Legislative Stabilization Condition and its role in Oil Contracts Arbitration

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Oil contracts are the key contracts that raised broad controversy in the legal, juristic and economic spheres, respectively, and this controversy comes from several sides, primarily the matter of those contracts, which is petroleum, which is an economic commodity that was economically discovered from the end of 19th century to date.

Importance of this commodity drove diversity and multiplicity of the conditions contained in those contracts. The key and most controversial condition is that of legislative stabilization which was widely debated and discussed in juristic media of all approaches. We have discussed the condition in the research titled "condition of legislative stabilization and its role in oil contracts arbitration" in three sections. The first section concerns definition of legislative stabilization condition and types in two topics. The first topic defines the legislative stabilization condition and the second for definition of its types. In the second section, we handled the stance of jurisprudence and the consequences thereof in three topics the first of which is that of the stance of jurisprudence and the second in its legal framing and consequences. In the third section, we handled the role of legislative stabilization condition in the terms of oil contracts arbitration and handled the key arbitral awards in the contracts the matter of investigation which contained condition of legislative stabilization in four topics the first of which is Texaco Arbitral Award of 1977, the second is Liamco Arbitral Award of 1977, the third is Agip Arbitral Award of 1979, and the fourth and last one is Aminoil Arbitral Award. We concluded by investigation set of conclusions and recommendations that we noted in place.

1- Introduction:

Energy is the most serious challenge facing humanity in the third millennium in view of increasing need to it in the fields of industry. Non-renewable energy, represented in hydrocarbons (oil and gas) is used in (3600) industries. The key description of petroleum is (black gold). Geological surveys confirm that global oil reserve is mainly in the Middle East. The latest statistics note that (52-67%) is in this region.

Exploitation of petrol resources is often between foreign companies that have their legal system which is different from the laws of petroleum-producing countries. The parties tend to conclude contracts between them to exploit petroleum. The foreign party, company, usually focuses on including special term named legislative stabilization condition. We will try through the section under study to highlight its definition and types, and the stances of jurisprudence from it and its legal framing as well as its consequences in the first four parts of it to define the legislative stabilization condition and types. The second part is the stance of jurisprudence and stances of legislature thereof. The third part is types of this condition. We preferred to dedicate the fourth part to the stance of the key arbitral awards concerning disputes on petroleum contracts where arbitration had an active role in deciding them as terms recently established for resolution of the oil contracts disputes where arbitrators take into account the legislative stabilization condition in rendering of their awards. Conclusion of the research will include the key results and recommendations that we will be drawn in this research.

2- First Section

Definition and types of legislative stabilization condition

In this section, we will handle definition of legislative stabilization condition and types in two topics the first of which is jurists' definition of the condition the matter of the study. Their

definitions varied. The second topic is that of the types of legislative stabilization condition.

2-1 Definition of legislative stabilization condition

Legislative stabilization condition means "that condition whereby the State undertakes not to apply any new legislation or new regulation to the contract concluded by the state with the foreign company[(1)]."

Through our reading and analysis of the above definition we conclude:

1.Enforcement of this condition derives from bilateral or regional agreement that can be deemed legislation with which the negotiating State's authorities restrict the State's authority to issue any regulation or legislation that can affect the contractual relation. Therefore, it may generate international liability in case of breach of the agreement .

2- There is a purpose of this condition to freeze the State's role in its contractual authority of legislation. This legislation is the legislation of investment or regulation of international contracts where a party is foreign[(1)].

In the framework of international contracts, including oil contracts, which include many conditions, and the arbitration clause comes as one of the conditions that the contracting parties clearly focused on them through the international contracts the matters of which are the natural resources the execution of which will take long times. The arbitration clause included new conditions, including the condition of legislative stabilization, which the foreign party is interested to introduce within the terms of contract to be assured about continuous execution of the contract without change of legislation with the first party represented in the State. Focus on this condition is due to the long terms of execution of oil contracts. This condition has two types that we will highlight in the second topic.

2-2 Types of legislative stabilization condition

This condition is classified into two types: Contractual conditions and legislative conditions, which we will handle in the second topic in two sections.

Section one: Contractual or agreed conditions of stabilization are the conditions which are contained within terms or conditions of the international contract itself and explicitly stipulate the law that applies to the contract on dispute, which is law with its applicable provisions and rules only at the time of conclusion with exclusion of any subsequent amendment that may be made thereto. As example of those conditions we mention the provision of article (15) of the agreement and contract which is concluded between the State of Cameroon with a company that inspects and exploits oil, which states "Amendments that may be made to the provisions set forth afterwards may not be applied to the company during the period of maturity." The provision of article (14) of the contract concluded between the State of Togo and mines company (Benin) in which it declares that "In the case where legislative or regulatory amendments of jurisdiction are made in the independent Republic of Togo, the latter undertakes to guarantee by particular exception in favor of mines Company (Benin) utilization of the former provisions related to the mining materials system and the mine fields which may be authorized for inspection, and the concessions granted to the company, which is not invoked by the latter in the new provisions"(1). A contract concluded in 1978 between Tunisia and a US oil company states that " Tunisian law on the date of signature of this contract shall be the applicable law on the date of this agreement." (1).

Part II: Legislative Conditions: Legislative conditions are legislative texts contained in the body of the law of the State that will enter as party to international contract or agreement with a foreign particular person whereby the State undertakes against the latter not to amend or revoke its law which is applicable to the contract or agreement. This type of time freezing means of the contract law adopted the Iranian oil

law enacted in 1957 which stipulates that "Any change in contravention to the conditions, concessions and circumstances which are defined or recognized in a certain contract on the date of conclusion thereof or at any time for the purpose of renewal thereof shall apply to that contract only within its first term, not during the period of its renewal." (2)

There is also provision of the Cameroonian law of investment of 1960 as article 18 thereof generally stipulates that it is "Residency agreement specifically defines the guarantees of stabilization in the legal, economic and financial fields as in the field of financial transfer and marketing of products." (3)

Libyan petroleum law promulgated in November 1955 stated that it shall not apply to the concessions granted before promulgation of it in article (24) of that law. The amendments made to this law afterwards deny that they don't prejudice the concessions which are concluded before its enforcement. (4)

In the draft oil and gas investment law that was presented to Parliament in May 2007 we find in chapter five, section two, that article (52) noted that "No provision in conflict with this law shall apply". Therefore, the provision states that in the cases where the legislative authority tends to establish certain legislation it shall consider the mentioned text, particularly in the cases where legal positions of this or that party are established for avoidance of the legal and economic consequences of the new legislation. (5)

3- Juristic stance of validity of the stabilization condition and its legal framing and consequences

In this section, we will handle the stance of legal jurisprudence towards validity or invalidity of the condition the matter of the study. We will also try to identify its legal framing and consequential results in three topics.

3-1 Jurisprudence stance towards the condition of legislative stabilization

Jurisprudence was divided into three approaches concerning this condition as will be seen in this topic.

3-1-1 Supporting approach

Advocates of this approach find that the legislative stabilization condition in the contracts concluded between the State and private foreign persons, including the oil investment contracts, are valid and productive conditions. These consequences are represented in that the contracting State may not terminate or amend the contract at its sole will or create any changes or modifications of its law in the manner that can prejudice the conditions of contract, except in the cases which are set forth in accordance with the contract or its amendment or by reference to legal system of this.

Advocates of this approach believe that these conditions are valid by themselves independently of each legal system, after the substantive rules of private international law or material rules of direct application. However, this opinion was criticized in three sides as follows:

First: Condition of legislative stabilization leads the contract to evade being subject to any law.

Second: This condition, if we took into account the characteristics of State contracts concluded with foreign persons, require several years that require the State to retain throughout the years of contract package of foreign systems that have no relation to its normal legislation and may lead to rigidity of law.

Third: Denial of the State's right to amend some of its remaining provisions in accordance with the condition of the contract to order this State to follow the policy of rigidity or legal freezing, which is normally in conflict with the State's role in development of the State's laws to cope with the new circumstances, according to Dr. Munzer Al-Shawy, to realize the economic purpose of legislation[(6)].

3-1-2 Opposing approach:

Advocates of this approach believe that those conditions have no legal value and don't give rise to any effect. Those conditions are contractual conditions like the other conditions contained in the contract. Therefore, those conditions don't have more binding force than the contract itself that contains them. Consequently, the stabilization condition shall in turn be subject to the sovereign authority as in the other contractual conditions contained in the contract, in addition to the fact that the State may not waive the concessions of public authority which the State doesn't have and which are indispensable for discharging the duties assigned to the state. According to this approach, the State shall have the right to intervention either to terminate or amend the contract at the State's sole will, if public interest so requires, regardless of whether the contract contains this legislative stabilization condition. This condition doesn't pose restriction on the State's sovereignty to terminate those contracts or amend them.

This approach was also criticized:

First: It is difficult to refuse every legal value of undertaking made by the State not to prejudice the rights and obligations of the contracting parties. If the parties include the expression of legislative stabilization condition in the contracts that they conclude, this is clearly because they estimate that those conditions are deemed valid and effective at the meantime and are not considered infeasible.

Second: The State that agrees on inclusion of the legislative stabilization condition which it concludes with foreign persons while believing that these conditions will have no significant effect on practice of its sovereign authority clearly violates the principle of good faith. Claiming that those conditions don't have binding power more than what is contained therein is manipulation of expressions. The legislative stabilization condition is a basic condition that the State may not prejudice the same as arbitration clauses.

In most times, when foreign contractor insists on including this clause because the right to compensation prescribed for it in case of state

practice of its sovereign authorities doesn't appear to be sufficient, it aspires to further protection.

Third: Concerning claim that State may not assign practice of its sovereign authority, this may be valid in view of the domestic law of this State, not as such in view of the international law. The State can limit some of its concessions by conversion and by contract. (7)

3-1-3: Conciliatory approach:

Part of jurisdiction advocated legislation stabilization condition being subject in terms of validity and value to legal system on which the contract is based. This legal system (applicable law) doesn't mean the contract in terms of matter. However, this means the legal system from which the contract derives its validity and which defines the rules that apply to the matter of contract. This international legal system, according to the conditions that define the applicable law that are contained in the contract. Therefore, the matter is no more than two hypotheses:

First hypothesis: The hypothesis where the contract is attributed to the national legal system of the contracting country, which is concerned with determination of whether or not those conditions are valid or that it considers them to be void. Other statement means in fact exclusion of those conditions from being subject to the domestic law which governs the entire contract, which is not acceptable. There is nothing to call for evasion of those contractual conditions themselves from being subject to the law that governs the entire contract. The legislative stabilization condition being subject to the national law of the contracting State results in difference of the legal consequences of another domestic law. There are legal systems that authorize those conditions and consider them to be valid. There are other legal systems that prohibit those conditions and consider them to be valid. In the case where domestic law prohibits inclusion of such conditions, those conditions shall be deemed void and their violation by the State shall not give rise to any liability to the other party. However, advocates of this approach believe that the State's nonobservance of stabilization conditions contained in the contract based on its national

law that prohibits inclusion of them can be deemed illegal work and therefore leads to raising its international liability towards the State to which the other party belongs based on bad faith of the State that accepted this condition in the contract while knowing that its national law prohibits this or based on the idea of intentional omission(8).

Second hypothesis: The hypothesis where the contract is attributed to the international legal system. This hypothesis is materialized when the contracting parties agree on subjecting the contract concluded between them to the applicable legislation of the contracting State at the time of conclusion of contract. The legislative stabilization condition leads to restriction of the evidence that new law shall be immediately and directly applicable. This evidence is only minor evidence that the parties may not agree on the opposite of it.

In conclusion, validity of legislative stabilization condition is a result of internationalization of contract. This condition doesn't contain any assignment by the Contracting State of practicing its legislative jurisdiction having binding strength the violation thereof by the contracting State results in raising the State's responsibility towards the other party. (9)

This approach is characterized by being an attempt to find solution amidst the problem of legal value of legislative stabilization conditions and the consequences thereof. It matches the two conflicting (advocating and opposing) approaches. In spite of its criticisms, we agree with it, because with the need of many countries, particularly developing countries, to invest in their natural resources, they still have broad area to practice its sovereignty on its territories on the one hand, and to fulfill its obligations of whatever type, on the other. This approach was practically applied by some arbitral awards that include the practical application of this condition.

3-2 Legal framing of legislation stabilization condition and its consequences

In this topic, we will try to highlight the legal framing of the above condition in two parts as follows:

3-2-1: Legal framing of legislation stabilization condition

There are many opinions that were expressed in respect of determination of the nature or legal framing of legislation stabilization condition as follows:

First: transformational conditions of the nature of law: Some writers believe that the amendments made to the applicable law after conclusion of contract don't apply to it in view of the fact that this law is incorporated in the contract and becomes contractual condition, like other conditions or terms of contract. In this case, that law only has its name, and lacks its legal status. We can concude that the time freezing condition practices transformational effect of the nature of law which is chosen for regulation of contract. It shall be noted here that transformation comes from the principle of authority of will and international freedom of contracts and agreements.

However, this opinion is valid only in respect of the contracting or agreed conditions of legislation stabilization or time freezing of law since the parties to contract choose the applicable law and incorporate it in the contract explicitly.

Second: Conciliatory conditions with the power of law: In case the parties agree on enforcement of the applicable legal rules at the time of conclusion of the contract, not the rules that may arise afterwards, it doesn't result in change of the nature of law within which those rules are included. Enforcement of the new rules that arise after conclusion of the contract stops. They remain legal rules in the technical terms. Here we say that the legislative stabilization condition has conciliatory effect by the force of application to the law of contract in the subsequent amendments.

3-2-2: Results of freezing conditions

There are two results of incorporating the stabilization condition the contracts:

First result: Law in international sphere lacks its nature as defined by domestic law; that is, its jurisdiction is only optional whenever this is desired by the parties to international contract. Here the matter ends by observance of individual rights which infringes respect of law in its essential nature. In related meaning, Mr. Batiffol says: "The parties' recognition of the authority of choice of applicable law to their contracts leads the parties to be free in choosing law only under a condition, particularly exclusion of every new judgment that will be rendered and affects the applicable contracts." (10)

Second Result: That contract becomes in nature with this condition as if it is not subject to any law; that is, contract is free of the authority of law at least in principle from the time when the amendment of law which is supposed to be made to it is made. (11)

3- Role of legislative stabilization conditions in the oil contracts arbitration

In this section, we will handle the practical applications of legislative stabilization condition for arbitrators in oil contracts-related disputes.

4-1 Arbitral award of Texaco 1977 (see appendix A) for facts of this case

Facts of dispute related to this judgment are summed up in that the government of Libya concluded in the period from December (1955) to April (1971) concluded some oil concession contracts with the American companies:

(California Asiatic oil company et Texaco overseas petroleum company)

Since in September (1973), government of Libya promulgated law No (66) of (1973) on nationalization of (51%) of all money, rights and assets owned by the two mentioned companies, and government promulgated, on (11) February (1974) law No (11) of (1974) on nationalization of all money, rights and assets owned by the above two companies. Those two companies notified government of Libya on (2) September (1973) with their intention to commence arbitration

to resolve the dispute that arose between them for the purpose of article (28) of the concession contracts concluded between the two companies and government of Libya. The dispute was referred to the International Court of Justice that appointed French Professor, Mr. Dupuy, as sole arbitrator to resolve this dispute.

Arbitrator addressed many important legal matters, including the matter of validity of validity of stabilization conditions and non-prejudice to the consequences of it, particularly the effect that arises of incorporating such conditions the matter of research in the contract on the state's right to take nationalization procedures.

In this respect, arbitrator started by assuring the State's right to take the nationalization measures that are not presently under discussion, and that it is considered expression of its sovereignty. However, it asks about whether the State's practice of this right doesn't know any restrictions on the international level and whether right to nationalization in particular, which is considered expression of the State sovereignty authorizes the state to breach its international liabilities which are assumed by the State within this sovereignty.

Arbitrator responded by stating that international law recognizes nationalization procedures, whether taken against citizens or against foreigners in whom the state didn’t vest any particular liability to guarantee to them continuity in their positions, and differentiated two hypotheses that we will highlight in two parts as follows:

Part I: Hypothesis in which the nationalizing state concludes with the foreign company contract that finds its basis in the domestic law of this country and is fully subject to it. In this hypothesis, settlement of the new position that arises out of nationalization shall be governed by the legal provisions which are applicable in this State.

Part II: Hypothesis where the state enters into internationalized contract with the foreign contractor whether because it is governed by the national law of the hosting country (as law which is incorporated by reference) that applies on the date of contract and which is stabilized on the same date in accordance with its conditions,

particularly because this contract was put directly under the authority of international law. In this hypothesis , the situation is completely different from the previous hypothesis. The State put itself in the framework of the international legal system to undertake towards the foreign party that contracted it to guarantee the legal and economic conditions within certain period of time. On the other hand, this undertaking requires the foreign party to make huge investments and inspection operations, and to exploit the oil resources in the territory of this State, and to bear the risks that arise out of all this. Accordingly, the decision taken by the State for nationalization, even if though it is considered practice of jurisdiction of domestic law entails international consequences from the moment when the nationalization procedures prejudice legal relation of the international law relations to which the nationalizing country is party.

However, the State can't invoke its sovereignty to deny the undertakes that the state freely admitted in the framework of this sovereignty itself, and can't, in accordance with the procedures which are subject to its domestic law itself, undermine the rights of the other contracting party which fulfilled the various obligations vested in it in accordance with the contract.

In view of those principles, arbitrator estimated that it is reasonable to determine whether nationalization measures which are taken by government of Libya against the two claimants can ignore certain undertaking of government not to take such measures.

Arbitrator indicated that lack of any condition in the concession contract concluded by the parties enjoins government of Libya from recourse to nationalization. However, arbitrator noted that this contract contains article (16) which stipulates that, "Government of Libya will take all necessary measures to guarantee that the company has all rights which are vested therein by this agreement, and that the contractual rights that explicitly arise in accordance with the present franchise can't be amended without consent of the parties. This concession shall be interpreted in accordance with the law of oil and applicable regulations on the date of signature of this agreement.

Every amendment or cancellation of those laws and regulations shall not affect the contractual rights of the company without consent of the company." (12)

Arbitrator states that this provision that aims at stabilizing the position of foreign contracting party doesn't bear in principle prejudice to sovereignty of the State of Libya not only because the state is freely committed to it, but also because this condition which stabilizes the legislative and regulatory system in the field of oil on the date of signature of the agreement doesn't prejudice in principle the legislative and regulatory system in the State of Libya. This state reserves its concessions to promulgate laws and regulations in the field of oil towards all citizens and foreigners, respectively, who are not vested this obligation. The role of article (16) is limited to not using such legislative and regulatory works against the parties towards whom government is committed to such undertaking throughout the period agreed for execution of the contract. Therefore, the amendments may arise out of adoption of new laws and regulations that can't prejudice the mutual rights of those parties. Therefore, it is not said that sovereignty of the State of Libya is missing; the State simply assumed with its sovereignty such obligation in an international agreement throughout the period of execution of this agreement, which is considered the common law of the parties.

Recognition of nationalization by international law is not sufficient to authorize the State to the right to ignore its undertakings. International law itself also recognizes for the State the ability to internationally undertake not to practice this right by its acceptance of incorporating the stabilization condition in contract concluded with a private foreign person.

According to the foregoing, the arbitral award concluded that in view of the international law of contracts, nationalization can't be invoked against the internationalized contract concluded between the state and a private foreign person, and includes legislative stabilization conditions. The arbitral award was in favor of the American company. Government of Libya tried to ignore it and claimed that right to

nationalization is not a matter subject to arbitration, based on the UN Resolution No (1803) and other resolutions that entitled all states to full sovereignty over their natural resources(13). However, by the end of course, Government of Libya compensated the company for insurance with an amount of USD (19) million(14).

4-2 Arbitral award of Liamco 1977

This award was rendered in the dispute that arose between Government of Libya and the company named Liamco (Libyan American Oil Company) following nationalization by Government of Libya of the properties and interests of this company in accordance with the nationalization resolutions issued in (1973) and (1974). In accordance with the nationalization resolutions issued in the early September (1973), (51%) of the company's properties and interests were nationalized. In accordance with the nationalization resolution issued on (11) February (1974), the remaining properties and interests of this company. When the Government of Libya refused to participate in the procedures of arbitration and objected to appoint its arbitration, the company approached president of the International Court of Justice to appoint sole arbitrator to resolve this dispute by application of the arbitration clause set forth in article (28) of the contract concluded between the parties. president of International Court of Justice has actually appointed Mr. Mahamassani, Lebanese National, as sole arbitrator to adjudicate this dispute. Arbitration proceedings were initiated on (2) July (1974), and resulted in issuance of the mentioned arbitral award on (12) April (1977).

The award addressed many legal matters, including the matter under research. The arbitrator states that the condition contained in article (16) of the contract the matter of dispute (which has been previously mentioned on addressing Texaco Arbitral Award) is part of the conditions named stabilization conditions, and non-prejudice to those conditions the binding power of which is recognized in international law. In addition, the condition contained in article (16) is justified not only according to the Libyan oil legislation but also according to "the principle of inviolability of contracts", which is a

general principle recognized in domestic law and international law, respectively. In addition, this condition is considered to be in conformity with the principle of non-retrospective laws which dictates refusal of every retrospective effect of any new legislation.

Therefore, arbitrator acknowledged validity of the stabilization and no prejudice conditions that are contained in the oil contracts concluded between the petroleum-producing countries and the foreign companies. However, it didn't address the consequences of them. In particular, it didn't explicitly determine whether those conditions ban the State from adopting nationalization procedures which can put an end to the contract before the deadline agreed between the contracting parties. (15)

However, arbitrator, after addressing the state's right to nationalization and stating that the vast majority of public international law jurists confirm the state's right to nationalization of foreign money, and that states have the right to undertake nationalization in the manner and the form that the state considers to be suitable, and that they have the full freedom in this field, and there is no rule in this respect to restrict the State's practice of this right in the international judgments or international conventions. In addition, international law jurists in particular admit today that State's right to nationalization applies to the money of concessionaire even before the date scheduled for elapse of concession, in addition to the United Nations resolutions on nationalization which confirmed the sovereign right of States to nationalize their natural resources.

After addressing the principle of inviolability of contracts and indicating that this principle is taken for granted by most national legal systems, including Islamic sharia and international law, respectively, and that this principle applies to the ordinary contracts and concession contracts also. It is also required for individuals and governments. Therefore, the contract may be terminated or amended only by mutual satisfaction of the contracting parties.

After all, arbitrator concluded several propositions, including that the state's right to nationalize its natural resources is a sovereign

right which shall be subject to compliance with compensation in case of premature termination of franchise contracts. Nationalization of the rights that arise out of concession, if it doesn't have discriminatory nature, and if it is not accompanied by illegal act or behavior, is considered illegal by itself and doesn't represent illegal work. However, it creates obligation of compensation for concessionaire because of premature termination of concession contracts.

In view of those legal propositions, arbitrator concluded that Lyamco concession contracts which are concluded with the government of Libya are deemed to be binding contractors and may be terminated only in certain cases, including the case of non-discriminatory nationalization which is accompanied by reasonable compensation.

In conclusion, arbitrator declared validity of the stabilization and no prejudice conditions. However, he stated that those conditions and the principle of inviolability of contracts doesn't enjoin the state's role to put an end to contract by nationalization before the deadline agreed between the parties.

4-3 Agip Arbitral Award 1979

Facts of the dispute of this judgment are summed up in that in (1962) the Italian Agip Company and Government of Congo concluded contract for exploitation of petroleum resources provided the contract be governed by Congolese law. Agip Company owned (90%) of its shares and Swiss International Holding Company owned the remaining (10%). This established company exercised its business in distribution of petroleum in Mice in (1965). On (12) January (1974), Government of Congo nationalized the petroleum products distribution sector in accordance with law No (1) of (1974) which transferred the nationalized money to the national company (Hydro-Congo), which included nationalization of all companies working in the field of petroleum distribution sector, except for Agip Company which has previously concluded on (2) January (1974) an agreement with Government of Congo whereby Agip undertook to assign to government number of shares that represents (50%) of its capital. In

addition, government agreed that the company maintains its standing as joint-stock company from the private law companies in spite of the government's contribution therein, and government undertook to adopt the suitable provisions to avoid application of future amendments to the companies' law to the company.

On (12) April (1975), President of the Republic of Congo issued decree No (6) of (1975) on nationalization of the company. When dispute arose between the parties, the parties commenced arbitration before International Investment Disputes Resolution in accordance with the arbitration conditions set forth in the agreement concluded between them on (2) January (1974), and arbitral tribunal was created to resolve this dispute. The court consisted of Mr. J. Trolle, president; Mr. Dupuy and Mr. Rouhani as arbitrators. The arbitral tribunal addressed many matters including the matter under research.

In this respect, the arbitral tribunal noted that government undertook (in accordance with the provision of article four of the agreement concluded between government and Agip on (2) January (1974)) that the company shall keep its character as joint-stock company of private law. In accordance with the provision of article (11) of the mentioned agreement, the legal system of the company shall not be amended even in case of introduction of new amendments to the companies' law.

Arbitral tribunal argued that contract was unilaterally terminated. In accordance with resolution No (6) of (1975), it clearly ignores the stabilization conditions that derive their application not from sovereignty of the contracting country but from the common will of the parties. It stated that the conditions which have been freely approved by government shall not prejudice in principle the State's legislative and regulatory sovereignty so long as government reserves this sovereignty before citizens or foreigners to whom it didn't keep those undertakings, and so long as those conditions are limited to the present case in not using the legislative and regulatory amendments set forth in the agreement as evidence. In view of this, arbitral tribunal

concluded that nationalization procedures adopted by government is illegal, and to order government to compensate the company for the damages that arise out of this nationalization.

4-4 Arbitral award of Aminoil 1982

Facts of this dispute related to this judgment are summed up in that on (1948) Prince of Kuwait concluded a contract with the American Aminoil Company whereby the company obtained concession for inspection and exploitation of petroleum in the State of Kuwait for sixty years. This contract contained stabilization and no prejudice condition that prevents the State's adoption of any amendment of the contract during the period of validity of the contract. However, when the company refused the request of Government of Kuwait to amend the contract in accordance with the agreements that were concluded between the petroleum exporting countries that were signed in Tehran in (1971). In Geneva, in (1972 and 1973), Government of Kuwait terminated the contract and nationalized the company in accordance with decree by law No (124) of (1977).

The company invoked commencement of arbitration, and arbitration agreement was concluded between the parties in July (1979). Arbitral tribunal was created of three senior jurists of international law: Professor (P. Reuter), President; Professor G. Fitzmaurice; and Professor Hamed Sultan, as two members.

Matters that were referred to the court included the stabilization and no prejudice condition and the consequences of it, particularly the effect of incorporating such conditions in the contract on the State's right to adopt nationalization procedures.

In this respect, arbitral tribunal confirmed that the State's right to adopt nationalization procedures is not a matter of debate, and that stabilization and no prejudice conditions contained in the contract aimed at the procedures that can cause gross material damage to the company's interests because they are described as confiscation. Whereas nationalization is not confiscation, it shall be governed by international law for several conditions including payment of

reasonable compensation, stabilization condition contained in the contract the matter of dispute doesn't target national procedures.

Arbitral tribunal refused the point of view that was invoked by the company, which implies that stabilization condition which is contained in the contract was drafted by loose and absolute expressions that suffice to ban commencement of nationalization, and assured that there is no doubt that the contractual restrictions of the State's right to nationalization are acceptable in accordance with law. However, this serious undertaking of non-nationalization shall be matter of explicit provision and shall be for specific period of time. Therefore, undertaking of non-nationalization can't be concluded from the stabilization condition stated in the contract by general expressions, and for long period of time that takes the term of franchise contract which is concluded for two years.

It is noteworthy that arbitral tribunal focused on assuring that if it is not possible to interpret the stabilization clause as obstacle of nationalization, this means that these conditions lack their value and effect. These conditions, as implicitly dictating that nationalization doesn't have the nature of confiscation, enhance the necessity of reasonable compensation as condition for validity of nationalization. The arbitral award defined certain amount of compensation that was USD (179,750,764) to be paid by Government of Kuwait to Aminoil Company in the first of June (1980). Government of Kuwait initiated without reservations.

After review of the standing of arbitral award towards the matter of validity of stabilization and no prejudice condition and the consequences of it, we can conclude that all those awards recognized validity of this condition. However, they varied on the scope of their application. Some arbitral awards- such as Texaco Arbitral Award and Agip Arbitration- concluded that those conditions enjoin the State's adoption of nationalization procedures taken by the State and to order the State to pay compensation.

On our part, we believe with some jurists that stabilization and no prejudice are valid and legally authorized conditions. The State

may by its sovereignty include such conditions in the contract concluded between the State and foreign party. The state shall, on practice of its legislative policy and privileges as public authority, take into account the State's existing undertakings and contractual liabilities, including the stabilization and no prejudice conditions. If supreme interest of society or (essential) condition in the terms of reference of contract require, the State shall call on the foreign party to enter into negotiation for achievement of this review by consensus, and the other party may refuse negotiation in good faith on the pretext that stabilization and prejudice condition immunize the contract against any intervention by the State. The applicable practice in general from (1950) in the field of exploitation of petroleum resources reveal the gradual drafting of customary rule that key changes of conditions require the parties to negotiate for the contract to be consistent with the new circumstances. If foreign partner refuses negotiation in good faith, the State shall practice its sovereign authority to strike contractual balance or put an end to contract by nationalization. In this case, the other party has no other means than receiving reasonable compensation for the damages sustained by him, and which shall be estimated by the competent judiciary and arbitration in case the parties agree on commencement of arbitration.

However, this doesn't mean that stability and no prejudice conditions are futile in practical terms since inclusion of such conditions in the contract and the contracting State's observance of them provides assurance and confidence to foreign companies and get them to approach dealing with them, and can create suitable environment for investment in natural resources because petroleum industry passes through four phases (exploration, extraction, refining and marketing) which are still monopolized by leading companies that always seek stable legal and economic environment because the terms of contracts of investment in the field of energy, including oil and gas, are usually very long up to ten years, including the guarantees that the State seeks and that achieve stability for the state, which is the condition of legislative stabilization.

4- Conclusions:

1. We found by research that there is certain effect of the legislative stabilization condition when it is included as a condition of oil contracts and has several outcomes for the contracting State which reaches raising its internal and international liability, the easiest of which is compliance with compensating the contracting party, and that breach of such condition can create environment that detracts the foreign investor who usually has economic and technical capacities that the national party can't afford, and that inclusion of legislative stabilization condition which most countries worked to dedicate in the foreign investment contracts in general, and the oil exploitation contracts in particular, through the legal provisions; that is, it shall be stipulated by legal provision and it is either an agreement that results from an international convention that was stipulated by the international organizations. We mean by legislative stabilization condition to restrict the State and freeze the applicable law to the contract in its case at the time of conclusion, which enjoins the State from assuming any legal procedure or amendment of its provisions. However, jurists were divided in several approaches in terms of definition of its legal nature. It is widely believed that State shall have the right to make changes of its law, although there is an agreement between the parties for the purpose of public interest. However, some believe that there is no difference and some who believe that the principle of authority of will is a basic principle in termination of the applicable law. Will prevails over the principle of State sovereignty.

2. Whereas the legislative stabilization condition is a principle for guarantee of stabilization of legislation to safeguard sufficient protection to investor for attraction of his capitals

and guarantee of his freedom of investment in the hosting country to dictate this condition in the investment contracts have results and consequences for the parties to contractual relation, including negative impacts and results on the State, represented in restricting the state from intervention in making any amendments to the contract in change of its law and the positive outcomes for the foreign party. There are also negative results for the investor. In case the State breaches the contractual liabilities between the State and the foreign party, this gives rise to liability of contractual nature.

3. The study drew the following conclusions, including that the legislative stabilization condition is a contractual condition the effect of which is limited to the provisions of applicable law. We believe that those conditions are failing because concentration of relation between the investor and the State didn't meet the condition of stability and its function as protector of this relation, and didn't guarantee for investor the protection that he seeks so long as the State can change the applicable law to the contract concluded under the provisions of the previous law. We believe that it didn't consider the State's adoption of sovereign procedures such as issuance and amendment of laws and issuance of decisions according to public interest is not respect of contractual relation. The second result is that, as a matter of fact, we find that those concerned with those contracts try to separate them from law which is subject to amendments and changes laid by the State. In other words, freezing the contract in time. The fact in this case is that we believe that contract shall be separated from law so this contract becomes without law. In our view, period of time shall be laid in advance and stated, and in certain time law shall be applied to the contract because the State government is not stable and can be changed at any time. In addition, the State shall state in advance in the

contract the value of compensation of loss that the investor encounters as a result of the state's fulfillment of its undertakings.

4. In this research, we suggest to Iraqi legislature within the framework of regional and international institutions to be attractive and encouraging of the foreign investor to invest the natural resources, including oil, by accession to New York Convention on International Arbitration (1958) and other related conventions, and clear reference in investment legislation to the means of disputes resolution by corporate international arbitration and that the legal provision is not limited to arbitration to be clear in the above meaning for the foreign investor when he reviews the legal environment of investment in Iraq, in addition to care for preparation of the contracts of petroleum exploitation and focus on balancing the economic and technical need with the legal sides and guarantees sought by foreign investor to avoid any problems that may arise out of enforcement or interpretation of oil contracts.

Margins

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* Dr. Mahmoud Al-Mudhaffar: Mineral Resources and State and Individual's rights in it, Dar Al-Haqq, Beirut, 1998, p. 66.

* IPC: National Oil Company established in accordance with law No 11 of 1964 to exclusively assume the entire oil business, and Dupuy was cancelled as sole arbitrator to adjudicate this dispute. In accordance with the dissolved Revolution Command Council's resolution No 267 on 26/04/1987 to be merged with the Ministry of Oil and was returned by cabinet resolution on 08/08/2009.

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