

Received: 9 September 2021 Accepted: 11 December 2021

DOI: <https://doi.org/10.33182/ks.v10i1.654>

Legal complications of stabilization provisions in Iraqi Kurdistan production-sharing contracts

Rdhwan Shareef Salih¹

Abstract

During the period of long-term petroleum contracts, host states may attempt to amend the contractual regulation or even to annul contracts by changing their domestic laws, especially in developing countries. Therefore, to restrict the legislative or administrative power of the host States, the contractors would want the petroleum contracts to contain stabilization provisions. These provisions have been included in production-sharing contracts (PSCs) of the Kurdistan Regional Government (KRG). This study aims to critically analyse stabilization provisions of the KRG's PSCs in order to ascertain their legal complications when compared to the provisions of several oil-producing countries' PSCs. Thus, the study poses this question: what are the main legal complications of stabilization provisions of the KRG's PSCs? The study has clarified that most PSCs of the KRG have adopted full hybrid-stabilization provisions and a few of them have adopted limited hybrid-stabilization provisions that have been drafted very widely and are one of the main legal complications of the KRG's PSCs. Finally, it is suggested that the KRG push back on widely drafted stabilization provisions and adopt limited stability provisions or attempt to extricate PSCs from these provisions.

Keywords: Freezing provisions; economic balancing/equilibrium provisions; hybrid-stabilization provisions; the Kurdistan Regional Government; production-sharing contracts

Abstract in Kurmanji

Tevliheviyên qanûnî yên bendên îstîkrarê di peymanên parvekirina-hilberandinê yên Kurdistanê de

Di dema peymanên petrolê yên demdirêj de, welatên mîvandar dibe ku bawêl bidin rêzîknameyên peymanan biguberînin û beta peymanan betal bikin bi rêya guhertina qanûnên xwe yên navxweyî, bi taybetî jî li welatên pêşketinê. Herwiha, ji bo sînorkirina hêza qanûnsazî an jî rêveberî ya dewletên mîvandar, peymandar dê bixwazî bin bendên îstîkrarê bixin nav peymanên petrolê. Ev bend di nav peymanên parvekirina-hilberandinê (PPH) yên Hikûmeta Herêma Kurdistanê (HRK) de hatine bicihkirin. Ev xebat bawêl dide ku bi awayekî rexneyî bendên îstîkrarê yên PPHyên HRKê vekolîne da ku tevliheviyên wan ên qanûnî diyar bike bi rêya berawirdkirina PPHyên çend welatên hilberînerên petrolê. Bi vî awayî, xebat vê pirsê dike: Tevliheviyên qanûnî yên bingeşî yên bendên îstîkrarê yên PPHyên HHKê çi ne? Xebatê zelal kiriye ku piraniya PPHyên HHKê bendên îstîkrarê yên bi temamî dureh qebûl kirine û kêmtir jî wan bendên îstîkrarê yên dureh ên sînorkirî qebûl kirine ku gelek bi berfirehî hatine nivîsandin û yek jî bingeşî tevliheviyên qanûnî yên PPHyên HHKê ne. Di dawiyê de, hatiye pêşniyarkirin ku HHK jî bendên îstîkrarê yên bi berfirehî diyardirî vekişe û bendên îstîkrarê yên sînorkirî bipêjirîne an jî wan bendan ji PPByan derxe.

¹ Dr. Rdhwan Shareef Salih, Department of Law, Faculty of Law and International Relations, Soran University, Qr. Khabat, St. Kawa, Soran/Erbil, Kurdistan Region, Iraq. Email: rdhwan.salih@soran.edu.iq



Abstract in Sorani

نألوزییه یاساییه کانی مه رجه کانی سه قامگیری له گرێبه سه ته کانی پشکی- به ره هم له کوردستانی عێراق

له کاتی گرێبه سه ته نه وتییه درێژ خایه نه کاند، دهو له ته خانه خوێکان، به تاییه تی له و لات هه شه سه سه ندوو هه کان، ره نگه هه وێل بدهن به گۆرینی یاسا ناو خوێیه کانیان ریکاره کۆنتر اکتییه کان هه مواری بکه ن و ته نه ات گرێبه سه ته کان هه لێو هه شیننه وه. بۆیه، بۆ سنوورداری کردنی ده سه لاتی یاسایی و ئیداری و لات هه خانه خوێکان، به لێنده ره هه کان ده یانه ویت گرێبه سه ته نه وتییه کان رینماییه سه قامگیر بیه کان له خو بگرن. گرێبه سه تی پشکی- به ره هم (PSCs) ی حکومه تی هه ریمی کوردستان نه م رینماییه تی له خو گر تووه. ئامانجی نه م توێژینه وه شه کار بیه کی ره خه نه گرانه ی رینماییه سه قامگیر بیه کانی PSCs ی حکومه تی هه ریمی کوردستانه بۆ سا عه کردنه وه ی نألوزییه یاساییه کانیان له کاتی کدا له گه ل رینماییه کانی PSCs هه ندیک و لاتی دیکه ی به ره هه مپێه ری نه وت به راورد ده کرین. به مچۆره، توێژینه وه مه که نه م په رسیاره ده خاته روو: ئاریشه سه ره مکیه کانی به نه ده کانی سه قامگیری گرێبه سه ته PSCs ی حکومه تی هه ریم چین؟ نه م توێژینه وه شه ی روو نه کردۆته وه که زۆرینه ی PSCs ی حکومه تی هه ریم به ته وای رینماییه کانی گرێبه سه تی سه قامگیری هاو به ندی ته به نی کردوه و ته نه ا که مێکیان رینماییه کانی سه قامگیری هاو به ندی سنوورداری ته به نی کردوه که به شینه وه کی فراوان دارێژاره و یه کی که سه ره مکیه تر نألوزییه یاساییه کانی PSCs ی حکومه تی هه ریم. له کۆتاییدا، پێشنیار ده کریت که حکومه تی هه ریمی کوردستان رینماییه کانی سه قامگیری که به راوانی گه لاله کراون پاشگه ز بێته وه و ته به نی رینماییه سه قامگیر بیه سنوورداری بکات یان هه و لێدات PSCs- هه کان له و رینماییه ده ره باز بکات.

Abstract in Zazaki

Zehmetîyê qanûnî yê hukmanê îstîqrarî yê kontratanê parekerdişê berardişê yê Kurdistanê Îraqî

Demê kontratanê petrolî yê wextdêrgan de beno ke dewletê pêşkêşkerî, bitaybetî dewletê averşîyayoxî, biceribnê qanûnê xo yê zereyî bivurnê û wina madeyanê kontratanê zî bivurnê yan zî kontratan bi xo betal bikerê. Coka, seba ke îmkananê dewletanê pêşkêşkeran ê qanûnî û îdarîyan sînor bikerê, mutabîdî wazenê ke zereyê kontratanê petrolî de hukmê îstîqrarî est bê. Nê hukmî daxilê kontratanê parekerdişê berardişê (PSC) yê Hukmatê Herêma Kurdistanî (KRG) bîyî. No cigêrayîşê bedelê keno ke nê hukmanê îstîqrarî yê PSCanê KRG bi çimê rexnegir analîz bikero û zehmetîyanê înan ê qanûnî goreyê hukmanê PSCanê welatanê petrolhetoxanê bînan ra tesbîr bikero. Coka, no cigêrayîşê nê persî pers keno: zehmetîyê qanûnî yê hukmanê îstîqrarî yê PSCanê KRG çî yê? Cigêrayîşê vet meydanê ke zafêrîya PSCanê KRG hukmê îstîqrarî yê tam-hîbrîdî qebul kerdî û ci ra tayîne kî hukmê îstîqrarî yê hîbrîdê sînorkerdeyî qebul kerdî ke bi hewayêko zaf hîra virazîyayê û zehmetîya qanûnî ya bingeyêne yê PSCanê KRG yê. Peynîye de, pêşniyaz beno ke KRG hukmanê îstîqrarî ke bi hewayêko hîra virazîyayî, ver bi vejîyo û hukmanê îstîqrarî yê sînorkerdeyan qebul bikero yan zî biceribno ke PSCanê nê hukman ra vejo.

Introduction

Commonly, oil and gas contracts are long-term and capital-extensive agreements that cover long periods and high costs. It comes as no surprise that a lot may change during the period of the contract, especially in developing countries. The host states, i.e., states which international oil companies (IOCs) have invested in, may change their domestic laws and policies, which may have significant risks for and negative impacts on the contractor's operations and finances. Once the costly and risky exploration stage is over, the host state may attempt to tip the economic or fiscal terms in its favour by changing its laws. For example, Equatorial Guinea, Kazakhstan, Algeria, Angola and Ecuador have substantially increased taxes and royalties on petroleum revenues at various times. Therefore, in response to the

possibility of modification of contractual rights by unilateral governmental actions, the contractor would want the petroleum contract to contain stabilization provisions, commonly known as fiscal stability provisions, that allow the contractor to seek redress if host-state action reduces the contractor's take from the project. Contract stabilization provisions preserve the principle of *pacta sunt servanda*² or the strict sanctity of the contract against the sovereign right to change the law. However, as Mansour and Nakhle (2016) illustrate, under no legal system has the principle been found to be absolute, and contractual rights can be expropriated.

It is quite common to find stabilization provisions in contracts entered into by developing countries because of the anticipated change of law risk in such countries. However, including such stabilization provisions is not usual in contracts entered into with the developed countries because of the stable legal regimes available for contracts within these countries. Accordingly, it can be stated that another strategy--concerning the legal regime--is the incorporation of stabilization provisions. The main aim of stabilization provisions is to restrict the legislative or administrative power of the host state as sovereign in its country and legislator in its own legal system, to amend the contractual regulation or even to annul the agreement in order to protect IOCs (Bernardini, 2008; Emeka, 2008). Additionally, Peter Cameron illustrates the aim of stabilization provisions in the international petroleum industry and states they are "primarily to reinforce the provisions of a long-term investment contract by allocating a change of law risk between the host State party and the investor" (Cameron, 2014). He also explains that stabilisation provisions "aim to preserve over the life of the contract the benefit of specific economic and legal conditions which the parties considered appropriate at the time they entered into the contract" (Cameron, 2010: 219).

Production-sharing contracts (PSCs) of the Kurdistan Regional Government (KRG),³ like other PSCs around the world, employ a series of non-fiscal provisions, including stabilization provisions. These provisions are not managed well and are even not fixed in the Kurdistan Region Oil and Gas Law No. (22) of 2007 or any other legislation; therefore, they contain various legal complications that are contrary to the KRG's interests. However, studies examining stabilization provisions of the Kurdistan Region's PSCs are scarce. Only two were found: Ahmed and Othman (2016) have described the legal effects of freezing clauses articulated in the PSCs as the risk- management clauses in order to ensure the stability of legislation. Also, Mohsin S. Salih and Akram Yamulki (2020) examine the stabilisation clause in the Iraqi Kurdistan Region oil and gas contracts and elaborate on the concept and consequences of this clause. Throughout the literature, it is noteworthy that there is a dearth of critical scholarly studies on the stabilization provisions of the Kurdistan Region's utilized PSCs. This study, therefore, seeks to fill this gap and aims to critically analyse stabilization provisions of the KRG's PSCs in order to ascertain their legal complications when compared to the provisions of several other oil-producing countries' PSCs. This study also attempts to answer a significant question: What are the main legal complications of the stabilization provisions of the KRG's PSCs?

² *Pacta sunt servanda* (Latin for "agreements must be kept") is a fundamental principle of law, whereby contractual obligations must be respected.

³ Since 2006, the KRG has signed more than 60 PSCs with IOCs. For more information see Salih, R. S. and Yamulki, A. (2020a). Petroleum Exploration and Production Contracts as Regulatory Tools: The Kurdistan Region Production Sharing Contracts. *Journal of Law, Policy and Globalization*, 101, 165-184.

To answer this question, the study is divided into four main sections. Following this section, which introduces the study, the second section illustrates different types of stabilization clauses and the scope of stabilisation provisions. The third section critically evaluates the stabilization provisions of the KRG's PSCs and compares them to the stabilization provisions of several countries' utilized PSCs. The study will conclude in the fourth section by providing the main findings and recommendations.

Typology of Stabilization Clauses

Commentators distinguish stabilization provisions into different categories. According to Oyewunmi (2011), Paterson (2018), and Olawuyi (2018) stabilization provisions are of two types: 1) freezing provisions, which freeze the law that applies to the investment at the time the contract is signed, for the duration of the contract; and 2) economic equilibrium provisions, which allow for some adjustment that do not have asymmetric benefit or damage to one party. The economic equilibrium provisions aim to keep the same financial position of the investor as provided by the contract on the date it was signed. It is noteworthy that there is a disagreement between some commentators on the enforceability and validity of freezing stabilization provisions because they fetter the host state's sovereign power to make laws. However, international arbitral tribunals have found that stabilization provisions are valid and binding. In *Texaco Overseas Petroleum Co. and Cal. Asiatic Oil Co. v. Gov't of the Libyan Arab Republic* [1977], the arbitrator held that:

Not only has the Libyan State freely undertaken commitments but also the fact that this clause stabilizes the petroleum legislation and regulations as of the date of the execution of the agreement does not affect in principle the legislative and regulatory sovereignty of Libya.

Jasimuddin and Maniruzzaman (2016) and Emeka (2008) divide stabilization provisions into two key types: traditional freezing and modern hybrid-stabilization provisions. They also point out that under traditional freezing provisions, the law in force on the effective date of the contract governs the contract for the entire duration of the contract, and the host state shall be prohibited from later enacting any law inconsistent with the contract. However, according to modern hybrid-stabilization provisions, when the host state increases an IOC's financial burden by subsequent legislation, it is required to pay compensation to the IOC for the financial loss and/or to restore the balance of risks and rewards established in a contract by negotiation with the IOC in good faith. The hybrid-stabilization provisions generally encompass four principal features: defining a change of circumstance that will trigger renegotiation, indicating the effect of the change on the contract, outlining the objective and procedure of the renegotiation, and providing for a solution if renegotiation fails.

However, Maniruzzaman (cited in Thaib and Santiago, 2018) and Shemberg (2008) reveal that there are three main types of stabilization provisions: freezing, economic balancing/equilibrium, and hybrid provisions. The freezing provisions are designed to make new laws inapplicable to petroleum contracts. The economic balancing provisions provide that although new laws will apply, the parties shall agree to make the necessary adjustments to the relevant provisions of the contract and the IOC will be compensated for the cost of complying with them. The hybrid provisions are a combination of freezing and balancing provisions. Box 1 provides examples of the three types of stabilization provisions that are

adopted in this study. Cameron (2014, 2016) classifies renegotiation provision as a form of stabilization provision and states that renegotiation provision is often seen as a modern form of stabilization. Bernardini (2008) also opines that renegotiation provisions (also called adaptation provisions) are used as an alternative to or in combination with stabilization provisions. Therefore, most PSCs worldwide have used renegotiation provisions in combination with economic equilibrium and hybrid stabilization provisions. Renegotiation provisions require parties to come back to the bargaining table and restart negotiating the terms of their contract in specified circumstances. They provide the opportunity of salvaging a contract that has become onerous or inefficient due to the changing circumstances during the contract periods. It is also noteworthy that in the KRG's PSCs, there are no articles that involve the renegotiation provision explicitly. In other words, they do not contain any direct article addressing renegotiation provisions.

Box 1. Examples of Different Types of Stabilization Provisions

Freezing Stabilization Provision:

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

Economic Equilibrium Stabilization Provisions:

2)The Contractor agrees that it will obey and abide by all laws, taxes, duties, levies, and regulations in force in Kenya.

(3) If after the Execution Date of this Contract the economic benefits of a party are substantially affected by the promulgation of new laws and regulations, or of any amendments to the applicable laws and regulations of Kenya, the parties shall agree to make the necessary adjustments to the relevant provisions of this Contract, observing the principle of the mutual economic benefits of the parties.

Hybrid-Stabilization Provisions:

27.2 The State agrees and commits to Contractor, for the duration of this Agreement, to maintain the stability of the legal, tax, financial, minings, customs and economic import and export conditions of this Agreement in accordance with Article 27 of the Petroleum Law.

27.4 If at any time after this Agreement has been signed there is a change in the applicable laws, regulations or other provisions effective within Georgia which to a material degree adversely affect the economic position of the Contractor or any Contractor Party hereunder, the terms and conditions of this Agreement shall be altered so as to restore the Contractor to the same overall economic position as that which the Contractor would have been in had this Agreement been given full force and effect without amendment.

Source: By Author, Extracts from the Islamic Republic of Mauritania PSC for Block C6, 2016, Article 26(3); the Kenya PSC for Block L1B, 2012, Article 40(2 and 3); the Georgia PSA for Kumisi Block, 2000, Article 27(2 and 4).

It should be noted that the stabilization provision is a negative provision for the host states, and it has several disadvantages for them: firstly, they can freeze the legal and regulatory situation of the country for an extended period of time. Secondly, compensation will be required from the government when changes affect an investor (Radon, 2005; Salih and Salih

2015). As Muttitt (2006) points out, many PSCs contain worse provisions or so-called stabilisation provisions which give PSCs a higher legal status than other laws; and if there is a conflict with a future law, the PSCs take precedence. Consequently, even laws and regulations relating to labour standards, workplace safety, community relations, or the environment will not be able to be strengthened during the contract period. Bernardini (2008: 99) also clarifies that “[b]y a stabilization clause the State accepts that the exercise of its legislative and administrative powers will not have the effect of modifying the contractual conditions agreed with the investor to the latter’s detriment.”

Furthermore, the scope of stabilisation provisions varies widely, and they come in different forms. The provisions may vary in respect to the period they cover. They can be granted for the entire contractual period or for an initial period of years of operations. Additionally, the coverage of stability provisions can also differ. They may cover only specific fiscal laws, or certain provisions (such as tax and royalty rates); alternatively, it could cover broad legal and fiscal laws (including environmental laws as well as labour legislation, companies and exchange control regulations), or cover every law/regulation that affects the contract. However, it is preferable to limit the fiscal stability provisions to direct taxation (including corporate tax, royalties, and other resource-specific taxes such as rent taxes) (Mansour and Nakhle, 2016). In other words, as illustrated in Table 1, the provisions can be the full stability provisions, which aim to protect against the implications of all changes of all laws for the entire duration of the project; or they can be the limited stability provisions, which have some limitation on the application of the provisions designed on the face of the contract.

Table 1. Variations of Stabilization Provisions

Full Freezing Clauses freeze both fiscal and non-fiscal law with respect to investment for the duration of the project. Exemptions are required.	Limited Freezing Clauses freeze a more limited set of legislative actions. Exemptions are required.
Full Economic Equilibrium Clauses protect against the financial implications of <i>all changes of law</i> , by requiring compensation or adjustments to the deal to compensate the investor when any changes occur.	Limited Economic Equilibrium Clauses protect against financial implications of <i>some limited set</i> of changes in law or after specified costs are incurred. They require compensation or adjustments to the deal to compensate the investor only when the covered changes occur.
Full Hybrid Clauses protect against the financial implications of <i>all changes of law</i> , by requiring compensation or adjustments to the deal, including exemptions from new laws, to compensate the investor when any changes occur.	Limited Hybrid Clauses protect against financial implications of <i>some limited set</i> of changes in law or after specified costs are incurred. They require compensation or adjustments to the deal, including exemptions from new laws, to compensate investor only when the covered changes occur.

Source: Shemberg, 2008: 9.

Legal Complications of Stabilization Provisions of the Kurdistan Region PSCs in Comparison with other Countries’ PSCs

The Oil and Gas Law of the Kurdistan Region 2007, which is the main legislation providing the legal framework to govern and manage petroleum operations and all relevant activities in the Kurdistan Region (Salih, 2021), does not design stabilization; nor does it contain any direct

provision on fiscal stability. The Law; however, under Article 40(3) has only stabilized the types of applicable taxes. It states that “[a]pplicable taxes of the Regional Government shall be the only taxes that apply to Petroleum Operations.” On the other hand, the Model PSC of the KRG in Article 43(2-5), under the heading ‘Fiscal Stability’ has adopted the hybrid-stabilization provisions, which are a combination of freezing and economic equilibrium provisions. Article 43 of the KRG Model PSC stipulates that:

43.2 The obligations of the CONTRACTOR in respect of this Contract shall not be changed by the GOVERNMENT and the general and overall equilibrium between the Parties under this Contract shall not be affected in a substantial and lasting manner.

43.3 The GOVERNMENT guarantees to the CONTRACTOR, for the entire duration of this Contract, that it will maintain the stability of the legal, fiscal and economic conditions of this Contract, as they result from this Contract and as they result from the laws and regulations in force on the date of signature of this Contract. The CONTRACTOR has entered into this Contract on the basis of the legal, fiscal, and economic framework prevailing at the Effective Date. ...

The above provisions freeze the contractor obligations, as well as legal, fiscal, and economic conditions resulting from the contract, laws, and regulations at the time the contract is signed, for the entire duration of the contract. They also prohibit the host state from later enacting any law inconsistent with the contract. However, the KRG Model PSC in the second part of Article 43.3 and Article 43.4 has adopted economic equilibrium provisions broadly; it stipulates that:

... . If, at any time after the Effective Date, there is any change in the legal, fiscal and/or economic framework under the Kurdistan Region Law or other Law applicable in or to the Kurdistan Region which detrimentally affects the CONTRACTOR, the CONTRACTOR Entities or any other Person entitled to benefits under this Contract, the terms and conditions of the Contract shall be altered so as to restore the CONTRACTOR, the CONTRACTOR Entities and any other Person entitled to benefits under this Contract to the same overall economic position (taking into account home country taxes) as that which such Person would have been in, had no such change in the legal, fiscal and/or economic framework occurred.

43.4 If the CONTRACTOR believes that its economic position, or the economic position of a CONTRACTOR Entity or any other Person entitled to benefits under this Contract, has been detrimentally affected as provided in Article 43.3, upon the CONTRACTOR’s written request, the Parties shall meet to agree on any necessary measures or making any appropriate amendments to the terms of this Contract to re-establishing the equilibrium between the Parties and restoring the CONTRACTOR, the CONTRACTOR Entities or any other Person entitled to benefits under this Contract to the position (taking into account home country taxes) it was in prior to the occurrence of the change having such detrimental effect. Should the Parties be unable to agree on the merit of amending this Contract and/or on any amendments to be made to this Contract within ninety (90) days of the CONTRACTOR’s request (or such other period as may be agreed by the Parties), the CONTRACTOR may refer the matter in dispute to arbitration as provided in

Article 42.1, without the necessity of first referring the matter to negotiation and mediation.

Despite adopting the hybrid-stabilization provisions, which is a negative point for the host states, the KRG Model PSC has given another right to the contractors, allowing them to benefit from any future change to the Kurdistan Region petroleum legislation. This means if the change to legislation is against the contractors, it will not apply to the contractors. However, if it is to their benefit, it will apply. The KRG Model PSC in Article 43.5 states that “[w]ithout prejudice to the generality of the foregoing, the CONTRACTOR shall be entitled to the benefit of any future changes to the petroleum legislation or any other legislation complementing, amending or replacing it.” It is clear that Article 43.5 of the KRG Model PSC is one of the main negative points for the KRG.

By reviewing the available PSCs of the KRG, it can be observed that most of the KRG’s PSCs have adopted the exact hybrid-stabilization provisions that have been adopted by the KRG Model PSC.⁴ They contain the stabilisation provisions that are worded broadly, under which not only fiscal but also all legal and economic framework of the Kurdistan Region legislations or other legislation applicable in or to the Kurdistan Region have been stabilized, and not only for the contractor, but also for the contractor entities or any other person entitled to benefits under the contract. The KRG’s PSAs for Taq Taq, Pulkhana and Bina Bawi Blocks, which were signed in 2002, 2003 and 2006 respectively, have adopted broader hybrid-stabilization provisions, under which the government has stabilized the legal, tax, financial, mining, customs, and economic import and export conditions of the contracts for the duration of the contracts; then they have provided economic equilibrium provisions. This is in contrast to most of the countries’ PSCs, which have only stabilized fiscal provisions for the contractor. For instance, the adopted stabilization (economic equilibrium) provisions of the Qatar Model Exploration and Production Sharing Agreement 2002 entitled ‘Economic Stabilization’ states that:

In the event CONTRACTOR is subjected by GOVERNMENT or QP [Qatar Petroleum], to any additional liabilities, fees, taxes, imposts or costs of any sort or kind, other than de minimus ones, during the term of this Agreement, then CONTRACTOR shall have the right to request from QP a modification to the terms and condition of this Agreement that will restore CONTRACTOR to the economic position it was in prior to the imposition of such liabilities, fees, taxes, imposts, or costs.

In addition, the Nigeria PSC for Block 905 Anambra Basin of 2007, in Article 27(1 and 2) holds that if fiscal terms of the contract are changed, parties agree to review the affected terms and conditions by such change to align them with the fiscal terms of the contract. It also states that if there is a change in legislation or regulations that materially affect the commercial benefit of the contractor, the parties shall agree to such amendments to the contract as are

⁴ For example see common Article 43(2-5) of the Kurdistan PSC for Rovi Block, 2006; the Kurdistan PSC for Mala Omar Block, 2007; the Kurdistan PSC for Atrush Block, 2007; the Kurdistan PSC for Bazian Block, 2007; the Kurdistan PSC for Sangaw South Block, 2008; the Kurdistan PSC for Qush Tappa Block, 2008; the Kurdistan PSC for Arbat Block, 2009; the Kurdistan PSC for Pulkhana Block, 2009; the Kurdistan PSC for Central Dohuk Block, 2010; the Kurdistan PSC for Safen Block, 2010; the Kurdistan PSC for Topkhana Block, 2011; the Kurdistan PSC for Garman Block, 2011.

necessary to restore as near as practicable such commercial benefits which existed under the contract as of the effective date. Also, according to Article 16(1)3 of the Ethiopia Model PSA of 2011:

In the event that after the Effective Date of this Agreement the economic benefits to be derived by a Party from the Petroleum Operations under this Agreement are substantially affected by the promulgation of new laws and regulations or of any amendments to the applicable laws and regulations of Ethiopia and if the affected Party so requests, the Parties shall agree to make the necessary adjustments to the relevant provisions of this Agreement, in order to ensure that the affected Party is restored to the same economic condition it would have been in if such change in the applicable laws had not taken place.

A further point to note is about the scope and coverage of the Kurdistan Region stabilisation provisions. Most of the KRG's PSCs and its Model PSC have adopted the full hybrid-stabilization provisions, which offer protection against the implications of all changes of all laws and regulations for the entire duration of the project. Al-Saleem (2020) clarifies that "[b]ecause of the fiscal and legal stabilization clause (art 43), oil companies have big advantages against KRG in any future dispute, as it means that the region, under any circumstances, can't make any submission or claim before courts to reduce its fiscal or legal obligations in future." Devine and Severova (2015) indicate that the host states generally push back on widely drafted stabilization provisions; the States mostly adopt stabilization provisions that offer protections against direct or discriminating changes against the contractor without limiting the ability of the host state to introduce changes to general laws, such as environmental and labour laws. Several other countries' PSCs have adopted limited stability provisions which have some limitations on the application of the provisions on the contracts. For instance, Uganda has limited stabilization provisions only for income taxes in two of its PSCs. Article 33(2) of the Republic of Uganda PSA for Exploration Area 1 and for Kanywataba Prospect Area, which has been signed in 2012 hold that:

... If after the Effective Date, there is any change in any law in Uganda dealing with income tax which substantially and adversely alters the economic benefits accruing to the Licensee, ... the Parties shall negotiate in good faith to agree upon the effect of the changes in law and the necessary adjustments and modifications to the Agreement in order to maintain the economic benefit of the Licensee which existed at the Effective Date of this Agreement

Likewise, but more broadly, common Article 17(10) of the India PSC for RJ-ONN-2004/2 Block, 2007 and the India Model PSC 2010 have limited stabilization provisions to income tax and other types of taxes, customs duty, and other levies. They state that:

If any change in or to any Indian law, rule or regulation dealing with income tax or other corporate tax, export/import tax, excise, customs duty or any other levies, duties or taxes imposed on Petroleum or dependent upon the value of Petroleum results in a material change to the expected economic benefits accruing to any of the Parties after the date of execution of the Contract, the Parties shall consult promptly in good faith to make necessary revisions and adjustments to the Contract in order to

Additionally, the Republic of Kenya Model PSC 2015, besides the adopted economic equilibrium provisions, has excepted several provisions of the Kenyan laws, which in Article 52 (4) stipulate that:

Nothing in this clause [equilibrium provisions] shall be interpreted as imposing any limitation or constraint on the scope or due and proper enforcement of the laws of Kenya of general application and which are in the interest of health, safety, conservation, or the protection of the environment for the regulation of any category of property or activity carried on in Kenya; ... in accordance with best petroleum industry practices.

Two of the latest contracts of Lebanon, the Exploration and Production Agreement for Block 4 and Block 9 of 2018, have also excepted Lebanese law relating the improvement of health, safety, environmental standards consistent with the evolution of international standards and practices from their adopted economic equilibrium provisions. The Islamic Republic of Mauritania PSCs for Block C6 of 2016; for Block C12 of 2012; and for Block C8 of 2012 provide that after the effective date of the contract, without the prior agreement of the parties, no legislative or regulatory provision may be applied to the contractor. It may be anything that directly or indirectly diminishes rights or increases obligations of the contractor under the contract and the legislation and regulations in force upon the effective date of the contract, excepting the legislative and regulatory provisions which are generally applicable, in the matter of safety of persons and protection of the environment or employment law.

Only five of the KRG's available PSCs have adopted limited hybrid-stabilization provisions. The KRG's PSAs for Erbil and Tawke Blocks, signed in 2004, have excepted changes in laws relating to the environment, health, and safety from their adopted hybrid-stabilization provisions. The KRG in its PSCs for Qala Dze, Dinarta, and Piramagrün Blocks, signed in 2011, has adopted more effective and more limited hybrid-stabilization provisions. According to Clause 43 of the three mentioned PSCs entitled 'Fiscal Stability', the KRG shall maintain the stability of the fiscal conditions of the contracts for the entire duration of the contracts. However, these three PSCs also stipulate that fiscal stability does not apply to government interest holders. Also, under these PSCs, the contractor acknowledges that the KRG may propose laws. These laws could have a beneficial or detrimental effect on the fiscal position of the contractor, and their primary purpose may be: the protection of the environment, promotion of the health and safety of the Kurdistan Region citizens and personnel engaged in petroleum operation, the regulation of hazardous substances (all to the standards of the European Union); decommissioning of petroleum facilities to the standards of the European Union and Alberta, Canada; regulation of pipelines; and the regulation of companies. According to these PSCs, the introduction of these laws will not entitle the contractor or any contractor entity to any rights to any alteration to the terms of these contracts.

More noticeably, these three PSCs have only adopted economic equilibrium provisions for the changing of tax laws, under which if after the effective date, there is any change to the Kurdistan Region tax laws and thus, the fiscal position of the contract entities is materially affected, not only detrimentally but also beneficially, then the contractor and the KRG shall negotiate to alter the terms of the contract so as to place the contractor entities in the same overall economic position as that which the original contractor entity would have been

without any change of tax law. Furthermore, under no circumstances will the KRG will be liable to any party or person for any consequential or indirect losses due to any change of tax law. If there is a dispute between both parties with respect to the effect of the change of tax law, then any party can refer the dispute to arbitration according to the provisions of the contract without first referring to negotiation and mediation.

It is interesting to note that the adopted full hybrid-stabilization provisions, which have been drafted very widely, are one of the main legal complications of almost all the Kurdistan Region's PSCs. Most countries' PSCs and Model PSCs worldwide contain no stabilization provisions. For example, PSCs of Belize, Brazil, Colombia, Trinidad and Tobago (Models 2006, 2014 and 2018), the Republic of Equatorial Guinea (Model 2006), Bangladesh (Model 2008), Cyprus (Models 2007 and 2012), Jordan (Model 2009), Libya (Model 2006), Sao Tome and Principe, Tanzanian (Models 2008 and 2013), and the Democratic Republic of Timor-Leste, contain no stabilization provision.⁵

Finally, it can be argued that due to the longevity of oil and gas contracts, the KRG cannot easily reform its signed contracts for the signed period. However, from 2014 to 2016 several IOCs relinquished their interests in a total of 29 blocks due to several reasons, such as the beginning of the fight against ISIS in Iraq, the dramatic fall in oil prices in mid-2014, and the KRG's challenges to pay IOCs until February 2016. The KRG currently has about 24 open-lisence blocks with significant available data such as 2D or/and 3D seismic survey and a number of existing wells in most of these blocks. Hence, it is a great opportunity for the KRG to extricate the contracts from complications of the adopted full hybrid-stabilization provisions, before dealing with IOCs (Salih and Yamulki, 2020b). The best evidence to prove the bargaining power of the KRG to adopt limited-stability provisions as well as its ability to succeed in securing investment without offering somewhat broad stabilization provisions is the KRG's utilized PSCs for Qala Dze, Dinarta and Piramagrun Blocks in 2011, which adopted more effective and more limited hybrid-stabilization provisions, as mentioned earlier.

Conclusion

Another strategy with respect to the legal regime of petroleum contracts is the incorporation of stabilization provisions. Due to long periods of petroleum contracts, the host states may change their domestic laws and policy within their territory, which may have significant risks for and negative impacts upon IOCs. On the contrary, the contractors want the petroleum contracts to contain stabilization provisions in order to restrict the legislative or administrative power of the host state to amend the contractual regulation or even to annul the agreement. Commentators classify stabilization provisions into different categories. For example, several authors such as Oyewunmi (2011), Paterson (2018), and Olawuyi (2018) have divided

⁵ See the Belize Agreement for Petroleum Exploration, Development and Production for Block A, 2000; the Belize Agreement for Petroleum Exploration, Development and Production for Block B, 2000; the Brazil PSC for Libra-P1 Area, 2013; the Colombia PSC for Rio Magdalena Area, 2001; the Colombia PSC for Guayuyaco Area, 2002; the Republic of Trinidad and Tobago Model PSC 2006; the Republic of Trinidad and Tobago Model PSC 2014; the Republic of Trinidad and Tobago Model PSC 2018; the Republic of Equatorial Guinea Model PSC 2006; the People's Republic of Bangladesh Model PSC 2008; the Republic of Cyprus Model PSC 2007; the Republic of Cyprus Model PSC 2012; the Jordan Model PSA 2009; the Libya Model PSC 2006; the democratic Republic of Sao Tome and Principe PSC for block 12, 2016; the democratic Republic of Sao Tome and Principe PSC for block 11, 2014; the democratic Republic of Sao Tome and Principe PSC for block 5, 2012; the United Republic of Tanzania Model PSC 2008; the United Republic of Tanzania Model PSC 2013; the Democratic Republic of Timor-Leste PSC for Contract Area E, 2006; the Democratic Republic of Timor-Leste PSC for Contract Area C, 2006; the Democratic Republic of Timor-Leste PSC for Contract Area H, 2006.

stabilization provisions into two types: freezing and economic equilibrium provisions. According to Jasimuddin and Maniruzzaman (2016) and Emeka (2008), stabilization provisions are of two types: traditional freezing and modern hybrid-stabilization provisions. While this study divides stabilization provisions into three key types: freezing, economic balancing/equilibrium, and hybrid stabilization provisions. Stabilisation provisions, as negative provisions for the host states, can freeze the legal and regulatory situation of the country and give PSCs a higher legal status than other laws; and if there is a conflict with a future law, the PSCs take precedence. The scope, coverage and the period of stabilisation provisions vary widely. They can be granted for the entire contractual period or an initial period of years of operations; they also may cover only certain provisions or cover every law/regulation that affects the contract.

The Oil and Gas Law of the Kurdistan Region 2007 has only stabilized the types of applicable taxes. It does not contain any other direct provision on fiscal stability. While, several other countries' PSCs have only stabilized fiscal provisions for the contractor, the Model PSC of the KRG in Article 43(2-5) and most of its PSCs have adopted the overly broad full hybrid-stabilization provisions, under which not only the fiscal but also all legal and economic frameworks of the Kurdistan Region legislations or other legislation applicable in the Kurdistan Region have been stabilized; not only for the contractor, but also for the contractor entities or any other person entitled to benefits under the contract, for the entire duration of the contract. They also have adopted economic equilibrium provisions broadly. The early signed PSCs of the KRG have adopted even broader hybrid-stabilization provisions. Generally, the host states push back on widely drafted stabilization provisions. For instance, Uganda has limited stabilization provision only to income taxes in two of its PSCs; the India Model PSC 2010 has limited stabilization provisions to income tax and other types of taxes, customs duties and other levies; and Lebanon's latest contracts have also excepted Lebanese law relating the improvement of health, safety, environmental standards from their adopted economic equilibrium provisions. In addition, most countries' PSCs and Model PSCs worldwide contain no stabilization provisions. However, only a few of the KRG's latest PSCs have adopted limited hybrid-stabilization provisions. Therefore, the adopted hybrid-stabilization provisions, which have been drafted very widely, feature among the main legal complications of almost all the KRG's PSCs and due to having about 24 open license blocks with significant available data and existing wells in most of them, currently, it is a great opportunity for the KRG to extricate the contracts from complications of the adopted full hybrid-stabilization provisions before dealing with IOCs.

After summarizing the main findings of this study, to minimise legal contentions and risks relating to stabilization provisions of Kurdistan's PSCs, several significant recommendations, which should be considered by the Kurdistan Region, are presented, as follows: Adopting full hybrid-stabilization provisions of the Kurdistan Region's PSCs is not recommended. It is suggested for the KRG to push back on widely drafted stabilization provisions and adopt limited stability provisions, which have some limitations on the application of the provisions on the contracts--for example, the ability of the host state to introduce changes to general laws, such as environmental and labour laws. Additionally, the widely drafted hybrid-stabilization provisions are among the main legal complications of almost all of the Kurdistan Region's PSCs while most countries worldwide utilize PSCs that contain no stabilization

provisions. Therefore, it is suggested that the KRG attempts to extricate PSCs from stabilization provisions.

References

- Ahmed, S. M. and Othman, A. M. S. (2016). Legal Effects of Risk Management in Petroleum Contracts: A Case Study of the KRG's Production Sharing Contracts. *Journal of University of Raparin*, 3(7), 73- 88.
- Al-Saleem, K. I. (2020). Assistant Professor in Law at Faculty of Law, Political Science and Management of Soran University, E-mail Interviewed by the Author on Legal Complications of Iraqi Kurdistan Region Production Sharing Contracts. Email from Al-Saleem to author on 25 August 2020.
- Bernardini, P. (2008). Stabilization and Adaptation in Oil and Gas Investments. *Journal of World Energy Law & Business*, 1(1), 98-112.
- Cameron, P. D. (2010). *International Energy Investment Law: The Pursuit of Stability*. Oxford: Oxford University Press.
- Cameron, P. D. (2016). Investment Cycles and the Rule of Law in the International Oil and Gas Industry: Some Reflections on Changing Investor-State Relationships. *Houston Journal of International Law*, 38 (3), 755-796.
- Cameron, P. (2014). In Search of Investment Stability. In K. Talus (ed.). *Research Handbook on International Energy Law*, (124-149). Cheltenham: Edward Elgar Publishing Limited.
- Devine, R. and Severova, A. (2015). Bargain Hunting in the Low Oil Price Environment: Key Issues for Investors When Bidding for Hydrocarbons in New Frontiers. *Journal of World Energy Law and Business*, 8(5), 425-438.
- Emeka, J. N. (2008). Anchoring Stabilization Clauses in International Petroleum Contracts. *The International Lawyer*, 42(4), 1317-1338.
- Jasimuddin, S. M. and Maniruzzaman, A. F. M. (2016). Resource Nationalism Specter Hovers Over the Oil Industry: The Transnational Corporate Strategy to Tackle Resource Nationalism Risks. *The Journal of Applied Business Research*, 32(2), 387-400.
- Mansour, M. and Nakhle, C. (2016). Fiscal Stabilization in Oil and Gas Contracts: Evidence and implications. *OIES Paper: SP 37*. Retrieved from <https://www.oxfordenergy.org/wpcms/wp-content/uploads/2016/02/Fiscal-Stabilization-in-Oil-and-Gas-Contracts-SP-37.pdf> (last accessed 12 May 2021).
- Muttitt, G. (2006). Production Sharing Agreements – Mortgaging Iraq's Oil Wealth. *Arab Studies Quarterly*, 28(3/4), 1-17.
- Olawuyi, D. S. (2018). *Extractives Industry Law in Africa*. Cham: Springer Nature Switzerland AG.
- Oyewunmi, T. (2011). Stabilisation and Renegotiation Clauses in Production Sharing Contracts: Examining the Problems and Key Issues. *Oil, Gas & Energy Law Intelligence Journal (OGEL)*, 9(6), 1-25.
- Paterson, J. (2018). Production Sharing Agreements in Africa: Sovereignty and Relationality. *CML Working Paper Series*, Paper No. 18/11. Retrieved from <https://law.nus.edu.sg/cml/pdfs/wps/CML-WPS-1811.pdf> (last accessed 13 May 2021).
- Radon, J. (2005). The ABCs of Petroleum Contracts: License-Concession Agreements, Joint Ventures, and Production-sharing Agreements. In S. Tsalik and A. Schiffrin (eds.). *Covering Oil: A Reporter's Guide to Energy and Development*, (61-99). New York: Open Society Institute.
- Salih, M. S. and Salih, R. S. (2015). Strategy of Oil Contract Negotiation. *International Journal of Business and Social Science*, 6(9), 168-175.
- Salih, M. S. and Yamulki, A. (2020) Stabilisation and Renegotiation Clauses in Iraqi Kurdistan Oil and Gas Contracts: A Comparative Study. *Journal of Law, Policy and Globalization*, 101-117.
- Salih, R. S. and Yamulki, A. (2020a). Petroleum Exploration and Production Contracts as Regulatory Tools: The Kurdistan Region Production Sharing Contracts. *Journal of Law, Policy and Globalization*, 101, 165-184.
- Salih, R. S. and Yamulki, A. (2020b). Reforms Feasibility in Kurdistan Region Petroleum Contracts, Triggered by the New Regional Blocks Divisions. *International Journal of Business and Social Science*, 11(5), 35-56.
- Salih, R. S. (2021). Legal Framework of Local Content Requirements in The Iraqi Kurdistan Region Oil and Gas Sector. *Palarch's Journal of Archaeology of Egypt/Egyptology*, 18(08), 304-321.

Shemberg, A. (2008). Stabilization Clauses and Human Rights. A Research Project Conducted for IFC and the United Nations Special Representative of the Secretary General on Business and Human Rights, International Finance Corporation. Retrieved from <http://documents.worldbank.org/curated/en/502401468157193496/pdf/452340WP0Box331ation1Paper01PUBLIC1.pdf> (last accessed 13 May 2021).

Thaib, W. S. and Santiago, F. (2018). Tax Stabilization Clause in Oil and Gas Industry. *Advances in Economics, Business and Management Research*, 59, 360-362.

Table of Statutes

Oil and Gas Law of the Kurdistan Region – Iraq No. (22) of 2007.

Table of Cases

Texaco Overseas Petroleum Co. and Cal. Asiatic Oil Co. v. Gov't of the Libyan Arab Republic [1977] 53 INT'L L. REP. 389.

Table of Production Sharing Contracts

The Belize Agreement for Petroleum Exploration, Development and Production for Block A, 2000.

The Belize Agreement for Petroleum Exploration, Development and Production for Block B, 2000.

The Brazil PSC for Libra-P1 Area, 2013.

The Colombia PSC for Guayuyaco Area, 2002.

The Colombia PSC for Rio Magdalena Area, 2001.

The democratic Republic of Sao Tome and Principe PSC for block 11, 2014.

The democratic Republic of Sao Tome and Principe PSC for block 12, 2016.

The democratic Republic of Sao Tome and Principe PSC for block 5, 2012.

The Democratic Republic of Timor-Leste PSC for Contract Area C, 2006.

The Democratic Republic of Timor-Leste PSC for Contract Area E, 2006.

The Democratic Republic of Timor-Leste PSC for Contract Area H, 2006.

The Georgia PSA for Kumisi Block, 2000.

The India PSC for RJ-ONN-2004/2 Block, 2007.

The Islamic Republic of Mauritania PSC for Block C12, 2012.

The Islamic Republic of Mauritania PSC for Block C6, 2016.

The Islamic Republic of Mauritania PSC for Block C8, 2012.

The Kurdistan PSA for Bina Bawi Block, 2006.

The Kurdistan PSA for Chiasorkh, Kifri and Cemcemal Areas (Pulkhana Block), 2003.

The Kurdistan PSA for Dihok Area (Tawke Block), 2004.

The Kurdistan PSA for Erbil Block, 2004.

The Kurdistan PSA for Taq Taq Block, 2002.

The Kurdistan PSC for Arbat Block, 2009.

The Kurdistan PSC for Atrush Block, 2007.

The Kurdistan PSC for Bazian Block, 2007.

The Kurdistan PSC for Central Dohuk Block, 2010.

The Kurdistan PSC for Dinarta Block, 2011.

The Kurdistan PSC for Garmian Block, 2011.

The Kurdistan PSC for Mala Omar Block, 2007.

The Kurdistan PSC for Pirmagrun Block, 2011.

The Kurdistan PSC for Pulkhana Block, 2009.

The Kurdistan PSC for Qala Dze Block, 2011.

The Kurdistan PSC for Qush Tappa Block, 2008.

The Kurdistan PSC for Rovi Block, 2006.

The Kurdistan PSC for Safen Block, 2010.

The Kurdistan PSC for Sangaw South Block, 2008.
The Kurdistan PSC for Topkhana Block, 2011.
The Lebanon Exploration and Production Agreement for Block 4, 2018.
The Lebanon Exploration and Production Agreement for Block 9, 2018.
The Nigeria PSC for Block 905 Anambra Basin, 2007.
The Republic of Kenya PSC for Block L1B, 2012.
The Republic of Uganda PSA for Exploration Area 1, 2012.
The Republic of Uganda PSA for Kanywataba Prospect Area, 2012.

Table of Model Production Sharing Contracts

The Federal Democratic Republic of Ethiopia Model PSA 2011.
The India Model PSC 2010.
The Jordan Model PSA 2009.

The Kurdistan Regional Government Model PSC.

The Libya Model PSC 2006.
The People's Republic of Bangladesh Model PSC 2008.
The Qatar Model PSC 2002.
The Republic of Cyprus Model PSC 2007.
The Republic of Cyprus Model PSC 2012.
The Republic of Equatorial Guinea Model PSC 2006.
The Republic of Kenya Model PSC 2015.
The Republic of Trinidad and Tobago Model PSC 2006.
The Republic of Trinidad and Tobago Model PSC 2014.
The Republic of Trinidad and Tobago Model PSC 2018.
The United Republic of Tanzania Model PSC 2008.
The United Republic of Tanzania Model PSC 2013.