



The Condition Of Legislative And Contractual Stability In Oil Contracts

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Abstract

Addressing disputes is one of the main goals of any law, the law follows in one of two ways, either preventing disputes from occurring in the first place, or resolving them after their occurrence, noting the privacy of oil contracts that are characterized by the disparity in the legal positions of the two parties, as one of the parties is a person who enjoy special advantage represented by the host oil state, and the other party is a private person who does not enjoy special benefits it is represented by the oil company, hence the difficulty of reconciling the outlook of the investing oil company and the host oil state, which makes disputes more complicated, so the source of concern is the state's attempt to exploit its influence and power as a protector of public interest to the extent that leads to a breach of the balance between the two parties. The balance of the oil contract is crucial to avoiding disputes, so it is imperative for both parties to the contract to create a state of balance between the objectives of the oil company, which is that the contract remains as it is without prejudice to it from any party, and the requirements of sovereignty and basic development that the state is keen to achieve to maximum possible degree on the one hand. Others, and this is by anticipating the issues over which disputes arise, and by identifying means of preventing them, the most important of which is the requirement of legislative stability and non-change of the contract, in order to ensure the maximum balance between Requests for stability and development, as well as maintaining affair balance between the host country's authority over its natural resources and the protection of foreign investment.

Keywords:-

1- The oil contract 2- Oil investment 3- Oil disputes 4- Oil company 5- The oil - producing country .

Introduction

First - the topic of research

As a result of the principle of sovereignty, the host oil state enjoys exceptional advantages that foreign oil companies contracting with do not enjoy, including the

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authority of legislation, which is the tool through which the host oil state expresses its investment policy in the field of oil, but the stability of the legislative provisions of the host state is a constant basis for the expectations of the oil company. The investor and its accounts, so it is necessary for the foreign oil company to insure itself with a number of legal guarantees, in order to protect its investment from making any legislative or regulatory changes that would prejudice its rights or impose obligations on it, so foreign oil companies contracting with the host oil state, or one of its bodies or its affiliated institutions to include in their oil contracts the condition of legislative stability and not prejudice to the contract, which would prevent the implementation of legislative amendments carried out by the host country on the oil contract, and prevent the state from interfering in amending the oil contract by its own will.

Second - the importance of research:

The importance of this research appears in the role that oil contracts play in the economic development of oil-producing countries, especially in developing countries, including Iraq, and in order to attract oil companies to invest in those countries, a stable political, security and economic environment must be created, as well as legislative stability for the laws of the oil-producing country, and its failure to modify the oil contracts unilaterally, so the importance of studying the legal and contractual stability clause in oil contracts increases in the role that this condition plays in maintaining the contractual bond between the two parties to the oil contract and ensuring its continuity, especially since the length of these oil contracts makes it more than others are subject to disputes between their parties.

Third - the research problem:

In the event that the law of the oil state includes the condition of legislative stability, there is no problem about the validity of this condition in the oil contracts and the obligation of the contracting state to it. However, the problem arises if the condition of stability is included only in the contract that the oil state concludes with the foreign company without stipulating it in the law of the producing country, as this condition may raise a constitutional problem represented in the lack of competence of the executive authority to restrict the legislative authority in exercising its original competence in legislating laws, and does the condition of stability achieve the public interest of the oil state or does it achieve the interest of the oil company only?

Fourth - Research Methodology:

In the scope of our research, we relied on the comparative analytical deductive approach that relies on the deduction and analysis of legal texts in Iraqi legislation and an attempt to compare them with comparative laws and legal systems, as well

as the adoption of the applied approach that is based mainly on strengthening jurisprudential and legislative positions with oil contracts concluded closely related to the subject, especially oil contracts Iraq, as well as oil contracts concluded in other oil countries in order to reach fruitful results.

Fifthly, the research plan:

We will divide the research in the legislative and contractual stability condition in oil contracts into two sections. In the first we deal with the concept of the stability condition in two demands. We discuss in the first requirement the definition of the stability condition and its legal nature. The second is to study the legal value of the stability condition and its role in limiting oil contract disputes, in two demands. It is necessary to display.

The first topic

The concept of constancy condition

The condition of stability has several definitions in which jurisprudence differs, and it has forms that differ according to its source, content, or the beneficiary party, and the condition of stability finds its legal basis in legislation, whether it is national or international, as well as in oil contracts concluded by oil countries with foreign companies, as for the nature of The condition The jurisprudence has differed in this regard, so we will divide this topic into two demands.

The first requirement

Definition of the condition of stability and its legal nature

In this requirement, we will discuss the definition of the condition of stability and its legal nature by dividing it into two branches. In the first we will discuss the definition and in the second the legal nature of the condition according to the following:

First branch

Define stability condition

The oil state can modify the contractual rights in the oil contract by taking certain actions as a public authority, so it is natural that a large number of oil contracts include conditions known as stability conditions to ensure that the contract does not change and remains fixed, as these conditions freeze the legal system of the contracting state The public authorities in this country are prevented from taking any measures or issuing any laws or regulations that lead to a breach of the contractual balance and endanger the interests of the foreign oil company (), and within the framework of the stability condition, a distinction is made between the legislative stability condition and the non-violation of the contract (the

contractual stability condition), Therefore, we will discuss in this section the definition of what is meant by each.

First - Defining the Legislative Consistency Condition: - The Legislative Consistency Condition is intended as a legal tool through which the foreign company is protected from the risks of legislation, and aims to freeze the state's role as a legislative authority and a party to the contract at the same time by preventing it from changing the legal rules in force at the time of its conclusion, as the state undertakes Accordingly, not to issue new legislation that applies to the contract concluded between it and the investor contracting with it in a way that upsets the economic balance of the contract and results in harm to the other contracting party (the foreign oil company) (1), and some jurisprudence went to define it as an attempt to isolate the oil contract from the law that must govern it, by freezing it in time so that only the law applies to the contract in its state at the time of the conclusion of that contract, with the exclusion of all modifications that may occur to it in the future (2), while some of them went to define it as the condition under which the state undertakes not to apply any legislation new, or new regulations on the contract it concludes with foreign companies (3).

The main objective of introducing the legislative stability clause is to establish the legislative rules as they were at the time of the conclusion of the contract, i.e. the stability of this contractual bond on the one hand, and on the other hand the inclusion of this condition is due to the inequality in the legal status between the two parties to the contract and the length of the contract term, so the foreign oil company tries to fortify itself with a set of legal guarantees against violating its rights or the economic balance in the contract, as a result of the oil state's intervention as a public authority in the form of issuing new legislative rules (4). The foreign company contracting with it is to prevent the state from using the privileges it enjoys as a legislative authority capable of creating and implementing the law on the contract concluded between it and the foreign company contracting with it (5).

Accordingly, the agreement to include this condition is considered a waiver by the host oil state in favor of the foreign oil company of a part of its sovereignty in the field of legislation through its pledge to immunize the oil contract from being subject to the application of any subsequent legislative amendments to it that may harm the company's economic position, and thus the legislative stability clause aims at Oil contracts to protect the oil company from:

- A- Future national legislation that bears the character of arbitrariness towards the foreign company.
- B- Legislation and government procedures aimed at nationalizing the oil project.
- C - National legislation aimed at increasing the financial and non-financial obligations of foreign oil companies.

Second - Definition of the condition of inviolability of the contract (the condition of contractual stability): The condition of inviolability of the contract means that the state undertakes not to modify the contract at its own will by using its privileges according to its internal law as a public authority, which gives the foreign party contracting with it immunity against what it enjoys. It has authority resulting from this administrative characteristic (6), and some jurisprudence goes that the condition of contractual stability is intended for the state to undertake that the rights and obligations of the two parties may not be modified unilaterally without the consent of the other party, using the privileges of public authority that it basically enjoys vis-à-vis the foreign contractor (7) .

The condition not to prejudice the contract aims to prevent any modification of the contract by the oil state unilaterally to protect the foreign company contracting with it against the administrative risks that are represented in the management's right in legal systems to modify the terms of the contract to which it is a party at its own volition (8), and according to the condition of not prejudice to the contract, the state shall. The host, upon concluding the oil contract, pledged not to make any modifications to the contract unilaterally, which leads to the stability of the contractual balance between each of the host country and the foreign oil company.

Although the condition of inviolability of the contract (the nodal stability condition) differs from the legislative stability condition in theory, the oil contract may include both conditions at the same time, in addition to the fact that the distinction between the nodal stability condition and the legislative stability condition may seem less clear when. The implementation of each of these two conditions, the legislative stability condition aims in the end not to prejudice the contract, as it seeks to prevent the application of the new amendments to the law on it (9).

second branch

The legal nature of the condition of persistence

Jurisprudence differed in the legal nature of the legislative stability condition and the condition not to prejudice the contract into two directions, the first trend went to the fact that the stability condition is an exception to the principle of immediate and direct application of the new law, while the second trend went to the fact that they are conditions that change the nature of the law, that is, they lead to the integration of the law in the contract, so we will show each of the two directions according to the following:

First - the conditions of stability as an exception to the principle of immediate and direct application of the new law: - This trend of jurisprudence went to counting the conditions of stability as an exception to the principle of immediate and direct

application of the new law, and this principle is stable within the framework of the national law, according to it as long as the new law relates With legal rules commanding or related to public order, it is obvious that the new law is applied immediately from the date of its entry into force, and it has direct effects on all contracts, even those contracts that were concluded under the old law and this new law is not considered retroactive (10).

Thus, the condition of stability, which aims to perpetuate the validity of the old law that had been agreed upon by the two contracting parties, is an exception to the principle of immediate and direct application of the new law, which prevents the implementation of its provisions on the contract for which the governing law has been frozen in terms of time, and thus the principle of continuous effect of the old law replaces the direct effect of the new law and the old law continues despite its cancellation or amendment.

A part of jurisprudence has criticized this trend in adapting the legal nature of the condition of stability on the grounds that the principle of the application of the old law to the ongoing effects of contractual centers does not apply to administrative contracts, because the condition of stability is a principle branching from the principle of authority of will, and the will of individuals does not play a major role within the scope of contracts Rather, these contracts remain subject to the idea of the public interest that leads to solutions that cannot be reconciled with the simplest contractual principles. It applies to it with its immediate and direct effect (11).

Second - Conditions of stability Conditions that change the nature of the law: Another aspect of jurisprudence goes that the amendments that occur to the applicable law after the conclusion of the contract do not apply to the contract, given that that law is integrated into the contract and becomes contractual conditions like the rest of the contract paragraphs, and in In this case, that law remains only in its name and loses its basic character, and therefore the conditions of stability exercise a transformative effect on the nature of the law chosen by the parties to rule the contract (12), the contracting parties, due to their free will, have the right to incorporate into their agreements the appropriate rules for their relations borrowed from The national law, whether this merger was done by referring to the national law or by adopting these rules, as if the conditions of stability changed the nature of the chosen law and made it lose its character as a legal rule and made it a mere contractual condition (13). Therefore, the previous assumption is only in the contractual conditions of stability, as the contracting parties choose the applicable law and integrate it, but in the absence of the parties' will for this choice, the idea of merger has no place, because the law is determined by the judge's knowledge, and then there is no change in the nature of the law The chosen one because it does not exist in the first place (14), but if the conditions of stability are legislative conditions set by the legislator itself to encourage

investment, in this case the first theory (the conditions of legislative stability as an exception to the principle of the immediate application of the new law) seems the most appropriate, taking into account all the reservations regarding it (15).

The second requirement

Types of persistence condition and its legal basis

The legislative stability condition has several types, and this condition finds its legal basis in more than one source, so we will divide this requirement into two branches.

First branch

Types of Legislative Consistency Requirement

The requirement of legislative stability has various forms, in terms of its source, in terms of its content, and in terms of the groups benefiting from it. We will explain them in three paragraphs according to the following:

First - in terms of the source: We can distinguish between the contractual origin and the legislative origin of the legislative stability condition. The first is the conditions that are contained within the paragraphs of the contract concluded between the host country and the foreign investing company, while the second is the conditions that are based on legal texts existing in the applicable state law, on the contract, which stipulates granting the foreign company contracting with the state all the exceptional privileges stipulated in the law with a pledge to continue them even if this law is amended (16).

Second - in terms of content: It can be divided into general conditions aimed at freezing all the legal rules in force in the contracting state, by not applying all new legislation to the contract, and it may be special conditions that provide only that some of the legislation in force in the state does not apply. Whether these legislations are in force at the time of the conclusion of the contract, or future legislation such as legislation related to taxes and customs (17).

Third - in terms of the beneficiary categories: These conditions are divided into absolute conditions and relative terms. It stipulates that the beneficiary of these conditions is the private party contracting with the state and that all privileges and exemptions related to it are only benefited from, and do not apply to individuals working in the private project contracting with the state (18).

second branch

The legal basis for the persistence requirement

The condition of stability finds its legal basis in oil contracts, and the legislation of oil-producing countries, so we will address in this section the legal basis for both the legislative stability condition and the nodal stability requirement in two paragraphs according to the following:

First - The legal basis for the legislative stability clause: The legislative stability clause finds its legal basis in oil contracts. The text on the legislative stability clause in oil contracts was first mentioned in the concession agreement concluded between Iran and the Anglo-Iranian Oil Company in 1933, as it stipulated that legislation the government cannot change the concession or its conditions (19), as this condition was stated in Article (41) of the contract concluded between Ecuador and Texaco Petroleum in 1964, as it stipulated that ((the parties shall abide by the petroleum and mining laws in force at the time of signing the contract, those laws The texts of which have been incorporated into the contract and govern the operations that take place between the parties in any field that the parties have not expressly agreed to regulate)) (20), as well as the contract concluded between the Tunisian government and a foreign oil company in 1978, as stated in it "The law shall be applicable to the contract. The Tunisian law in force on the date of signing the contract, and the arbitrators shall settle the dispute on the basis of justice and the Tunisian law applicable at the date of the current agreement)) (21), as well as what was stipulated in Article (15) of the contract concluded between Cameroon and an oil exploration and exploitation company It was stated in it, "It is not possible to apply emergency amendments to the provisions of the texts mentioned hereafter during the period of the agreement without the company's prior approval"(22), as well as the text of Article (37) of the agreement concluded between Egypt on the one hand and the Egyptian Petroleum Corporation and Phelps Company on the other hand. 1963, as it stipulated that ((The Corporation and Phillips are bound by Law No. 66 of 1953 amended by Law No. 89 of 1956 and its executive regulations to the extent that the said law or its regulations do not conflict with the provisions of this agreement)). In addition to contractual practices, the legislation of many oil-producing countries has allowed the inclusion of conditions of legislative stability in their contracts with foreigners, within the framework of the policy pursued by these countries aimed at attracting foreign investments, as the requirement of legislative stability plays an important role in this policy as an important factor in attracting Foreign investment because it represents a source of reassurance for this investor, and among the examples of laws that stipulate such conditions, we can refer to the Libyan Oil Law No. (25) for the year 1955, which stipulated in Article (24) that the law does not apply to the concessions granted before its issuance, In addition, the amendments that were attached to this law after that stipulated that they would not affect the privileges held prior to its implementation, as well as what was stated in the Algerian Investment Law of 2001, as Article (15) of it stipulates that ((the revisions and cancellations that may occur in the future shall not apply to the The investments made within the framework of this order unless the investor explicitly requests that." (23), and in this context comes what is stipulated in the Jordanian Investment Law No. (68) of 2003 in Article (6) that "for the investor whose project

enjoys exemptions or Advantages under the investment promotion legislation and its amendments that were in force before the entry into force of this law, He may choose, regarding his project, any of the following: A- Continuing to benefit from the exemptions and benefits that were granted to his project until the end of the exemption period granted to him under those legislation and with the conditions stipulated therein. B- Benefiting from the privileges and exemptions granted to projects under the provisions of this law, provided that its members reconcile and abide by the conditions and requirements required by this law or the regulations issued pursuant thereto. The legislator has the option for the investor to keep the advantages that were prescribed to him under the previous legislation, or to take advantage of the advantages decided by the new law, which represents a confirmation of the conditions decided by the law under which the investor was contracted as long as the investor does not want to change these conditions, and the Iranian Oil Law of 1957 stipulates On the condition of legislative stability, as it stated in it ((Any change contrary to the conditions, privileges and conditions specified or recognized in a contract at the date of its conclusion or at any period of its renewal shall not apply to that contract neither during its first term nor during the period of its renewal)) (24).

As for the Iraqi legislator, this condition has been adopted in the investment laws. At the level of federal legislation, we find that the Iraqi Investment Law No. (13) of 2006 stipulates in Article (13) of it that ((any amendment to this law does not have any retroactive effect that affects guarantees, exemptions and rights established accordingly)), and at the level of legislation in the Kurdistan region - Iraq, we find that the investment law in the region No. (4) of 2006 stipulates in Article (18/Second) that ((all investment projects that were approved by the Investment Promotion Authority are considered. .. legal investment projects and continue to enjoy the privileges and incentives granted to them)), according to the text of this article, the above law does not apply to investment projects that were approved prior to its issuance.

As for international legislation, the International Assembly, in its session held in Athens in 1979 and devoted to discussing the subject of the law applicable to contracts concluded between states and foreign private persons, ended up recognizing the legality of the parties' agreement on the legislative stability of the chosen law, as Article (3) of the recommendation issued About him that ((the parties may agree that provisions in the internal law to which they refer in the contract are those intended in their content at the moment of the conclusion of the contract)) (25)).

It is worth noting that the foreign oil company is not only the one who benefits from the legislative stability condition, but the host country also benefits from it, but with different limits according to the different stages of the oil industry. But after the discovery of oil, its benefit is mainly to encourage the foreign company to

increase its efforts to reach a successful discovery and to spend more money without hesitation (26).

Second - The legal basis for the condition of inviolability of the contract (contractual stability): There is a condition of inviolability of the contract (the condition of contractual stability) in the form of texts in oil investment contracts, from that contract concluded between Iran and the consortium group of companies in 1954, which stipulated the condition of nodal stability in Article 41, No public or private legislative measure, administrative measure, or any other act of any kind issued by Iran or any governmental authority in Iran, whether central or local, can nullify this Agreement, modify its provisions, or prevent or prevent The necessary and effective implementation of its terms and that canceling or amending the agreement can only take place with the consent of the parties (27)), as well as the contract concluded between the Saudi General Petroleum Corporation (Petromin) and the Italian company Agip in 1967, as stipulated in Article (21) that ((this shall be the contract is a final and binding agreement between the two parties as soon as the two parties sign it and it may not be amended or changed except with the written consent of the two parties by mutual consent. 45/1) provided that ((this agreement is governed by the texts contained therein and may not be amended except with the agreement of its parties)). It also stipulated the condition of contractual stability of the contract concluded between the Syrian government and the American company SAMCO in 1977 in Article (8/b), As stated in it ((rights and obligations of the Syrian Oil Company SAMCO contained in this contract and valid until the date of its expiry is subject to the provisions of this contract and can not be changed or modified except by a joint agreement between the contracting parties)), as well as what was stipulated in Article (16) of the model contract annexed to the Libyan Research Law, which was incorporated into the texts of the contract concluded between Libya and the American Company (Texaco) and (CAOC), as stated in it ((The Libyan government shall take all necessary rules in order to ensure that the company enjoys all the rights conferred by this agreement, and the rights expressly arising from this agreement cannot be modified in accordance with the law governing petroleum and the regulations in force at the moment The signing of this agreement adopting the amendment based on which Article 112 was included in the concession contract, and any amendment or cancellation of these laws and regulations does not affect the rights arising from the contract, which were decided upon by the company as long as it was done without its consent.

As for the Iraqi oil contracts, we find that the traditional concession contracts were devoid of a stipulation of the nodal stability clause, as those contracts were modified with the agreement of the two parties through a new agreement called (the Amending Agreement) and a special law was issued by it (), and the oil service contracts in Iraq did not It includes a text regarding the contractual stability

clause, except that there is an agreement amendment between the two parties represented by the supplementary agreement between the Iraqi National Oil Company and the French company (Earab) in 1974 (28), as for the Iraqi development and production contracts (the production sharing contract) with the Russian and Chinese companies in 1997, It stipulated the condition of contractual stability, as it stated in it ((the amendment is made by the two parties authorized to amend)). This means that the amendment can only take place with the consent of the two parties to the contract represented by the Iraqi Ministry of Oil and the foreign oil company. As for the oil investment contracts that were recently concluded in Iraq is among the oil licensing rounds announced by the Ministry of Oil, as it stipulated the condition of contractual stability, as it did not allow the contract to be amended except with the written consent of the two contracting parties. Article (32/2) of the two models of the service contract provided For the (TSC) technician and the oil development and production (DPC) contract that ((this contract may not be modified or any text added to it except by virtue of a written document duly signed by the authorized representatives of both parties)).

The second topic

The legal value of the stability clause and its role in reducing oil contract disputes Jurisprudence, as well as arbitration provisions, differed in the legal value of the stability condition, and this is what we will address in the first requirement of this topic, while the second requirement will be devoted to the role of the stability condition in limiting oil disputes.

The first requirement

The legal value of the condition of stability

There has been a long discussion and controversy about the legal value of the requirement of legislative stability and not prejudice to the contract (the requirement of nodal stability) at the level of jurisprudence, or before the arbitral tribunals that were formed to settle disputes in oil contracts concluded between the oil states and the foreign companies contracting with them, so we will divide this requirement into two branches, we deal with In the first section, the opinion of jurisprudence, and in the second section, the provisions of the arbitral tribunals, according to the following:

First branch

The position of fiqh on the condition of stability

There are three trends in jurisprudence about the legal value of the requirement of legislative stability and not prejudice to the contract (conductive stability), which are represented by the following:

The first direction: According to this direction, the conditions of stability in the contract concluded between the oil state and the foreign companies contracting with it are considered valid conditions, which results in the state not being permitted to modify the contract by its own will, or making any amendments or changes in its laws that would prejudice the oil contract except in the event that there is a condition allowing the state to rescind or amend the contract, or by referring to a legal system that permits this, and this opinion is based on the theory of the free contract, these conditions are true in themselves without reference to a legal system that determines this validity, and as for counting these conditions as true because they are one of the rules of material private international law, or because it is one of the material rules of direct application (29), and this opinion is also based on the principle of the sanctity of contracts and their inviolability that in the field of contracts with a foreign element conflict with the idea of the sovereignty of the state, and its right as a public authority to amend contracts concluded between them and among other persons, the state's acceptance of a contract with the foreign party indicates its waiver of all the privileges it enjoys as a public authority, which is inferred from the existence of the legislative stability requirement, and thus the supremacy of the principle of the sanctity of contracts on the principle of state sovereignty (30).

This trend has been criticized from several aspects. On the one hand, the conditions of stability lead to the contract not being subject to any law, especially the law of the contracting state. On the other hand, oil contracts are long-term contracts. Therefore, the state is committed to maintaining its legal system despite the economic and political developments throughout the duration of the contract. This means that the oil-producing country follows a policy of legal stagnation, which contradicts the role of the state in developing its law to suit its new circumstances.

The second trend: This trend goes to the fact that the terms of legislative stability and non-violation of the contract stipulated in the oil contracts have no legal value, and do not have any legal effect, as they enjoy the binding force that the contract enjoys, and then submit to the condition of stability and non-violation of the sovereign authority that enjoys the state, as in other conditions that are included in the contract, and giving it a legal value means the state waives its right to change its laws, and its right to amend and terminate the contract at its own will as a public authority (31), which means that the owners of this trend overcome the idea of state sovereignty. Based on the principle of the sanctity of the contract, and then for the oil state to issue new legislation that applies to the oil contract concluded between it and the foreign party, or to amend the oil contract, regardless of the inclusion in this contract of the condition of legislative stability and non-violation of the contract. However, this trend has been subjected to criticism, as part of the jurisprudence has gone to the fact that it is not logical to

reject every legal value of the condition of stability and non-violation of the contract, and if these conditions do not have every value, why should they be included in contracts concluded between the state and foreign companies.

The third trend: This trend tried to find a compromise and reconcile between the two opposing directions, and (JIMENEZ DE ARECHAGA) reached a compromise that the condition of stability is one of the factors that are taken into account when deciding the appropriate compensation, as he says (this does not mean that the condition of stability is not It has effect. An expected cancellation is a violation of such a contractual condition that would create a special right to compensation, and the amount of compensation must be much more than it is in normal cases because the existence of such a condition is a closely related case and must be taken into account when determining the appropriate compensation... (32), and thus this trend grants the right to amend or terminate the contract, and at the same time preserves the economic investment made by the foreign company when concluding the contract. It is applicable to and binding on the other party, but it entails the state's obligation to compensate the other party for the increased burdens arising from it as a result of legislation or decisions.

second branch

The position of arbitration rulings on the condition of stability

The issue of the legal value of the legislative stability clause and not prejudice to the contract was presented to the arbitral tribunals that were formed to settle disputes arising from oil investment contracts concluded between some host countries and the oil companies contracting with them. By the following:

First - Saver Arbitration Judgment ((33): In the arbitration case of Saver Company against the Iranian government, the arbitrator, Cavin, in the judgment issued on March 15, 1963, stated that "in accordance with the agreement concluded between the two parties, the foreign company provided Iran with financial aid." And technical and investments that include wide responsibilities and risks, and therefore it seems necessary to protect them against legislative amendments that may affect the rights and obligations of the parties, and to ensure legal security for them, which is difficult to achieve if the pure and simple application of Iranian law, which is the authority of the Iranian state to amend it)) Thus, this ruling has recognized the legal value of the legislative stability requirement.

Second - Liamco Arbitration Judgment (34): This judgment was issued on 12/4/1977 regarding the dispute that arose between the Libyan government and Liamco Company due to the Libyan government securing the property and interests of this company in accordance with the nationalization decisions issued in 1973 and 1974, which resulted in the nationalization of 51% of the company's property and interests, and the arbitral tribunal was subjected to the requirement of legislative stability and not prejudice to the contract contained in Article (16)

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of the contract, and stated that these conditions are recognized as their binding force in international law, as it stated in this contract (((For the purpose of enhancing the contractual nature of the Liamco concession and other similar concessions, given that one of the contractors is the state, it was found necessary to ensure a certain protection of the contractual rights of the concession holders, as it is usual for foreign investors who accepted the risk of investing large sums of money, and large numbers of Workers to operate their concessions are keen to obtain sufficient guarantee in order to respect the principle of the sanctity of the contract, and for the purpose of ensuring such protection, a provision has been entered in this sense in Clause (16) of the said company's agreements, and this provision is legally authorized and formulated in accordance with Clause No. The same model contained in Table (11) attached to the Oil Laws of 1955 and 1956, stated that the aforementioned item (16) falls within the scope of what has been termed the condition of stability and the inadmissibility of breaching contracts, which is a legally binding condition under the rules of international law).

Third - Texaco Arbitration Judgment (35): This judgment was issued on January 19, 1973, and the facts of this case are summarized by the Libyan government issuing Law No. 66 of 1973 nationalizing the funds, rights and assets of two American companies (California and Texaco). That the Libyan government contracted with them under an oil concession contract, and the arbitrator was exposed to many important legal issues, including the issue of the validity of the conditions of stability and the legal effects resulting from them, and the impact of including such a condition in the contract on the right of the state, especially to take nationalization measures. The arbitrator has made it clear that there is no condition in the concession contract concluded through the mediation of the parties that prohibits the Libyan government from resorting to nationalization. However, the arbitrator noted that the contract includes Article (16) which states: ((The Libyan government will take all necessary measures with a view to ensuring that the company enjoys all the rights conferred by this agreement, and that the contractual rights expressly established under the current concession cannot be modified without the consent of the parties, and this concession shall be interpreted in accordance with the Petroleum Law and the regulations in force on the date of signing this agreement, Every amendment or cancellation of these laws and regulations does not affect the contractual rights of the company without its consent)), so the recognition of nationalization by international law is not sufficient to authorize the state the right to ignore its obligations, as the international law itself also recognizes the state with the ability to pledge internationally not to exercise this right , by accepting the inclusion of the requirement of legislative stability in a contract concluded with a foreign private person, and in the end the arbitrator concluded that, given the international law of contracts, nationalization cannot be adhered to against the contract concluded

between a state and a foreign private person as long as the contract includes a condition for legislative stability.

Fourth - Agip arbitration award (36): This judgment was issued by the International Center for Settlement of Investment Disputes in Washington in 1979 regarding the dispute between the Italian company Agip and the Government of the Congo. It provides for the freezing of the legal rules that apply to the aforementioned agreement, as they are the only ones in force without other amendments or subsequent changes in the laws issued by the State of the Congo. That is, when the country hosting the investment agreed to include in the investment contract a condition of freezing the legal system at the time when the agreement was concluded, the new laws do not affect or detract from the contractual obligations of the state.

Fifth - Aminol arbitration ruling (37): The facts of the Aminol arbitration issued in 1982 are summed up in the conclusion of the Emir of Kuwait a concession contract to search for oil with the American company Aminol in 1948 for a period of 60 years. However, Kuwait nationalized all the company's property by Law No. (124) of 1977 in exchange for a fair compensation determined by a quasi-judicial committee. However, the company refused to cooperate with the committee and resorted to arbitration. (These conditions are not void conditions in themselves and do not constitute an attack on the sovereignty of the state, despite the fact that they restrict its powers. Rather, the conditions of stability are nothing but a real exercise of state sovereignty. The sovereign state has the right to waive its right to nationalization, except that this waiver is of importance as it cannot be deduced from the mere condition of normal stability in a contract concluded between it and the other party. Rather, the state's pledge not to nationalize must be a definite and unequivocal pledge that does not raise any ambiguity, and if doubt arises, it is interpreted in the interest of the contracting state.

The court has made it clear that the condition of stability applies to long-term contracts, and this long period in which the state is bound should not conflict with the sovereign rights of the contracting state, which makes it necessary not to implement the condition of stability. Because of the nationalization of the company by the Kuwaiti government, the American Aminol has acknowledged the validity of the legislative stability condition and the condition not to be prejudiced. However, the existence of such conditions does not prevent the state from taking the nationalization procedure, and accordingly the arbitral tribunal in this case ruled the validity of the nationalization measures taken by the Kuwaiti government with its commitment To pay the amount of compensation to the company that was evaluated by the arbitral tribunal.

From all of the above, and after we touched on the legal value of the stability condition that is stipulated in contracts with a foreign element in general, including oil contracts, it was found that there is a heated dispute between

jurisprudence regarding the legal value of this condition. From our side, we see that a distinction must be made between two cases: -

A- The presence of the condition of stability in special legislation: in this case, it can be said that this condition is valid and that the contracting state is obligated to it because it is contained in a special law issued by the competent legislative authority in the state, which imposes commitment to it from government agencies and does not allow evasion of the obligations that it entails, and then hold it legally responsible for breaching such an obligation.

B - The presence of the condition of stability in the contract only: Such a condition may raise a constitutional problem, as how can the contracting government agency, which is an executive agency, through a contractual condition, exercise a right that does not belong to it but rather belongs to the legislative authority in the state, such as issuing new laws or repealing laws Existing or taking any other legislative action that is at the core of its competence under the Constitution, even if this affects the clauses of the contract concluded between them, but we believe that the condition of stability in this case is considered a valid and productive condition for the government, and therefore a contractual responsibility will be imposed on it in the event of failure to do so. Its commitment to these conditions because legally it is not supposed to be a condition contained in the contract and the will of the contractors - the host oil state and the foreign company contracting with it - and the state is not bound by it, so the state when exercising the privileges of common law must take into account its commitments that it undertakes, and abide by Implementation of all obligations resulting from the contract, as foreign oil companies need reassurances for the purpose of attracting them to oil investment, especially in developing countries. Important elements in attracting and encouraging oil investment and reassuring companies to provide the necessary protection for their funds, but at the same time it is necessary to protect the interests of the host country by establishing a balanced relationship between it and the foreign company by stipulating in the oil contracts that the two parties review the texts of the oil contract within a specific period to amend These texts are in accordance with the interests of both parties, and this is what was included in the oil contract between the Government of Guinea and the company (Bougainrille Copper Ltd) in 1974, which stipulated the necessity of the two parties to the contract meeting every seven years in order to discuss in good faith whether the agreement concluded between them achieved its objectives (38) and there is nothing to prevent the Iraqi government from guaranteeing its oil contracts with foreign companies this method to avoid disputes between the two parties.

The second requirement

Oil disputes and the role of the condition of stability in reducing them

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Disputes are contained in oil contracts due to the different interests between the two parties to the contract represented by the oil-producing country and the contracting oil company, but there are many means to avoid the parties to the contract such disputes, the most important of which is the condition of stability, so we will address in this requirement the oil disputes that may occur between the parties to the contract are in the first section, while in the second section we discuss the role of the stability clause in avoiding those disputes.

First branch

Oil struggles

The main problem that accompanies oil contracts is how to reconcile the general objectives that the host oil state seeks to achieve, and the interests and objectives sought by the foreign oil company, and although the two parties to the oil contract have addressed the majority of issues related to their rights and obligations and their regulation through the paragraphs of the contract concluded between them, but Whatever their perceptions and predictions of future matters may be, they remain limited and they cannot control any new matters. It is conceivable that disputes may arise between them in the case of the practical exercise of those rights and obligations that they organized in the contract, whether regarding their interpretation or specifying their contents or the failure of one of the parties to the contract to implement its specific obligations. towards the other party, and these disputes may arise from the breach by the oil state of its obligations, or the foreign oil company with their mutual obligations.

As for the disputes arising from the oil state's breach of its obligations, they may arise due to the oil state taking unilateral measures without the consent of the other party, or due to its breach of its contractual obligations stipulated in the oil contract it concluded, as there are three types of unilateral actions that the state submits in contracts the first type of action is represented in the oil state making fundamental changes in its national legislation with the aim of keeping pace with global developments, which affects the concluded oil contract (39), including the conflict between the Congolese government and the Italian company Agip in 1975 when the Congolese government issued Law No. (6) of 1975 nationalizing the shares of Agip, which prompted the oil company to resort to arbitration (40).

As for the second type, it is represented by the measures taken by the oil state that lead to the termination or cancellation of the contract, including the dispute between the independent American Oil Company (Amin oil) and the Kuwaiti government following the Kuwaiti government's issuance of Law No. (124) of 1977 terminating the agreement with the company by its unilateral will . Also, disputes between the oil state and the foreign company contracting with it may arise as a result of the oil state changing the terms of the contract and this third type, and among the oil disputes that were submitted to arbitration, it was stated

that the terms of the contract may not be changed by the unilateral will of the oil state, the dispute between Liamco and the Libyan government Year 1977 (41).

As for the disputes arising from the oil state's breach of its contractual obligations, according to the oil contract, the oil state has several obligations in the face of the oil company contracting with it, or the equipment is in breach of the contract. Reasonably, or the emergence of obstacles that prevent the implementation of the oil contract, or the claim of ownership of the contract area from a third party, or the breach of other obligations of the oil state stipulated in the contract.

As for the disputes arising due to the contracting foreign oil company's breach of its obligations, it is envisaged that these disputes will occur in many cases, as the oil company must carry out the tasks entrusted to it by itself without delay or omission, and not delay in carrying out the works entrusted to it in the contract beyond the specified date, And that the oil works be carried out in a manner that conforms to the agreed-upon specifications, and there are other obligations on the oil company stipulated in the oil contract.

After clarifying the disputes that may occur between the two parties to the oil contract, it can be said that there are two types of disputes that can be avoided or at least mitigated through the stipulation of the contract on the condition of legislative and contractual stability represented by the oil state making fundamental changes in its national legislation in order to keep pace with developments International, which affects the concluded oil contract, or the oil country changes the terms of the contract.

second branch

The role of the condition of stability in reducing oil disputes

The stability clause plays an important role in achieving a balance between the two parties to the oil contract by limiting the state's general authority to amend or terminate the contract, by protecting the contract from any legislative or administrative procedures being applied to it after its signing. With the aim of encouraging it to invest in oil in its territory, which helps it to raise the rate of economic growth in it, and this concession is a waiver by the state of a manifestation of its regional sovereignty, and since the amendments that occur to the law governing the oil contract lead to upsetting the economic balance of the contract in a right way Damage to the foreign company, the existence of such a condition leads to the stability of the contractual bond between the oil state and the foreign company contracting with it through the contract not being affected by the amendments that occur to the contract law. (42).

The condition of stability is the most effective legal method for the stability of the system established by the paragraphs of the oil contract, and at the same time, this condition enables the parties to the contract to avoid disputes that arise due to the emergence of legislation subsequent to the conclusion of the contract, or an

administrative action by the national party that affects the financial balance of the contract (43).

The technical analysis of the condition of stability in oil contracts shows three legal mechanisms that are followed by both parties to the oil contract to achieve the goal of stability, which are as follows:

1- That the paragraphs of the contract prevail in the laws issued later, either by legislation or administrative regulations, and this is achieved by stipulating that the contract becomes binding so that its paragraphs become not subject to amendment by legislation, including what was stipulated in the contract concluded between Tunisia and an American oil company that ((The Tunisian law applicable to the contract shall be applicable on the date of signing the contract...)) (44), and what was stipulated in Article (2) of the contract concluded between Egypt and SAAM Oil and Gas, that “the rules and procedures mentioned in the Paragraphs attached to the force of law are binding regardless of any legislative provisions.

2- That the paragraphs of the oil contract may not be modified by any means except with the agreement of the two parties, including what was stipulated in Article (31) of the contract concluded between the Saudi General Petroleum Corporation (Petromin) and Sinclair, Natomas and Pakistan Company in 1967, as it stated: “This contract is an agreement It is final and binding between the two parties as soon as the two parties sign it, and it may not be amended or changed without the written consent of the two parties...)(45), including what was stipulated in Article (17) of the oil contract concluded between Kuwait and the independent American Oil Company and abbreviated as Aminoil. In 1948, the sheikh may not, by general or special legislation, administrative procedures, or any other method of any kind, cancel this agreement except in accordance with what is stipulated in Article Eleven. They agreed together and stated that it was in the interest of both parties, and they agreed to make some modification, deletion or addition to this agreement.

3- Excluding the application of the laws and regulations issued by the oil state after signing the contract, for the law of the oil state under which the contract was signed is applicable law, including what is stipulated in the contract concluded between the Zambian government and a foreign company, as it says ((Any arbitration body is obligated when interpreting And the application of any agreements, documents, legislation, orders and other things related to the dispute by applying the law of the Republic of Zambia as it is on December 24, 1969, while ignoring the legislation, provisions, orders and instructions in force in Zambia but issued or adopted after that date)).

It turns out that the condition of stability is more common in contracts concluded between countries and private foreign persons, including oil contracts, and this condition is the most effective way to provide a legal guarantee in favor of the

foreign contracting company, which helps the parties to avoid disputes that may arise as a result of the issuance of subsequent legislation. However, the practical reality indicates that the existence of the condition of stability in oil contracts does not constitute an effective legal guarantee, and therefore is not a sufficient guarantee to avoid disputes between the parties to the contract, as the sanctity of the contract does not prevent the national legislature from exercising its sovereignty in issuing Laws and taking measures that serve the public interest even if this contradicts the clauses of the contract, as the supremacy of a subsequent legislative rule over any contractual provision leads to wasting the legal value of the condition of stability (46), and this matter is clearly evident in the disputes arising from nationalization operations, as these conditions do not play an active role in protecting foreign oil companies when the oil state passed laws to nationalize its oil projects under the pretext of the public interest. (the conditions of stability), and thus the nationalization carried out by the Kuwaiti government against Aminol Company is considered a project by a sovereign state despite the presence of a stability clause in the concession contract concluded between the two parties, as well as the mechanism of the arbitration panel in the Texaco case in 1977 between the Libyan government and two American companies. That nationalization is not affected by the conditions that establish the legislative and regulatory system in the field of oil at the date of signing the agreement because it affects, in principle, the legislative and organizational sovereignty of the State of Libya (47).

However, all of the above does not mean that the condition of stability is completely useless, and that it has no legal effect, as these conditions strengthen the negotiating position of the foreign company when referring the dispute over the oil contract to the arbitral tribunal or resorting to any means of settling disputes, as it can be the condition of stability has to exercise its legal force in terms of being a motivator to reach a compromise or a fair settlement, and then obtain a fair compensation, since the amount of compensation with the presence of the condition of stability is much more than it is with the absence of this condition, because its presence must be taken into account when Determining the appropriate compensation, and thus the condition of stability is a legitimate condition that can represent a basis for negotiation or bargaining, because the arbitral tribunals recognize it as a basis for appropriate compensation.

Conclusion

After we finished the study on the subject of our research tagged (the legal and contractual stability condition in oil contracts), we reached a number of results and a set of recommendations, represented by the following:

First - the results

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In the context of research on the legal and contractual stability requirement in oil contracts, we reached the following results:

1- It is conceivable that there will be disputes between the two parties to the oil contract - the oil-producing state and the contracting oil company - in the event of the practical exercise of those rights and obligations that they organized in the contract, whether regarding their interpretation or specifying their contents or the failure of one party to the contract to implement its specific obligations towards the other party, and from these disputes are for the oil state to bring about fundamental changes in its national legislation in order to keep pace with global developments, which affects the concluded oil contract, and disputes between the oil state and the foreign company contracting with it may arise as a result of the oil state changing the terms of the contract.

2- It is necessary to work to avoid disputes that may arise between the parties to the oil contract by anticipating the issues that may arise about disputes, and to identify means of preventing them by including certain means in the oil contract, including the condition of legislative and contractual stability, in order to ensure the maximum level of Balance between the requirements of stability and development, as well as maintaining a fair balance between the sovereignty of the oil-producing host country over its natural resources and the protection of the foreign investing oil company.

3- Political instability in the majority of oil-producing countries, especially Arab countries, is a source of great concern for foreign oil companies, which prompts them to work to establish the laws of the countries they contract with at the time of contracting, because any political change in those countries must entail changing the ruling regime. In it, and then sometimes changing laws, and this may not be in the interest of foreign oil companies, and the best evidence of this is what happened in Iraq after 2003 and what happened in Arab countries from the events of the Arab Spring, which are among the oil-producing countries, from radical changes to the ruling regimes In it, as is the case in Tunisia, Egypt, Libya, Yemen, as well as Syria, what is the guarantee to maintain the stability of the laws in which the oil contracts were concluded?

4- Perhaps the most important steps taken by foreign companies working in the field of oil since the first oil contracts in order to obtain the greatest guarantees that preserve their interests and avoid losses that may be incurred by legislative instability, is to dictate the condition of legislative stability so that the law that concluded the contract remains Under which it is valid throughout the period of entry into force of the contract concluded between them, since the existence of such a condition prevents the contracting state from making any amendments to the laws in force at the time of the conclusion of the contract in a way that affects the rights and obligations arising from the contract, and it has appeared to us that

foreign companies have succeeded in That is, as the vast majority of new contracts contain an explicit text stipulating that.

5- Since there is a heated dispute between jurisprudence regarding the legal value of the legislative stability requirement that is stipulated in state contracts in general, including oil contracts, from our side, we believe that a distinction must be made between two cases:-

A- The presence of the condition of stability in special legislation: in this case, it can be said that this condition is valid and that the contracting state is obligated to it because it is contained in a special law issued by the competent legislative authority in the state, which imposes commitment to it by government agencies and not allow evasion of the obligations that it entails, And then hold it legally responsible for breaching such an obligation.

B - The presence of the condition of stability in the contract only: Such a condition may raise a constitutional problem, as how can the contracting government agency, which is an executive body through a contractual condition, exercise a right that does not belong to it but belongs to the legislative authority in the state, such as issuing new laws or repealing laws Is it present or taking any other legislative action that falls within its core competence under the Constitution, even if it affects the terms of the contract concluded between them?

6- The condition of stability is common in oil contracts, and this condition is considered the most effective way to provide a legal guarantee in favor of the foreign contracting company, which helps the parties to avoid disputes that may arise as a result of the issuance of legislation subsequent to the signing of the contract or a unilateral action by the administration. The practical reality indicates that the existence of the condition of stability in oil contracts does not constitute an effective legal guarantee, and therefore is not considered sufficient to avoid disputes between the parties to the contract, as the sanctity of the contract does not prevent the national legislature from exercising its sovereignty in issuing laws and taking measures that serve the public interest even if this contradicts With the clauses of the contract, as the supremacy of a subsequent legislative rule over any contractual provision leads to wasting the legal value of the stability condition, but the above does not mean that the stability condition is completely useless, and that it has no legal effect, as these conditions strengthen the negotiating position of the foreign company when Referring the dispute regarding the oil contract to the arbitral tribunal or resorting to any means of settling disputes, as the condition of stability can exercise its legal force in terms of being a trigger for reaching a compromise or a fair settlement, and then obtaining Fair compensation, as the amount of compensation with the presence of the condition of stability is much more than it is with the absence of this condition, because its presence must be taken into account when deciding the appropriate compensation, and thus the condition of stability is a legal condition that can represent a basis for negotiation

because the arbitral tribunals recognize it on the It is the basis for adequate compensation.

Secondly, recommendations

The most important recommendations that we reached in the subject of our research are as follows:

1- As all new oil contracts concluded by the Iraqi government as well as the Kurdistan Regional Government with foreign companies include the condition of legislative and contractual stability, and given that the authorities competent to conclude such contracts are not authorized by any legal text to take such a step, which entails a constitutional problem that must be avoided By placing a special text in the draft oil and gas law that allows the authorities concerned with oil contracts to do so, or by placing a text in it that requires that all oil contracts concluded by the competent authorities be submitted to the legislative authority for approval, in implementation of the principle of separation of powers.

2- That the contracting authority in Iraq expressly declares in the oil contracts its commitment to foreign oil companies with the principle of compensation in the event of nationalization, a procedure that Iraq has previously resorted to, and this compensation can be described as being appropriate as stipulated by the resolution of the United Nations General Assembly issued on 12/14/1962, or to stipulate that compensation is effective, even sufficient and immediate.

3- We recommend the authorities concerned with concluding oil contracts in Iraq to insist that the oil contract include the condition of renegotiating all its clauses through a joint committee between the two parties.

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