] Article 8 of the Constitution of 1975 provided that: "The land and natural resources located in the soil, subsoil, in territorial waters and in the continental shelf of Mozambique are owned by the State. The State determines the conditions for their use. The People's Republic of Mozambique recognizes the Charter of Economic Rights and Duties of States adopted by the XXIX Session of the General Assembly of the United Nations."
This principle of State's ownership over its resources originated in 1962 (following the creation of the United Nations in 1948) with the approval of the United Nations Resolution on Permanent Sovereignty over Natural Resources - U.N.G.A. Res 1803 (XVII). A sequence of resolutions reinforcing this principle were adopted by the United Nations, such as the 1966 General Assembly Resolution 2158 (XXI) and the 1974 General Assembly Resolution 3281 (XXIX), which approved the Charter of Economic Rights and Duties of States referred to by Mozambique's 1975 Constitution.
In Anderson, Owen, et al. *International Petroleum Law and Transactions*. Chapter "Overview of the International Petroleum Industry", sub-chapter 1.2.1. "Snapshot History of Key Players". Rocky Mt. Min. L. Fdn, 2020.

[8] ENH was created through Decree 18/81, of 3 October 1981. See: https://enh.co.mz/sobre-enh/.

[9] Article 6 of the 1981 Petroleum Activities Law.

investor and the HG. It determined instead that only concession model-based contracts would be granted and by way of public tenders to any entity fulfilling the applicable requirements.[10] The regime also determined that the State was allowed to participate in the petroleum operations at any stage.[11]

The Constitution of the Republic of Mozambique currently in force also dates from 2004 (as amended and republished by Law 1/2018 of 12 June - "**CRM**") and it has a similar provision to that from the 1975 Constitution guaranteeing the State's ownership over the natural resources. Article 98 determines that "*the natural resources located in the soil, subsoil, inland waters, territorial sea and continental shelf, as well as in the exclusive economic zone, are the property of the State*" and also that domestic law regulates the management and conservation of all assets of public domain.

Since 2004, several legal diplomas were approved in order to complement the regime established by the 2001 Petroleum Law and its Regulations, such as Decree 19/2004, of 2 June 2004, approving the Regulations on the Petroleum Production Tax[12]; Law 12/2007, of 27 June 2007, approving the tax regime applicable to petroleum operations[13]; Ministerial Order no. 272/2009, of 30 December 2009, approving the Petroleum Operations and Infrastructures Regulations[14]; Decree 56/2010, of 22 November 2010, approving the Environmental Regulations for Petroleum Operations; Decree 45/2012, of 28 December 2012, approving the regime applicable to downstream activities[15], among others.[16]

It was not until 2014 (13 years after the approval of the 2001 Petroleum Law) that the Petroleum Law and its Regulations were once again reviewed and the legislation currently in force was approved, namely Law 21/2014 of 18 August 2014 (the 2014 Petroleum Law) and Decree 34/2015, of 31 December 2015 (the 2015 Petroleum Law Regulations).

[10] Article 5.1 of 2001 Petroleum Law and Articles 3.1 and 4.1 of 2004 Petroleum Law Regulations.
[11] Article 8 of 2001 Petroleum Law.
[12] No longer in force. Currently, Decree 32/2015, of 31 December 2015, governs the tax regime and benefits applicable to petroleum operations.
[13] Revoked and replaced by Law 14/2017, of 28 December 2017.
[14] Amended by Decree 84/2020, of 18 September 2020.
[15] Revoked and replaced by Decree 89/2019, of 18 November 2019.
[16] See Global Legal Group. "Oil & Gas Regulation 2021 | Mozambique | ICLG." International Comparative Legal Guides International Business Reports, 2021.

The 2014 Petroleum Law establishes under its Article 18[17] the same principle as the CRM. In short, all petroleum resources found within the Mozambican territory belong to and are managed by the Mozambican State.

In addition to the two legal diplomas referred above, a third and not less important diploma was enacted also in 2014, that is Decree-Law 2/2014, of 2 December 2014, which approved a special legal regime governing the Liquified Natural Gas ("**LNG**") projects in Areas 1 and 4 in the Rovuma Basin, in the North of Mozambique (where the major gas reserves were discovered).

Mozambique's national petroleum laws regulate how private entities may access the exploration of petroleum resources. The law states that any operation must be previously authorized by the State. The Government continues to reserve the right to take part of any project implemented to conduct petroleum operations (not subject to any minimum or maximum thresholds but in practice varies from 10 to 20%)[18], through **ENH**.[19]

The approval of the terms and conditions of concession contracts is a prerogative of the Government under the 2014 Petroleum Law and for that reason, in 2016, the Government passed Resolution 25/2016, of 3 October 2016, approving the Exploration and Production Concession Contract Model (the "**Model EPC**"). This template shall guide all negotiations between the Government and any foreign investor wishing to conduct petroleum exploration operations in Mozambique.

Evidently, the legislation referred to above could not be approved without taking into account the *status quo* of the industry in Mozambique at each given moment. The next section outlines some of the milestones of that industry.

2.1.2. The petroleum industry

The first petroleum discoveries in Mozambique took place onshore in the 1950s, in Inhambane Province (in the Mozambique Basin)[20].

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[17] Article 18 of the 2014 Petroleum Law establishes that "the petroleum resources located in the soil and the subsoil, inland waters, territorial sea, continental shelf as well as in the exclusive economic zones are property of the State".
[18] Atkins, Kevin, et al. Project Finance NewsWire, November 2014, pp. 56 – 60.
[19] Article 20 of the 2014 Petroleum Law.
[20] The concession areas are basically distributed between the Mozambique Basin (mostly center and south region) or Rovuma Basin (in the North). See: http://www.inp.gov.mz/pt/Pesquisa-Producao/Descobertas-na-Bacia-de-Mocambique .

Despite the drilling and seismic activities[21] carried out between the 1950s to 1990s, only after the proclamation of independence in 1975 and the end of the civil war in 1992 the fields were actually developed.

The first licensing round was held in 1984 and the other four between 2005 and 2014 - most of the fields being developed were a result of these four successful rounds.[22]

Table 1 in Appendix I lists the EPCs that remain in force, which date from 2000 to 2018. [23]

The first EPC (for Pande and Temane fields) of Table 1 represents the first gas production obtained in Mozambique (Temane fields in 2004, followed by the Pande fields in 2009), both operated by the South African company Sasol. [24]

From all the EPCs identified in Table 1, the biggest discoveries of natural gas were found in Area 1 and Area 4 of Mozambique's deep water Rovuma Basin[25], which lies off the northern coast of the country[26], and in which the multi-million dollar LNG projects are set to be developed[27], turning Mozambique into one of the top 10 LNG exporters in the word.[28]

In Area 1, production is expected to start in 2023/2024, with the construction of onshore LNG facilities in Afungi, in the Palma district in Cabo Delgado province, whilst in Area 4 the final investment decision on the Rovuma LNG Project in Mozambique has been put on hold. [29]

2.2 Petroleum projects general features under current Mozambican laws

The petroleum projects in Mozambique begin with the State granting the IOCs a right to carry out petroleum operations under the terms to be agreed in the concession contract.[30]

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[21] See: http://www.inp.gov.mz/pt/Pesquisa-Producao/Sismica and http://www.inp.gov.mz/pt/Pesquisa-Producao/Furos .

[22] See: http://www.inp.gov.mz/pt/Concursos .

[23] See: http://www.inp.gov.mz/pt/Pesquisa-Producao/Concessoes-em-Vigor .

[24] See: http://www.inp.gov.mz/en/Exploration-Production/Current-Areas-of-Exploration-and-Production/Pande-Temane-PSA-Area .

[25] The main players in Area 1 of the Rovuma Basin include Total (which acquired the American company Anadarko), Mitsui, ENH, PTTEP, BPRL Ventures, ONGC Videsh and Beas. Meanwhile, Area 4 is being developed by Exxon Mobil, ENI, CNPC, Galp, Kogas and ENH (through the joint venture Mozambique Rovuma Venture).

[26] See: https://www.eia.gov/international/analysis/country/MOZ .

[27] See: https://www.nsenergybusiness.com/projects/area-1-mozambique-lng-project/ .

[28] See: https://www.africaoilandpower.com/2020/03/20/mozambique-the-next-great-lng-player/ .

[29] See: https://clubofmozambique.com/news/mozambique-loses-about-us2-billion-from-exxon-mobils-delayed-fid-178108/ .

[30] Paulino, A. *Lições do Juiz Paulino (II), O regime jurídico contratual especial do gás natural liquefeito da Bacia do Rovuma – Uma leitura crítica face à lei geral.* Alcance Editores, 2018, pp. 97-116

The award of concessions usually follows a public tender process[31], but it may also be granted through direct negotiations. That is possible for areas that had already been declared available, that is, when (i) no concession was granted pursuant to previous public tender; (ii) rescission, relinquishment and abandonment; or (iii) the need to join adjacent areas into a concession, where justified, i.e., due to technical and economic reasons.

Once the tender or the negotiations are concluded the State, through ENH, can enter into an incorporated or unincorporated joint venture with the IOCs, as agreed under the concession contract.

The 2014 Petroleum Law specifically refers to concessions[32] as the type of contract to be entered into with the private investors but not in a classical way. Taking into account its features it is better described as a hybrid Petroleum Exploration and Production Contract ("**EPC**") opposed to the traditional concessions or the other two most common types of EPCs which are the PSA and the risk sharing service agreement.[33]

According to the 2014 Petroleum Law, the following rights may be conferred to the |IOCs (be it in onshore or offshore areas): a) Reconnaissance; b) Exploration and production (the EPC); c) Pipeline construction and operation; and d) Infrastructure construction and operation.[34]

The EPC confers its holder an exclusive right to perform petroleum operations, as well as a non-exclusive right to construct and operate production and transportation infrastructure.[35]

The exclusive exploration right granted under the EPC shall not exceed eight years and is subject to area abandonment provisions. In the event of a discovery, the IOCs may maintain that rights to complete the work initiated within a specific area (within the appraisal period), to comply with their work and appraisal obligations and to determine commercial value and allow oil development and production.

[31] Articles 17 and 21 of 2014 Petroleum Law.
[32] Article 28 of 2014 Petroleum Law.
[33] King & Spalding, *Upstream Government Petroleum Contracts – A Practitioner's Guide to Concessions, Production Sharing Contracts and Risk Service Agreements,* Juris Publishing, 2017, p. 27.
[34] Article 28 of the 2014 Petroleum Law.
[35] "Comparative Legal Guides | Mozambique: Energy – Oil & Gas." Country Comparative Guides | The Legal 500, 2020.

Under the development plan approved by the Government IOCs may maintain the exclusive right to develop and produce oil and gas in the development area, being able to renew it for equal or shorter periods, as deemed most advantageous for national interest.[36]

As indicated above, the Mozambican EPC Model was only approved in 2016 and since then, the EPCs signed after that year are based on the EPC Model (for example, those granted for the Mozambique Basin)[37]. It is worth noting that the previous EPCs had already a similar structure.

Like any other contract, the Model EPC begins with identifying the parties, its scope and duration and in that regard remitting to the petroleum legislation in force.

The EPC addresses the exploration of petroleum within the timeframes permitted by law as well as the subsequent development in case of a discovery, determining the obligations that the concessionaire is subject to. It is determined in the EPC that where more than one concessionaire is conducting the petroleum operations, they shall all be jointly liable – unless it establishes an independent liability.

Needless to say, the EPC is a central piece in the State-concessionaire relationship[38] but prior to any negotiation or execution of an EPC, the private investors usually analyze the country in which they intend to invest, to better understand the business, social, political and economic environment which ultimately will impact their project. The next section compares Mozambique's profile with three other African countries.

2.3 Mozambique's risk profile: a comparative analysis

Besides understanding the country's applicable legislation or track record in the oil & gas industry (as discussed above), investors also look into a country's risk profile. Investing overseas involves a careful examination of the economic, political and business risks that might result in unexpected investment losses. That said, investment decisions depend largely on a country's favorable rating.

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[36] Article 30 of 2014 Petroleum Law.

[37] EPCs for Blocks A5-A, A5-B, PT5-C and also Z5-C and Z5-D. Please refer to Appendix II, Table 2. See: http://www.inp.gov.mz/pt/Politicas-Regime-Legal/Contratos-de-Pesquisa-Producao-de-Hidrocarbonetos .

[38] Sills, M. "Structuring and Protection of Foreign Investment in the Natural Resources Sector." *Oil, Gas & Energy Law Journal (OGEL)*, 1 Dec. 2009.

Also, depending on the respective risk profile the HG may be more or less favorable to the investors demands for risk mitigation mechanisms in the EPCs (such as stabilization clauses, as further discussed below).

Country risk can be measured using various metrics and studies, including independent risk reports such as The Corruption Perception Index by Transparency International, the World Bank Doing Business Index, the World Bank Worldwide Governance Indicators, the Resource Governance Index, the Fragile States Index or the Global Petroleum Survey, etc. [39]

Table 2 in Appendix II summarizes the ratings of each of the four countries under analysis, allowing for a comparison between each of them.

Overall, Mozambique and Angola present inferior ratings, with Ghana leading the ranks, followed by Tanzania.

One of the reasons for Mozambique's poor results is linked to the State Budget which is a major weakness. As well put by the Natural Resource Governance Institute "There is still much uncertainty regarding the timing and size of revenues from its nascent gas sector, yet the government has rapidly ramped up borrowing on the back of these future revenues. Donors and the IMF suspended aid to Mozambique in 2016 when the government revealed it had kept $1 billion in debt undisclosed. The country can enhance the transparency of its national budgeting by passing oil and gas revenue management legislation, including adopting and enforcing fiscal rules (as Uganda and Tanzania, also new oil and gas producers, have recently done)."[40]

Despite its rating the Angolan oil and gas industry has thrived, representing the majority percentage of the country's exportations. That has been possible without the typical set of risk mitigation tools that one would expect which leads to the conclusion that IOCs are quite adaptable to risky environments. A comparative analysis of these four countries is further developed under Parts III and IV below.

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[39] Anderson, Owen, et al. *International Petroleum Law and Transactions*. Chapter "Overview of the International Petroleum Industry", sub-chapter 1.2.2. "Host Governments". Rocky Mt. Min. L. Fdn, 2020.
[40] See https://resourcegovernanceindex.org/country-profiles/MOZ/oil-gas .

III. INVESTORS APPROACH TOWARDS POLITICAL AND REGULATORY RISKS

3.1 Overview of risk mitigation tools in international petroleum contracts

Bearing in mind that the petroleum contracts are of long duration, they usually involve large financing, technological and operational costs, not to mention the risks (e.g. geological, commercial and market, operational, geopolitical, legal, climate change and also HG risks)[41]. These may occur in countries whose political, social and economic reality most times do not guarantee the stability of business (please refer to Table 2 under section 2.3 above as an example of countries where investors have to manage different sets of risks).

Petroleum exploration projects are carried out in long cycles, extending twenty-five years or more. During this period, governments may change through elections or revolutions, economic and social development may occur. Situations may arise that impose legislative changes, exposing the investors to a level of uncertainty that is not desired.

Given the State's protection of its natural resources, as discussed above under Part I, the only document that the investors can directly influence is the EPC (and with some limitations, namely HG legislation. Example if that is the existence of a model contract like the Model EPC). Despite the existence of international conventions, treaties or bilateral agreements (such as Bilateral Investment Treaties – "**BIT**", further discussed below), which appeared as a result of a globalized economy and aim at protecting foreign investment[42], the EPC continues to be the main instrument governing the parties' relationship.

As such, it is a common practice in the industry that a certain set of provisions are included in the EPCs to safeguard the investors against the adverse effect of political, economic and social constraints in host countries, whilst also ensuring or promoting the economic balance of contracts. [43] Companies demand stability of their investment terms.[44]

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[41] As discussed during the module International Petroleum Transactions lectured at Católica Global School of Law, course from 2018-2019, by Professor Jacqueline L. Weaver.

[42] Poulsen, L. "The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows", *European Journal of International Law*, Vol. 20, Issue 3, August 2009, pp. 935–938.

[43] Dias, N. "Stability in International Contracts for Hydrocarbons Exploration and Some of the Associated General Principles of Law: From Myth to Reality" OGEL 4, 2010.

[44] Shemberg, Andrea, and Aizawa, Motoko. "Stabilization Clauses and Human Rights", IFC, May 2009, p.6.

From the IOCs point of view one of the ideal stabilization mechanism would be including a clause preventing any unilateral change by the HGs through legislation, or through administrative or judicial decisions, to avoid impacting negatively the terms and conditions negotiated in the EPC (by changing the applicable law or its interpretation). This allows for the projects to be successfully implemented [45]. Another way would be agreeing on the possibility of renegotiating the contract should an imbalance occur that changes the parties' original expectations. In this case the aim would be reinstating the economic balance that existed before that changing event.[46]

The clauses mentioned above are classified by the literature as stabilization clauses[47], which can adopt different forms: form "freezing" clauses (impairing HG's legislative and administrative powers to unilaterally change the legislation that impacts the EPC)[48], to promulgation of the contract as a special law[49], making it more difficult to change it, as well as those that establish that the contract shall be amended in case any legislative initiative affects its economic balance[50] (deemed renegotiation clauses), among others. The different types of stabilization clauses are further analyzed under section 3.2 below.

Taking the IOCs side, it would not be difficult to achieve the protection they seek (such as resorting to freezing clauses, but on the opposite side there's a HG and by preventing the

[45] Nwete, B. O. N. "To What Extent Can Stabilisation Clauses Mitigate the Investor's Risks in a Production Sharing Contract?" OGEL, 1 Mar. 2005.
[46] Cameron, P. "Stabilization and the impact of changing patterns of energy investment", J.W.E.L.B. Vol. 10., 5, October 2017, p.393-394. Cameron takes the example of the case Parkerings v Lithuania (Parkerings Companiet AS v Lithuania, Award, ICSID Case No ARB/05/8, IIC 302 (2007) 14 August 2007. Another case Cameron refers to is Alex Genin, Eastern Credit Limited, Inc and AS Baltoil v The Republic of Estonia, ICSID Case No ARB/99/2: http://italaw.com/cases/documents/486) where the tribunal pointed out to the investor that investing in emerging countries without negotiating risk mitigating clauses should be understood as an acceptance of such risks by the investor. Another illustration of the importance of having a stabilization clause and the penalty for not obtaining one was provided in the Pauschok case (Sergei Pauschok, CISC Golden East Company, CJSC Vostokneftegaz Company v The Republic of Mongolia, Award on Jurisdiction and Liability, 28 April 2011 (UNCITRAL), para 302.) where the tribunal stated: "Foreign investors are acutely aware that significant modification of taxation levels represents a serious risk, especially when investing in a country at an early stage of economic and institutional development. In many instances, they will obtain the appropriate guarantees in that regard in the form of, for example, stability agreements which limit or prohibit the possibility of tax increases."
As presented by Cameron (p. 394). "these awards underline the importance of a stabilization clause in a dynamic setting. (…) The complex implications of large new developments, notably in oil and gas but also in for example, minerals such as iron ore, are creating unfamiliar challenges for governments in some of these low-income countries, testing the adequacy of their legal frameworks and institutional capacity."
[47] Bernardini, P. "Stabilization and adaptation in oil and gas investments", Journal of World Energy Law & Business, Vol 1, No. 1., 2008, p.100.
[48] Faruque, A. "Validity and Efficacy of Stabilisation clauses", Journal of International Arbitration, Volume 23, Issue 4, 2006, pp. 317-336.
[49] Maniruzzaman, A. F. M. "The Pursuit of Stability in International Energy Investment Contracts: A Critical Appraisal of the Emerging Trends." OUP Academic, 25 July 2008
[50] Loncle, Jean-Marc, and Philibert-Pollez, Damien. "Stabilisation Clauses in Investments Contracts", International Business Law Journal 3, 2009, p. 275.

possibility of adapting contracts, the sovereign power of the HG would be severely limited and with it its goal of safeguarding the national interests. [51]

Also, in favor of the IOCs, any breach of the agreed stabilization clauses would likely result in the right to be compensated by the HG. For this and the reasons outlined above, it is not unexpected that HGs carefully negotiate stabilization clauses to avoid any interference with their sovereignty and adverse effect to the local economy and tax rentability of the projects.[52]

In any case, neither a stabilization clause (or clauses) alone may achieve its purpose, nor it is the only risk mitigation measure available to the investors.

As Cotula (2008) well summarizes, the "stabilization clauses should not be looked at in isolation. They are only one of the many tools that investors have in order to mitigate non-commercial risk – together with other tools such as insurance, equity participating by the host state, involvement of international financial institutions (…) and investment treaties. Rather than trying to "squeeze everything" into an all-encompassing stabilization clause, it may make more sense to have a reasonably targeted stabilization clause, accompanied by a range of other tools that contribute to mitigate non-commercial risks by other means".[53]

Other tools include a choice of law provision which "internationalizes" that contract or restricts application of the host country's law, and an agreement on international arbitration to resolve future disputes. These two tools together with stabilization clauses, as stated by Bowman (2019), form the "three elements[54] (that) lean on each other - they are correlative - and together they form a robust "stabilization architecture."[55]

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[51] Cotula, L. "Regulatory takings, stabilization clauses and sustainable development." OECD Investment Policy Perspectives 2008, 2008, p. 74.
[52] Nwaokoro, J. "Enforcing stabilization of international energy contracts." The Journal of World Energy Law & Business 3.1, 2010, pp. 103-110.
[53] Cotula, p. 86.
[54] Also known as the "three pillars of security" in petroleum international contracts. See also: Cameron, P. "Stabilisation in Investment Contracts and changes of Rules in host countries: Tools for Oil and Gas investors", AIPN, 2006, p. 12.
[55] Bowman, J. "Risk Mitigation in International Petroleum Contracts, International Mining and Oil & Gas Law", reprinted and updated in 50 Geo. J. Int'l L., 2019, p. 751.
Bowman (p. 748-74) also mentions other sources, besides the three pillars, namely stabilization assurances in the respective national legislation and also through existing bilateral and multilateral investment treaties (such as the BITs).

In relation to the choice of law, this is ordinarily used to guide which law or legal principles apply to the investment contract, including in the always delicate event of dispute between the companies.

According the thesis of the internationalization of contracts, it would also be in favour of the IOCs that the parties also agreed to international laws[56] or international general principles[57]. The benefits of including international law as the applicable law or at least international principles is seen in several legal proceedings.[58]

However, nowadays, most EPCs have the domestic law of the HG as the law applicable to the contract, mainly due to the existence of a more robust legal system throughout the emerging countries where petroleum resources are explored. This obligation is usually established in the host country's legislation and that cannot be overridden by the EPC.

What may assist the investor in a situation where the domestic law applies is also the existence of a BIT between that investor's country and the host country.

The BITs have, according to some authors[59], the purpose of reducing the aforementioned political risk since they are treaties that protect private investment, existing between a HG and the State from which the investor is a national, setting forth standards for treatment of foreign investors in areas such as expropriation of property, repatriation of funds, and settlement of disputes.[60]

As stated by Cameron (2006), "BITs can be important. (…) For example, a requirement that the HG "shall observe any obligation it may have entered into with regard to investments of

[56] And international laws to be understood according to Article 38(1) of the Statute of the International Court of Justice (June 26, 1945, 59 Stat. 1055, 33 U. N.T.S. 993; *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 (AM. LAW INST. 1987), which identifies four sources: international conventions; international custom; the general principles of law; and judicial decisions and writings of the most highly qualified publicists of the various nations – See Bowman pp. 779-780.

[57] Bowman, pp. 777-783, gives as an example of a clause under which international principles are also applicable: Clause 28.7 of the 1955 Libya Model Deed of Concession, which determines that "This Concession shall be governed by, and interpreted in accordance with, the principles of law of Libya common to the principles of International Law and in the absence of such common principles then by and in accordance with the general principles of law, including such of those principles as may have been applied by International Tribunals".

[58] Several arbitral awards have supported the application of international law, such as *Lena Goldfields, Ltd v USSR* - referred by Nwokolo, A. "Is there a legal and functional value for the stabilization clause in international petroleum agreements", Centre for Energy, Petroleum and Mineral Law and Policy, Annual Review, 2005 (*see footnote* 46); or *Sapphire International Petroleum Ltd v National Iranian Oil Company* (footnote 48).

[59] Comeaux, Paul E. and Kinsella, N. Stephan, "Reducing Political Risk in Developing Countries: Bilateral Investment Treaties, Stabilization Clauses, And Miga & Opic Investment Insurance," NYLS Journal of International and Comparative Law: Vol. 15, No. 1, Article 2, 1994, pp. C 2-3.

[60] Anderson, Owen, et al. *International Petroleum Law and Transactions*. Chapter "Dispute Resolution – Investment and Commercial", Rocky Mt. Min. L. Fdn, 2020.

nationals of the other Contracting Party"[61]. Such 'obligations' could be imposed by way of a law or by way of a foreign investment contract (or an EPC).

In Mozambique, however, there are only a few BITs in place[62] (between 20 to 30, with some not yet in force), but as a general rule they all allow for any dispute to be settled through arbitration, which ties in with the discussion below on the third pillar of security for foreign investors – arbitration.

It is common sense that if the host state's court has jurisdiction over the dispute between the parties concerned and even with a BIT in place, the risk of the state's court to interpret the breach of the stabilization clause by the state in the light of the state's claimed defense of (so-called) "public interest" is high (be it due to being a despotic regime or under financial pressure, or any other consideration).

In this era of globalization, it is increasingly common for parties to international contracts to provide for international arbitration in a neutral venue (instead of the HG venue) for the purpose of the settlement of their disputes.

As referred by Maniruzzaman (2005), "an international arbitral tribunal can look at the stabilization clause from both subjective and objective standpoints, no matter what law applies to the stabilization clause (whether it is the law of the host state or some non-national legal system, rules or principles, i.e. international law, transnational commercial law or general principles of law etc.). Thus, the provision for international arbitration in an international contract can give efficacy to the stabilization clause contained in it by providing the foreign party at least with an opportunity to air grievances against the state party for the breach of its legitimate expectation created while mutually agreeing to such a clause". [63]

Bowman (2019) adds that it is important to choose internationally accepted arbitral rules (such as UNCITRAL, ICC, LCIA, etc.), and also to choose for a neutral seat of arbitration.[64]

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[61] Cameron, P. "Stabilisation in Investment Contracts and changes of Rules in host countries: Tools for Oil and Gas investors", AIPN, 2006 p, p.40

[62] See: https://investmentpolicy.unctad.org/international-investment-agreements/countries/143/mozambique .

[63] Maniruzzaman, A. F. M. "Some Reflections on Stabilisation Techniques in International Petroleum, Gas and Mineral Agreements", International Energy Law and Taxation Review, 2005, p.100

[64] Bowman (pp. 783-786) makes a great point in relation to the seat of arbitration given that in accordance with the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), approved by the U.N. General Assembly meeting in New York City in June 1958, which provides the international legal framework for the enforcement of agreements to arbitrate and arbitral awards, it is possible for the national courts of a given country (chosen as the seat of arbitration) to set aside the award granted in its

Still on the topic of risk mitigating measures typical of international petroleum contracts and before discussing stabilization clauses in more detail, it is worth mentioning that the players in the oil and gas industry also resort to the following mechanisms: a) use of a model contract which is transparent and efficient and according to international practices; b) flexible fiscal system; b) periodic readjustment of contract equilibrium; c) anti-corruption provisions, among others.

3.1.1. Stabilization clauses

Following the discussion above, it is understood that the highly risky and large-scale investments that are at stake in EPCs influence the demand for protective measures by the IOCs, especially those that safeguard their rentability[65].These measures translate into various stabilization mechanisms, from international investment treaties, to the adoption of protective provisions in each national legislation or in EPCs or guaranteeing a neutral forum and neutral law in case of any dispute.[66]

Given that the focus of this Paper is on the stabilization clauses agreed under the respective EPC, an historical event worth reminding is when a clause of this nature was first agreed between a HG and a foreign investor. It dates back to the beginning of the twentieth century, more exactly in 1901 and under an EPC entered into between the Persian Empire and a British national and according to which the investor was exempted from certain taxes for the term of the contract (repealing the application of any new legislation approved by the HG).[67]

Stabilization clauses, as summarized by Bowman (2019), "*seek to protect the investor from governmental action that adversely affects the value of the investment contract and underlying instrument, by preventing that action, by insulating the contract from the action, by shifting to the host state or national oil company the financial burden of that action, or by modifying the terms of the contract to restore all or part of the contract's original value in response to that action*". [68]

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country (that is, the country of origin – or the seat of arbitration). Given this risk, a neutral seat is always a better option.

[65] Anderson, Owen, et al. *International Petroleum Law and Transactions*. Chapter "Host Government Contracts – Non-Fiscal Provisions", sub-chapter 6.2.9. "Stabilization and Adaptation", Rocky Mt. Min. L. Fdn, 2020.

[66] Maniruzzaman, A. F. M. "The Pursuit of Stability in International Energy Investment Contracts: A Critical Appraisal of the Emerging Trends." OUP Academic, 25 July 2008, p. 121.

[67] E.g. Agreement of May 28th, 1901, between the Government of His Imperial Majesty the Shah of Persia and William Know D'Arcy, now held by the Anglo-Persian Oil Company, Ltd., art. 7

[68] Bowman, p. 751.

Before investing or even discussing stabilization clauses, it is commonly accepted that the private investor must first assess what would be the legal consequences in the event of a unilateral legislative change of the HG[69] (whether compensation would be due, which is normally the case) meaning that it must first know the local law.

Given its international acceptance, these provisions are generally seen as creating a favorable environment in terms of investment[70], attracting investment and mitigating risks. [71]

It is important to clarify that historically stabilization clauses have been focused on fiscal terms[72] or other legal aspects of the EPCs, but not health, safety and environment matters ("**HSE**"). This approach has been widely accepted as it is understood that these matters demand for more flexibility from the IOCs in accommodating HG's demands. The reasoning is that HSE matters can also touch on human rights issues and social and environmental issues, which are very important for the development and long-term sustainable economy of any country. There can also be situations where these matters have an impact on any social or environmental related public interest regulation and the HG would surely and despite any stabilization clause wish to impose its sovereign power over the IOC's interest (in defense of public interest). For that reasons IOCs are not exempted from the possibility of renegotiation and adaptation of the EPCs to new legislation governing HSE matters and imposing additional actions, as long as it is still economically viable. [73]

That said, the classification of stabilization clauses has been widely discussed amongst the literature [74], and this mechanism has clearly evolved throughout the past decades. According

[69] Cameron, P. "Stabilisation in Investment Contracts and changes of Rules in host countries: Tools for Oil and Gas investors", AIPN, 2006, pp. 56-58.

[70] Sar, Meriç. "Stabilization Clauses in Investment Contracts", Georgetown University Law Center, 2013, p.5.

[71] E.g. Article 92 of the Angolan Petroleum Act (approved by Act 10/04 of 12 November), which establishes as follows: "The rights acquired under petroleum concessions and exploration permits issued, as well as agreements entered into by the National Concessionaire related to oil concessions and exploration permits existing or validly signed and effective on the date of entry into force of this law, remain fully valid and effective in protection of the contractual stability (...)" - free translation.

[72] Tordo, Silvana. "Fiscal Systems for hydrocarbons – Design issues", World Bank Working Paper n. 123, 40902, The World Bank, 2007, pp. 3-4.

[73] Shemberg, Andrea, and Aizawa, Motoko. "Stabilization Clauses and Human Rights", IFC, May 2009, p. 5 of Annex 1.
Also Bowman, p. 786, agreeing to the carve-out of HSE.

[74] E.g. Cameron, P. "Stabilisation in Investment Contracts and changes of Rules in host countries: Tools for Oil and Gas investors", AIPN, 2006, p. 53-54, determines that the jurisprudence divide these in either traditional clauses (dated from 1970-1980, and highlighting cases such as *Agip vs. Congo, BP vs. Libia, Liamco vs. Libia* and *Libia vs. TOPCO*) or modern clauses, which aim at restoring the contract balance (equilibrium).
Also, Coale, Margarita. "Stabilization Clauses in International Petroleum Transactions", 30 Denv. J. Int'l L. & Pol'y 217, 2002, p.222-223.

to Bowman[75] (2019), these can be divided into 10 types: a) Freezing; b) Exemption; c) Risk Allocation; d) Guarantee; e) Non-opposability; f) Legalization (Enclaving); g) Contractualization; h) Intangibility (a subtype usually addressed within the non-opposability provisions); i) Anti-expropriation; j) Anti-stabilization nullification; and k) Renegotiation (equilibrium). [76]

The next section of this article will address separately each of the types of stabilization clauses and discuss their features.

a) Freezing clauses

Freezing clauses determine that the contract is subject to the laws (and taxes, or both) in force on the date the contract was executed, regardless of any subsequent change in them by the government. [77] An example is the 1955 Libya Model Deed of Concession which provided the following: "*This Concession shall, throughout the period of its validity, be construed in accordance with the Petroleum Law and Regulations in force at the time of granting of the Concession*"[78]; or the Algerian Model PSC, which provided for a "partial" freeze (revealing the modern tendency against unlimited freezing clauses[79]) in a way that refers to the applicable law: "(*t)he Contract shall be governed by and interpreted under the laws of Algeria in effect, in particular Law no. 86-14 of August 19, 1986, as modified and completed by Law 91-12 of September 7, 1991, Law no. 91-12 of December 4, 1991, as well as their implementation texts.*" [80][81] The latter prevents any change to said legislation and to its implementing texts (including any other regulations that would be in breach of the regime governing the EPC establishes) by the government or at least, should that happen, the HG would be in breach of the contract and have to compensate for any damage caused.[82]

[75] Bowman, p. 751.
[76] Ibid 751-775.
[77] Anderson, Owen, et al. *International Petroleum Law and Transactions*. Chapter "Host Government Contracts – Non-Fiscal Provisions", sub-chapter 6.2.9. "Stabilization and Adaptation", Rocky Mt. Min. L. Fdn, 2020, which refers to the arbitral award Amoco Int'l Fin. Corp. v. Gov't of the Islamic Rep. of Iran, 15 Iran-U.S. C.T.R. 189, Award No. 310-56-3 (July 14, 1987) for a definition of freezing clauses.
[78] Cl. 16 (2) of the Libyan Model Deed of Concession (Schedule 2 of the Libya Petroleum Law no. 25 of 1955), as cited by Bowman, p. 760.
[79] Anderson, Owen, et al. *International Petroleum Law and Transactions*. Chapter "Host Government Contracts – Non-Fiscal Provisions", sub-chapter 6.2.9. "Stabilization and Adaptation", Rocky Mt. Min. L. Fdn, 2020
[80] Algerian 2002 Model Production Sharing Contract art 34.1, as cited by Bowman, p.760.
[81] Marshall, Fiona, and Murphy, Deborah. "Climate Change and International Investment Agreements: Obstacles or Opportunities" – Draft for discussion, published by International Institute for Sustainable Development, 2009, pp.34-35, which explain that freezing clauses were included in the contract between the companies' consortium and HGs of the polemic Baku-Tsibilisi-Ceyhan *(BTC)* pipeline which crossed Azerbaijan, Georgia and Turkey.
[82] See award issued by sole arbitrator, Prof. René-Jean Dupuy, in the Texaco Calasiatic v Government of Libya case on 19 January 1977, under which Libya was ordered *restitutio in integrum* in favour of the company whose concessionary rights had been nationalized (YB Com Arb 1979, 177).

b) Exemption

The investor is granted the right to be exempted of certain obligations (e.g. taxes) for the term of the concession. A classic example is the Agreement of May 28th, 1901, between the Government of His Imperial Majesty the Shah of Persia and William D'Arcy, which provided for "(…) all products exported shall be free of all imposts and taxes during the term of the present concession. All material (…) shall enter Persia free of all taxes and custom-house duties."[83]

c) Risk Allocation

Through these clauses the risk is transferred to the HG or (or its NOC if the latter is the counterparty), and the HG/NOC shall be responsible for the fees and taxes arising from the contract or as a result of the HG's legislative powers, on behalf of the IOC. An example of the risk burden falling on the NOC is an Indonesian PSC (1968) [84], which required that Pertamina, Indonesia's NOC, "*to pay and hold the contractor harmless from all Indonesian taxes and exactions of any government authority. If for any reason the contractor pays any tax for which it is entitles to be held harmless, Pertamina agreed to reimburse the person paying the tax within 60 days*".[85]

d) Guarantee

A typical form of stabilization that can be found in some contracts is the type under which the HG guarantees the stability of contracts' terms and conditions. An example is the 2006 Ghana Deepwater Tano Petroleum Agreement which establishes the following:

"*As of the Effective Date of this Agreement and throughout its Term, 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 interpretation thereof) including, without limitation, the Petroleum Income*

[83] Article 7. For other examples see Bowman, pp. 754-756.
[84] As indicated by Bowman (p. 766) for arbitration awards enforcing risk allocation clauses see *e.g.,* Himpurna Cal. Energy Ltd. v. PT. (Persero) Perusahaan Listruik Negara, Ad-Hoc Award, 101, 132-135 (May 4, 1999); Mobil Cerro Negro, Ltd. v. Petroleos de Venez., Case No. 15416/JRF/CA, Final Award, 543 (Dec. 23, 2011); Phillips Petrol. Co. Venez. Ltd. et al. v. Petroleos de Venez., Case No. 16848/JRF/CA, Final Award, 205-217 (Sept. 17, 2012).
[85] Bowman, p. 764.

Tax Law, the Petroleum Law, the GNPC Law and those other laws, regulations and decrees that are applicable hereto."[86]

It is also common that this provision is accompanied by other stabilization clauses (of different types), included under other sections in the contract.

e) Non-opposability

In this case, the HG agrees that any change to the legislation applicable to the contract does not apply to the latter, which acquires an "enclave" status.[87] An example is the Trinidad & Tobago Model Deepwater Production Sharing Contract, as follows:

"*So much only of the [Petroleum] Act and the Regulations as are not excluded by the Contract shall apply to Contractor, and where any provision of the Act or the Regulations is modified by this Contract for purposes of this Contract, the Act and the Regulations shall be read and construed accordingly, and where there is any conflict or variance with reference to any matter between the provisions of this Contract and the Act or the Regulations, the provisions of this Contract shall prevail."*[88]

f) Legalization

Some HGs determine in the contract that it shall be enacted into law, changing its legal status and providing for a great protection namely against unilateral changes to it. An example is the Azerbaijan PSCs which determine the following:

"Upon approval by the Parliament of the Azerbaijan Republic of this Agreement, this Agreement shall constitute a law of the Azerbaijan Republic and shall take precedence over any other current or future law, decree or administrative order (or part thereof) of the Azerbaijan Republic which is inconsistent with or conflicts with this Agreement except as specifically otherwise provided in this Agreement."[89]

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[86] Petroleum Agreement among Government of the Republic of Ghana, Ghana National Petroleum Corp. and Tullow Ghana Limited, Sabre Oil and Gas Limited, and Kosmos Energy Ghana HC in respect of Deepwater Tano Contract Area art. 26.2, Mar. 10, 2006, http://www.tullowoil.com/Media/docs/default-source/5 sustainability/ petroleumagreementdeepwater_tano.pdf?sfvrsn-4.
[87] Bowman, p. 762.
[88] Trinidad & Tobago Production Sharing Contract of 2014 art. 38.2, https://extractiveshub.org/servefile/getFile/id/6861.
[89] Bowman, p. 768, which refers to the Agreement on the Exploration, Development and Production Sharing for the KaIrabakh Prospective Structure and Area Adjacent in the Azerbaijan Sector of the Caspian Sea art. 22.1 (Nov. 10, 1995).

g) Contractualization

In this case the opposite of legalization takes place, i.e., the law is incorporated in the contract, making it mandatory for the HG and governing the parties' relationship for the duration of the agreement. An example is Algeria, where the Hydrocarbons Law of 1986 determined a certain taxation scheme, which was then "contractualized" into the PSCs. [90]

h) Intangibility (or mutual consent required)

An intangibility clause determines that any change to the contract must obtain the HG and IOC (i.e., both parties), mutual consent. Whilst this may be understood as quite common in any agreement, in this context, it shall prevent any unilateral change of any legislation to operate automatically (even in case the counterparty is a NOC, it would mean that in order for any new rule to affect the contract, both NOC and investor would have to agree. [91]

As presented by Bowman[92] (2019), the 1937 Concession entered into by the Sultanate of Muscat and Oman with the Petroleum Concessions, Ltd., determined that "No alteration shall be made in the terms of this Agreement by either the Sultan or the Company except in the event of the Sultan and the Company jointly agreeing that [sic] is desirable in the interests of both parties to make certain alterations, deletions or additions to this agreement."

i) Anti-expropriation

Expropriation is one of the first risks that a private investor has in mind when investing in a foreign country and despite the possibility of a State waiving its right to expropriation[93], that usually translates to the State having to proceed with a compensation, should the expropriation take place. In other words, even in cases where the HG waives its right of expropriation, there may be situations (e.g. for public good[94]), that the HG may still take action against the private investor and nationalize its assets. This is a controversial discussion, the balance between the

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[90] Bowman, p. 769-770.
[91] See Amoco Int'l Fin. Corp. v. Iran, 15 Iran-U.S. **Cl.** Trib. Rep. 189 (1987) (Brower, J. Concuning Opinion) (discussing the legal effect of Article 21(2) of the Khemco Agreement, which provided: "Measures of any nature to annul, amend or modify the provisions of this Agreement shall only be made possible by the mutual consent of NPC and AMOCO.").
[92] Bowman, p. 762.
[93] See award confirming enforcement of anti-expropriation clauses: Texaco Overseas Petroleum Company v. The Government of the Libyan Arab Republic, Award, 19 January 1977, ILM 17 (1978), para 80.
[94] As agreed under the UN General Assembly Resolution 1803 on the Permanent Sovereignty of States over Natural Resources (1962).

sovereign powers of a HG to pursue public good and private interests, and therefore a contractual provision that would supersede such power is usually not accepted under customary international law[95] (with some exceptions[96]). In any case, a compensation would be due.

An example is the 1995 Gabon Exploration and Production Sharing Contract which under article 43.3 determines that "[*t*] *otal or partial nationalization or expropriation of the Contractor's rights entail just and equitable compensation in accordance with internationally accepted rules and principles*." [97]

j) Anti-stabilization nullification

According to Bowman (2019), although not a common provision, it is used to deter a HG from nullifying a stabilization provision[98] i.e., rendering it inoperative or unlawful, through the adoption of a new law or regulation. In other words, these clauses foresee the possibility of changes in the legal regime but determine that it shall not apply should it affect the "promises of stability made by the government or NOC".[99]

Quite interestingly, this type of provision was included in an EPC entered into between ENI East Africa S.p.A., and the Mozambican Government and ENH, for the Area 4 Offshore Rovuma Block, under which the parties agreed that "*[r]eferences in this EPC to applicable law [Mozambican law] are without prejudice to the rights of the Parties under Article 27.14 when such applicable law is Mozambican law*."[100] As analyzed by Bowman (2019)"(Article 27.14) contains a mandatory renegotiation provision (such as the type of clause explained under k) below) with a health-safety-environmental carve-out. This form of anti-stabilization

[95] Gehne, Katja, and Brillo, Romulo. "Stabilization Clauses in International Investment Law: Beyond Balancing and Fair and Equitable Treatment", Institute of Economic Law, Martin Luther University Halle-Wittenberg, 2014, pp. 17-19

[96] See the Aminoil case expropriation against Kwait, regarding the termination of the concession, where the arbitral tribunal declared that "*No doubt contractual limitations on the State's right to nationalize are juridically possible, but what that would involve would be a particularly serious undertaking which would have to be expressly stipulated for, and be within the regulations governing the conclusion of State contracts; and it is to be expected that it should cover only a relatively limited period*.", in *G*ov'tofKuwaitv.An.Indep.OilCo.(AMINOIL)FinalAward(Mar.24,1982).

[97] Exploration and Production Sharing Contract between Republic of Gabon and Vaalco Gabon, Inc. art. 43.1, July 7, 1995, available in https://www.resourcecontracts.org/contract/ocds-591adf-5358845209/view#/pdf.

[98] Bowman, p. 772.

[99] Ibid.

[100] Article 31.3. EPC available in http://www.inp.gov.mz/pt/Pesquisa-Producao/Areas-de-Pesquisa-e-Producao-Actuais .

nullification provision specifically shields the renegotiation provision from application of the HG's law that could render it inoperative or nullify its terms."[101]

k) Renegotiation (economic equilibrium)

Following all the types described above which, one way or another, aim to freeze a legal regime or prevent HG's actions which adversely impact the contract (imposing new obligations or distorting the economical outcome), history has proven that the HG still continues to challenge these clauses and what these protect[102]. In many cases this leads to arbitration which can prove to be a burdensome and expensive process (despite some final favorable decisions on behalf of the investors as discussed above and being preferrable then local courts.

That said, the renegotiations clauses (which are understood as the "modern" form of stabilization[103]) intend to "stabilize the value of investment by adjusting contract terms in response to adverse government actions".[104] Better said, these clauses do not literally stabilize the contract as they determine that "the HG may change the law, including taxes, as it may wish, but a change that fundamentally changes the economics of a HG contract will trigger a renegotiation to preserve the original economics".[105] The latter is commonly understood as an "economic equilibrium clause".

Not all investors see in this clause the perfect outcome. It may be that certain hesitation has to do with the fact that they consider that they may be making the contractual relationship unpredictable, increasing transaction costs or making the contract non-mandatory. [106]

For that reason, Bowman (2019) establishes that to achieve the protection desired by the IOC, a renegotiation clause should provide for the following:

"(1) a triggering event that adversely affects the investor's economic benefits, economic equilibrium, or rights and obligations; (2) a mandatory procedure requiring renegotiation to modify the parties' contract in response to the triggering event; (3) a statement of the end result to be achieved by this procedure, i.e., an agreement to restore investor's economic benefits,

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[101] Bowman, p. 772.
[102] See Chapter "Host Government Contracts – Non-Fiscal Provisions", in International Petroleum Law and Transactions (Rocky Mt. Min. L. Fdn., (2020), sub-chapter 6.2.9. (Stabilization and Adaptation).
[103] Ibid.
[104] Bowman, p. 766.
[105] Anderson, Owen, et al. *International Petroleum Law and Transactions*. Chapter "Host Government Contracts – Non-Fiscal Provisions", sub-chapter 6.2.9. "Stabilization and Adaptation", Rocky Mt. Min. L. Fdn, 2020.
[106] As discussed by Gotanda, John. "Renegotiation and adaptation clauses in Investment Contracts*", revisited,* Vanderbilt Journal of Transnational La*w,* Volume 36, 2003, pp. 1461 - 1473.

economic equilibrium, or rights and obligations; and (4) a provision calling for recourse to international arbitration when the parties cannot reach agreement on the appropriate changes to their contract."[107]

An example of a well-drafted renegotiation clause is included in the EPC entered into between the Nigerian National Petroleum Corporation and Esso Exploration and Production Nigeria Limited (1993), as follows:

"In the event that any enactment of or change in the laws or regulations of Nigeria or any rules, procedures, guidelines, instructions, directives or policies, pertaining to the Contract introduced by any Government department or Government parastatals or agencies occurs subsequent to the Effective Date of this Contract which materially and adversely affects the rights and obligations or the economic benefits of the CONTRACTOR, the Parties shall use their best efforts to agree to such modifications to this Contract as will compensate for the effect of such changes. If the Parties fail to agree on such modifications within a period of ninety (90) days following the date on which the change in question took effect, the matter shall thereafter be referred at the option of either Party to arbitration under Article 21 thereof. Following [the] arbitrator's determination, this Contract shall be deemed forthwith modified in accordance with that determination."[108]

The guidelines laid out by Bowman (2019) are not the easiest to achieve and when negotiating a contract, the IOCs and HGs often fail to specify the type of relief wished or even that it only determines that the parties shall renegotiate but not imposing a duty of achieving a final result, often leading to prolonged and failed negotiations. [109]

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[107] Bowman, p. 766.

[108] Production Sharing Contract between Nigerian National Petroleum Corporation and Esso Exploration and Production Nigeria Limited cl. 19.2 (May 21, 1993). Bowman adds in footnote 77 that "*The arbitral tribunal in Esso Expl. and Prod. Nigeria Ltd. and Shell Nigeria Expl. and Prod. Co. v. Nigerian Nat'l Petrol. Corp., Final Award 370, at 106 (Oct. 24, 2011), determined that Claimants proved "they are entitled to relief under the stabilization clause [Clause 19.2] to prevent future overlifting by NNPC based on the changes in the FIRS' [the Nigerian tax authority's] policies." They also found that all four requirements under Clause 19.2 had been met, and ordered modification of the PSC to add a provision at Clause 8.1 (i) to allocate Profit Oil to Contractor in the future to ensure its compensation in the event that the change in FIRS' policy results in a future difference between Tax Oil as it existed on the effective date of the PSC and Tax Oil resulting from application of the policy as it exists as of the date of the Final Award.*

[109] See Chapter "Host Government Contracts – Non-Fiscal Provisions", in International Petroleum Law and Transactions (Rocky Mt. Min. L. Fdn., (2020), sub-chapter 6.2.9. (Stabilization and Adaptation).

As a final note under renegotiations clauses, there is a certain type of clause that can be mistaken with a stabilization clause and that's why it is worth referring in this section, but it has some important differences. The literature classifies it as an "adaptation clause".

An adaptation clause is included in the EPC, but it usually addresses matters external to the parties' agreement, namely "changes in circumstances" – very similar to hardship clauses. As referred by Bernardini (2008), the circumstances that trigger the review of the contract are "beyond the control of the parties (and must) cause a substantial modification of the economic equilibrium of the contract. It may be invoked by the party whose obligations have thus become more onerous, its objective being to protect the aggrieved party, be it the State (or the State entity) or the investor."[110] Also, adaptation may be triggered, in the parties' silence, by the law governing the agreement[111].

To exemplify what an adaptation clause is, we take the example of the Liberia Model PSA (2009), which establishes that:

"(if) changes in circumstances from those existing at the effective date … have a significant material effect on the terms of this contract, (then) either NOCAL or the Contractor shall (…) effect such changes in or clarifications to this Contract that they mutually agree are necessary (…) to meet in good faith to make the necessary revisions and adjustments (…)".[112]

Having concluded the exposition above (without prejudice of other hybrid types of stabilization clauses that may exist), as discussed previously under section 3.1., these stabilization clauses must be supported by an applicable law that does not limit its effects (and internationalizes the contract) and also by allowing for an international arbitration (together, the three pillars of security).[113] These other two pillars are discussed in detail under the two next sections. [114]

3.1.2. Governing law

As stated by Maniruzzaman (2005), "a practitioner also needs to consider some hedging devices, namely (i) the provision for international arbitration, and (ii) the application of a national law or legal rules or principles, or the provision for other safeguard measures, even if

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[110] Bernardini, p. 99.
[111] In civil law regimes, this principle is, as a general rule, enshrined in the civil code.
[112] Anderson, Owen, et al. *International Petroleum Law and Transactions*. Chapter "Host Government Contracts – Non-Fiscal Provisions", sub-chapter 6.2.9. "Stabilization and Adaptation", Rocky Mt. Min. L. Fdn, 2020.
[113] Bowman, p. 748.
[114] Cameron, P. "Stabilization and the impact of changing patterns of energy investment", J.W.E.L.B. Vol. 10., 5, October 2017, pp. 389–403

the law of the host state is to apply to the contract, that makes it difficult for the state party to easily nullify the stabilisation clause."[115]

Following the discussion above, along with a stabilization clause it is of the utmost importance that IOCs pay attention to the applicable law and possibility of resorting to arbitration.[116]

In relation to international arbitration (further analyzed under the next section), the conclusion is that it is an industry practice to allow for international arbitration in EPCs[117]. That is a benefit to the IOCs. Differently, the law applicable to the merits of the cause, or procedural rules (and combining it with the seat of arbitration, where the parties may resort to local courts assistance and should guarantee that these do not hinder the arbitral process) is far from unanimous consensus.[118]

That said, the main concern lies on the governing law of the agreements, giving the rigidness commonly imposed by HGs that national law must apply at all times. As stated by Brown, "it follows that in a situation in which the dominant concern of the foreign investor is with the legislative competence of the State, attention, in the first instance, at least, must focus on questions concerned with the proper law of the contract."[119]

Bowman (2019) explains that besides the optimal solution where international law or the IOC's home country law solely applies (which is very rare), there are usually two paths: 1) either the HG's law applies along with extra-state laws (e.g. international principles or law), or 2) restrict the application of HG's laws – or a third option which is pursuing both at the same time.[120]

The first option has been pacifically accepted [121], even in case where the parties have not identified an applicable law[122], with of other sources of law being: i) principles of law common

[115] Maniruzzaman, A. F. M. "Some Reflections on Stabilisation Techniques in International Petroleum, Gas and Mineral Agreements", International Energy Law and Taxation Review, 2005, p. 100.
[116] Bowman, p. 775.
[117] Ortino, F. "*Latest developments in investor — state dispute",* IIA Monitor n.' 1 International Investment Agreements, United Nations Conference on Trade and Development, Geneva, 2008.
Also Weiler T. *"International Investment Law and arbitration, Leading cases from ICSID, NAFTA, Bilateral Treaties and Customary International Law",* Cameron May Ltd. International Law and Policy, 2005.
[118] Anderson, Owen, et al. *International Petroleum Law and Transactions*. Chapter "Dispute Resolution – Investment and Commercial", Rocky Mt. Min. L. Fdn, 2020.
[119] Brown, Roland. "Choice of Law Provisions in Concession and Related Contracts", 39 Modern L. Rev. 625, 1976, p. 633.
[120] Bowman, p. 777.
[121] As indicated by Bowman under footnote 108, see Liamco Award - Libyan Am. Oil Co. (LIAMCO) v. Gov't of the Libyan Arab Republic, Award (Apr. 12, 1977), VI Y.B. Com. Arb. 89, 105-06 (1977) - and Convention on the Settlement of Investment Disputes between States and Nationals of Other States art. 42(1), Oct. 17, 1966, 575 U.N.T.S. 159 ("The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties.").
[122] As indicated by Bowman under footnote 109, See Aramco Final Award (Saudi Arabia v. Arabian An. Oil Co. (ARAMCO), Final Award (Aug. 23, 1958), 27 I.L.R. 117, 168 (1958), which established that "The Arbitration Tribunal holds, therefore, that it has to ascertain the law to be applied to the merits according to the indications

to the home countries of the HG and IOCs; ii) law of a third country; or iii) international law[123], including general principles of law[124].[125]

As for the second route indicated by Bowman (2019), who so well summarizes that "the investor can negotiate to limit or reduce application of that law by insisting on one or more of the stabilization devices (...) when confronted by the host government's demand that its law govern their contractual relationship. In this way, the investor can accede to the government's demand, but subject to inclusion of provisions in the contract that: (1) "freeze" the law by incorporation of a specific set of laws; (2) require the host government's law to be consistent with the terms of the investment contract; (3) require mutual written agreement to amend, modify, supplement, or vary the contract; (4) "contractualize" key provisions of the law; (...) 6) limit the effect of changes in the law by requiring renegotiation to restore the original value of the contractual relationship (…)."[126]

In the case of Mozambique, only in an EPC from 2000[127] a reference to international law exists (complementing Mozambican law) but since then all EPCs are subject exclusively to domestic law.

Whether one route or the other is taken, it is clear that national laws continue to play an important role and HGs are not flexible in this regard. That said, IOCs shall continue to make sure that any dispute shall be resolved through arbitration, as further explained below.

3.1.3. Arbitration

By way of introduction and relevant to the conclusions reached in this study, the next subsection provides a summary of the legal framework of arbitration, as a risk mitigation tool, under Mozambican law.

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given by the Parties and, failing adequate indications of the Parties, to determine this law taking all the circumstances of the case into consideration."

[123] International law to be understood in accordance with article 38 (1) of the Statute of the International Court of Justice.

[124] According to Bowman (pp. 778-81), includes principles such as "duty of good faith, *pacta sunt servanda*, unjust enrichment, estoppel and acquiescence, respect for acquired rights, obligation to repair wrong, principle of res judicata, passage of time as a defense to a claim, no one may be judge in his own case, non-aggravation of dispute before tribunal."

[125] The Association of International Petroleum Negotiators (AIPN) 2017 Model Dispute Resolution Agreement (available in https://www.aipn.org) suggests as the governing law "the substantive law of [designate state/country], to the extent consistent with international law, as defined in Article 38 of the Statute of the International Court of Justice, and to the extent the laws of [designate state/country] are not consistent with international law, then general principles of international law shall prevail."

[126] Bowman, p. 782.

[127] See Pande Temane PSA dated 26 October 2000, Article 35.

Arbitral tribunals are expressly foreseen in the CRM as being side-by-side with administrative courts, labor courts, tax courts, customs courts, admiralty courts and community courts.[128]

As in other countries favorable to arbitration, Mozambique is party to key international treaties and there are several internal sources of legislation regulating the possibility of choosing arbitration (either domestic or international) and adopting many of the solutions generally accepted as best practices.

On 11 June 1998, Mozambique ratified the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), which entered into force on 9 September 1998,[129] and that entails two different important consequences. On the one hand, Mozambican courts must recognize and enforce arbitration agreements that meet the necessary requirements under article II of the New York Convention. If legal proceedings concerning a matter subject to such an arbitration agreement are brought before Mozambican courts, the court, at the request of one of the parties, shall decline jurisdiction, unless it finds, on a prima facie judgment, that the arbitration agreement is null and void, inoperative or incapable of being performed. This 'negative effect' of the arbitration agreement is also reflected, in similar terms, in article 12 of the Mozambican Arbitration, Conciliation and Mediation Law (Law No. 11/99 of 8 July 1999, the Mozambican Arbitration Law).

On the other hand, subject to the conditions laid down in the New York Convention, Mozambican courts must recognize and enforce arbitral awards rendered in other New York Convention contracting states and, conversely, arbitral awards rendered in Mozambique may also be enforced in other New York Convention contracting states. In this respect, it should be noted that Mozambique, under the terms permitted by the New York Convention, made a reciprocity reservation, in the sense that it reserves the right to apply the Convention only when arbitral awards have been rendered in the territory of another contracting state.

This is also a reason why choosing the seat of arbitration is so important [130]as it will be the place where the award is deemed to have been made and should that country not be a signatory to the New York Convention, that would not allow the Mozambican courts to enforce it.

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[128] Article 223(2) of the CRM.

[129] See footnote 63 above.

[130] Other reasons include: The law of the seat determines the extent to which the courts can intervene in the arbitral process; also the law of the seat will determine the grounds on which an award can be challenged before local courts, and the IOCs wish to guarantee that local courts have limited power to interfere, as well as limited grounds

The enforcement of foreign arbitral awards rendered in New York Convention contracting states requires prior recognition proceedings subject to the New York Convention rules and limits and also to article 1094 of the Mozambican Civil Code Procedure (approved by Decree-Law No. 44.129 of 28 December 1961, as amended by Decree-Law No. 1/2009 of 24 April 2009). These proceedings take place before the Supreme Court and, at least in accordance with the law, are very expedited.

Second, and in respect of international investment protection law, Mozambique is a party to the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) and has signed 27 bilateral investment treaties (BITs), 20 of which are currently in force[131].

As a consequence of Mozambique being a party to the ICSID Convention, it may be possible for qualified foreign investors to submit to ICSID arbitration certain disputes, provided that there is consent by the Mozambican state, among other requisites.

In general terms, such consent may arise either from: a) one of the BITs in force; b) an arbitration agreement contained in contracts with the Mozambican state (or with other state entities, subject to additional requirements under the ICSID Convention); or c) Mozambican internal law, especially Investment Law (Law No. 3/93 of June 24 1993, regulated by Decree-Law No. 43/2009 of August 21 2009 and as amended by Decree-Law No. 48/2013 of September 13 2013), which, however, do not apply to the oil, gas and mining sectors (nevertheless important for all other sectors and specially for nationals of non-contracting states).[132]

for challenge, and can have an effective supportive role – besides the very important possibility of enforcing such award in a foreign state.

[131] It is of the utmost importance to be aware of the BITs in force. The recently rendered *Oded Besserglik v Mozambique* award (available in https://www.italaw.com/sites/default/files/case-documents/italaw10925.pdf), a case brought by a South African national, Mr Besserglik, against Mozambique regarding an investment in a couple of entities in Mozambique, resulted in many years of discussions until the tribunal concluded that the treaty invoked by the investor was not in force.

[132] In that case, according to Article 69 of the 2014 Petroleum Law (general regime), arbitration between the Mozambican state and foreign investors subject to the 2014 Petroleum Law may be governed by the following laws: a) the Mozambican Arbitration Law; b) the ICSID Convention and Rules; c) the rules fixed in the Regulation on Additional Facility approved on 27 September 1978 by the ICSID, if the foreign entity does not fulfil the conditions of nationality foreseen in article 26 of the ICSID Convention; and d) the rules of other international instances of recognised reputation in accordance with the agreement of the parties in the concession agreements foreseen in the Petroleum Law. In this case, it is necessary for an express specification of the conditions for its implementation, including the way of appointing the arbitrators and the deadline to issue an award.

Mozambique's network of BITs in force covers most of the states from where major investment flows come, directly or indirectly, including, in particular, the United States, China, India, United Kingdom, France, Germany, Italy, Mauritius, Netherlands and Portugal. Investors may consider the structuring of their investments in Mozambique so as to attract and maximize the protection afforded by these treaties.

As referred previously, most of these BITs contain, with slight variations, the usual standards of protection, including fair and equitable treatment, compensation for expropriation, national and most favored nation treatment and non-discrimination. The treaties also generally include Mozambique's consent to arbitrate investment disputes with protected investors arising out of the treaties typically offering the alternative between ICSID arbitration or ad hoc arbitration (frequently under the UNCITRAL Rules of Arbitration).

3.2 Risk Mitigating tools in Mozambican EPCs

Having considered the three pillars of security and understanding how these complement each other, the question remains on how those risk mitigation tools are addressed in the Mozambican EPCs, specially taking into account the legislative changes that occurred in the past 40 years (since the first petroleum law was approved in 1981)[133].

The analysis below will tackle several EPCs over time and analyze the risk mitigating tools that the investors managed to secure under each contract. It starts with the EPC executed in 2000, the only contract that is in force and that was approved under the legal regime established by the 1981 Petroleum Activities Law. All other EPCs are more recent and are governed by either the 2001 or the 2014 Petroleum Law (and respective Regulations), both more sophisticated legal diplomas than the 1981 Petroleum Activities Law, especially on risk mitigating tools.

a) Pre-2001

As explained, the Pande Temane EPC was executed under the legal regime approved by the 1981 Petroleum Activities Law. This law did not regulate or introduce the concept of stabilization clauses, only establishing that Mozambican law would apply to the respective contract and allowing for arbitration as a means of dispute resolution.

[133] For a legislative chronology please refer to section 2.1.1.

However, many stabilization clauses are found in this contract, as follows:

a) Clause 11.20.a) provides for a renegotiation clause, similar to that included in the EPC entered into between ENI East Africa S.p.A., and the Mozambican Government and ENH, for the Area 4 Offshore Rovuma block.
b) Article 13.2 provides for a stabilization clause (exemption clause) under which the investor is exempt from various taxes (not all) in Mozambique.
c) Article 31.3 determined that "should any change to the legislation affect the economic value that the contractor obtained from the contract, then the parties shall negotiate an amendment to restore that balance" – establishing an economic equilibrium clause, which does not freeze the legal regime but allows for a review of the contract.
d) Article 31.4 carves out any legislative powers over HSE matters from the obligation described above under clause 31.3, that way guaranteeing that the HG can still enact laws that may regulate this issue (and as long as it does not discriminate the investor – introducing herein a vague term).

As for the governing law and dispute resolution mechanism, Article 34 allows for arbitration under ICC rules and having as seat of arbitration London, England, while Article 35 determines that the contract is governed by Mozambican law and applicable principles of International Law.

b) 2001-2010 EPCs

With the enactment of the 2001 Petroleum Law and 2004 Petroleum Law Regulations, the first established under article 26 that all contracts in force executed under the previous legislation would be governed by the new legislation as long as it would not adversely affect the terms agreed under the contracts.

This is a stabilization clause classified as a "non-opposability clause" and in this case, established in the law and applicable to all EPCs. This allows that contracts signed prior to this law continue to be in force and are not affected by the new legislation (such as the 2000 Pande Temane EPC).

The concession contracts entered into between 2004 and 2010 under the 2001 Petroleum Law and 2004 Petroleum Law Regulations have an equilibrium clause similar to that of the 2000 Pande Temane EPC, which determines that should any change to the legislation affect the economic value that the contractor obtained from the contract, then the parties shall negotiate an amendment to restore that balance (an economic equilibrium clause). The contracts also had an exemption of certain tax provisions and anti-stabilization nullification to protect the renegotiation clauses. [134]

In relation to the governing law and means of dispute resolution most of the EPCs approved during this period establish that either ICSID[135], ICC or UNCITRAL[136] rules apply and the seat of arbitration is usually out of Mozambique[137] with domestic law as the governing law.[138]

The Mozambican Government and Sasol were more "creative" in the EPC entered into for blocks 16 &19, dated of 1 June 2005[139], under which the following stabilization clauses were approved:

a) Clause 9.2. provides for a renegotiation clause, similar to that included in the EPC approved for Area 4 Offshore Rovuma Block, identified above.
b) Article 11.2 provides for a stabilization clause (exemption type), under which the investor is exempt from various taxes in Mozambique.
c) Article 27.12.a), determines that the expropriation or nationalization of assets, rights or interests or any other assets is not allowed (introducing an anti-expropriation stabilization clause).[140]
d) Article 27.12.c), determines that any change in the legislation applicable to the contract may only apply whenever it is not contrary to the contract. (approving a "non-opposability" stabilization clause).

[134] E.g. EPC for Area 1 Offshore Rovuma Basin, dated of 2006, entered into between Anadarko, MIREME and ENH (clause 11.2 – tax exemption and clause 27.13 – economic equilibrium clause);
See also EPC for Area 4 Offshore Rovuma Basin, dated of December 2006, entered into between ENI East Africa S.p.A. and MIREME and ENH (Clause 11.2 - tax exemption and clause 27.14 – economic equilibrium clause);
In the case of the EPC for Area A Onshore, dated of 21 September 2010, there is a non-opposability clause (clause 27.11.c), along with an economic equilibrium clause (clause 27.13), besides the typical tax exemption (clause 11.2), and the anti-stabilization nullification clause (clause 31.3), as well as anti-expropriation clause (clause 27.11.a).
[135] EPC for Area 1 Offshore Rovuma Basin; EPC for Area 4 Offshore Rovuma Basin; EPC for Area Onshore Rovuma Basin, dated of 18 April 2007, entered into between Artumas, MIREME and ENH
[136] EPC for Area 1 Offshore Rovuma Basin
[137] Usually London, England, or Geneve, Switzerland or Hague, the Netherlands or also Oslo, Norway.
[138] Clause 30.3.b) of the EPC for Area 1 Offshore Rovuma Basin; same clause number under the EPC for Area 4 Offshore Rovuma Basin – applying Mozambican law to the merits of the arbitration.
[139] Similar to the EPC for Area Onshore Rovuma Basin, dated of 18 April 2007, entered into between Artumas, MIREME and ENH, which has an anti-expropriation clause as well as a non-opposability clause.
[140] Nevertheless, not determining any formula for calculation of compensation scheme should that take place.

As for the governing law and dispute resolution, Article 30.3 allows for arbitration under UNCITRAL rules and having as seat of arbitration Geneve, Switzerland, also determining that the merits of the cause will be decided in accordance with Mozambican law, as Article 31 determines that the EPC is governed by Mozambican law.

c) 2010-2015 EPCs

The 2014 Petroleum Law establishes under article 68 that all contracts in force executed under the previous legislation would be governed by the new legislation as long as it would not adversely affect the terms agreed under the contracts, replicating the same legal provision from the previous petroleum law and guaranteeing some sort of stabilization for the contracts in force.

Also, Law 27/2014 of 23 September (which approved the Petroleum Tax Law in force) allows under Article 40 for a tax stabilization for a period of 10 years, making it applicable to all EPCs.

An important clarification is that this regime does not fully apply to the concessions granted for the exploration of the major discoveries of gas fields in the Rovuma Basin and the LNG project (namely Area 1 and 4, both EPCs executed in 2006).

Given the importance of these projects to the country, the IOCs were able to push for a special regime and which was enacted just for these areas (approved by Decree-Law 2/2014, of 2 December 2014 – the Areas 1 and 4 Decree-Law) – with the 2014 Petroleum Law and 2015 Petroleum Law Regulations applying subsidiarily. In 2014 the projects hadn’t yet taken off and therefore a transition to a new legal regime was carried out without any major obstacles.

Under the Areas 1 and 4 Decree-Law, a stabilization regime was approved under Article 26, which has no equal in any other project or legislation in Mozambique. This provision freezes the tax regime for the period of the respective enterprise, unless these do not represent an additional burden of more than 5 million USD in a given year, above which these should not apply. In any case it also imposes a duty on the HG to compensate the concessionaires should there be any loss resulting from the unilateral legislative activity (implementing an economic equilibrium clause).

d) 2016 - today EPCs

In 2016, with the approval of the EPC Model, a similar provision as that agreed under the 2014 Petroleum Tax Law can be found, which includes a template provision for tax stabilization under article 11.9, for a period of 10 years, subject to negotiation.

Curiously, the EPC Model does not address all stabilization clauses usually approved under other Mozambican EPCs[141]. That leaves us to deduce that the parties will have to discuss and agree on a case-by-case basis (probably taking into account previous EPCs – as results from the analysis above these do not differ much from one another).

In relation to the EPCs entered into in 2018[142] , under the 2014 and 2015 legal regime, it is worth noting that:

i) The EPCs followed the template EPC Model and adopted a tax stabilization regime for a period of 10 years or shorter period (such as 5 years – differently from the previous EPCs which did not establish a deadline – continuing in force throughout the term of the contract) but renewable.

ii) Under Article 11.8 the EPC includes a reference to the 2014 Petroleum Tax Law and indicating that this law and the tax stabilization period agreed under the 2014 Petroleum Tax Law applies to the EPC. This is a "contractualization" stabilization clause, as explained above under 3.1.1. g)[143].

iii) The anti-expropriation clauses have been removed from most contracts, along with "non-opposability" clauses or the "economic equilibrium" clauses.

As for the governing law and dispute resolution mechanisms, the 2018 EPCs continue to implement arbitration procedures, subject to UNCITRAL or other international set of rules, with the seat of the arbitration in a European city and with domestic law as the governing law. [144]

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[141] E.g. Pande Temane EPC dated 26 October 2000 (article 31.3) or the EPC for blocks 3 and 6 dated 10 October 2008 (article 27.14).

[142] E.g. for blocks A5-A, A5-B, PT5-C, Z5-C, Z5-D.

[143] Article 11.8 of the EPC for Area PT5-C, dated of 17 October 2018, entered between SASOL, MIREME and ENH. See also section 3.1.1. above for the "contractualization" clause.

[144] EPC for Area PT5-C, dated of 17 October 2018, entered into between SASOL, MIREME and ENH.

e) Preliminary Considerations

The study above leads to the conclusion that Mozambique has always distanced itself from the most typical and classical types of stabilization clauses (such as rigid freezing clauses that were so common in the past). This makes sense given its role as a new player in the industry and which has clearly learned from the experience of other countries.

The enactment of an EPC Model that poorly provides for stabilization clauses like those found in earlier EPCs (especially those approved between 2001 and 2010) can be understood in two ways: either the Mozambican Government wishes to limit the risk mitigation tools available to IOCs or they wish to leave room for negotiations on a case-by-case basis and taking into account each project's particularities. That assessment will have to be made after new EPCs are approved and to understand whether the approach taken into the 2018 EPCs will remain the same (with fewer stabilization clauses than the EPCs from 2001-2010 and specially the 2005 EPC for blocks 16 &19).

This review of Mozambique's legislation and EPCs provisions from 2000 to today shows that (and taking into account Bowman's recommendations[145]): the Mozambican legal framework is quite modernized and robust when it comes to availability to resort to international arbitration (one of the three pillars of security). As for governing law, it follows the global tendency, imposing domestic law as mandatory governing law and leaving it to the arbitral tribunals to balance the IOCs interests *versus* the HG's pretensions in these international forums.

As a general remark, much more can be done to properly safeguard both parties' interests (and avoiding dragging in uncertainty and arbitration procedures), such as addressing in more detail how to properly deal with expropriation or the renegotiation mechanism whenever the economic equilibrium is affected.

IV. COMPARATIVE ANALYSIS OF STABILIZATION PROVISIONS

4.1 General overview

Mozambique entered the international petroleum panorama later than many other African countries. This section discusses stabilization provisions used by more experienced African nations, such as Angola and Ghana and also looks at Tanzania, a relative newcomer.

[145] Bowman, p. 786.

By unveiling the existing stabilization clauses under the respective legal regimes of these three countries it is intended to compare them and understand whether lessons are to be learnt that should be adopted by the Mozambican Government.

4.2 Republic of Angola

Angola is Africa's second largest oil producer (behind Nigeria), reaching a production of 1,637 barrels per day (2017)[146] and an economy largely dependent on oil exports.[147] It is, nevertheless and due to the drop in oil prices, also focusing in LNG, having the first exportation from Soyo (Angola) taken place in 2013.[148]

The Angolan PSA model only provides for a stabilization clause in the following terms:

"Without prejudice to other rights and obligations between the Parties under the contract, in the event that, any law, decree or regulation in force in the Republic of Angola is approved after signing and adversely affects the obligations, rights and benefits established herein, the Parties must agree, in order to submit to the competent authorities for approval, amendments to the contract that allow for the recovery of such rights, obligations and benefits". [149]

The stabilization clause allows for a renegotiation (for restoring equilibrium), not even discussing a compensation obligation.

Also, under the Law on the Taxation of Petroleum Activities, the executive, with legislative authorization from the Angolan Parliament, can grant exemptions related to taxes, reduction of the tax rate or any other changes to the applicable rules, when justified for economic reasons.[150]

In turn, the PSA Model determines that the arbitration can be carried out under UNCITRAL Rules, with Angolan Law as applicable law and Luanda, Angola, as the seat of arbitration. [151]

Overall, and proving to be a major player in the petroleum industry (with the stated-owned company Sonangol active in the development of fields), in relation to risk mitigating measures particularly in the form of stabilization clauses, it is not a very investor friendly environment.

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[146] According to OPEC Monthly Report, 18 January 2018.
[147] Economic National Plan of Angola 2018-2022.
[148] Global Legal Group. "Oil & Gas Regulation 2021 | Angola | ICLG." International Comparative Legal Guides International Business Reports, 2018, p. 20
[149] Article 38.2 of the Angolan PSA Model.
[150] Article 11.3 of Law 13/04, of 24 December.
[151] Article 42 of the Angolan PSA Model.

4.3 Republic of Tanzania

Tanzania does not produce crude oil, and the country has not had a recent commercial oil discovery. However, it is a small natural gas producer, and the country is planning to become an exporter of LNG in the future. This follows several natural gas discoveries made in offshore southern Tanzania since 2010, large enough to support a LNG plant.[152]

In turn, Tanzania has adopted a different approach towards stabilization clauses. Neither the 2008 Model PSA or the 2013 Model PSA[153] provide for any clause of fiscal or legislative stabilization.[154] The 2004 model did, and under Article 30[155] of the PSA entered into between Tanzania Government and ABC Oil Company, includes an economic equilibrium renegotiation clause, as follows:

"If at any time or from time to time there should be a change in legislation or regulations which materially affects the commercial and fiscal benefits afforded by the Contractor under this Contract, the Parties will consult each other and shall agree to such amendments to this Contract as are necessary to restore as near as practicable such commercial benefits which existed under the Contract as of the Effective Date."

In relation to the governing law and arbitration clauses, all PSA Models determine that the Law of the Republic of Tanzania applies, as well as international arbitration rules (ICC or ICSID), but determining in some cases Dar-Es-Salaam as the seat of arbitration (e.g. 2008 and 2013 PSA Model).

Tanzania went through a reform in the 2000s, aiming at increasing control of natural resources to the state and Tanzanian citizens and obtain more benefits, like any other rich-resourced country, however, the State is deemed as imposing excessive control and regulation, and to create uncertainty and limited security for private investors[156] - adding to it the fact that stabilization clauses haven't been a practice nor more sophisticated arbitration clauses, and therefore failing to provide such important tool to the investors.

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[152] See https://www.eia.gov/international/analysis/country/TZA .
[153] Available in: https://extractiveshub.org/servefile/getFile/id/1822 .
[154] According to Moore, Christopher Robertson Kinley, et al. "The Effect of Non-Fiscal Clauses in Host Government Instruments on the Fair Market Value of Upstream Opportunities." OUP Academic, 18 Nov. 2019, pp. 480–501, this is not beneficial as the authors conclude that "The presence or absence of some form of fiscal stabilization is an important characteristic of HGIs and its presence should command a premium."
[155] Available in: https://www.resourcecontracts.org/contract/ocds-591adf-9558611436/download/pdf .
[156] Fjeldstad, Odd-Helge, et al. "Governing Petroleum Resources, Prospects and Challenges for Tanzania", CMI, 2019

4.4 Republic of Ghana

Ghana is a small oil and natural gas producer, but these are both expected to increase within the next five years with the start of new offshore projects.[157] Ghana exports its crude oil production to international markets, and the country's natural gas production is used to fuel its domestic power plants.[158]

Having analyzed the Ghana's Model Petroleum Agreement[159], several stability provisions have been found. First, tax provisions, e.g. Article 12.1, which determines that "*No tax, duty, fee or other impost shall be imposed by the State or any Political Subdivision on Contractor, its Subcontractors or its Affiliates in respect of activities related to Petroleum Operations and to the sale and export of Petroleum other than as provided in this Article*."

In turn, Article 12.9 also states: "*It is the intent of the Parties that payments by Contractor of tax levied by the Petroleum Income Tax Law qualify as creditable against Contractor's United States federal income tax liability. Should the United States Internal Revenue Service determine that the Petroleum Income Tax Law does not impose a creditable tax, the Parties agree to negotiate in good faith with a view to establishing a creditable tax on the precondition that no adverse effect should occur to the economic rights of GNPC or the State.*"

The stability provision in Article 12.1 is for all practical purposes a "freezing" clause, while Article 12.9 stands as an "economic equilibrium" clause, with a high risk of resulting in interpretation disputes between HG and investors about what is a "credible tax". [160]

There is also article 26.2 of the Model Petroleum Agreement of Ghana, as follows:

"As of the Effective Date of this Agreement and throughout its Term, 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

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[157] "Recent discoveries appear to indicate oil and gas resources stretch across the country's shoreline (...). There currently are about 11 petroleum agreements between the Government of Ghana, GNPC and petroleum operators signifying the increased interest in Ghana's oil industry." In https://www.trade.gov/knowledge-product/ghana-oil-and-gas .

[158] See https://www.eia.gov/international/overview/country/GHA.

[159] Ghana Model Petroleum Contract, available in: https://www.extractiveshub.org/resource/view/id/2875 .

[160] Amoako-Tuffour, Joe, and Owusu-Ayim, Joyce. "An Evaluation of Ghana's Petroleum Fiscal Regime", Ghana Policv Journal, December 2010, pp. 26-27.

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. This Agreement and the rights and obligations specified herein may not be modified, amended, altered or supplemented except upon the execution and delivery of a written agreement executed by the Parties. 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, to the extent sought to be applied to this Agreement, constitute a breach of this Agreement by the State."

This clause has quite a comprehensive scope[161], and it includes both a "guarantee" clause (by way of guaranteeing the stability of the terms and conditions), and also an "intangibility" clause (as it determines that any change to the contract must obtain both parties mutual consent), besides the fact that HG action may constitute a breach and therefore, result in a compensation in favour of the investor.

As for the arbitration, it provides for under Article 24.5 for UNCITRAL rules and that it shall take place in Stockholm, Sweden, "under the auspices of the Arbitration Institute of the Stockholm Chamber of Commerce[162]" and as applicable law, under Article 26.1, "(…) *shall be governed by and construes in accordance with the laws of the Republic of Ghana consistent with. Such rules of international law as may be applicable, including rules and principles as have been applied by international tribunals*".

Furthermore, under Article 26.3. (under section "Miscellaneous): *"Where a Party considers that a significant change in the circumstances prevailing at the time the Agreement was entered into, has occurred affecting the economic balance of the Agreement, the Party affected hereby shall notify the other Parties in writing of the claimed change with a statement of how the claimed change has affected the relations between the Parties."*

The clause above is an adaptation clause, but it fails to provide for a clear definition of change of circumstances, as well as the effect of the change on the contract, the objective of the

[161] Amankwah, Charlene. "Issues in Stability in Ghana's Model Petroleum Agreement", 2 UK L. Student Rev. 31, 2014
[162] Article 24.1.

renegotiation, and also the procedure. [163] These gaps undermine the effectiveness of this clause.

Authors Dowuona-Hammond and Kojo Stephens[164] agree that "Ghana adopted both freezing clauses and economic equilibrium clauses prior to its large-scale commercial discovery in 2007 but migrated to the exclusive use of economic equilibrium clauses, after the perspectivity of its acreage became firmly established in the petroleum industry".[165]

Despite the room to improve, Ghana demonstrates a more empowered contractual status which allows the HG to renegotiate and review the terms of its petroleum contracts to restore economic equilibrium as and when so required.

V. CONCLUSION

Stabilization clauses are of great interest to the IOCs as these clauses have been historically been implemented as risk mitigation tools to protect the investor from fiscal and political risks, which affect their investment, reducing their profitability.[166]

As noted by Bowman (2019), a "minimum core set of commitments would comprise a guaranty of stability, non-opposability provision, allocation of fiscal risk provision, choice of host government's law and international law, UNCITRAL Rules, and seat of arbitration outside host country". [167]

Economic equilibrium renegotiation clauses, like those approved in most EPCs in force in Mozambique, offer a middle ground between stability and predictability. However, they also "promote uncertainty, and ultimately, undermine the (…) ability to enforce changes in the contractual relation"[168]. Another example is the "anti-expropriation" clause under the

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[163] Very important aspects in order to have a proper renegotiation clause of this kind, see Bernardini, pp. 103-106

[164] Stephens, Kojo. "From Total Immunization to an Economic Balancing Act: The Trajectory of Stabilization Clauses in Ghana's Petroleum Agreements." OGEL, 2019

[165] Exactly the same stabilization clauses are found in the petroleum agreement entered into by the Ghana Government, GNPC and Amerada Hess Ghana Limited, for the Deepwater Tano/Cape Three Points Area (Offshore), dated of 8 February 2006, in: http://www.petrocom.gov.gh/L&C_folder/Pet_register/deepwater_tano_cape_three_points/DEEPWATER_TANO_CAPE_THREE_POINTS_CONTRACT_AREA.pdf

[166] Moore, Christopher Robertson Kinley, et al. "The Effect of Non-Fiscal Clauses in Host Government Instruments on the Fair Market Value of Upstream Opportunities." OUP Academic, 18 Nov. 2019, pp. 480–501.

[167] Bowman, p. 787.

[168] Branco, Miguel. "Production Sharing agreements – legal blessing or curse for developing countries?", International Energy Law Review, 2021, p. 3

Mozambican EPCs, which fails to fully address the risk of expropriation, as it does not include any formula for the calculation of the compensation).[169]

While it has been generally agreed that the evolution to renegotiation/adaption clauses has been natural,[170] due to the issues raised by freezing stabilization clauses, these still fail to provide for the required comprehensive regulation of the matter and therefore fail to provide the shield required or expected by the investors, especially in a high-risk country such as Mozambique or Angola (please refer to Appendix II, Table 2).

It is however worth noting that in comparison to Angola, Ghana and Tanzania, only Ghana offers a similar level of stabilization to Mozambique, with the latter seemingly better prepared and closer to meeting the minimum set of requirements identified by Bowman as encouraging foreign direct investment (pairing with quite a positive country profile).

The Angolan Government probably does not need to resort to many of these mechanisms due to the maturity of its oil and gas development and proving the IOCs resilience to adapt to difficult conditions without a sophisticated set of risk mitigations that includes several types of stabilization clauses.

Mozambique and Ghana share similar risk mitigation tools and more attractive to the investors, while Tanzania hasn't yet invested or developed these. It still has to go a long way when it comes to stabilization clauses having also to continuing guaranteeing the solid profile presented today, indispensable for any foreign investor and especially in an industry like the oil and gas.

Characters: 92.912

[169] Alexander, Frank. "Comment on Articles on Stabilization by Piero Bernardini, Lorenzo Cotula and AFM Maniruzzaman†." *OUP Academic*, 1 Nov. 2009, p. 258.
[170] Nakhle, Carole. "Fiscal Stabilization in Oil and Gas Contracts - Evidence and Implications", Oxford Institute for Energy Studies, 16 Nov. 2017.

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IV. APPENDICES

APPENDIX I – Table 1: EPCs in force in Mozambique

Main Investor / Operator*	**Blocks**	**Year**
SASOL	Pande & Temane fields	2000
SASOL	16 & 19	2005
TOTAL	Area 1	2006
ENI / EXXON MOBIL	Area 4	2006
ARTUMAS	Area Onshore Rovuma	2007
PETRONAS	Blocks 3 & 6	2008
SASOL	Area A Onshore	2010
ENI & SASOL	A5-A	2018
EXXON MOBIL	A5-B	2018
SASOL	PT-5	2018
EXXON MOBIL	Z5-C	2018
EXXON MOBIL	Z5-D	2018

*Note: Both the Ministry of Energy and Natural Resources ("**MIREME**") and ENH are parties to all EPCs above mentioned.

APPENDIX II – Table 2: Comparative Risk Profile

* The country with the best rating in each metric is highlighted in green and the one with the lowest rating is in yellow and bold.

#		Angola	Ghana	Mozambique	Tanzania
Corruption Perception Index by Transparency International[171]		27	43	**25**	38
World Bank Doing Business Index[172]		**145**	**145**	138	141
World Bank Worldwide Governance Indicators[173]	Political Stability and Absence of Violence/Terrorism	35.24	50.48	**20.00**	32.86
	Government Effectiveness	**12.98**	41.83	18.75	17.31
	Rule of Law	**13.46**	55.29	14.90	29.33
Resource Governance Index[174]		**35**	67	50	49
Fragile States Index[175]		87.3	64.2	**91.7**	78.1
Global Petroleum Survey (Fiscal terms)[176]		46% mild/strong deterrent to investment	No data.	**67% mild/strong deterrent to investment**	No data.

[171] Score Scale from 0 (very corrupt) to 100 (no corruption), https://www.transparency.org/en/cpi/2020/index/moz.
[172] Ranking Scale from 1 (best) to 190 (worse), https://www.doingbusiness.org/en/rankings .
[173] Percentile Rank (0-100) indicates rank of country among all countries in the world. 0 corresponds to lowest rank and 100 corresponds to highest rank, https://info.worldbank.org/governance/wgi/Home/Reports .
[174] Score Scale from <30 (Failing) to >74 (Good), https://resourcegovernanceindex.org/country-profiles/MOZ/oil-gas .
[175] The Fragile States Index (FSI) is an annual ranking of 178 countries based on the different pressures they face that impact their levels of fragility. The FSI scores should be interpreted with the understanding that the lower the score the better, as a reduced score indicates improvement, and higher score indicates instability. See: https://fragilestatesindex.org/country-data/ .
[176] This report presents the results regarding barriers to investment in oil and gas exploration and production facilities in various jurisdictions around the globe. Those barriers include high tax rates, costly regulatory obligations, uncertainty over environmental regulations, and the interpretation and administration of regulations governing the "upstream" petroleum industry, as well as concerns over political stability and security of personnel and equipment. See: https://www.fraserinstitute.org/studies/global-petroleum-survey-2018 .