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Stabilisation and Renegotiation Clauses in Iraqi Kurdistan Oil and Gas Contracts: A Comparative Study

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Abstract
Oil and gas contracts with the long-term characteristic are the scene of colliding between international oil companies' interests and host government's interests. This characteristic could make such contracts vulnerable to unpredictable political, economic and legislative changes at the time of conclusion. Therefore, the contracting parties tend to use mechanisms to protect the economic balance they have reached from the conclusion until completing the contract. Contractual clauses are an effective mechanism to maintain the economic balance, various contractual clauses have been devised, of which stabilisation and renegotiation clauses are prominent types. This article aims to examine and evaluate the stabilisation and renegotiation clauses in the Iraqi Kurdistan Region oil and gas contracts. It elaborates on the concept and consequences of these clauses and provides a comparison of the clauses in the different countries' oil and gas contracts. The research methods adopted in this article, include comparative analysis methods and the research is conducted through extensive study of the relevant literature. The principal finding from this study is the existence of deficiencies and shortcomings in stabilisation and renegotiation clauses within the Iraqi Kurdistan production sharing contracts. It is suggested that the Kurdistan Regional Government should review such clauses for its future oil and gas contracts.
Keywords: Stabilisation Clause, Renegotiation Clause, Kurdistan Region of Iraq, Production Sharing Contracts, Indonesia and Nigeria.
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1. Introduction

Oil and gas contracts are long-term contracts and need huge capital investment. In the duration of these contracts, sometimes, circumstances, economic, and government changes lead to disputes. Therefore, oil and gas contracts contain some clauses to prevent and resolve disputes. To avoid disputes, there are a lot of clauses in different names that a host government and an International Oil Company (IOC) can insert in their contracts. This article considers and discusses the inclusion of the stabilisation and renegotiation clauses as essential contractual clauses for the prevention and resolution of disputes in the Kurdistan Region of Iraq's (KRI) oil and gas contracts and compares them with some countries' oil and gas contracts. For this purpose, the article provides an overview of stabililsation and renegotiation clauses and clarifies the differences between them. It also highlights the most important points in order to draft effectively the clauses. For comparison of the clauses of KRI's oil and gas contracts, mainly Indonesian and Nigerian as well as some other countries' oil and gas contracts are taken.

2. Stabilisation Clauses in KRI's Oil and Gas Contracts

Stabilisation clauses are absolutory crucial in oil and gas contracts, particularly for oil and gas companies. These clauses are founded to protect oil and gas companies during the lifetime of contracts by reducing the different types of risks, for example, the risk of changing legislation of the host state. This section evaluates and analyses the stabilisation clause in KRI's oil and gas contracts. To achieve this aim, it provides an overview of the clause and compression of it in different countries' Production Sharing Contracts (PSCs).

2.1 An Overview of the Stabilisation Clause

This sub-section defines the stabilisation clause and identifies its main types. It determines the requirements for triggering the clause and its consequences as well as explaining that how to effectively draft this clause in oil and gas contracts.

2.1.1 Definition of stabilisation clause

Stabilisation clause is a way for risk mitigation to protect the oil and gas companies from various type of risks such as political risk[1] which is the risk that the laws of the host country would change to the disadvantage of oil and gas companies, thus reducing the value of the investment. Stabilisation clauses are defined as "Contractual

[1] Mohsin Shareef Salih and Rdhwan Shareef Salih, 'Strategy of Oil Contract Negotiation' (2015) 6 /9 International Journal of Business and Social Science168

clauses in private contracts between investors and host States that address the issue of changes in law in the host State during the life of the project".[1] It also has been defined as "Contract language which freezes the provisions of a national system of law chosen as the law of the contract as to the date of the contract in order to prevent the application to the contract of any future alternations of this system".[2]

The accepted definition of this clause in oil and gas contracts in this article is that:

> the stabilisation clause is a form of governmental guarantee in a negotiated petroleum contract, which usually provides that the terms negotiated under the contract between a state and a foreign national will not be altered unilaterally or terminated by the state through the promulgation of legislation or regulation.[3]

Through these definitions, it appears that stabilization clauses are significant methods to mitigate risks that face oil and gas companies by freezing the legislation of host countries that apply to the oil and gas contract during the life of the contract.

2.1.2 Types of Stabilisation Clauses

The insertion of particular types of stabilisation clauses in oil and gas contracts is a result of the bargaining process and strength of the parties and reflects a balancing of the opposite interests of the State and international oil company. In general, stabilisation clauses are categorised into three types which are freezing clause, economic equilibrium clause, and hybrid clause.

2.1.2.1 Freezing Clause

The classical or freezing stabilization clause restricts the power of the sovereign. It seeks to limit the exercise of the State's legislative and administrative powers and prevents it from changing the contractual conditions agreed with the contractor to the latter's detriment. The clause reinforces the principle of the sanctity of contracts by protecting the contractor against the actions of the State party. Thus, classical stabilisation clauses seek to address possible risks, by freezing the State's regulatory powers and ability to unilaterally change the regime and terms relied upon by the Contractor in the agreement i.e. prohibiting the application of any subsequent law or regulations by the State. A freezing stabilisation clause is consistent with the concept of non- retroactivity of laws, which denies the retrospective effect of new legislation on existing contracts and maintains that the rights gained under such contracts or previous legislation are protected.[4]

The PSC model of Mozambique provides this clause as follow:

> The Government shall not revoke or amend the Authorisation granted to ENH to explore for and produce Petroleum from the Contract Area without taking effective measures to ensure that such revocation or amendment does not affect the rights granted to the Contractor hereunder.[5]

And:

> The Government will not without the agreement of the contractor exercise its legislative authority to amend or modify the provisions of this Agreement and will not take or permit any of its political subdivisions, agencies and instrumentalities to take any administrative or other action to prevent or hinder the Contractor from enjoying the rights accorded to it hereunder.

2.1.2.2 Economic Equilibrium Clause

As the practice of the sovereign authority by the State party to a contract cannot be totally restricted by a classic stabilization clause, some techniques have been recently developed in a way that respects this reality and at the same time maintains the economic balance of the contract. Economic equilibrium is a modern technique and type of stabilisation clauses.[6] In Contrast to freezing clauses, economic equilibrium clauses ensure that in the case of changes to the legal terms that affect the contract, it will be amended to restore the original economic equilibrium. In the economic equilibrium clause, the State's practice of sovereign authority is not barred contractually. However, such action is counterbalanced by the clause that the economic balance of the contract as of the effective date of the contract will be protected throughout the lifetime of the contract.[7] Economic equilibrium clauses have moved from traditional freezing clauses and developed a hybrid contractual mechanism combining stabilisation with renegotiation provisions. Thus, economic equilibrium clauses are modern stabilisation and renegotiation clauses at the same time. In this regard, Cameron[8] noted that renegotiation clauses are frequently seen as the modern form of stabilisation.

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[1] Andrea Shemberg, Stabilization Clause and Human Rights, A Research Project Conducted for IFC and the United Nations Special Representative of the Secretary-General on Business and Human Rights . International Finance Corporation, 2009, 4

[2] Peter Cameron, Stabilisation in Investment Contracts and Changes of Rules in Host Countries: Tools for Oil & Gas Investors, Association of International Petroleum Negotiators, Final Report, 2006, 12

[3] Abdullah Al Faruque, 'Stability in Petroleum Contracts: Rhetoric and Reality. (Lessons from the Experiences of Selected Developing Countries and Economies in Transition 1980- 2002)' (DPhil thesis, University of Dundee 2005),95

[4] Ibid, 98

[5] Model Production Sharing Contract of Mozambique, 2001, Art 30.7(d) and (e).

[6] A. F. M. Maniruzzama, 'The pursuit of Stability in International Energy Investment Contracts: A Critical Appraisal of the Emerging Trends' (2008) 1 Journal of World Energy Law & Business 121

[7] Ibid, 126

[8] Peter Cameron, 'In Search of Investment Stability' in Kim Talus (ed), *Research Handbook on International Energy Law* (Edward Elgar 2014) 139

Recently different manners of economic equilibrium clauses can be found in international oil and gas contracts to address the changed circumstances brought about by the unilateral acts of the State, i.e. legislative or regulatory, exercised in the sovereign capacity after the effective date of the contract. According to their achievement of economic balance, economic equilibrium clauses are classified into three categories, stipulated economic balance, non-specified economic balancing, and negotiated economic balancing.[1]

The Stipulated economic balance provides an automatic amendment of the contract in a stipulated way, for instance, the Ecuadorian model of PSC provides as follow:

> In case of modifications to the tax regime, including the creation of new taxes, or the labor participation, or its interpretation, that have consequences on the economics of this Contract, a corresponding factor will be included in the production share percentages to absorb the increase or decrease in the tax burden or in the labor participation of the previously indicated contractor. This correction factor will be calculated between the Parties and approved by the Ministry of Energy and Mines.[2]

The non-specified economic balancing, although providing for automatic amendment, does not stipulate the nature of such amendment, nor will it need the mutual agreement of the parties involved for such amendment. An Azeri production-sharing contract provides that:

> In the event that any Governmental Authority invokes any present or future law, treaty, intergovernmental agreement, decree or administrative order which contravenes the provisions of this Agreement or adversely or positively affects the rights or interests of Contractor hereunder, including, but not limited to, any changes in tax legislation, regulations, or administrative practice, the terms of this Agreement shall be adjusted to re-establish the economic equilibrium of the Parties, and if the rights or interests of Contractor have been adversely affected, then SOCAR shall indemnify the Contractor (and its assignees) for any disbenefit, deterioration in economic circumstances, loss or damages that ensue therefrom. SOCAR shall within the limits of its authority use its reasonable lawful endeavors to ensure that the appropriate Governmental Authorities will take appropriate measures to resolve promptly in accordance with the foregoing principles any conflict or anomaly between all such treaty, intergovernmental agreement, law, decree or administrative order and this Agreement.[3]

The negotiated economic balancing entails the parties to meet to negotiate amendments to the contract. The Indian Model PSC includes the following clause:

> If any change in or to any Indian law, rule or regulation dealing with income tax or other corporate tax, export/import tax, excise, customs duty or any other levies, duties or taxes imposed on Petroleum or dependent upon the value of Petroleum results in a material change to the expected economic benefits accruing to any of the Parties after the date of execution of the Contract, the Parties shall consult promptly in good faith to make necessary revisions and adjustments to the Contract in order to maintain such expected economic benefits to each of the Parties, provided, however, that the expected economic benefits to the Parties shall not be reduced as a result of the operation of this Article.[4]

2.1.2.3 Hybrid Clause

As the name requires, a hybrid clause simply consists of a combination of the characteristic of both the freezing clause and the economic equilibrium clause. This type of stabilization clause entails the host State to reinstate the IOC to the same position it was before the change of law was made. This clause attempts to balance the State's interests by retaining its sovereign power of legislation and imperative of economic interest of the private party through adaptation and commercial adjustment of contract.[5] An example of the hybrid clause can be found in a PSC Kazakhstan.

Article 21

> 21.1. The Tax Regime set forth in the Contract shall be permanently in effect until the expiration of the Term of the Contract.
>
> 21.2. If changes are made in the law after the Contract signing data that make further observance of the original terms and conditions of the Contract impossible or that lead to a significant change in its general economic terms and conditions, the Contractor and representatives of the Competent Body and Tax Agencies may make changes in or correction to the Contract that are needed to restore the economic interests of the Parties as of the Contract signing date. These changes in or correction to Contract terms and conditions shall be made within sixty days of the time of written notification of a Tax Agency or the Contractor.[6]

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[1] Ibid.

[2] Model PSC of October 2002 for the Exploration of Hydrocarbons & the Exploration of Crude Oil Ecuador, Art. 11.7

[3] Exploration Development and Production sharing for the Block including the Padar Area and the Adjacent Prospective Structures in the Azerbaijan Republic in 1999 between the State Oil Co of Azerbaijan and Kura Valley Development Co Ltd and Socar Oil Affiliate (Azerbaijan), Barrows (art 24.2).

[4] Indian Production Sharing Agreement Model, 2010, Art. 17.10.

[5] Al Faruque, op.cit, 101.

[6] Exploration for and production and production sharing Contract of crude hydrocarbons in the Chinarevskoye Oil and Gas-Condensate Field

It starts with a simple statement that the contract terms shall remain inviolable throughout the whole life of the contract. In addition, it says any changes accrued in the country's general laws shall not deteriorate the contractor's position.

2.1.3 Scopes of Stabilisation clauses

Stabilisation clauses may vary not only by the technique of stabilisation but also according to the extent of the stabilisation right. According to the stabilisation right, stabilisation clauses mainly are:

2.1.3.1 Full Stabilisation Clauses:

Full stabilisation clauses aim at complete and comprehensive protection against subsequent changes in national law without any restriction on the freezing of laws. In other words, a full stabilisation clause tries to completely protect contractual undertakings from any change of applicable law by a host state.[1] These clauses in modern State contracts are rarely found because host States often do not accept such an unlimited clause.

2.1.3.2 Limited Stabilisation Clauses

Usually, host States based on their negotiating power, attempt to limit the appropriate use of the stabilisation clauses as much as possible. Under the limited stabilisation clause, all laws of host State will not be frozen and the competencies apply to specific legislation such as tax laws, labour law, the law relating to the repatriation of rights, and stabilisation of export-import provisions.[2] The limited stabilisation clauses are more effective and preferable by host States and the modern oil and gas contracts indicate a preference for the usage of limited stabilisation clauses.

2.1.3.3 Time-Limited Stabilisation calsuse

In stabilisation clauses, the duration of application of the clause also can be limited. The stabilisation clause may apply for the whole duration of the project or the different phases of the project. In the later, the host State stabilises its national laws in a specific phase of the project. For example, the duration of the stabilisation clause can be limited for the exploration for or production of oil and gas. Such a clause can cause a win-win situation for the parties in the negotiation process of the oil and gas contract.

2.1.4 Requirements for a stabilisation clause

Requirements for triggering a stabilisation clause in oil and gas contracts can be derived from definitions of stabilisation clauses. Thus, the requirements in brief are:

a) In the event of freezing clause, using the legislative and administrative powers by the State in order to change the contractual conditions agreed with the contractor during the life of contract. In other words the application of any subsequent law or regulations by the State to change the regime and terms relied upon by the Contractor in the contract.

b) In the event of an economic equilibrium clause, using the sovereign authority by the State and changing the legal terms that affect the contract, thereby disrupting the economic balance of the contract compared to the effective date of the contract.

2.1.5 Consequences of Stablisiation clause

The consequences of stabilization clauses to a great extent depend on the particular form of the clause. Stabilization clauses protect the oil company's interest against the host State's unilateral action, either legislative or regulatory, that may affect the contract. These Clauses guarantee the stability of essential terms of the contract bearing upon the return on the private party's investment, such as fiscal regime, labour legislation, companies' and exchange control regulations.[3] Stabilisation clauses prohibit expropriation or nationalization of the company's investment. They preserve the contractual terms and conditions as originally agreed by the parties rather than modifying them in any respect. Thus, nationalisation or expropriation of oil and projects or a unilateral change or termination of the contract containing a stabilisation clause by the host states should be treated as an unlawful act under national and international law.[4]

A stabilisation clause cannot stop a State from exercising its absolute right to legislate for an overriding public purpose, there is an overwhelming case in support of the argument that the main legal consequence of a breach of a stabilisation clause is the financial restriction upon the State, which signifies that compensation must be awarded in the case of breach of stabilisation clause.[5]

An economic stabilisation clause achieves the financial equilibrium of the contract as conceived at the time it was made. In this regard, the equilibrium of the contract is determinable by the different factors including the definition of the term itself in the contract, the surrounding circumstances, and the adjustment made by the parties voluntarily in the contractual relationship over the course of the contract duration. The resultant

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in West Kazakhstan Oblast pursuant to licence series MG no. 253D, in 1997, between the Republic of Kazakhstan State Committee for Investments (the Competent Body) and Production sharing agreement between The Republic of Kazakhstan State Committee for Investments (the Competent Body) and the Zhaikmunai Limited Liability Partnership (the Contractor), Kazakhstan, Art.21

[1] Al Faruque, Op.Cit.,96

[2] Ibid, 97

[3] Piero Bernardini, " Stabilisation and Adaptation in Oil and Gas Investments"(2008)1 Journal of World Energy Law & Business 98

[4] Al Faruque, op.cit, 112

[5] Ibid, 115

consequences for subsequent legislation affecting the economic equilibrium of the contract can be mitigated either by way of payment of compensation to the party or other equitable solution including modification of the contract terms as may be agreed by the parties.[1]

2.1.6 Drafting Stabilisation Clauses

As explained earlier, the main purpose of the stabilization clauses is to knot the hands of the host State during the lifetime of a project under a natural resource development contract, thus the host State cannot intervene with the interests of the international oil company. Drafting a stablisation clause is essential for inserting the clause in oil and gas contracts. Carelessness and lack of prudence and insight may result in defective and useless clauses. Thus drafters of these clauses should pay more attention to the drafting process to insert an effective stabilization clause in the contracts.

First of all, in order to avoid difficulties and different interpretations, the drafting language should be clear and precise.

In the context of stabilisation clauses, the status of the state as a contracting party may often be disputable. In international oil and gas contracts, three main situations are met by international oil companies:[2]

a) the national oil company (NOC)
b) the host State itself; or
c) both the NOC and the host State together

To avoid problems the parties should provide unambiguously in express terms in the contract, whether the State company operates as a representative of the State, with all the consequences resulting from the fact that the State is a party, or on the contrary as a separate entity. Identifying a company as separate from the State when it is a privatized company is not a problem. The role of State-owned companies as a party should be explained in the contract concerning any possible legal problem that may arise. Such considerations are important to the classic stabilisation or freezing clauses and may not extend to economic equilibrium clauses. However, the above-mentioned problem can be overcome when freezing clauses are coupled with economic equilibrium clauses as they are often inserted in many modern international oil and gas contracts. When the NOC itself concluded the contract as a separate company with an international oil company and inserts an economic equilibrium clause, the above-mentioned problem of a freezing clause could be avoided.[3]

- When drafting stabilization clauses in a contract with the host State, international oil companies should be careful that in certain countries' stabilization clauses may sometimes be subject to restrictions imposed by the legal and constitutional framework of the host State. As a result, these clauses may not be enforceable and the international oil company will be left without the needed protection from any unilateral action by the State that might affect its interests.[4]

-Whatever the purpose of the clause is freezing the law or establishing a system for the restoration of economic equilibrium, it needs to contain a clear undertaking from the host government to provide stability to the company.[5]

- Parties should pay attention to the trigger of stabilization clause. The trigger is a part of the clause that controls the main issue of whether a qualifying event has happened. It is the entrance to relief and, as such, the way it is created is critical to the protection the clause ultimately gives the company. It should be assumed that the trigger will be heavily negotiated between the parties and its final wording will reflect a compromise.[6] Usually, stabilisation clauses have triggers based on a definition of change in law. However, sometimes definitions of change in law are considerably more complicated than this, covering changes to the way existing laws are interpreted or applied by the authorities of the host State. Express coverage for 'interpretive change' is important because it is often the case that stabilisation conflicts emerge not from the promulgation of new laws, but from changes in the way the courts and other authorities interpret and apply existing legislation. When the trigger is created around the existence of a legislative event, the clause will not reply to this sort of administrative or judicial act, in spite of this it may be just as damaging as the enactment of a new statute. [7]In drafting the clause, the changes arising from administrative and judicial acts should be covered whether by a direct way which includes extending the definition of change in law to stipulate that is contains any change in the manner in which a law is construed, evaluated, applied or administered by any government authority, or by an indirect way, through the definition of law. For instance, in the indirect way law can be defined as follows:

Law means any statute, code, regulation or other written law enacted by the State or other government authority (including with respect to taxation and fiscal matters), or any decision, judgment or order issued by the State or

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[1] Ibid,120

[2] A. F. M. Maniruzzama, " Drafting Stabilisation Clauses in International Energy Contracts: Some Pitfalls for the Unwary"(2007) 5 /2 Oil, Gas & Energy Law Intelligence < https://www.ogel.org/article.asp?key=2498 > accessed 8 March 2020

[3] Ibid

[4] Ibid

[5] Sam Luttrell and Amanda Murphy, 'Stabilisation Provisions in Long-Term Mining Agreements' (Global Arbitration Review)< https://globalarbitrationreview.com/chapter/1194142/stabilisation-provisions-in-long-term-mining-agreements > accessed 7 March 2020

[6] Ibid

[7] Ibid

other government authorities or other capable executives, judicial or administrative bodies.
In a stabilisation clause, typically a consultation or negotiation process is formed, the object of which is to prevent disputes rather than to resolve disputes, it must clearly state how this process is begun. Usually phrases of 'request for negotiations' or 'request for consultations' and sometimes 'notice of change in law' are used in the clause. The two key issues to consider in making the contractual framework for these notices are timing and content. While it may be enticing to see the notice provision as a mere formality, it must be realised that the notice provision actually has a significant functional dimension, as it is connected to the trigger. For this reason, the notice provision should be paid proper attention in the drafting process.[1]
Another important part of the stabilization clause is the procedure for negotiation. In drafting the clause, parties should be obligated to a procedure for finding manners to address the effect of the change in the law that has been notified by the international oil company. It is vital that the clause specifies the part of the host State that will participate in negotiations and determines a time frame in which the discussions must begin (the deadline for completion of negotiations can be determined in another clause which provides the parties with the right to refer the conflict to dispute resolution if the negotiations are failed).[2]

2.2 The Application of Stabilisation Clauses in KRI's PSCs

After presenting a clear understanding of the stabilization clause, this section seeks to evaluate the clause in two KRI's PSCs. With regard to stabilisation clauses in the first PSC, there is Article 43 (Governing law, fiscal stability and amendments) which provides international oil companies with legal and fiscal stability as following:

> Fiscal Stability
>
> 43.2 The obligation of the CONTRACTOR in respect of this contract shall not be changed by the GOVERNMENT and the general and overall equilibrium between the Parties under this Contract shall not be affected in a substantial and lasting manner.
>
> 43.3 The GOVERNMENT guarantees to the CONTRACTOR, for the entire duration of this contract, that it will maintain the stability of the legal, fiscal and economic conditions of this contract, as they result from this contract and as they result from the laws and regulations in force on the date of signature of this contract. The CONTRACTOR has entered into this contract on the basis of the legal, fiscal and economic framework prevailing at the Effective Date. If, at any time after the Effective Date, there is any change in the legal, fiscal and/or economic framework under the Kurdistan Region Law or other law applicable in or to the Kurdistan Region which determinately affects the CONTRACTOR, the CONTRACTOR Entities or any other Person entitled to benefits under this contract, the terms and conditions of the Contract shall be altered so as to restore the CONTRACTOR, the CONTRACTOR Entities or any other Person entitled to benefits under this contract to the same overall economic position (taking into account home country taxes) as that which such Person would have been in, had no such change in the legal, fiscal and/ or economic framework occurred.
>
> 43.4 If the CONTRACTOR believes that its economic position, or the economic position of a CONTRACTOR Entity or any other Person entitled to benefits under this Contract, has been determinately affected as provided in Article 43.3, upon the CONTRACTOR's written request, the Parties shall meet to agree on any necessary measure or making any appropriate amendments to the terms of this Contract to reestablishing the equilibrium between the Parties and restoring the CONTRACTOR, the CONTRACTOR Entitles or any other Person entitled to benefits under this Contract to the position (taking into account home country taxes) it was in prior to the occurrence of the change having such detrimental effect. Should the parties be unable to agree on the merit of amending this Contract and /or on any amendments to be made to this Contract within ninety (90) days of the CONTRACTOR's request (or such other period as may be agreed by the Parties), the CONTRACTOR may refer the matter in dispute to arbitration as provided in Article 42.1, without the necessary of first referring the mater to negotiation and mediation.
>
> 43.5 Without prejudice to the generality of the foregoing, the CONTRACTOR shall be entitled to the benefit of any future changes to the petroleum legislation or any other legislation complementing, amending or replacing it. [3]

Through reading Article 43 in the first example of KRI PSCs, it appears that the type of stabilisation clause is a combination of freezing and economic equilibrium clauses, therefore, it is a hybrid stabilisation clause. The Article states that the government will not change the obligations of the IOC and maintains the stability of legal, fiscal and economic conditions of the contract within the whole lifetime of the contract. It clearly shows how to trigger the stability clause and explains the negotiation procedure between parties by written request from the IOC, it also determines timing which is 90 days from the writing request to make an agreement for amendment of the contract.

[1] ibid
[2] ibid
[3] The Production Sharing Contrac, Dohuk Block (2008) between the Kurdistan Regional Government of Iraq and DNO Iraq As, Art. 43

In the case of failing to amend the contract, the contractor may refer the matter in dispute to arbitration without the necessity of first referring the mater to negotiation and mediation. Thus, it could be noted that the stabilisation clause in KRI's PSCs is in the interest of oil and gas companies more than the government. The scope of stabilisation clause is unlimited and there is not any exception.
In the second KRI's PSC Article 43 (Fiscal Stability) stipulates:

> GENERAL
> 43.1 The Government shall maintain the stability of the fiscal conditions of this Contract, as they result from Applicable Law in force as of the Effective Date, for the entire duration of this Contract in accordance with this clause 43.
> 43.2 The provisions of the clause 43 do not apply to Government Interest Holders.
> ACKNOWLEDGMENT OF FUTURE LAWS
> 43.3 The Contractor acknowledges that the Government has advised it may propose Laws which could have a beneficial or detrimental effect upon the fiscal position of the Contractor, including Laws the primary purpose of which may be:
> (a) the protection of the environment to the standards of the European Union;
> (b) the promotion of the health and safety of citizens of the Kurdistan Region to the standards of the European Union;
> (c) the promotion of the health and safety of personnel engaged in Petroleum Operations to the standards of the European Union;
> (d) the regulation of hazardous substances, including the transportation and disposal thereof, to the standards of the European Union;
> (e) decommissioning of petroleum facilities, including Wells and refineries, to the standards of the European Union and Alberta, Canada;
> (f) regulation of pipelines; and
> (g) the regulation of companies.
> The introduction of such Laws will not entitle the Contractor or any Contractor Entity to any rights to any alteration to the terms of this Contract.
> CHANGE OF TAX LAW
> 43.4 If, at any time after the Effective Date:
> (a) there is any change to Regional Tax Laws in force on the Effective Date ("Change Tax Law"); and
> (b) the fiscal position of the contractor Entities under this Contract is materially either beneficially or detrimentally affected by such Change of Tax Law; then
> (c) the Contractor and the Government shall negotiate to alter the terms of this Contract so as to place the Contractor Entities in the same overall economic position (taking into account home country taxes) as that which the Original Contractor Entity ("Original Contractor Entity" means Deposal) would have been without any Change of Tax Law.
> 43.5 The Government will under no circumstances be liable to any Party or Person for any consequential or indirect losses because of any change of Tax Law.[1]

From this clause in the KRI's PSC, it appears that the stabilisation clause is a Hybrid Stabilisation clause. It combines freezing and economic equilibrium clauses. In general, it has been designed well, the scope of the clause is limited and some laws and regulations have been excepted from stabilisation. It also addresses the negotiation to amend the contract.

2.3 Stabilisation Clause Comparison

To evaluate further stabilisation clauses in KRI's PSC, this section provides a comparison of the clause with stabilisation clauses in certain countries' PSCs.

a) Indonesia PSCs

In the Indonesia PSC, which is taken as a sample, the stablisation clause could not be found. Thus, there is no stabilisation clause in the contract.

b) Nigerian PSC

In the Nigerian PSC, similar to the KRI's PSCs, there is the stablisation clause, Article 27(Changing in Legislation) states:

> 27.1 The Parties agree that the commercial terms and conditions of this Contract are based on the existing fiscal terms in accordance with the provision of the Deep Offshore and Inland Basin Production Sharing Contracts Act, 1999 and the fiscal terms as contained in clause 16 of this Contract. If such fiscal terms changed, the Parties agree, subject to clause 27.2, to review the terms and conditions of this Contract

[1] Production Sharing Contract, Piramagrum Block, 2011, between The Kurdistan Regional Government of Iraq and Repsol YPF Oriente Medio S.A, Clause. 43

affected by such changes to align such terms and conditions with the fiscal terms.

27.2 If any time or from time to time there should be a change in legislation or regulation which materially affects the commercial benefits afforded the Contractor Parties 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.[1]

Thus, in the same way as the KRI's PSC, there is the fiscal stability clause titled (changing in Legislation) in the Nigerian PSC. However, its type is an economic equilibrium clause, because it attempts to restore affected commercial benefits of contractor in the case of changing legislation rather than freezing legislation.

In contrast to the KRI's PSC, the Nigerian PSC is not precise in the negotiation procedure and timing to reach an agreement to make amendment the contract in order to restore commercial benefits of the contractor. It also does not address the case of the failure by parties to amend the contract.

c) Other Countries

Exploration and production contracts of Mauritania provide a good example for stabilisation clause. An exploration and production contract between The Islamic Republic of Mauritania and Kosmos Energy Mauritania in Article 26 (Applicable Law and Stabilisation of Terms) states:

26.2 The Contractor shall be subject at all times to the laws and regulations in force in the Islamic Republic of Mauritania.

26.3 No legislative or regulatory provision occurring after the Effective Date of the Contract may be applied to the contractor which would have as a direct or an indirect effect to diminish the rights of the Contractor or to increase his obligations under this Contract and the legislation and regulations in force upon the Effective Date of this Contract, without the prior agreement of the Parties.

However, it is agreed that the Contractor cannot, with reference to the preceding paragraph, oppose the application of the legislative and regulatory provisions which are generally applicable, adopted after the Effective Date of the Contract, in the matter of safety of persons and of protection of the environment or employment law.[2]

The Stabilisation clause in this contract is different from many other PSCs. It begins with binding the contractor to the laws and regulations in force at all times in Mauritania. Then, the clause states that legislative or regulatory provisions occurring after the effective date of the contract which have a direct or an indirect effect to diminish rights of the contractor may not apply to the contractor without the prior agreement of the Parties. Thus, in this case, the prior agreement is needed. This clause also is not unlimited and there are exceptions such as the matter of safety of persons and of protection of the environment or employment law.

The PSC of Malawi is another effective example for stabilisation clause. In Clause 49 (Stability Period) it stipulates:

49. 3 The Government guarantees to the Contractor, for the entire duration of this Agreement, that it will maintain the stability of the fiscal and economic conditions of this Agreement, as they result from this Agreement and as they result from the laws in force on the Effective Date. The Contactor has entered into this Agreement on the basis of the legal, fiscal and economic framework prevailing at the Effective Date. If there are any changes with respect to any provisions of any law which may detrimentally and unfairly affect the Contractor's economic position during the Stability Period, this Agreement shall be amended as may be necessary to restore the Contractor to the economic position it would have enjoyed during the Stability Period but for such changes.

49.4 If the Contractor believes that its economic position has been detrimentally and unfairly affected as provided in clause 49.3, upon the Contractor's written request, the Parties shall meet to agree on any additional necessary measures with a view to re-establishing the economic equilibrium between the Parties and restoring the Contractor to the position it was in prior to the occurrence of the change having such detrimental effect. Should the Parties be unable to agree on the merit of amending this Agreement and/or on any amendments to be made to this Agreement within ninety (90) days of Contractor's request (or such other period as may be agreed by the Parties), the Contractor may refer the matter in dispute to arbitration as provided in Clause 48. [3]

In the PSC of Malawi, the stabilisation clause similar to KRI's PSCs is a hybrid stabilisation clause. Firstly, it freezes the laws for the entire duration of the contract and then it requires amendment of the contract in the case of changing laws that causes detrimentally and unfairly affect the Contractor's economic position during the Stability Period. The Clause provides a clear procedure for the parties to meet and amend the contract during a determined period. In the case of failure to amend the contract, it requires to refer this dispute to arbitration. However, as the same first example of KRI's PSC this clause is unlimited and no exceptions are identified in the

[1] Production Sharing Contract, Covering Block 905 Anambra Basin, in 2007, between Nigerian National Petroleum Corporation and 1. Gas Transmission and Power Limited, 2. Energy 905 Suntera Limited, 3. Ideal Oil and Gas Limited, Clause 27

[2] Exploration and Production Contract, Block 6, 2006, between The Islamic Republic of Mauritania and Kosmos Energy Mauritania, Art.26

[3] Production Sharing Agreement for Block 6 in 2014 between the Government of the Republic of Malawi and Pacific Oil Ltd, Clause 49

contract.

3. Renegotiation Clauses in KRI's Oil and Gas Contracts

In the previous section, it has been seen that IOCs have genuine concerns about protecting their investments and usually insert stabilisation clauses into their contracts as a barrier against state intervention with their investment. However, these clauses do not offer the host State sufficient flexibility to change the terms and conditions of their contracts. The rigidity of oil and gas contracts containing stabilisation clauses could be the main sourceof disputes between host States and IOCs. In an oil and gas contract, the IOC requires stability, while the host State requires flexibility. As a consequence of this, to guarantee the long-term contract, additional mechanisms are required to maintain the sovereign prerogatives of the State as well as protecting the legitimate commercial expectations of the IOC. These additional contractual mechanisms could come in the manner of renegotiation clauses, which permits the parties to review and renegotiate certain terms either at specific intervals or at the occurrence of certain trigger events. The insertion of such clauses helps the parties to escape from the inflexibility that usually associated with contracts containing stabilization clauses.[1] This section seeks renegotiation clauses in KRI's PSCs and. For this purpose, it provides an overview of renegotiation clauses and compares the clause in KRI's PSCs with some countries' PSCs.

3.1 An Overview of Renegotiation Clauses

This sub-section defines the stabilisation clauses and determines their types and consequences. It also makes the difference between renegotiation and stabilisation caluses. Then it explains the reasons behind renegotiation clauses and requirements for triggering these clauses. It also makes guidance for drafting these clauses.

3.1.1 Definition of Renegotiation Clauses

In a long-term contract, parties need to predict circumstances that may change the contractual equilibrium and consider mechanisms to confront them. In such a contract, the parties could insert certain clauses to protect the contract with changing circumstances and make it more flexible in which the renegotiation clause could be one of these clauses. Different terms have been used for renegotiating contracts, such as review[2], revision[3], adaptation[4], adjustment[5] and modification. However, it is preferred to use the renegotiation.

The renegotiation clause has been defined in several ways, for instance: 'Renegotiation clauses are provisions in contracts that, upon the happening of a certain event or events, require all parties to return to the bargaining table and renegotiate the terms of their agreements'.[6] Renegotiation clauses also could be defined as contractual clauses that protect contracting parties by making a contract flexible and dynamic during its lifetime, to adapt it to changing circumstances and, more especially, to restore the equilibrium of the contract.

3.1.2 Types of Renegotiation Clause

Renegotiation clauses can be divided into two categories: 1- Traditional Renegotiation clauses 2- Modern Renegotiation clauses

3.1.2.1 Traditional Renegotiation Clause

a) General Renegotiation Clauses

General Renegotiation clauses specifically determine the aim of renegotiation of terms which most frequently is to return each of the parties to their position before the change of the legal environment surrounding the contract.[7] General renegotiation clauses influence the whole substance of the investment agreement. They provide conditions under which the whole bargain may be reopened. For example, the Haitian Petroleum Agreement of 1979 provides the following clauses:

> It Is agreed that the terms of this contract shall, upon the request of either party, be subject to renegotiation after seven (7) years from the date of pay-out or ten (10) years after the year end in which commercial production is reached, whichever time is late – provided however, that in no event shall 'renegotiation' be deemed to be tantamount to termination. Rather 'renegotiation' shall be deemed to reflect the opportunity of the parties to adjust the economic terms and conditions of this contract to account for the then local and international conditions.[8]

According to this clause, the contracting parties have an obligation to renegotiate within the determined time. The

[1] Sangwani Patrick Ng'ambi, *Resource Nationalism in International Investment Law* (Routledge 2016) 130
[2] Joachim Frick, *Arbitration in Complex International Contracts* (Kluwer Law International 2001)157
[3] Abdullah Al Faruque, "Renegotiation and Adaptation of Petroleum Contracts: The Quest for Equilibrium and Stability" (2008) 9 The Journal of World Investment & Trade113
[4] John Y Gotanda, " Renegotiation and Adaptation Clauses in International Investment Contracts, Revisited" (2003) 36 /4 Vanderbilt Journal of Transnational Law 1461
[5] Robert Scott, "Conflict and Cooperation in Long-Term Contracts" (1987)75 California Law Review 2005
[6] Gotanda,loc,cit.
[7] Bertrand Montembault, 'The Stabilisation of State Contracts Using the Example of Oil Contracts. A Return of the Gods of Olympia' (2003) International Business Law Journal 593
[8] Service Contract, 1979, between the Haitian State and Anschutz Oversea Corporation, Article 3.3

obligation of parties begins either at the happening of a specific event or at regular intervals.

b) Specific Renegotiation clauses

This type of renegotiation clause in contracts refers to a specific event or matter. For instance, the production agreement in 1974 between the Government of Ghana and Shell Exploration and Production Company of Ghana contains the below clause:

> It is hereby agreed that if during the term of this agreement there should occur such changes in the financial and economic circumstances relating to the petroleum industry, operating conditions in Ghana and marketing conditions generally as to materially affect the fundamental economic and financial basis on this Agreement, then the provisions of this Agreement may be reviewed or renegotiated with a view to making such adjustments and modifications as may be reasonable having regard to the Operator's capital employed and the risks incurred by him always provided that no such adjustments or modifications shall be made within 5 years after the commencement of production of petroleum in commercial quantities from the production area and that they shall have no retroactive effect.[1]

In this clause, the triggering event is explicitly defined. It has also determined standards regarding the degree of change in circumstances. The clause covers changes in economic and financial circumstances in the petroleum industry. Apart from this, it clarifies when the contract adjustments or modifications can occur.

This type of renegotiation clause executes only by occurring of specified triggering event or events that stipulated in the clause. This can be considered a limitation of renegotiation clauses. Concerning specific renegotiation clauses, parties cannot ask for renegotiating outside of specified events. In contrast, general renegotiation clauses may encourage the parties to request a renegotiation of the contract on flimsy grounds thereby threatening the stability of the contract.[2]

3.1.2.2 Modern Renegotiation clauses (Economic Equilibrium Clauses)

Equilibrium clauses as explained and mentioned in the section two, are a type of renegotiation clauses as well. They are a combination of Stabilisation and renegotiation provisions.

3.1.3The Scope of Contract Change by Renegotiation Clause

Renegotiation clauses usually comprise of a guideline as to the extent of the contract change. The significance of this issue stems from the fact that it will determine the result to be achieved by the renegotiation process. The Vietnam production sharing agreement is an effective example to indicate the extent of contract change. It requires the parties to consult each other and "make the necessary change to ensure that the contractor is restored to the same economics which would have prevailed if the new law and/or regulation or amendment had not been introduced"[3].

The extent of contract change in the renegotiation clause could be appropriately restricted by limitations such as the passage of a certain number of years in advance of any renegotiation phase can take place or if the clause excludes a specific outcome such as the exclusion of any retroactive outcome. Finally, the extent of contract change can extend to the compensation of the contractor for any loss or damages resulting from the implementation of new laws or changes in current regulations.[4]

3.1.4 Difference between Renegotiation and Satabilisation Clauses

Renegotiation clauses allow flexibility and permit changes in the contract. However, classical stabilization clauses establish a fixed legal regime by home State throughout the duration of the contract.[5] In an oil and gas contract, the tendency of IOCs for stability in contractual relations and the demand of host government of developing countries for a more flexible contractual regime can be a major source of a conflict between them.[6]

Renegotiation clauses do not threaten the host State's sovereign prerogatives. They make the possibility of renegotiation of certain terms of the contract at specified times or on the occurring of specified circumstances. In contrast, classical stabilisation clauses restrict the legislative power of the host State to apply new laws and regulations to the detriment of the IOC and by this threat the host State's Sovereign prerogatives. [7]

3.1.5 Reasons for Renegotiation Clauses

The most important reasons for renegotiation clause in oil and gas contracts in brief are:

a) Oil and gas contracts are long-term contracts

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[1] The Petroleum Production Agreement, 1974, between the Government of Ghana and Shall Exploration and Production Company of Ghana Ltd, Article 47

[2] Bede Nwete, 'To What Extent Can Renegotiation Clauses Achieve Stability and Flexibility in Petroleum Development Contracts?' (2006) International Energy Law and Taxation Review 56

[3] The Production Sharing Contract of 19 August 1992 for offshore Block 04-2 between the Vietnam National Oil and Gas Corporation of the Socialist Republic of Vietnam, Lasmo Vietnam Ltd. & C. Itoh Energy Development Co., Ltd. Art. 17.8

[4]Shapur Farhangpur, 'Analytical Study of Arbitration Under International Oil and Gas Agreements Disputes under the Indian, Iranian and International Trade Law: Problems and Prospects' (DPhil Thesis, University of Pune 2011) 303

[5] Talal Abdulla AL-Emadi, "The Renegotiation Clause in Petroleum International Joint Venture Agreements" 2012. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2073340 , accessed 20 March 2010

[6] Samuel Asante, "Stability of Contractual Relations in the Transactional Investment Process" (1979)28 International & Comparative Law Quarterly 401

[7] Piero Bernardini, "The Renegotiation of the Investment Contract" (1998)13 Foreign Investment Law Journal 411

In the oil and gas industry, the commitment of huge capital for exploration and development, and the assumption of considerable risk, in particular in exploration, require contracts of a very long time. As long-term contracts are needed to make IOCs assume the risk (in exploration, a risk of failure in most of the projects), these long-term contracts are then exposed for a long duration to developments the occurrence of which and the impact of which on the contract are frequently hard to forecast. A long-term investment is typically made based on assumptions concerning the geology of the area, costs of inputs, labour and other payments (e.g. taxes and royalties to the government) and the cost of complying with environmental requirements. In the duration of the contracts, certain unexpected changes may occur and impact the economics of the project and make pressure on the parties to amend the contract via renegotiation.[1] Therefore the long duration of oil and gas contracts, is a reason for inserting the renegotiation clause.

b) Investment Risks

Oil and gas contracts are subject to several significant risks and uncertainties within their duration which can lead parties to ask the renegotiation. For instance:[2]

1) Change in Geology and Economic Balance of the Project

An unexpected rise or decrease in prices of natural resource production on the international market can have a significant impact on the economic balance of the project and lead the contracting parties to renegotiations. Likewise, the unexpected discovery of huge petroleum reserves, or changes in technology which decrease the cost of developing the project, may also lead the host government to demand renegotiation, as may the foreign investor following an unsatisfactory find in a hostile geographical environment.

2) Change of Laws and Regulations

IOCs in oil and gas contracts demand stable investment conditions. Therefore, most of their contracts contain the stabilization clauses. IOCs aim to freeze the obligations arising from the laws and regulations at the time of concluding the contract through inserting stabilisation clauses and the host State should not be able to change the existed balance at the time of concluding the contract by changing the existed laws and regulations or by issuing new laws and regulations. Notwithstanding the inclusion of stabilisation clauses in oil and gas contracts, host States often change some laws and regulations which could change the existed economic balance of the project at the time of concluding the contract. Thus, issuing unpredictable regulations by host States or International conventions could hurt the economic balance of the project and significantly change the economic conditions of oil and gas projects. In such a situation to continue the project, the contracting parties need to renegotiate the contract. In such a case, renegotiation, as a flexible act amends the contract and reduces the possibility of conflicts.

3) The Environmental Risk

A long-term oil and gas project may pose a serious risk to the environment. the influence of environmentalists may force cancellation or suspension of a project which is considered as likely to cause serious damage to the environment, to the disadvantage of parties to the contract who might have invested a considerable sum of cash into the project. Emerging new national or international environmental standards and regulations after the concluding oil and gas contracts, may add cost to a project which was not considered by the parties at the time of the agreement.[3] This frequently occurs in developing countries where environmental regulations are not well established, and more often, they are issued in response to one environmental disaster or another which is publicized and adopted by some powerful environmental pressure groups (domestic or international). When an oil and gas contract confronts the environmental risks, salvaging the project may require a review of the contract by the parties in order to address those environmental concerns.[4]

4) Change in government

The change in government *per se* may not offer any legal basis for renegotiating a contract entered into by the previous government. However, in international business, a change of regime (particularly if brought about through a coup d'état, revolution or other drastic measures) does put pressure on contractual relations in international business and most commonly is used by the new government as one of the reasons for attempting to renegotiate an agreement signed by its predecessor, particularly when circumstances surrounding the initial contract are blemished by assertions of corruption, incorrect procedure or abuse of office by the previous regime.[5]

c) Creating early opportunity to resolve disputes

The considerable change in the economic balance of the contract may lead it to the disadvantage of one of the contracting parties and creates contractual disputes. In order to prevent the risk of referring disputes to courts or arbitrations, the parties should always consider renegotiation. Initially, the parties need to identify the risk of

[1] Abba Kolo & Thomasa W. Walde, "Renegotiation and Contract Adaptation in International Investment Projects: Applicable Legal Principles and Industry Practices" (2000)1 The Journal of World Investment & Trade 5
[2] Ibid,23.
[3] ibid,28
[4] Ibid,29
[5] Ibid.

changing circumstances and instead of predicting all probabilities and referring the issue to courts and arbitration, they should determine a process to confront these risks within the contract.[1] Renegotiation clauses provide parties with an appropriate opportunity to resolve the disputes. This opportunity will be the first entry to summon the parties and give them the possibility for the adaptation of the contract. Thus, the renegotiation makes contractual relations more flexible. It is a rational way for both governments and IOCs in oil and gas contracts to salvage the risk of an otherwise failing project, which has serious negative consequences for parties when the project can be salvaged by suitable adaptation.

3.1.6 Consequences of Renegotiation Clauses

In the renegotiation process of an oil and gas contract, the parties will succeed or fail. The effective renegotiation of an oil and gas contract leads to the modification of the contract by changing the terms or restructuring of the contract and therefore, renegotiation makes the contractual relationship more sophisticated. The effective renegotiation also has benefits for host governments and IOCs.

> The successful renegotiation may bring the following benefits to the host government: financial- increasing economic benefits from the project; political-restructuring of contract and control over the management; social benefits-increased employment opportunities, training of local forces, participation of the local community in decision making process, sharing of profits of community, protection of environment and technology transfer etc. The renegotiated terms of the contract may be beneficial to the IOCs by preserving the contractual equilibrium through ensuring the anticipated benefits from the project. The renegotiated settlement may not only be beneficial to the parties in the present context of contract but also it may have a positive impact upon the future relationships between the parties.[2]

The main issue of contract adaptation is the goal of equity and fairness in the contractual outcome. In a long-term contract that the economic balance has been changed, the renegotiation may bring equity and fairness in the contractual outcome.

Renegotiation of an oil and gas contract in a changed economic and social context could decrease the scope of political risks, because by the renegotiation of the contract in cases of a change of circumstances, the host State commits itself to conduct negotiations with the IOC instead of taking unilateral action. The successful renegotiation provides the parties with a reasonable solution which finally facilitates stability in the contractual relationship by advancing confidence, trust and reliability between them.[3]

However, in the renegotiation process, sometimes the parties do not reach an agreement. With concern to the failure of renegotiation, the practice of oil and gas contracts on renegotiation offers no clear guidance. The duty of Parties in renegotiation clauses is their best effort to reach an agreement. Thus, parties are required to do their best to pursue successful negotiation in good faith, but they are not required to reach an agreement. In the failed renegotiations, it is a substantial principle that failure to reach an agreement is not a breach of contract.[4] The failed negotiation does not raise any responsibility if the parties have negotiated in good faith. But, the failed negotiation can be considered as a breach of contract only if it is proved that one of the parties has not acted in good faith.[5] In the end, if the parties do not reach an agreement by the renegotiation, often oil and gas contracts directly refer the issue to arbitration.

3.1.7 Requirements for Triggering the Renegotiation Clause

Many oil and gas contracts determine triggering events in the contract to define the scope of renegotiation in advance. The types of triggering events may differ from a contract to another depending upon the parties' ability to foretaste the potential problems.[6] Any renegotiation clause has its conditions that need to be met before the renegotiation phase can start. The imposition of laws or regulations the implementation of which harmfully affects the IOC’s economic benefits could be the trigger of renegotiation. [7]Sometimes the trigger of renegotiation can be more precise, for instance, the increase in customs or taxes. The latter type of trigger has the advantage of precise, but such a renegotiation clause applies only to defined aspects of the contractual relationship. Another requirement that can be a trigger of the renegotiation clause is the change in the financial and economic circumstances concerning the oil and gas industry, operating conditions in the host State and marketing conditions generally as to materially affect the fundamental economic and financial basis of the contract.

The triggering events need to be under the control of both parties because the control by only one of them may lead to disputes. Clearly defined triggering events may prevent an opportunistic renegotiation by restricting the free hand of a wide interpretation of the change of circumstances for triggering renegotiation. Therefore, the parties need to act in good faith in invoking the triggering events.[8]

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[1] Ibid, 22
[2] Al Faruque, “Renegotiation and Adaptation of Petroleum Contracts: The Quest for Equilibrium and Stability, op,cit, 133
[3] Ibid
[4] Bernardini, “The Renegotiation of the Investment Contract”, op, cit. 419
[5] Al Faruque, “Renegotiation and Adaptation of Petroleum Contracts: The Quest for Equilibrium and Stability, op,cit, 130
[6] Ibid,122
[7] Zeyad A. AL Qurashi , “ Renegotiation of International Petroleum Agreements” (2005) 22 Journal of International Arbitration 261
[8] Al Faruque, “Renegotiation and Adaptation of Petroleum Contracts: The Quest for Equilibrium and Stability, op,cit,123

3.1.8 Drafting Renegotiation clause

As indicated in previous sections, renegotiation in oil and gas contracts could be a consequence of force majeure clause, hardship clause or stabilization clause. Moreover, the renegotiation in oil and gas contracts could be conducted as a consequence of the renegotiation clause in the contract. Drafting the clause is a crucial subject in a successful renegotiation clause within the oil and gas contracts. In drafting such a clause, parties need to pay special attention to several confiscations:

First, the triggering events and the procedure to be followed by the parties require to be precisely formulated. Triggering events need to be defined in the renegotiation clause and should be precise and specifically worded to avoid extensive interpretation by any party as well as fears of instability and frequent disputes. 'The triggering events may include a variety of factors-tax increase, specific risk materialises, changes in the financial and economic circumstances relating to the petroleum industry or interval of specific time period'.[1]

Equilibrium should be struck between flexibility in the definition of triggering events that may result in instability and the requirement of concreteness of the definition of events to achieve stability. Thus, events triggering the renegotiation should be carefully weighed by the necessity of contract stability so that minor events which have no major economic consequences, should not be regarded as triggering events for renegotiation of the contract.[2]

Secondly, the extent of the contract change on the basis of renegotiation clauses has to be clearly defined. Renegotiation clauses frequently include a guideline as to the extent of the contract change. The significance of this issue could be realised from the fact that it will determine the result to be reached by the renegotiation process. For example, the clause requires the parties to have a consultation and make the necessary change to ensure that the contractor is restored to the same economic situations which would have existed if the new law and/ or regulation or modification had not been introduced.[3]

Thirdly, the renegotiation clauses have to define the obligations and rights of parties through the renegotiation process. The clause also should be asked for conducting renegotiation in good faith by the parties.

3.2 The Application of Renegotiation Clauses in KRI's PSCs

As explained and indicated earlier, the renegotiation clause is essential in oil and gas contracts and could be a crucial mechanism to avoid disputes in such contracts. KRI's PSCs do not contain the renegotiation clause as an independent clause, however, in the contracts, parties are allowed to negotiate as a consequence of stabilisation clause as mentioned in the consequences of the clause. Article 43 (43.3 and 43.4) in the KRI's PSC shows the opportunity for negotiation as a consequence of the stabilisation clause as presented in the section of the sabilisation clause in KRI's oil and gas contracts. As mentioned earlier, the stabilisation in KRI's PSCs is a hybrid stabilisation clause, thus the clause contains freezing and economic equilibrium provisions. Concerning the economic equilibrium part of the clause in PSCs of KRI which is analysed in the section of stabilisation clause in KRI's PSCs, it also could be considered a renegotiation clause, because it is a combination of stabilisation and renegotiation provisions.

3.3 Renegotiation Clause Comparison

To analyse the renegotiation clause in KRI's PSC, this section attempts to compare and contrast the PSCs of KRI with certain countries' PSCs.

a) Indonesia PSCs

As a renegotiation clause, the Indonesian PSC does not contain such a clause, however, section xv (3. Suspension of Obligation) 3.3 allows parties for renegotiation as below:

The Party whose ability to perform its obligations is so affected shall notify the other Party thereof in writing, stating the cause and both shall do all reasonably within their power to remove such cause.

b) Nigerian PSCs

The Nigerian PSC allows the parties to negotiate in the event of changing legislation that affects the economic balance of the project Article 27 as they are presented in previous sections.

> 27.2 If any time or from time to time there should be a change in legislation or regulation which materially affects the commercial benefits afforded the Contractor Parties 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.[4]

This article permits the parties to meet and amend the contract in the case of changing legislation that affects the commercial benefits of the contractor. However, it does not determine the timing for the procedure and there is no

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[1] ibid, 122
[2] Ibid
[3] AL Qurashi, op.cit.,290
[4] Production Sharing Contract, Covering Block 905 Anambra Basin, in 2007, between Nigerian National Petroleum Corporation and 1. Gas Transmission and Power Limited, 2. Energy 905 Suntera Limited, 3. Ideal Oil and Gas Limited, Clause 27

arrangement for the case of failure of negotiation by the parties.

c) Other countries' PSCs

The Lebanon PSC could be a good example for the renegotiation clause. The Lebanese PSC in Article 28 (Changing in Laws and Regulations) states:

> 2. In the event that the law no 132/2010 (OPR Law), any regulations adopted thereunder (including the decree no 10289/2013(PAR), or any other Lebanese laws are modified after the date of this EPA in any other manner (except as set forth in the next sentence) that substantially affects the economic or financial position of the Right Holders in respect of this EPA, then the Right Holders may notify the Minister and the Petroleum Administration that they wish to meet in order to discuss appropriate adjustments to the terms of this EPA to preserve such economic or financial position. The Right Holders may not provide any such notification if the relevant change in Lebanese law relates to the improvement of health, safety, environmental standards consistent with the evaluation of international standards and practices. If any such notification is provided, the Right Holders shall, together with such notice, provide an explanation in reasonable detail of the manner in which the relevant modifications substantially affect the economic or financial position of the Right Holders in respect of this EPA. The Parties shall thereafter engage in good faith discussion with a view to agreeing on such adjustments. Neither Party shall have an obligation to agree to any adjustment. If such discussions do not produce an agreement within ninety (90) days of the commencement of such discussions, then the Right Holders may submit the issue to a sole expert, who shall determine the adjustment that is necessary to preserve the economic or financial position of the Parties. Any adjustment agreed by the Parties or determined by a sole expert shall be submitted for approval by the Council of Ministers, and shall be effective only if such approval is granted.[1]

The renegotiation clause in this contract is well-drafted and could be useful for KRI future PSCs. It clearly explains the procedure of negotiation for adjustment of the contract in the case of the affected economic and financial position of the contractor by changing laws and regulations. The clause is not unlimited and there are some exceptions such as the improvement of health, safety, environmental standards consistent with the evaluation of international standards and practices. The period of ninety days is determined to reach an agreement and in the case of no agreement is produced, the contractor may submit the issue to a sole expert. Any adjustment agreed by the Parties or determined by a sole expert needs the approval of the Council of Ministers.

The PSC of Azerbaijan also is an effective example of a renegotiation clause. In Article 23.2 (Economic Stabilisation) stipulates:

> The rights and interests accruing to Contractor (or its permitted assignees) under this Contract and its Sub-contractors under this Contract shall not be amended, modified or reduced without the prior consent of Contractor. In the event that the Government or other Azerbaijan authority invokes any present or future law, treaty, intergovernmental agreement, decree or administrative order which contravenes the provisions of this Contract or adversely or positively affects the rights or interests of Contractor hereunder, including any changes in tax legislation, regulations, administrative practice, or jurisdictional changes pertaining to the Contract Area, the terms of this Contract shall be adjusted to re-establish the economic equilibrium of the Parties, and if following any such adjustment the rights or interests of Contractor remain adversely affected (including any adverse effect suffered for the period before this Contract adjustment is implemented, if such is not fully compensated by the adjustment), then SOCAR shall indemnify the Contractor (and its permitted assignees) for any disbenefit, deterioration in economic circumstances, loss or damages that ensue therefrom. SOCAR shall within the full limits of its authority use its reasonable lawful endeavours to ensure that the Government will take appropriate measures to resolve promptly in accordance with the foregoing principles any conflict or anomaly between such treaty, intergovernmental agreement, law, decree or administrative order and this Contract.[2]

The article requires the prior consent of the contractor to amend or modify its rights and interests in the contract. It states when laws and regulations are changed and the rights and interests of the contractor are affected by this, the terms of this Contract shall be adjusted to re-establish the economic equilibrium of the Parties. The article adds, after adjusting the terms, if the rights and interests of the contractor remain adversely affected, the government shall indemnify the Contractor for any disbenefit, deterioration in economic circumstances, loss or

[1] Exploration and Production Agreement for Petroleum Activities in Block 4, 2018, between the Republic of Lebanon and Total E&P Liban SAL, And Eni Lebanon B.V., And NOVATEK Lebanon SAL., Art. 28

[2] Agreement on the Joint Development and Production Sharing for the Azeri and Chirag Fields and the Deep Water Portion of the Gunashli Field in the Azerbaijan Sector of the Caspian Sea, 2017, between The State Oil Company of the Republic of Azerbaijan and Azerbaijan (ACG) Limited, BP Exploration (Caspian Sea) Limited, Chevron Khazar, LTD, Exxon Azerbaijan Limited, Inpex Southwest Caspian Sea ,LTD., Itochu Oil Exploration (Azerbaijan)INC., Ongc Videsh Limited., Statoil Apsheron As, Turkiye Petrolleri A.O. , Art. 23.2

damages that ensue therefrom. However, the scope of the clause according to this article seems unlimited, because there is not any exception to the clause. Also, there is not a determined period for an agreement to adjust the terms of the contract. The article also does not address the situation of no agreement to adjust and modify the terms of the contract by the parties to re-establish the economic balance of the project.

4. Conclusion

In a long-time oil and gas contract, circumstance may change and lead to disputes. There are certain contractual clauses that can prevent the contract from arising disputes in the lifetime of the project and play an important role to avoid from disputes. Stabilisation and renegotiation clause are two main clauses for dispute avoidance in changing circumstances and legislation. This article has provided a clear understanding of these clauses, via defining and explaining their consequences as well as indicating the differences between the clauses. It has given essential points to obey and pay attention in drafting the clauses in oil and gas contracts.

Stabilisation and renegotiation clauses for dispute avoidance in KRI's PSCs have been studied and compared with Indonesian and Nigerian PSCs. Concerning the stabilisation clause in KRI's PSCS, it is considered that the clause is well-drafted. It is a combination of classic and modern stabilisation clauses. This clause states that obligations of International Oil Company will not be changed by the government and the Kurdistan Regional Government maintains the stability of legal, fiscal and economic conditions of the contract within the whole lifetime of the contract. It clearly shows how to trigger the stability clause and explains the negotiation procedure between parties by written request from the IOC, it also determines timing which is 90 days from the writing request to make an agreement for amendment of the contract.

Renegotiation clauses are crucial in oil and gas contracts to prevent parties from arising disputes. In KRI's PSCs, the renegotiation clause is absent as a separate clause, however, as consequences of stabilisation clauses in the contracts, parties can negotiate and solve their problems. The stabilisation in KRI's PSCs is a hybrid stabilisation clause, thus the clause contains freezing and economic equilibrium provisions. Concerning the economic equilibrium part of the clause in PSCs of KRI which is analysed in the second section, could be considered a renegotiation clause, because it is a combination of stabilisation and renegotiation provisions.

It is recommended that Kurdistan Regional Government should review the provisions of stabilisation and renegotiation in its PSCs and insert a comprehensive stabilisation clause as well as including the renegotiation clause as an independent and effective clause in the future PSCs. It is also suggested further studies in contractual clauses to avoid disputes in oil and gas contracts.

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