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RENEGOTIATION CLAUSES IN INTERNATIONAL PETROLEUM CONTRACTS

SARBAST ABDULLAH HAMAD

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ABSTRACT

A contract contents or provisions which the formation of the contract is based on are contractually obligatory, and both parties of the contract must commit themselves to perform those obligations. Sometimes, a contract is concluded under ordinary circumstance, but then after, an event occurs, makes the performing of the contract is more difficult and burden for one or both parties.

A contract parties are able to insert various clauses and terms to the contract to improve and boost it more and serve the parties interests. The Renegotiation Clause is one of the clauses that can be depended on, and it is used more, during the formation of a contract, which is described as international, long-lasting and financially huge by the parties.

This thesis talks about and discussed two major fields in detail. The first field details general statutory introduction of the renegotiation clause as well as its legal root, and the chapter one represents normally this field. The second field focuses and discusses the application of renegotiation clause to non-international petroleum contracts, the possibility of its application to international petroleum contracts to deal with the events which affect negatively the economic equilibrium between the contract parties' obligations, and I have taken Iraq and Kurdistan Region of Iraq as examples. Also, I as a researcher have argued that this clause in international petroleum contracts is more proper and suitable than other legal clauses contractually, practically and economically for the contract parties, especially for the recent developing state parties, and chapter two and three typically embody this field. In end, chapter four as the last chapter shows the main conclusions, which I have drawn through researching, including the result that the incorporation of renegotiation clause into international petroleum contracts as long-term contracts gives contracts flexibility, enables contracts to respond more unwanted situations and serves the contract parties' interests and the contract performance, particularly in developing states like Iraq, as a main conclusion.

Key Words: Renegotiation clause, international contracts, petroleum contracts, contractual obligations, economic equilibrium, triggering events, parties to contract, contractual terms, oil company, change of circumstances.

ÖZ

Sözleşmenin oluşumuna dayanan bir sözleşme içeriği veya hükümleri sözleşmeye bağlı olarak zorunludur ve sözleşmenin her iki tarafı da bu yükümlülükleri yerine getirmekle yükümlüdür. Bazen, sıradan koşullar altında bir sözleşme yapılır ancak herhangi bir olayın meydana gelmesi durumunda, bir veya iki taraf için de sözleşmenin uygulanmasının daha zor ve yük olmasına neden olur. Sözleşme tarafları, daha fazla gelişmek ve tarafların menfaatlerine hizmet etmek için sözleşmeye çeşitli hükümler ve şartlar ekleyebilmektedir. Yeniden Müzakere Maddesi taraflar tarafından uluslararası.

Bu tez, iki önemli alanı ayrıntılı olarak tartışmıştır. Birinci alan, yeniden müzakere hükümlerinin yasal olarak yürürlüğe konması ile birlikte hukuki kökünü açıklar ve birinci bölüm normalde bu alanı temsil eder. İkinci alan, uluslararası olmayan petrol sözleşmelerine yeniden müzakere şartının uygulanmasını, uluslararası petrol sözleşmelerine uygulanmasının sözleşme taraflarının yükümlülükleri arasındaki ekonomik dengesini olumsuz etkileyen olaylarla başa çıkma ihtimalini vurgulamakta ve tartışmaktadır ve Irak ve Irak'ın Kürdistan Bölgesi örnek olarak verilmiştir. Ayrıca, uluslararası petrol sözleşmelerinde yer alan bu maddenin sözleşme bazında, pratikte ve ekonomik açıdan diğer hukuki hükümlerden daha uygun olduğu, özellikle son gelişmekte olan devlet partilerinde sözleşme tarafları için uygun olduğu ve ikinci ve üçüncü bölüm tipik olarak bu alanı somutlaştırdığı ileri sürülmüştür. Sonuç olarak, dördüncü ve son bölümde araştırma sonuçları gösterilmektedir. Yeniden müzakere hükmünün uluslararası petrol sözleşmelerine uzun vadeli sözleşme olarak dahil edilmesi sözleşmelere esneklik kazandırmakta, sözleşmelerin daha istenmeyen durumlara cevap vermesini sağlamakta, sözleşme taraflarının çıkarlarına ve sözleşme performansına özellikle de Irak gibi gelişmekte olan ülkelerde hizmet vermekte olduğu sonucunu da ana sonuç olarak içermektedir.

Anahtar Kelimeler: Yeniden müzakere maddesi, uluslararası sözleşmeler, petrol sözleşmeleri, sözleşmeden doğan yükümlülükler, ekonomik denge, tetikleyici olaylar, sözleşmeli taraflar, sözleşmeden doğan şartlar, petrol şirketi, koşulların değişmesi.

DEDICATION

To my beloved mother

To the pure soul of my late father

To my dear siblings

To whom who supported and helped me even with a word one of the days in my study process.

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CONTENTS

ABBREVIATIONS

Aminoil……American Independent Oil Company

BPC ……Basra Petroleum Company

CEU……Central European University

CISG ……Contracts for the International Sale of Goods

CNPC ……China National Petroleum Company

DAT…….Delivered at Terminal

DAP…….Delivered at Place

DDP…….Delivered Duty Paid (shipping)

DNO ……. Det Norske Oljeselskap ASA (Norwegian Oil Company)

ECCL……Edinburgh Centre for Commercial Law

EJIST….Electronic Journal of Instructional Science and Technology

EPA ……. Environmental Protection Agency

EPSA …….. Exploration & Production Sharing Agreement

FDI ……..... Foreign Direct Investment

FILJ……..Fordham International Law Journal

FOC ……. Foreign Oil Company

IIED……...International Institute for Environment and Development

ICC ……..… International Chamber of Commerce

IEA ……... International Energy Agency

IELS……International Energy Law Symposium

IJBSS……International Journal of Business and Social Science

IMF ……..…….. International Monetary Fund

INOC ……..… Iraq National Oil Company

IOC ……. International Oil Company

IPC ……..…… Iraq Petroleum Company

ITC……International Trade Centre

JVC …….…….. Joint Venture Contracts

KRG …….. Kurdistan Region Government

LLC……..…Limited Liability Company

MCC ……. Modern Form of Concession Contracts

MEPC……...Middle East Policy Council

MNR ……...……... Ministry of Natural Resources

NIOC ……...…….. National Iranian Oil Company

NOC ……..…… North Oil Company

OECD …….. Organization for Economic Cooperation and Development

OGEL…….....Oil, Gas & Energy Law

OPEC ……..... Organization of the Petroleum Exporting Countries

PSC ……..….... Production Sharing Contracts

RFB ……..…...Remuneration Fees Per Barrel

SEAJBEL….South East Asia Journal of Contemporary Business, Economics and Law

SOC …….……... South Oil Company

SSRN…….....Social Science Research Network

TCC …….. Traditional Concession Contracts

TNC…….....Transnational corporations

TPC …….. Turkish Petroleum Company

TSC ……... Technical Service Contracts

UK ……... United Kingdom

UKHL……United Kingdome House of Lords

UNCTAD ……... United Nations Conference on Trade and Development

UNIDROIT……International Institute for the Unification of Private Law

UPI …… United Press International

US ……..…... United States

VJTL……...Vanderbilt Journal of Transnational Law

CHAPTER ONE

INTRODUCTORY CHAPTER

1.1 General Introduction

It is evident that contract is a voluntary agreement, generally based on the parties' approval, enforceable at law and considered as a binding legal agreement.[1] So the parties are able to incorporate contractual terms into basic contract, to improve the contract, avoid future disputes and keep balance legally and economically between parties of contract. Understandably, a contract term or clause is any term or provision inserted into a contract by parties, dealt as a part of the contract, creates a contractual obligations and breaching it by a party or parties, gives rise to legal responsibility and litigation, and all terms have not same legal weight, because some of them are peripheral to the contract objectives. Also, the terms or clauses of contracts should be compatible with general rules and principles as well as the principle of justice.[2]

It is obvious that international trade contracts and foreign investment contracts are usually featured as long-term contracts, means need a long period of time to be conducted, due to either the parties' desire like supply contracts, or the nature of contract which requires more time for performing, such as investment contracts in general, the contract of constructing of industries and transferring of technology and international roads, etc.[3]

My goals, as a researcher, for choosing this subject are to familiarize and clarify this term, show its legal concept, through presenting its scope and determining its legal condition and differentiating from its similar conditions. Also, showing how to use this clause in the international non-petroleum contracts and its consequences, use this clause in international petroleum contracts and its consequences then. Then, I will show as a researcher the application of the clause to international petroleum contracts in Iraq and Kurdistan Region of Iraq as well as its consequences. It means that I, as a

[1] Elizabeth A. Martin and Jonathan Law, Dictionary of Law (6th edn, Oxford University Press 2006) 126.
[2] Ken LaMance, 'Common Clauses in a Contract' (Legal Match, 29 December 2015) <http://www.legalmatch.com/law-library/article/common-clauses-in-a-contract.html> accessed 28 April 2016.
[3] UNIDROIT, 'Issues Relating to Long-term Contract' (UNIDROIT, 15 February 2016) <http://www.unidroit.org/work-in-progress-studies/current-studies/long-term-contracts> accessed 28 April 2016.

researcher, will do all those acts to be this clause practiced in the international petroleum contracts in the recent developing part of the world more, including my country and my region, Iraq and the Kurdistan Region of Iraq, because Iraq and the Kurdistan Region now in the state of investing in field of petroleum with help of international companies, and it is notably practiced in more foreign investment contracts and I will exam that this clause to be applied in the international petroleum contracts in Iraq and Kurdistan region of Iraq, so as to know its economic, legal and investment interests and incentivize foreign investments in Iraq and the Kurdistan Region of Iraq. Consequently, all of them together will support my argument is that renegotiation clause for international petroleum contracts as long-term contracts is more proper than other legal and contractual exemption terms, makes contracts more flexible to treat with many unpredictable events as well as all possible future events, which fundamentally lead to change in the balance of parties' obligations, and relying on this clause in international petroleum contracts, especially in developing states draws a conclusion that practicing renegotiation clause will have positively economic, legal and practical consequences relating to the contract performance.

I, as a researcher, have noted that the contracts which the time is essential element in are more influenced by change of circumstances, especially international contracts. Sometimes during performing a contract a global unforeseen or foreseen event occurs, affects negatively the performance of contract, the state of balance economically between the parties of contract and disturbs or alters the parties' equilibrium, in a way the performance of obligations of one party becomes sometimes impossible and some other times excessively burdensome.

Notably, the global market constantly is being changed. Sometimes the changes are rather massive due to some events and circumstances, have effects all over the world and particularly affect the prices of raw materials, manufactured and productive materials and the prices in general. This oscillation of international trade situation has originated new methods and ideas for treating with new developments and circumstance.[4] Additionally, the various national rules and legislations don't conform to the developments of international investment and trade contracts. Incidentally, the Theory of Force Majeure and Hardship Clause are kind of weak sometimes to deal

[4] Claude Cellich, 'Contract Renegotiations' (International Trade Centre, International Trade Forum, January 2001) <http://www.tradeforum.org/Contract-Renegotiations/> accessed 29 April 2016.

with various economic and technological states of international contracts, and to respond the changes that happen to conditions of international contracts during performing of them. The approach of the concept of Force Majeure is suitable more with internal contracts and referred the disputes to jurisdiction of judge.[5] Also, arbitration clause which requires the dispute to be resolved through international arbitration method, needs more time and money as well as many disadvantages.[6]

Moreover, the progression and constant changes of global market upon the international trade and investment contracts, have resulted in using a clause called renegotiation clause in international contracts, which relating to investment and trade by the parties of contracts. This clause aims to review and make changes in the provisions of a contract through renegotiating between the parties of a contract, so that the contract to be compatible with new circumstances, to be remained alive and its imbalance to be restored, and now it is endorsed more by the international contractors.[7]

In fact, international oil companies which relate to the exploration and exploitation projects and host states in frame of international petroleum contracts, contend with various risks, such as huge change in the global markets prices, erroneous estimate for oil reserves, as well as many unforeseen events that might have effect on carrying out contracts obligations.[8] In addition, the inclusion of renegotiation clause shows the reaffirmation of parties' good faiths, seriousness, and beliefs in the sanctity of the contract and gives assurance about commitments.

Actually, choosing this subject and its being important, do not belong just to my thoughts and postulate, but it also counts on a number of economic, legal and practical considerations that can be shown in these follow points:

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[5] Joern Rimke, 'Force Majeure and Hardship: Application in the International Trade Practice with Specific Regard to the CISG and the UNIDROIT Principles of the International Commercial Contracts' (CISG, 11 May 2011) <http://www.cisg.law.pace.edu/cisg/biblio/rimke.html> accessed 29 April 2011.

[6] Latham and Watkins, 'Guide to International Arbitration' (2014) <https://www.lw.com/thoughtleadership/guide-to-international-arbitration-2014> accessed 30 April 2016.

[7] Sangwani Patrick Ng'ambi, Resource Nationalism in International Investment Law (1st edn, Routledge 2016) 131.

[8] TOTAL, 'Risks Related to Oil and Gas Exploration and Production' (TOTAL Report 2014) <http://publications.total.com/document-de-reference_2014_VA/risk-factors/other-risks/risks-related-to-oil-and-gas-exploration-and.html> accessed 30 April 2016.

i. At the economic level: the presence of this clause in international investment contracts, such as international petroleum contracts, contributes to the progression of economy, because it grants stability and enviable confidence to the parties and plays apparent role in existing of cooperating and coordinating between parties for economic and foreign investment progress and re-development process. Also, it helps the contract to be performed consistently even in the sever situations.

ii. At the legal level: this clause has a legal basis and makes the parties return to negotiation again, to modify the agreement provisions optionally, instead of resort to national courts or international arbitration and spending more time and money.

iii. At the practical level: practically, this clause has proven that its being present in the international contracts has benefits to the parties and it services the parties balancing interests, so today international trade and investment contracts are going to include this clause more and more, and it has been practicing in the international contracts nowadays more than before.

In addition, many host states are developing countries, in which their political and economic situations are not stable, such as Iraq. So these countries should offer incentives for international oil companies, to work in those countries and make them use their capital, expertise and all potentials for the fruitful work in both oil exploration and oil exploitation activities. Host countries especially new developing countries also need seriously international oil companies' participations for working in their petroleum resources. Agreeing on inserting renegotiation clauses in international petroleum contracts is considered a crucial step towards creating steady ties between the parties of the contracts and makes them sure about future risks which may face them.

1.2 The Legal Basis and Scope of Renegotiation Clause

1.2.1 The Legal Basis of Renegotiation Clause

It was realized that the renegotiation clauses are conditional terms which are included as provisions into contracts, during forming contracts by contracting parties, agree on renegotiating contracts provisions so as to modify the intended provisions, in cases of occurring certain events through performing the contract. This clause also is deemed as an agreement that its contents are agreed by the parties, and it is usually regulated as a substantive part of the contract, to keep the contract from any events by which affect the continued performance of the contract.[9]

Essentially, there is globally a general legal principle called as the freedom of contract, including freedom of choice, which is considered in each of international legislations and national legislations. Originally, this doctrine has come from the philosophy of the18th century, which known with individuality and freedom of expression, then eventually it resulted in setting out universal declaration of human rights. That means all humans are free and equal in enjoying the rights, allows individuals to do what they will, in condition not to harm or violate others' rights, and should respect public order and morality. Moreover, the wills of contracting parties give enforceability to the contract and its contents, because renegotiation clause as a reviewing instrument is the parties' option and supported by them voluntarily, this clause is binding and has quite good enforceability, and it is carried out by the parties soon without delay. Particularly, if the renegotiation clause is binding, there are not more chances to appeal.[10]

In addition, this principle results in two legal ramifications. **First:** The freedom of contractors as a judicial concept and legal doctrine means that individuals are free to conclude various provisions into contracts, include various terms or clauses, and it is based on mutual agreement and free choice. Individuals' freedom should not be hampered by law during contracting, except for the protection of public order and morality. **Second:** Respecting the will of contracting. What the parties have agreed on in a contract, must be conducted and should not be modified or suspended without

[9] Commission on Commercial Law and Practice, 'ICC Force Majeure Clause 2003 – ICC Hardship Clause 2003' (ICC, 2003) <http://store.iccwbo.org/t/ICC%20Force%20Majeure%20Hardship%20Clause> accessed 1 May 2016.

[10] Abdul-Majid Al-Hakim, Abdul-Baqi Al-bakri and Muhammad Taha Albashr, The Theory of Commitment in Iraqi Civil Law (4th edn, Al-Hatik, Cairo, Egypt, 2010) 20-22.

new agreement, and it is not permitted to a judge to interfere in contracts lives by modifying or suspending of execution.[11]

Accordingly, in the line with Article 1/1 of UNIDROIT principles, the parties are entitled to conclude contracts and determine their contents freely and with full consents. The article enshrined one of the fundamental rights is to enjoy the freedom of contracting optionally and with sound free will. It means the parties have autonomy in concluding the contracts and their forms or bodies.[12] In addition, as stated in Article 1/3 of UNIDROIT principles, the contract is legally binding, the parties are not able to terminate or modify the contract provisions without depending on the provisions of the contract itself or an agreement, means if there is a provision or reaching an agreement which allows the parties to modify the contract, the parties then can do it.[13]

So, this principle governs contracts lives at the time of creating till being performed completely. It also can be said that the essential legal base of the renegotiation clause is the principle of freedom of contracts, and takes its legal force from this prominent global and legal principle. Hence, this clause has legal support and legal legitimacy that contracting parties are able to depend on it in forming contracts, without facing legal problems.

1.2.2 The Scope of Renegotiation Clause

According to Article 1/1 of UNIDROIT Principles, a contract parties enjoy the right to determine the scope and content of a contract. It means that determining the scope of any legal subject or relation, needs to limit and show what that contracting parties agree on, and the legal relation which includes all rights, obligations and conditional provisions, that the parties must be committed to them, as well as stating how to perform the agreement.[14]

As set forth in the Iraqi Civil Code in Article 150 (2) that general principles of law, international customs, justice and nature of the legal relation and obligation contribute

[11] USLEGAL, 'Freedom of Contract Law and Legal Definition' (USLEGAL) <http://definitions.uslegal.com/f/freedom-of-contract/> accessed 1 May 2016.
[12] UNIDROIT Principles 2010, art 1 (1).
[13] Ibid, art 1 (3).
[14] UNIDROIT (n12).

to determine the scope of any legal relation.[15] Accordingly, it can be said that the scope of the renegotiation clause specifically is the events and their characteristics which the clause includes, to face all obstacles that may affect the performance of the contract obligations in the future. Generally, the scope of renegotiation clause involves not only the events or texts which are mentioned in the clause, but also general legal principles, global customs, justice, the nature of the obligation, as well as possible future changing events can be considered as the bound of the contract, and they basically contribute to determine the scope of clause and interfere in shaping the circle of the clause too, because the clause is set out in the frame of the contract and on the basis of an agreement.

1.3 The Triggering Events of the Renegotiation Clause and their Conditions

Statutorily, the scope of renegotiation clause stretches generally to the events which embody these following conditions. It means the events which enter into the range of renegotiation clause and trigger it, have to embrace three universal conditions, so that the disadvantaged party is able to use and take advantage from the clause, such as stated in Article 6.2.2 of UNIDROIT Principles.[16]

I. The Independence of the Event from the Disadvantaged Party's Will:

The existence of this condition in the occurrence is truly essential, so that the disadvantaged party or debtor is able to get benefit from the renegotiation clause in the contract, for reforming the contract provisions, to restore the balance between contractual obligations. It's not sensible that a party is entitled to invoke the renegotiation clause, while the event was happened directly because of him or he has acted in bad faith directly or indirectly.[17]

Notably, international arbitration considers UNIDROIT Principles about unforeseen circumstances conditions which affect the economic balance of contract, and this condition is counted as an essential condition of unforeseen event of renegotiation clause, and also this condition practically is very important element and is deemed by

[15] Iraqi Civil Code 1951, art 150 (2).
[16] UNIDROIT (n12) art 6 (2) (2).
[17] Rimke (n 5).

some jurists essential element, which must be present in the event of renegotiation clause, especially in the international trade contracts.[18]

In fact, there must be direct or causal relationship between the act of a person and the event in order that person to be liable for the loss. The casual relationship is a universal legal principle, which is considered by all international and domestic legislations, as set forth in Egyptian Civil Code in Article 165, mentions that if a person proves that the damage caused by a foreign reason, such as by accident, force majeure or a third person's action, that person is not liable for that damage.[19] Additionally, this principle is practiced about non-performance obligation, results from unforeseen event, such as stated in Article 79, (1) and (2) of CISG, which showed that if the failure of performance of obligation was due to an event beyond the party or a third person, the party is exempted of non-performance obligations liability.[20]

Incidentally, the Article 6.2.2 of the UNIDROIT Principles adopted personal standard, to deal with the independence of event from debtor will. So in the international trade field, personal criterion obviously is used as well as it is seen in the awards of international arbitration.[21]

II. Unpredictability:

Unpredictability as a condition of the event which triggers renegotiation clause means that parties of a contract are not able to anticipate an event, or they must not be sure about the event occurring which will become the basis of renegotiation clause. The UNIDROIT Principles in Article 6.2.2.B stated that the burdensome circumstance which may insert into the renegotiation clause must not be predictable at the time of contract by the disadvantaged party. The evaluation of capacity of the disadvantaged

[18] Van Houtte and Hans, 'The UNDROIT Principles for International Commercial Contracts' (Trans-Lex, Paris, 1995) < http://www.trans-lex.org/117400/> accessed 3 May 2016.
[19] Egyptian Civil Code 1949, art 156.
[20] CISG 1980, art 79 (1) and (2).
[21] UNIDROIT (n12) art 6 (2) (2).

party to anticipate the event is usually done according to the circumstance of the event itself.[22]

There is no question that the progression of technology and science plays actual role, in changing the ways which were used to measure the ability of predictions. It also means that the serious probability for the event occurring should not be felt at the time of contract or before occurring the event.[23] The international arbitration tribunals usually consider the standard of serious probability, to evaluate the condition of unpredictability, consider in their decisions, mentioned that unpredictability is meant impossibility to predict at the time of the event happening, and there is no any reason or condition indicates that an event very likely will happen.[24]

There is a question about the scope of the unpredictability condition. Does unpredictability extend to just the event itself or to just the result of event or to both together? The acceptable and fairly reasonable opinion by many legal experts is that the prediction of happening of an event and its consequences must be dealt together, not separately.[25] It means that unpredictability of event should be extended to and covers the consequences too. The reality tells us that it is not reasonable when someone predicts an event without expecting its result and the reverse is true. So, the condition of unpredictability is considered at the time of contracting, hence contracting parties should be aware as much as a normal or reasonable man for expecting events, so as the events to be deemed as out of predictive ability. Plus, the events which trigger renegotiation clauses can be unpredictable at the time of contracting or include possible future changing events too.

[22] Ibid.

[23] James Manyika, Michael Chui, Jacques Bughin, RichardDobbs, Peter Bosson and Alex Marrs, 'Disruptive Technology: Advances that Will Transform Life, Business, and the Global Company' (Michincy Global Institute, May 2013) <http://www.mckinsey.com/business-functions/business-technology/our-insights/disruptive-technologies> accessed 7 May 2016.

[24] Werner Melis, 'Force Majeure and Hardship Clauses in International Commercial Contracts in View of the Practices of the ICC Court of Arbitration' (Trans-Lex,) <http://www.trans-lex.org/126600/> accessed 7 May 2016.

[25] Ihsan Star Khizir, 'The Concept of Urgent Circumstances and Economic Imbalance Consequence on the Performance of Contracts' (9 January 2009) <http://www.droit-alafdal.net/t82-topic> accessed 8 May 2016.

III. The Impossibility to Avoid Occurring the Event and Its Consequences:

The last and another condition of the triggering event of the renegotiation clause is that the disadvantaged party is not able to avoid event and its consequences, even if he tries seriously and is ready to accept great loss, but he could not do it. This is an essential condition which must be met in the event that triggers renegotiation clause, so that the disadvantaged party use the renegotiation clause to amend the contract provisions. Also, this condition depends on good faith which the debtor party should act in good faith, in order be able to benefit from this clause. It means if the disadvantaged party was able to avoid the event and its results, but he did not do it and acted in bad faith, the renegotiation clause in this case could not be used by the disadvantaged party.[26]

So, this condition the impossibility to avoid the event and its consequences is considered truly important, which must be occurred in the event that becomes the subject of renegotiation clause.

1.4 The Required Imbalance Degree to Trigger the Renegotiation Clause

1.4.1 Imbalance

It is palpable that renegotiation clause is triggered when the continued performance of a contracting party's obligations have become effectively onerous, caused by an unpredictable event or a possible future occurrence beyond the ability and control of the parties, and it results in disorder and imbalance in economic element of the contract and justice requires restoring the balance economically between parties of a contract. Also, the economic imbalance degree in the contract should arrive to a certain level, and it usually reaches a stage between moderate stage and absolute impossibility stage, without arriving a level in which performing the obligations has become absolutely impossible, but it should be more than moderate level and economically harmful and exhausting for the disadvantaged party.[27]

[26] Rimke (n 5).

[27] Peter Sarcevic and Paul Volken, The International Sale of Goods Revisited (1st edn, Kluwer Law International 2000) 31.

In fact, contracting parties usually agree on determining a certain degree of imbalance, disturbance or dangerousness, which may face the economic element of the contract, during adopting the renegotiation clause in the contract. They stipulate that the change must be visible, tangible and essential, in a way creates fully economic imbalance in the contract. It means the gravity of loss doesn't let to be afforded by only the disadvantaged party, but it must be shared to all contracting parties on the basis of justice.[28]

Under international contractual legal principles, the importance is that the event which can triggers the renegotiation clause must give rise to seriously imbalance and breaking contractual equilibrium in the financial contracting obligations between the parties, in a way the disadvantaged party is not able to perform its obligations without getting grave loss.[29]

It's worth mentioning that the concept of imbalance of a contract is considered in national jurisdictions and legislations as a legal term or principle on the internal level, but it is known in various terms such as, urgent circumstance, unforeseen event, force majeure concept, frustration, impossibility, impracticability, hardship concept or clause, etc. They are kind of close to each other and to the renegotiation clause too, in terms of the essence that they mention imbalance of contractual economic duties, caused by an unforeseen event.[30] Internationally, UNIDROIT Principles have adopted the essence of renegotiation clause as a principle and mentioned imbalance of contract because of an unexpected event, as stated in Article 6-2-2, which should conduct renegotiation in the state of happening an event that has caused imbalance of the contract.[31] Furthermore, International Chamber of Commerce (ICC) as the largest and most representative business organization in the world, adopted and recognizes, through its 2003 update (the ICC 2003) a stipulation on unforeseen events and mentioned that when an unforeseen event happens, causes the change of balance of the contract and the performance of contractual obligation of a party, becomes

[28] Basak Basoglu, The Effects of Financial Crisis on the Binding Force of Contracts-Renegotiation/Rescission or Revision (1st edn, Springer 2016) 92-93.
[29] Ng'ambi (n7) 670.
[30] Puelinckx, A.H, 'Frustration, Force Majeure, Imprevision, Wegfall der Geschaftsgrundlage, Unmoglichkeit, Changed Circumstances' (Trans-Lex, 3 J.Int'l Arb. 1986, No. 2, at 47 et seq) <http://www.trans-lex.org/128100/> accessed 10 May 2016.
[31] UNIDROIT (n12) art 6 (2) (2).

seriously onerous during performing the contract, and it then gives rise to renegotiation for adjusting the contract provisions.[32]

Notably, it is necessary to distinct between simple change and serious change in the balance of contractual duties. The first is considered that is not more than a usual danger, means that being changed just in the prices and price of raw materials resulted from normal economic fluctuations, but gigantic and serious change in the balance of the contractual obligations, makes performing the contract duties effectively onerous and becomes sometimes close to impossibility but not full impossible. Relating to this matter, international arbitral tribunals emphasize basically on distinguishing between usual or ordinary change of global markets and prices and massive imbalance of the contract.[33] For example, if there is a contract between two companies, and according to the contract, the company A is binding to provide oil products to the company B according to global markets price, after a period of time, the company A suspended supplying of oil products to the company B on the basis of a rise in oil prices, and requests to stop performing its obligations and amend the contract provisions, complying with new fluctuation of prices. As regards this example, arbitral tribunals rejected such requests which has stated in the example, because it is not enough just being fluctuated in the prices to be used for modifying the contract provisions on the basis of renegotiation clause, but also it needs occurring an event which disrupts radically contractual equilibrium.[34]

In addition, it is very important to adopt a specific wording to show the imbalance by contracting parties and it would be useful to arbitral tribunals too, because using general wordings cause usually vagueness and affect the interpretation of the provisions of the contract. [35]

1.4.2 The Criteria for Assessing Imbalance

In respect of the criteria for assessing imbalance, there are two main yardsticks basically for dealing and assessing legally circumstances are objective or material standard and personal standard. According to objective or material standard, the contracting parties in their agreement do not depend on their personal assessments,

[32] Commission on Commercial Law and practice (n 9).
[33] Rimke (n 5).

[34] Linda Mulcahy, Contract Law in Perspective (4th edn, Cavendish Publishing Limited 2008) 135.
[35] Marcel Fontaine & Filip De Ly, Drafting International Contracts (1st edn, Martinus Nijhoff 2009) 492.

but they measure the imbalance according to the standard of a reasonable person, means a usual person with moderate descriptions and is replaces the disadvantaged party, to evaluate the imbalance of contract, realizing if that reasonable man is able to perform the contractual obligations or is beyond him, so as to know the effect of unforeseen event on the disadvantaged party ability to perform his contractual and financial duties. However, according to personal yardstick, the imbalance of a contract is assessed pursuant to the scope of change which happened to the personal and financial situation of the parties, specifically the disadvantaged party. Also, the importance of this standard is that the financial and economic status of the injured party takes into account, and it is beneficial for the disadvantaged parties who their financial efficiencies are not great.[36]

Moreover, the objective or material standard is considered by legislations and judicial decisions to assess the amount of onerousness and economic imbalance of the disadvantaged contracting parties, due to an unforeseen event. Practically, international arbitration tribunals in their awards consider the objective yardstick for assessing imbalance. For example, in decision under number 1512/1971 of international chamber of commerce (ICC/Paris), the jury award considered and depended the basic terms and conditions of the contract and justice according to a reasonable person not the personal and financial status of the contracting parties or their personal assessments for imbalance,[37] and it states in national civil codes, such as in article 147/2 of Egyptian Civil Code, considers the objective standard for assessing the amount of imbalance.[38]

Although objective standard is criticized on the basis that this standard discounts the financial status of the injured party his or herself, this standard doesn't ignore the personal financial situation of the disadvantaged party in absolute way, but the financial ability of the disadvantaged party can be regarded during assessing the imbalance of the contract.[39]

[36] Al-Hakim, Al-bakri and Albashr (n10) 163.
[37] Arbitration Award [1971] ICC, YCA 1512.
[38] Egyptian Code (n19) art 147 (2).
[39] Ahmed Suwayhi Shalibk, 'The Concept of Urgent Circumstances: Its Elements and Conditions' (Al-Iftaa, 9 September 2014) <http://aliftaa.jo/Research.aspx?ResearchId=72#.VzyMKfkrLX5> accessed 8 May 2016.

1.5 Comparisons between Renegotiation Clause and Its Similarities with other Legal Exemption Terms

In fact, various clauses can be incorporated into contracts by contracting parties, so that the contracts could be typically adapted for new, future and unforeseen developments and circumstances.[40] Also, renegotiation clause is deemed as an essential method for treating with new conditions, which affect the contract equilibrium and performance of contractual obligations, due to the unavoidable changed circumstances.[41] It is worth mentioning that international and national legislations in the world have made variety of exemption terms or doctrines to treat with this state, such as hardship, frustration, impracticability, force majeure, Act of God, impossibility, etc. Notably, renegotiation clause and with some main other clauses such as, hardship clause, sometimes urgent circumstances are essentially close to each other in more elements, but at the same time with Force Majeure or frustration have basic differences and also similarities.[42] The researcher is going to take force majeure for comparing with renegotiation clause, due to its more common and practicable in the international and domestic legislations.

1.5.1 Renegotiation Clause and Force Majeure

Force majeure is also known as superior force and in French called 'Cas Fortuit'. [43] When an unavoidable event or circumstance occurs, which beyond the control of the parties and could not reasonably be predicted. Also, the unforeseen event due to either the human beings' acts, such as war or any military hostilities, insurrection, strike, crime, riot, etc., or the acts of God, such as flood, draught, hurricane, volcanic eruption, earthquake, fire, tidal waves, etc., which totally restricts one party or parties from performing their contractual duties under the contract, and makes the carrying out of the contract impossible,[44] as defined in Article 7.1.7 of UNIDROIT Principles

[40] Pueliinckx (n 30).
[41] Staffing Industry Analysts, 'Drafting a Contract: Sample Clauses' (Staffing Industry, 31 October 2012) <http://www2.staffingindustry.com/eng/Publications/CWS-3.0/Archive/2012/October-31-2012/Drafting-a-Contract-Sample-Clauses> accessed 12 May 2016.
[42] Pueliinckx (n 30).
[43] Merriam-Webster Dictionary, 'Force Majeure' (Merriam-Webster) <http://www.merriam-webster.com/dictionary/force%20majeure> accessed 13 May 2016.
[44] Pueliinckx (n30).

that the debtor is excused from his liability for fulfilling the obligations of a contract, due to an event which is outside of human control and prediction.[45]

It is notable that force majeure with some other exemption doctrines in common law, such as frustration, impossibility is essentially close to each other more, as well as with Act of God, and they have many common characteristics with each other, such as the impossibility of performing contracts' obligations, due to unforeseen and irresistible events.[46]

Notably, if we compare renegotiation clause with force majeure, we will find out that both terms have a number of significant shared features, and at the same time they have some basic different elements, as they will be shown below:

1.5.1.1 The Similar Faces between Renegotiation Clause and Force Majeure

Actually, renegotiation clause and force majeure have a number of similarities, which can be condensed into this form below:

i. both concepts are based on justice and fairness, means the uniformity of origin,
ii. inability of foreseeing the event by the parties,
iii. inability of avoiding and preventing the event from occurring,
iv. the event beyond the reasonable control of the parties,
v. the failure of one or both parties to carry out their contractual duties under the contract, and
vi. like renegotiation clause, force majeure can sometimes give rise to renegotiation some.[47]

1.5.1.2 The Obvious Difference between Renegotiation Clause and Force Majeure

Additionally, both concepts have some basic differences, such as:

[45] UNIDROIT (n 12) art 7 (1) (7).

[46] Rimke (n 5).
[47] Melis (n 24).

i. The event which is subject to the renegotiation clause, makes usually the performance of the contractual obligations towards the disadvantaged party excessively onerous or burdensome but not totally impossible, whereas force majeure makes the performance of the contract obligations quite impossible, at least for a short while.

ii. Renegotiation clause is used as a method during the occurrence of an unforeseen event or possible future event, for reviewing and altering the contract provisions, for mitigating the heavy influence on the involving party, and the parties intend to remain to fulfill the contract, while the force majeure event often pushes the parties towards to the non-performance and termination of the contract.[48]

iii. Force majeure normally is recognized globally as a concept and legal principle, and it is dealt differently between civil law jurisdictions and common law. Under civil law codes, the existing of a clause in respect of the force majeure literarily is not required and is dealt as a considered and enforceable principle, so that the parties can invoke and take advantage of force majeure rules and get relief for force majeure event when it occurs, but under the common law, such as English law, the presence of a clause with regards to force majeure in the contract is necessary, in a way without a particular clause, the parties are unable to invoke force majeure events and to be excused from liability of non-performance of the contract obligations.[49] Alternatively, English contract law recognizes frustration to deal with exceptional, unforeseen, and irresistible events, which make the performance of obligations impossible and illegal or radically different from what that they have agreed on before,[50] such as the case of Fibrosa Spolka Akcyjna v Fairbarin Lawson Combe Barbour Ltd [1942] that invasion was recognized as frustrating of contract.[51] On the contrary, renegotiation clause can be described as a legal basic term and nowadays inserted usually into long-term contracts as clauses. It has become an irreplaceable and crucial mechanism in

[48] Rimke (n 5).

[49] Damian McNair, 'Force Majeure Clauses' (Dla Piper, Jun 2012) <https://www.dlapiper.com/~/media/Files/Insights/Publications/2012/06/iForce%20majeurei%20clauses/Files/forcemajeureclauses/FileAttachment/forcemajeureclauses.pdf> accessed 17 May 2016.

[50] Andrew Burrows, A Restatement of the English Law of Contract (1st edn, Oxford 2016) 165.

[51] Fibrosa Spolka Akcyjna v Fairbarin Lawson Combe Barbour Ltd [1942] UKHL 4, [1943] AC 32.

the international trade and investment contracts, because the economic and practical necessities in international investment contracts make they need such kind of clauses. Also, it was proven that the performance of international trade and investment contracts require usually enough time and last long time, and it might occur sometimes an unforeseen event beyond the parties expectations, which renders disequilibrium of the contract, constitute a burden upon one or both parties and makes the contract performance burdensome, in a way the contract provisions need to be altered through renegotiation method.[52]

iv. Renegotiation clause is influenced more with change in the global market prices that occurs usually because of political and economic events, which affects materially the performance of a contract by a disadvantaged party, and it makes fulfilling his contractual obligations onerous largely.[53] However, force majeure is affected often by acts of God or natural events, such as flood, earthquake, draught, etc., and people-made accidents, such as war, riot, etc.[54]

v. Unlike force majeure, renegotiation clause can be described as flexible clause, because renegotiation clause can be formed in contracts to include much more circumstances and events.[55] Conversely, the scope of force majeure cannot be extended out of its range, includes normally events that cause impossibility in the contract performance field, and it is suitable more for local events and subject to the assessment of domestic jurisdictions.[56]

vi. When the conditions for applying the renegotiation clause are arisen, the parties are binding contractually to negotiate and review the relevant contract provisions, in order to reach a satisfied resolution and continue the contract, but under force majeure conditions, the disadvantaged party can invoke this

[52] Ng'ambi (n 7) 144.

[53] Wolfgang Peter, Arbitration and Renegotiation of International Investment Agreements (1st edn, Kluwer Law International 1995) 241.

[54] World bank group, 'Sample Force Majeure Clauses' (Worldbank, 10 March 2015) <http://ppp.worldbank.org/public-private-partnership/ppp-overview/practical-tools/checklists-and-risk-matrices/force-majeure-checklist/sample-clauses accessed> 18 May 2016.

[55] Petri Mantysaari, The Law of Corporate Finance: General Principles and EU Law (1st edn, Spriger 2010) 168.

[56] Juanita May Low, 'UK: Force Majeure – The Clause, The Definition, The Application' (Mondaq, 9 January 2012) <http://www.mondaq.com/x/159974/Contract+Law/Force+Majeure+The+Clause+The+Definition+The+Application> accessed 18 May 2016.

legal doctrine through court or arbitration, if the applicable law recognizes the force majeure concept.[57]

1.5.2 Renegotiation Clause and some other Main Legal Exemption Terms

Actually, renegotiation clause and with some others of legal and contractual exemption terms such as, hardship clause, impracticability and sometimes urgent circumstances have common and identical elements and basis, that deal with unforeseen events which affect economically the balance of the contract obligations, and all of them are considered as excuses for non- full performance of obligations under contracts, because the circumstances make the performance of contract onerousness not full impossible.[58] Under those terms, the parties can practice renegotiation to settle the matter and restore the economic balance of the contract and to continue contracts, so all of them could achieve same goal, such as it was emphasized specifically in Article 2.2.3 (1) of UNIDROIT Principles on resorting to renegotiation, in the case of onerous or hardship situations.[59] Additionally, the international and domestic legislations and principles involve the contents of those exemption terms, as well as domestic jurisdictions recognize those doctrines in their judicial decisions, such as the contents of those doctrines were stated in article 79 of CISG, which mentioned not liability for the failure of performing obligations due to an event is beyond of parties control,[60] in article 6. (2.2) of UNIDROIT Principles mentioned burdensome or hardship circumstances, where make imbalance of contracts, due to the increasing of contracts' cost implementing or falling the price of materials and goods, and the disadvantage parties can request for renegotiation, to restore the equilibrium of contracts, It means that the renegotiation as satisfied method for restoring the balance of duties and to continue the contract, becomes a result and reflection of the situations, where the events trigger those terms or doctrines.[61] With respect to domestic legislations and jurisdictions, the contents of those doctrines were recognized in them, such as stated in Article 146/2 of Iraqi Civil Code, when a public and urgent or exceptional incident occurs, beyond the prediction

[57] Rimke (n 5).
[58] Elena Zaccaria, 'The Effect of Changed Circumstances in International Trade' (Austlii, 2004) <http://www.austlii.edu.au/au/journals/IntTBLawRw/2004/6.html> accessed 18 May 2016.
[59] UNIDROIT (n 12) art 2 (2) (2) (3) (1).
[60] CISG (n20) art 79.
[61] UNIDROIT (n 12) art 6 (2) (2).

and control of the parties, caused the implementing of obligations burdensome not full impossible, the court is allowed on the basis of justice decreasing the obligations of the debtor under the contract, to restore the balance between the parties.[62] In short, even though renegotiation clause and hardship clause, impracticability, and the theory of urgent circumstances have some essential shared elements and characteristics, the renegotiation clause and those terms have differences too. The main and basic difference between them appears in their consequences that the parties under renegotiation clause at first are obliged contractually to resort to renegotiation, when the circumstance occurs, and it is not happened under other terms in a way the parties are free to resort to renegotiation or litigation even termination at the beginning,[63] as well as the theory of urgent circumstances subject to the jurisdiction of judge and relates to internally legal relationships.[64]

[62] Iraqi Code (n 15) art 146 (2).
[63] Christoph Brunner, Force Majeure and Hardship under General Contract Principles (1st edn, Kluwer Law International 2009) 479.
[64] Al-Hakim, Al-bakri and Albashr (n10) 163.

CHAPTER TWO

THE RENEGOTIATION CLAUSES IN INTERNATIONAL NON-PETROLEUM CONTRACTS AND INTERNATIONAL PETROLEUM CONTRACTS: THE APPLICATIONS AND CONSEQUENCES

2.1 The Application of the Renegotiation Clauses in International Non-Petroleum Contracts and their Consequences

Practically, incorporating renegotiation clauses into international commercial contracts in today's global long-term trade and investment contracts have become normal and kind of necessary. Actually, every contract can face events which become an impediment to fulfill the contract and make the contract performance onerous and sometimes impossible, and this research is particularly relates to onerousness, but the long-term contracts are more likely to face this matter.[65] Although every type of contracts has particular characteristics, which should be treated differently by parties at time of formation, they have enough common elements that can be taken as models for international non-petroleum contracts. Incidentally, I am as a researcher going to take each of international long-term supply of goods and international transfer of technology as two models for international non-petroleum contracts, apply renegotiation clause to them and detect their consequences.

2.1.1 International Long-term Supply of Goods

International long-term supply of goods has been taken as model for international non-petroleum contracts, because it is the kind of contracts which could be the time is essential element in because such kind of contract needs a period of time to be performed, considered a contract for the sale of goods which is the most common form of transaction in the business world, as well as is more practicable in the international trade field, so it is more suitable to be a model for this purpose.[66] The researcher is going to put the spotlight on those aspects of international supply of goods contract, which are firmly connected to the main dissertation subject.

[65] Edinburgh Centre for Commercial Law, 'Long Term Contracts Changing Circumstances and Interpretation' (The ECCLblog, 31 July 2011) <http://www.ecclblog.law.ed.ac.uk/2011/07/31/long-term-contracts-changing-circumstances-and-interpretation/> accessed 16 Jun 2016.

[66] Noel Ruddy, Simon Mills and Nigel Davidson, Salinger on Factoring: Long Term Contracts for the Supply of Goods or Services (4th edn, Sweet & Maxwell 2006) 229.

2.1.1.1 Definition of the Contract

An international long-term supply of goods contract can be defined as an agreement, by which a supplier as one party agrees during agreed period of time and at a fixed price, to supply a customer as the other party all of the specified goods that as same as the parties have agreed in regard to the quantity and quality of the goods, and the customer basically promises to receive the goods and pay the agreed price of the goods. Also, both parties to an international supply of goods contract agree on all necessary terms, which relate to the formation and performance a supply of goods contract, includes usually all means whereby the goods are delivered, the price are paid, as well as the price schedule and invoicing process. In other words, a supply of goods contract shall involve all standard terms and conditions are inherent in a contract in general and in a supply of goods in specific.[67]

2.1.1.2 Change Circumstances

Sometimes after an international long-term supply of goods concluded, unforeseen events occur, which are out of contemplation and control of the parties, create excessively burden on the one party, alter radically the balance of the present contract, and make the performance of the contract onerous but not absolute impossible. [68] So the injured party is entitled to ask for revision of the contract provision. The events in order to be taken into account as exemption occurrences must ___

i. Be unforeseen by the disadvantaged party at the time the contract is formed;

ii. Be beyond the control of the affected part; and

iii. The risk of the events in accordance with the contract must not be required to be borne by the affected party.[69]

It is worth mentioning that the affected party must note the other party about the occurrences which have become an impediment to perform his obligations under the

[67] International Trade Centre, 'Model Contracts for Small Firms: Legal Guidance for Doing international Business' (ITC, August 2010) Legal Studies Research Paper <http://www.intracen.org/> accessed 16 June 2016.

[68] Margaret Griffiths, Law for Purchasing & Supply: Termination and Remedies (2nd Edition, Financial Times 1996) 65- 66.

[69] CISG (n 20) art 79 (1).

contract within a reasonable time, otherwise the injured party who fails to perform the contract will be liable for losses causing by such non-receipt.[70]

Specifically, the researcher will provide a hypothetical instance on international long-term supply of goods contract, in which unforeseen events happens that results in impediments to fulfill the contract normally, assuming that an Iraqi party in Erbil (Kurdistan Region) and a Turkish party have entered hypothetically into an international long-term supply of goods. According to the contract, the Turkish party is binding to provide the Iraqi party with large numbers of tons of the frozen chicken weekly at a specified price for one full year, depend on DAP as an incoterm for arranging their liabilities in respect of costs and risks are connecting with the transportation and delivery of goods, in a way they contractually agree the place of delivery will be Ibrahim Khalil, where takes place on frontier between Turkey and Iraq and a tariff point also locates there.[71] Accordingly, the liability of Turkish party is to bring the goods to the tariff point of Ibrahim Khalil with costs of transportation, and then from that point the liability of Iraqi party will start, including transportation and tariff costs until the goods arrive to Erbil and to his purpose place. After that, assuming that in the middle of the course of performing the contract, some unforeseen happens and create excessively burden on the Iraqi party and make the performance contract onerous, such as the price of petroleum falls down deadly, this makes the government to increase the amount of tariff on the borders, and at the same time some political and administrative disputes arise between central government of Iraq in Baghdad and Kurdistan Region Government, consequently the central government forbids importing some goods from Kurdistan region into the central government provinces. Here, assuming that there is the renegotiation clause in their contract to review the contract provisions, in the cases of occurring unpredictable events like above events, whereby the Iraqi party as disadvantaged party can invoke the renegotiation clause to amend some contract provisions, so as the contract to be continued and keep the contract alive.[72]

[70] Ibid (4).
[71] Universal Cargo Admin, 'Incoterms Definitions Parts 3: DAT, DAP, DDP' (Universal Cargo, 19 February 2013) <http://www.universalcargo.com/incoterms-definitions-part-3-dat-dap-ddp/> accessed 17 Jun 2016.
[72] Commission on Commercial Law and practice (n 9).

2.1.1.3 The Renegotiation Clause

In fact, the parties to an international long-term supply of goods can adopt the renegotiation clause in the contract, so as to be invoked by the affected party, in case of that an unforeseen event happens and affects economically the balance of obligations under the contract and make the contract performance burdensome.[73] Subsequently, when an event of renegotiation clause occurs and the renegotiation clause works in an international long-term supply of goods contract, there will be these apparent following consequences:

i. The affected party shall give notice to the other party about the event occurrence, which affects excessively his financial ability to perform his contractual obligations in the reasonable time.[74]

ii. Both sides of the contract should agree to appoint meeting time to review the provisions, which will assist the contract to be rescued and so that the injured party continues on performing his obligations under the contract, and this is done in accordance with and relying on renegotiation clause.[75]

In a case that the parties failed to reach an agreement to adapt the contract provisions, they can resort to court or arbitration tribunal, or they can end the contract at the date they agree on.[76]

2.2 The Renegotiation Clause in International Petroleum Contracts and their Consequences

First of all, before researching and talking about the renegotiation clause in international petroleum contracts, it is necessary to refer the significant aspects of the international petroleum contract as a widely crucial contract in field of international investment in the world, due to the constantly importance of the role of the petroleum as natural resource and energy in the globe.

[73] UNIDROIT (n 12) art 6 (2) (3) (1).
[74] CISG (n 20) art 79 (4).
[75] UNIDROIT (n 12) art 6 (2) (3) (1).
[76] UNIDROIT (n 12) art 6 (2) (3) (3).

2.2.1 International Petroleum Contract

In fact, international petroleum contract is regarded as a substantive foreign investment factor, and it has many major aspects, by which international petroleum contract image will be visible.[77]

2.2.1.1 Definitions

Because the international petroleum contract is considered as the foreign investment, it is necessary to comprehend it to define the foreign direct investment as the first step, and then to refer to the definition of the international petroleum contract.

2.2.1.1.1 Foreign Direct Investment (FDI)

Actually, foreign direct investment constantly has been playing a substantial role in progressing of the global economy after, especially after the development of technology, the formation of international organizations relate to incentive for direct foreign investment, such as WTO, IMF or WBG and particularly in recent developing states for their being lack in capital, enhanced technology and skilled or qualified element of humans, as well as third world debt crisis. So, all of them have made foreign direct investment effective necessary and suitable mechanism to be used for investing and developing economy and financial infrastructures by the developing countries.[78]

According to UNCTAD, foreign direct investment is defined as a kind of investment which experiencing a long-term relationship and exercising a long-standing interest, and it is able to rule the administration between a company or a contractual party in investor country and a company or a production unit in another country (host country).[79]

Also, OECD has defined foreign direct investment that is a class of crossing-border investment, which investing foreign capital in a certain country (host country), by a resident in one economy (the direct investor), includes a long-lasting relationship, which reflecting benefits to the foreign investor, who is whether an individual,

[77] Mustafa Erkan, International Energy Investment Law (1st edn, Kluwer Law International 2011) 161.
[78] Selma Kurtishi, 'The Effect of Foreign Direct Investment for Host Country's Economy' (2013) 5 (1) EJIST 26.
[79] Basm Hamadi Al-Hssan, Foreign Direct Investment: The Concept of FDI (1st edn, AL – Halabi Legal – Publication 2014) 17.

company, or institution, and he is entitled to direct his assets from his country any other country in where he is resident.[80]

It has been evidenced from both above definitions that foreign direct investment is essentially a long-term and undeniable investment, in which the investor has really right to participate in managing his assets, and his right scope varies according to amount of his assets from capital total.[81]

2.2.1.1.2 Petroleum Contract

It may be interesting to know literally and scientifically what the petroleum is. Literally, petroleum means 'Rock Oil'. The word originated from the Greek word 'Petra' means rock, and 'oleum' means oil. Scientifically, the liquid crude oil and natural gas, or all liquid and gaseous hydrocarbons are component of the petroleum and is named a fossil fuel.[82] On the one hand, petroleum can be particularly defined as a dark thick attained from under the Earth's surface, from which several different substances are produced involving petrol, paraffin and diesel oil. On the other hand, petroleum means crude oil or natural gas, or means a combination of crude oil and natural gas together.[83]

However, according to Odilon Evrard Ngoundou an international petroleum contract can be defined as an agreement signed between a host state and a foreign oil company to progress a country economy with respect to petroleum field, to research and exploitation of hydrocarbons within a perimeter considered as the territory of the host state of petroleum investment.[84]

It is worth mentioning that the parties to an international contract are usually fall into two main sides. The first side frequently is the host government, through oil ministry

[80] OECD, ' OECD Benchmark Definition of Foreign Direct Investment' (OECD, 2008) <http://www.oecd.org/investment/fdibenchmarkdefinition.htm> accessed 18 Jun 2016.
[81] Al-Hassan (n 79) 18.
[82] SPE International, 'What is Petroleum, Crude Oil, and Natural Gas?' (petroleum101, 29 October 2014) <http://petroleum101.com/what-is-petroleum-crude-oil-and-natural-gas/>accessed 18 June 2016.
[83] Oil Price, Editorial Dept, 'What is Crude Oil? A Detailed Explanation on this Essential Fossil Fuel' (Oil Price, 24 Jul 2009) <http://oilprice.com/Energy/Crude-Oil/What-Is-Crude-Oil-A-Detailed-Explanation-On-This-Essential-Fossil-Fuel.html> accessed 18 Jun 2016.
[84] Odilon Evrard NGOUNDON, 'A study of the legal problems of state contracts' (Memoireonline) <http://www.memoireonline.com/12/09/2920/m_A-study-of-the-legal-problems-of-state-contracts2.html> accessed 18 Jun 2016.

or national oil company (NOC), and the other side is an IOC or a group of IOCs. Also, state enters normally into an international petroleum contract as a public authority, representative of public finance, responsible for the policy of the country economy, and the state as a party to the contract often waives exercising its some conventional authorizations, such as the authority of law amendment and elimination of laws, rules and regulations unilaterally.[85] So, the petroleum contract is deemed as a state contract, in which a sovereign state participates usually as a party to the contract with foreign companies or multinational or transnational companies.[86]

2.2.1.2 Some Terms of the Petroleum Contracts

Particularly, there are some important terms which associate with the petroleum contracts, used in the petroleum contracts language, and some most important and common of them are necessary to be mentioned as following.

i. Block- means. Subdivision of an area measuring approximately 200-250 square kilometers, in which a company or companies are licensed for the purpose of petroleum processes.

ii. Barrel. Means a quantity or unit of volume measurement of crude oil, and it is equal to 42 US gallons.[87]

iii. Oil Well. A hole that is drilled or dug in the ground, from which petroleum extracted or is pumped. It is also known oiler.[88]

2.2.1.3 The stages of Petroleum Lifetime and Production

Practically, the petroleum production operations usually go through several essential stages as following.

i. Exploration. Because petroleum cannot be found on the surface of the Earth, it needs to search for it under the ground, and the ground could

[85] Abbas Ghandi, 'Oil and Gas Services Contracts around The World' (14 March 2014) California A Review Paper of Oil and Natural Gas Fiscal Systems <http://www.des.ucdavis.edu/faculty/Lin/service_contracts_review_paper.pdf> accessed 18 Jun 2016.

[86] NGOUNDON (n84).

[87] Oil & Gas UK, the Voice of the Offshore Industry, 'Glossary' (Oil & Gas UK) <http://oilandgasuk.co.uk/glossary.cfm> accessed 18 Jun 2016.

[88] Cambridge Dictionaries Online, 'Oil Well' (Cambridge Dictionary) <http://dictionary.cambridge.org/dictionary/english/oil-well> accessed 18 Jun 2016.

located in in a sea, land, forest or ice. Notably, the step of survey normally precedes the exploration process, which involves Arial survey that includes Arial photographs and satellite pictures to obtain the data, Magnetic survey that involves the force of gravity, and Seismic survey includes detailed analysis of the underlying rocks using sound. After that, the process of exploration starts respectively.[89]

ii. Development. Means the construction to get the hydrocarbons out. The stage of develop for petroleum production usually starts after exploration occurrence. When the pointed field has been explored, discovered and realized that the petroleum deposit is worth extracting from the ground with the estimated cost, the next phase is to develop infrastructure to get it out.[90] Also, this process definitely relies on several reasons, such as geology, location, and national regulations. The oil company should strive to find a more sufficient way to extract hydrocarbons from the ground and to the global market.[91]

iii. Production. It is the operation of extracting the hydrocarbons from the ground, sorting out the useful and saleable liquid hydrocarbons and gas from the other non-salable or unusable substances and impurities, and then preparing the liquid hydrocarbons and gas to be marketed and sold out. Normally, production stage emphasizes on processing crude oil and gas, in a way that crude oil is processed at a refinery and natural gas is processed to be cleaned from impurities.[92]

iv. Abandonment. It is a state in which the process of petroleum production is getting widely lower, less effective and viable financially and economically. It means that a well's producing potentiality is not as much as that the oil company is able to continue or keep processing. In other

[89] Tim Boykett and others, Oil Contracts: The Life & Times of A Petroleum Project (1st edn, the British Library 2012) 14.
[90] US EPA Office of Compliance Sector Notebook Project, 'Profile of the Oil and Gas Extraction Industry' (EPA/310-R-99-006, October 2000) 17
[91] Tim Boykett and others (n 106) 17.
[92] Ibid 18.

words, this situation occurs when the well production is economically no longer encouraging or profitable.[93]

2.2.1.4 The Formation of an International Petroleum Contract

Article 2.1.1 of UNDROIT Principles defined the ways of forming a contract, in a way that a contract can be concluded either by the way of offer and acceptance or by the attitude types of the parties, which represent clearly the acceptance of an offer. In order to create an international petroleum contract, there has to be an agreement between the parties, in a way an offer is made by one party called the offeror and the offer must be accepted totally by the other party, who called offeree intending for creating a legal relation.[94] The following mechanisms and elements have to be occurred and practiced during almost all contracts, including international petroleum contracts. It is worth noting that every category of contracts has some particular features and procedures, which have to be observed at time of conclusion.

2.2.1.4.1 The Formation of the Contract

Generally, for forming a contract the parties to a contract have to take these following steps and take these elements into account.

2.2.1.4.1.1 Offer and Invitation to Treat

Generally, the process of offer is made when a party decides to enter into a legal relation, which needs an agreement between the parties. The first step is making an offer by the offeror and rendering to the other party or offeree. As stated in CISG code, Article 14 (1), that an offer is made when a proposal for concluding a contract is rendered to one person or more by an offeror, in which the offeror defines implicitly the determination of the quantity and the price, and indicating his intention to the offeree that he will be bound in state of acceptance occurrence.[95] When an offer reaches the offeree, it becomes effective, and the offer can be withdrawn or revoked after the revocation got to the offeree and he has not sent his acceptance back, such as mentioned in CISG code, Article 15 (1, 2), and Article 16 (1).[96] Also, according to Article 16 (2, 3) of the CISG code, an offer cannot be voided when a fixed time or an

[93] EPA Office of Compliance Sector Notebook Project (n 90) 33.
[94] UNIDROIT (n 12) art 2 (1) (1).
[95] CISG (n 20) art 14 (1).
[96] Ibid 15 (1, 2) and 16 (1).

irrevocable sign has been indicated. Normally, when the rejection reaches the offeror or the pointed time expires, the offer is considered revocable.[97]

With regard to the invitation to treat, it can be said that the invitation to treat is a term of contract law to differentiate some commercial actions from formal contract offers. Under English law, the price of some items are displayed in a shop window, or when advertised via public media, is considered an invitation to treat, not deemed as an offer of sale, so that the offeree is able to accept it so as to be a contract. Also, the person who asks for tenders for purpose of purchasing, selling of goods, or supplying of services, makes in this situation an invitation to treat, but the person who makes tenders is who makes offer too.[98]

2.2.1.4.1.2 Acceptance

When the offer has been accepted by the offeree, the contract is considered as a binding concluded contract. Also, UNDROIT Principles through the Article 2.1.6.1 indicated and defined the acceptance of offer that any articulations or other ways, by which the assents can be shown by the offeree, deemed as acceptance, and being silent or passive acts do not arrive the level of the acceptance.[99] Moreover, according to Article 18 (2) of CISG code, an acceptance of an offer procures affectivity at the time that the offeree gives his consent and the acceptance reaches the offeror.[100] Accordingly, the period of acceptance is usually counted at the moment of offer expression, as it fixed in Article 2.1.8 of UNDROIT Principles.[101] With respect of this matter, sometimes an answer to or a reaction of an offer indicates the acceptance, but at the same time it involves additions, limitations or other amendments is considered a refuse for the offer and forms a counter-offer, as referred in Article 19 of CSG.[102]

[97] Ibid 16 (2, 3).
[98] Kenneth Smith and Denis J Keenan, English Law: The Formation of contract (5th edn, Pitman 1975) 150-153.
[99] UNIDROIT (n 12) art 2 (1) (6) (1).
[100] CISG (n20) art 18 (2)
[101] UNIDROIT (n 12) art 2 (1) (8).
[102] CISG (n 20) art 19

2.2.1.4.1.3 Consideration

Under English law, consideration is an indispensable element to make any contract,[103] as defined in Currie v. Misa, (1875), L.R. 10 EX153 which is an English contract law case that some right, benefit, profit or interest developing to one party personality, or some loss, damage, forbearance or responsibility faced, suffered or occurred by the other.[104]

In order to a promise make a contract binding, it must be endorsed by consideration. Consideration particularly means something of value or guaranteeing performances, which are exercised to make a promise enforceable and legally binding as a contract.[105] For example, the payment by a purchaser is regarded consideration for the vendor's promise to deliver goods, and dispatching of goods is also consideration for the purchaser's promise to pay.[106]

2.2.1.4.1.4 Form

Although according to general rule, the majority of contracts can be concluded orally, there are some kinds of contracts which interest to businesses are statutorily excluded and must be written, and they cannot be made just by offer and acceptance orally. It means some kinds of contracts as well as offer, acceptance and consideration, need a certain type of formation.[107] For instance, agreements are pertinent to consumer credit, which regulated under the Consumer Credit Act must be written,[108] a lease contract for more than 3 years has to be formed by deeds, as stated in English Law of Property Act 1925, ss 52 and 54 (2),[109] or the contract for sale of property has to be formed in writing, as mentioned in English Law Property Act 1989, s 25,[110] as well as the contracts of guarantee need to be evidenced in writing, as stated in English Statute of Frauds, s 4.[111]

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[103] Smith and Keenan (n 98) 164.
[104] Currie v Misa [1875] LR 10 EX 153.
[105] Cheshire, Fifoot & Furmston's, Law of Contract (12th edn, Butterworths 1991) 70.
[106] Guenter Heinz Treitel, An Outline of the Law of Contract (Butterworths 1975) 29.
[107] Griffiths (n 68) 25- 26.
[108] Consumer Credit Act 1974, s 65.
[109] English Law of Property Act 1925, ss 52 and 54 (2).
[110] English Law Property Act 1989, s 25.
[111] English Statute of Frauds, s 4.

2.2.1.4.1.5 Contents of the Contract

A contract usually includes two main terms are express terms and implied terms.[112]

2.2.1.4.1.5.1 Express Terms

The express terms involve the terms which are set out by parties to a contract in their agreement. It means the statements which were formed by the parties whether by oral or in writing. The importance of express terms appear when the contract faces a problem and the parties fall into a dispute, because the court must in its first step decide on what statements were set out by the parties and interpret those statements with intentions were behind those terms. Accordingly, if the contract is totally made through word of mouth, its contents will be associated with evidence that submitted to the judge, but if the contract is wholly made in writing, the detection of what was written usually submits normally and its analysis is a case of the jurisdiction of the judge.[113]

2.2.1.4.1.5.2 Implied Terms

However, implied terms, in addition to the terms which are adopted by the parties expressly, there can be others are implied and incorporated into the agreement from its context. Those implications can be received from custom, statute, or they can be derived by the judges' inferences.[114]

In respect of an international petroleum contract, the nature of such contracts has made the process of formation of those contracts different from others of contracts, such as the normal contracts of sale of goods, because the term of invitation to treat is practiced in the process of forming the contract. Practically, when a host government announces a tender for exploration and production of one of its block to all international oil companies, to apply and submit their tenders and proposals within specified period of time. In this situation, the process of announcement is an invite to treat by the host government, and the process of applying and submitting applications with proposals by the IOCs is considered the acceptance of invitation and at the same time are offers, which are rendered to the host government party to choose and accept

[112] Cheshire, Fifoot & Furmston's (n105) 122.
[113] Smith & Keenan (n 98) 193- 194.
[114] Cheshire, Fifoot & Furmston's (n105) 133.

one of them at its discretion.[115] An international petroleum contract, for prospecting and exploring of specified oil and natural gas blocks, is conducted through calling for tender and announcements, which are published in official journals, or announced in any specified official media centers. Then, corporations or IOCs as applicants start applying and submitting their applications with proposals.[116] Statutorily and commercially, when a party asks for tenders for the buying or selling of goods, or for supplying of services, the party in fact makes an invitation to treat, and the offer comes from normally the party who makes the tender and submits it to the inviting party, and the inviting party is free to accept the tender which is compatible with his descriptions, or he can reject any one of them.[117]

2.2.1.5 The Contents of International Petroleum Contract

It would be undeniably significant that the content of the international petroleum contract include the following terms and provisions.

i. The perimeter of the area, in which the holder authorized for research;
ii. A comprehensive program for exploration work;
iii. The rights and obligations of the parties to the contract;[118]
iv. The variety of the contract periods of time in respect of validity of the authorization of research as well as any terms, which associate with renewal, extension, or reduction of the area scope of the contract;[119]
v. The obligations connect to training and employing of the domestic workers in the host state, during the operations of the petroleum investment;[120]
vi. The financial obligation provisions and accounting rules concerning the petroleum processes;
vii. The obligations for the environment protection, according to legislation and regulations of the country as well as international standards;
viii. The terms connect with termination of the petroleum contract;[121]

[115] Treitel (n 106).
[116] 'Oil exploration tender for west Greece published in EU journal' (Energy Press, 5 November 2011) Energy Press <http://energypress.eu/tender-oil-exploration-western-greece-published-eu-journal/> accessed 19 Jun 2016.
[117] Griffiths (n 107).
[118] Mohsin Shareef Salih & Rdhwan Shareef Salih, 'Strategy of Oil Contract Negotiation' (September 2015) Vol. 6, No. 9 IJBSS 168.
[119] The Vietnam Petroleum Law 2008, arts (15) and (17).
[120] Silvana Tordo and others, Local Content Policies in the Oil and Gas Sector (1st edn, The World Bank 2013) 177.

ix. The obligations of abandonment and leaving the oil deposits and wells, when the petroleum contract is going to expire or before the expiration date of the contract.
x. Stabilization and renegotiation clauses;
xi. Circumstances of force majeure and hardship.
xii. The clauses which are connect with the mechanism of the resolution of disputes.[122]

2.2.1.6 The Main and More Common Types of International Petroleum Contracts

Since its inception in the early of last century until now, a number of different types of contracts internationally have been originated, through operating of the petroleum investment and industry by foreign companies for exploration and exploitation of fields. Two main categories of fiscal system exist. The first is concessionary systems or sometimes called license agreements, which known commonly as Royalty and Tax (R / T) systems, and the second is called contractual based systems or contractual agreements, which include each of production sharing contracts and service contracts.[123] Under a license agreement, the government set out exclusive rights to a foreign oil company to start exploring in a certain area, and the license holder finance the operations, sells all production, and pays a royalty on production and taxes on profits. In respect of contractual based system or contract agreements, an international oil company is entitled the right to specified area during reaching a contract with government or its national oil company NOC. Here, the company basically acts a contractor to the government, and the company also funds all activities and operations.[124] Accordingly and essentially, four types of them are truly common and more practicable all over the world, which are called concession contracts, production contracts, the service contracts, and the joint venture contracts. These types of contracts have made controversies between parties and individuals are

[121] Jenik Radon, 'The ABCs of Petroleum Contracts: License-Concession Agreement, Joint Venture, and Production-Sharing Agreement' (Openoil, 2011) <http://openoil.net/wp/wp-content/uploads/2011/12/Chapter-3-reading-material1.pdf> accessed 20 Jun 2016.
[122] Daniel Johnston, International Petroleum Fiscal Systems and Production Sharing Contracts (1st edn, PennWell 1994).
[123] Hassan Harraz, 'Types of Petroleum Contracts' (Slide Share, 27 May 2015). <http://www.slideshare.net/hzharraz/topic-4-types-of-petroleum-contracts-agreement> accessed 21 Jun 2016.
[124] Frank John, Mark Cook & Mark Graham, Hydrocarbon Exploration and Production: Petroleum Agreements (2nd edn, Elsevier 2008) 301-302.

concerned with this fact, on realizing that which one of types has preference or superiority over other in regard to advantage for both parties.[125] Now, the four types of international petroleum contracts are going to be researched and defined, as following.

2.2.1.6.1 The Concession Contracts

The history of concession contract and called also license agreement comes back to the early of past century, and it took place for the first time in Iran in 1901 between Persian government of that time and an English man, D'Arcy. This sort of oil agreement had opened a load gate before a large number of the concession contracts, which had been made following that agreement. For example, the first concession contract in Iraqi was concluded in 1925, in Saudi Arabia in 1933, and in Kuwait in 1934. The essence of this kind of petroleum contracts is that the host government give permission to the a foreign oil company to carry out operations to explore and exploit petroleum underground, in exchange for paying tax, fees, loyalties.[126] Also, the modern incarnation of such agreements usually grants a concessionaire company mining right, by which the licensed company procures exclusive rights to explore, prospect, vend and market oil or others of minerals that extract from a delimited region for a specified period of time.[127] Moreover, scholars view that the concession as the petroleum production regime is still used by around half of producing petroleum countries all over the world, including the UK, US, Russia, France, New Zealand, Australia, Colombia, South Africa, Argentina, and etc.[128]

The supreme features of this type of the international petroleum contract can be crystalized in following points.

i. The HS grants the foreign concessionaire company the mining right, includes the exploration and production authorizations upon the given zone for a specified period of time;

[125] Petroleum Today, 'A Report: Types of Oil Industry Contracts' (18 August 2015) <http://petroleum-today.com/index.php?go=news&more=312> accessed 21 Jun 2016.
[126] Zuhairah Ariff Abd Ghadas and Sabah Karimsharif, 'Types and Features of International Petroleum Contracts' (Jun 2014) 4 SEAJBEL 34
[127] Randon (n121)
[128] Ruslan Sulaimanov, 'Balancing State and Investor Interests in International Petroleum Contracts: Renegotiation Clause' (25 March 2011) CEU

ii. The IOC signs on loyalties, bonuses, fees, taxations and etc., during its operations for exploration and exploitation;

iii. The IOC takes liability of the financial and commercial risks; and

iv. The international oil company procures the title equipment, and oil and natural gas.[129]

It is worth mentioning that the concession contracts historically falls into two forms are the traditional concession contracts, which are dated back to before 1950s, and the modern concession contracts which have been practiced since 1950s. The traditional concession contracts have some apparent features, such as the large of given area, the long of concession duration, the loyalty is given to the HS by the IOC according per oil production volume, the petroleum reserved found ownership is belonged to the IOC, the required assets and funds for the operations of exploration and development are beard by the IOC as foreign direct investment exercise, plus the used equipment and installations ownership also are belonged to the IOC.[130] However, the modern form of concession contracts (MCC) also grants to IOC exclusive rights for exploration, development, sell, and exportation oil from a determined given area for a specified period of time, but under modern forms, the range of area usually falls into several limited blocks, the duration of contract is limited, the IOC is required to employ national employees, some modern forms include paying bonus to the HS, and MCC generally gives further active role for the host state involving its authority to review or control over concessionaire's decision.[131]

2.2.1.6.2 Production Sharing Contracts (PSC)

Actually, Production Sharing Contract is a pretty common and kind of new type of petroleum agreement, which dated back for the first time to the mid of 1960s, in Indonesia, and it used today more in the Middle East and Central Asia, too. Also, it normally signed between a host or producing government and an international oil company. The PSC is considered as a watershed in the history of petroleum contracts

[129] Abd Ghadas and Karimsharif (n 126).
[130] Ernest E. Smith, 'From Concession to Service Contracts' (1992) 27 IELS.
[131] Abd Ghadas and Karimsharif (n 126).

and produced a modern are of agreement in the life of petroleum industry.[132] Under a PSC, the host government contractually grants an international oil company the right to carry out the operations of the exploration and production and the contractor will own a share of hydrocarbon resources once they are out the ground. The existing cooperation between a national oil company (NOG) and a foreign oil company is the key character of this type of contract, because the government through its national oil company genuinely participants in managing the petroleum activities, by which the state has retained ownership of the natural resources and negotiate a profit-sharing system. Accordingly, the oil company works as a contractor, carries most mineral and financial risks of the initiative and exploration, growth and eventually producing in the given area as required. In the case of success, the oil company is usually allowed to use the money from produced oil to meet capital and operational expenditures, which called cost oil, and the profit money which comes from the remaining money is split between the host government and the oil company. In most of the production sharing agreements, fluctuations in the global oil prices or production rate touch the company's share of production.[133]

Moreover, Production sharing agreements can be helpful to recent developing governments of countries that are suffering for the lack of the inadequate expertise, qualification and capital to prospect their resources and hope to incentivize international oil companies to invest in the petroleum field. Additionally, those contacts can be very money-making agreements for the involved foreign oil companies, but regularly face considerable risks during it operations.[134] Furthermore, many developing countries, such as Egypt, Malaysia, Oman, Libya, Sudan, Thailand, Peru, Angola and Philippines have depended on this kind of petroleum production arrangement.[135]

[132] Kirsten Bindemann, 'Production – Sharing Agreements' (2009) 286084 Oxford Institute for Energy Studies.
[133] Raymond F. Mikesell, Petroleum Company Operations and Agreements in the Developing Countries (1st edn, Routledge 1984) s 5.
[134] Randon (n121)
[135] Sulaimanov (n 128).

2.2.1.6.3 The Service Contracts

In fact, the oil producing countries are constantly seeking the better petroleum contract regimes, in order to get an effective role and position for keeping central and governmental domination over national mineral resources and operations, protecting investment incentives concurrently to encourage foreign oil company (FOC), so as to continue on their investment activities in the country. Accordingly, the service contracts are considered as developed form of the production sharing contracts in terms of the provisions of the control and supervision of the oil producing state, due to regain totally sovereignty producing state without being subject to any negotiations in this type of contract. Also, a foreign oil company conducts its operations for exploration and production of mineral resources as a contractor and bears the risks alone, and it is remunerated for its works in the state of marketing production.[136] The first service contract was signed in the world was in Iran between Iranian Oil Company (NIOC) and the French oil company, ERAP, in 1966.[137] In addition, the foreign company works with the national oil company as a contractor to carry out specified services, through performing and providing technical, financial services as well as marketing produced oil sometimes, in exchange for a remuneration is to sell the amount of produced oil to the oil company at an exceptional price, so the foreign company's profits is the remuneration, which takes in exchange for only the services offered by the foreign oil company. Moreover, oil usually remains as the possession of the oil producing country, and the foreign oil company does not procure a direct stake in the oil reserves.[138] In addition, this type of arrangement for the petroleum production industry is greatly used in the Middle East and Latina America, but at the same time this regime of petroleum production is not really widespread.[139]

It is undeniably significant to mention and define the three main arrangement types of the service contracts typically are the risk service contract, the pure service contract and the technical assistance contract. In the risk service contract, the private petroleum companies shoulder totally all risk of exploration and production

[136] Ghandi (n 85).
[137] Fundinguniverse, 'National Iranian Oil Company History' (Funding Universe) <http://www.fundinguniverse.com/company-histories/national-iranian-oil-company-history/> accessed 21 Jun 2016.
[138] Muhammed Mazeel, Petroleum Fiscal Systems and Contracts (1st edn, Diplomica Verlag GmbH 2010) 27.
[139] Sulaimanov (n 128).

operations but has potential of profit, and all production belongs to the host government, in a case where the resources are found the company takes its cash fee for its service with an interest in the extracted resources, and vice versa. While, in the pure service contract, HS accepts all risks, and the company also attains an interest in the produced resource.[140] However, under the technical assistance contract, the HS is the most effective party, the private petroleum company has no possibility of obtaining an interest in the resource, and this arrangement can be used to derive more benefit from the transnationals' technological and professional expertise and capital resources, as well as permits the HS to keep its control and sovereignty over national mineral resources.[141]

2.2.1.6.4 The Joint Venture Contract (JVC)

The joint venture contracts have brought with themselves additional balancing mechanisms to the oil contracts. A joint venture contract could provide an oil producing state a larger control and supervision over the petroleum operations compared with each of Concession Contract and Production Sharing Contract.[142] Under this kind of contract the HS through its national oil company and the IOC share jointly in carrying out the operations to explore, develop and produce petroleum resources. Also, this type of contract allows the parties to share the risks, costs, production and profits, which connect with the area subjects to the joint venture contract. It means both parties jointly enjoy the rights and obligations in the petroleum project. Moreover, the oil producing state shall take part in the petroleum operations and carries the costs and risks jointly with IOC, in state the discovery is futile the host state will be subject to losses; however it will not occur exactly under the Production Sharing and Concession contracts. Furthermore, the scope of government participation in practice can be different from a contract to another, in terms of the bearing of risks and costs as well as the management participation. For examples, the form of this kind of contract has been practiced for first time in Irian

[140] Michael Likosky, 'Contracting and Regulatory Issues in the Oil and Metallic Minerals Industries' (April 2009) 18 TNC.
[141] Philip Daniel, Michael Keen & Charles McPherson, The Taxation of Petroleum and Minerals: Principles, Problems and Practice (1st edn, Routledge 2010) 98.
[142] Mikesell (n 133).

and Jaya in Indonesia in 1977, and following this contract it has been practiced in each of Nigeria, North West Shelf (Australia), and Russia.[143]

2.2.2 The Application of the Renegotiation Clause in the International Petroleum Contracts

It is evident that there has been growing interest in incorporating the renegotiation clause into contracts as an alternative dispute resolution, for review, renegotiation, or adjustment at various contract intervals. Also this type of clause is deemed as an 'agreement to agree' at a later phase in the contract course. Although some specialists of negotiations have fears of misuse of the clause by parties to contracts, the clause is preferred, endorsed, resorted nowadays by many parties to contracts, including broadly international petroleum contracts to treat economic conditions, face unforeseen events, by which contracts performance become burdensome upon effected parties to the contracts, and to rescue effected contracts from freezing situations and make them alive and ongoing.[144]

It is worth reminding that the researcher has been trying through this thesis contents, to argue for the largely significance of the inclusion the renegotiation clauses into international petroleum contracts, in order to fix unbalanced economic elements in the contracts, continue the performance of the contracts and eventually bring prosperity for the host countries and incentive foreign petroleum companies on investing. Now, the renegotiation clause is going to be applied to the four main types of international petroleum contracts.

2.2.2.1 The Application of the Renegotiation Clause in the Concession Contracts

As it has been pointed out above the concession contracts historically are divided into two forms are Traditional form and Modern form. Under traditional concession contracts (TCC), such form of these contracts did not grant host state the right to manage of and supervise over the operations of the petroleum production. It means that the host government was subject to the IOC and had the least or excluded from participation in petroleum operations.[145] So, the traditional concession contracts do not include any provision to renegotiate the terms and conditions of the contract and

[143] Abd Ghadas and Karimsharif (n 126).
[144] Daniel Johnston, International Petroleum Fiscal Systems and Production Sharing Contracts (1st edn, PennWell 1994).
[145] Tengku Nathan, The Indonesian Production Sharing Contract (1st edn, Kluwer Law International 2000).

do not have any provision to obligate the HS to take part in the operations of exploration and development. It is evident that the traditional concession contracts were not unsuccessful to accomplish economic balance, mutual interests and continual stability between the IOC and HS;[146] therefore in the second half of the 20th century, the usage of traditional concession agreements decreased and has been replaced by a new form of concession contracts.[147]

In respect of the modern concession contracts (MCC), this form of such contracts at the present time is a better and equitable contract formula grants the host state partially right to participate of the management and supervision of petroleum operations national and appointment of their labor and employment training by investing company.[148] For instance, by requiring minimum of the programs of exploration operation, approval of the expenses and costs of the exploration operation and the plans development field, and by granting the host government the option to contribute in the venture,[149] such as concession contracts in Libya, Saudi Arabia, Kuwait Angola, Ecuador and Oman.[150] Incidentally, it could be incorporated renegotiation clause as a provision into a MCC at the time of concluding, due to the existence of some elements like foreign long term investment, the participation of both parties in the contract regime and in such form of contracts both parties also are interested in financial terms like taxes and loyalty, which are influenced by changing economic balance between the HS and IOC. Accordingly, during forming a MCC, the host government and the IOC can adopt the renegotiation clause in the contract, and at the time of the trigging event occurrence, the effected party is able to invoke the clause. For example, one of the recommendations of subcommittee on Multinational Corporation on multinational petroleum companies and foreign policy of United States, Congress, Senate, committee on Foreign Relations, provided that the U.S. government shall incentivize oil companies to incorporate into concession

[146] Abd Ghadas and Karimsharif (n 126).
[147] Petroleum Today (n 142).
[148] Nathan (n 162).
[149] Abd Ghadas and Karimsharif (n 126).
[150] Randon (n121)

contracts provisions requesting to depend on automatic renegotiation of financial terms every 5 to 10 years.[151]

Accordingly, there is a law case known the Government of State of Kuwait v. American Independent Oil Co (AMINOIL), which associates with the concession agreement, unilaterally legislative authority by the government, and it shows that if there was a renegotiation clause to treat future occurrences, there would not have such difficult dispute between the parties, and the foreign petroleum company would be protected from the government disruptive acts.[152] Under the agreement, American Independent Oil Co (AMINOIL) was entitled to a concession by the Ruler of Kuwait, including the exploration and exploitation of hydrocarbons in 1948. During 1970s, a series of events, such as the oil price increase, the Abu Dhabi Formula on tax increase as well as OPEC announcement about the host state allocation increase, made the government of Kuwait modify the AMINOIL's concession unilaterally in 1975, and then a law was enacted by the Kuwait parliament to nationalize the concession in 1977. Subsequently, the AMINOIL's concession had been terminated with an envisaged payment as compensation, AMINOIL rejected the new developments, both sides ultimately decided to submit the dispute to arbitration, and in 1982 , the arbitral tribunal concluded that that the jurisdiction of the arbitral tribunal was incomplete to make a decision on reciprocal payment or damages claims, because of the Kuwait nationalizing decree of 1977.[153] To sum up, the fact which has been found out from this case is that if there was a fixed provision in the concession agreement, whereby both parties were obliged to resort to renegotiation to treat any new developments, which happened through lifetime of concession, the dispute would not happen like that, and the foreign oil company also would be conserved from any unfair and unilateral authority's acts.

[151] Subcommittee on Multinational Corporation, Report of Multinational Petroleum Companies and Foreign Policy (Washington, 2nd Session 1974) Volume 6, 131.
[152] Talal Abdulla AL-Emadi, 'The Renegotiation Clause in Petroleum international Joint Venture Agreements' (SSRN, June 2012) Oxford Legal Research Paper 4/2012 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2073340> accessed 16 July 2016.
[153] Kuwait v Aminoil [1982] 21 ILM 976 (Ad-Hoc).

2.2.2.2 The Application of the Renegotiation Clause in the Production Sharing Contracts

The production sharing contracts as a regime of petroleum agreements are really common used approach nowadays, after this form of agreement has regained the state's ownership for or sovereignty over national natural resources and becomes an effective party in the petroleum contract with foreign petroleum companies.[154] Since a PSC involves a number of observable characteristics, by which the PSC is defined. For example, this regime evolves the national control over petroleum operation, in a way the ownership and management of the national natural resources are under the control of the HS, and the foreign petroleum company works as a contractor for the state, which represented by national oil company or the natural resources ministry at its own risks and expenses, contains a taxation provision by which the IOC affords income tax, and the host state is provided the amount of produced petroleum, Also, the IOC usually is furnished with a portion of the production as the cost recovery from the contractual area, both parties are sharing in amount of production on a pre-determined ratio, plus all equipment and installations which are necessary for the exploration and production actions belong to the state party, as well as PSCs are originally long duration and open to the changing essentially events.[155]

Consequently, PSCs contain renegotiation clauses for treating with future unforeseen and possible changing occurrences, in which affect the economic equilibrium of parties' obligations, and the renegotiation clause so as to be effective and insightful, it should be the trigging events obviously indicated in the clause,[156] such as tax increase, price fluctuation of global markets, making change in loyalty quantum, marginal discovery. Moreover, the scholar future presented an instance of clause relating to renegotiation mechanism and gas discovery, in a way the contracting parties leave the decision upon the percentages of its portion for future, in case if gas is revealed during the production of petroleum.[157] Furthermore, in the all international petroleum contracts, including PSCs usually one of parties is the state party or government entity, which has influencing political and legal authority, is able to make changes in laws and relegations, by which affect the petroleum contract obligations performance.

[154] Nathan (n 161).
[155] Daniel, Keen and McPherson (n 141).
[156] Kim Talus, Research Handbook on international Energy Law (1st edn, Edward Elgar 2014) 131.
[157] Sulaimanov (n 128).

Here, the renegotiation clause could obligate the state party to resort renegotiation instrument, for review the provisions which it guesses they need to be adjusted. So, renegotiation clause has become an appropriate alternative to the traditional stabilization clause in this respect,[158] and it does not allow the state party to decide on significant issues or acting disruptively which gives rise to serious challenges to the contractual obligations performance towards the private party. Alternatively, the renegotiation clause in such form of contracts like PSCs makes a chance so that the decisions to be made through sharing both sides of the contract and secures the private party too.[159]

Incidentally, there is a practical example in Article 17 (10) of the Indian Model PSC, which permits to have renegotiation on economic imbalance and provided that in cases if changes made to the Indian law, rule or regulation, which are pertinent to income tax/other corporate tax, import or export tax, tax or customs duty, imposed upon petroleum or dependent on the petroleum value, imposed by central or any local authority and leads to a material change to economic advantages increasing to any of the sides after the effective date, the contracting party should consult directly to make crucial changes and revisions to the Contract to sustain such predicted economic profits to every of the Party as of effective date.[160]

Practically, Wintershall, A.G. et al v. Government of Qatar, is a case which in addition to its relation with an alleged breach of an agreement, it has a sort of association with renegotiation mechanism to treat with future developments.[161] In this case, Wintershall with the Government of Qatar reached Exploration and Production Sharing Agreement (EPSA) in 1976, in substitution for a concession agreement entered into in 1973. Under the agreement, Wintershall attained a 30-year exclusive right for exploring, drilling and producing petroleum in a specified area. Here, the researcher will concentrate on the side of the agreement, which connected with renegotiation clause. Basically, the EPSA addressed the found non-associated gas on

[158] Tade Oyewunmi, 'Stabilization and Renegotiation Clauses in Production Sharing Contracts : Examining the Problems and Key Issues' (December 2011) 9 OGEL.

[159] Law Teacher, 'Explain the Function of Stabilization and Renegotiation Clauses in Production Sharing' <http://www.lawteacher.net/free-law-essays/international-law/the-function-of-stabilisation-and-renegotiation-clauses-in-production-sharing-contracts-international-law-essay.php> accessed 27 Jun 2016.

[160] Indian Model Production Sharing Contract 2009, art 17 (10)

[161] Taida Begic, Applicable Law in International Investment Disputes (1st edn, Eleven International Publishing 2005) 133.

the basis of commercial quantities and economic utilization.[162] In addition, one of the agreement provisions mentioned a case that if non-associated gas was discovered, the Wintershall would have right to produce it on the grounds of a further contractual arrangements.[163] Accordingly, this provision is considered as a renegotiation clause in the EPSA for containing the renegotiation clause criteria or the reference to a trigging condition, such as leaving the treatment with a future possible condition is finding non-associated gas to further contractual arrangements. It means that the renegotiation should be taken place when the non-associated gas found in the defined area.[164]

2.2.2.3 The Application of the Renegotiation Clause in the Service Contracts

As it was mentioned before, under the three forms of service contract for arranging petroleum operations, the state party has greater control and supervision over the national mineral resources and the contractor does not obtain a share of production, in return is paid a service fee particularly with cash.[165] The key issue here is about the possible suitability of renegotiation clause for all forms of service arrangements, and which form is more suitable for renegotiation clause to be included in. Practically, the type of risk service contract, in which the IOC agrees to bear all risks are pertinent to find intentioned resources during exploration activity and it is paid cash remuneration.[166] It means the IOC has accepted all risks are associated with the exploration operation before, so there are no enough and appropriate chances whereby renegotiation clause being trigged. In other words, the chance of application of renegotiation clause to the risk service contract is sort of weak, due to its natural contractual structure and contents.[167] But in a case, if the exploration efforts are fruitful, the contractor will be recovered for those costs and paid cash fee by the host government via sale of the oil or gas, and the fee is typically grounded on a percentage of the remaining revenues. Also, the fee is usually subject to taxes, and it is very akin to the PSCs.[168] Here, the opportunity of application of renegotiation

[162] Wintershall AG v The Government of Qatar [1989] 28 ILM 795 (Ad hoc tribunal).
[163] Doak Bishop, James Crawford & William Michael Reisman, Foreign Investment Disputes: Cases, Materials, and Commentary (1st edn, Kluwer Law International 2005) 442.
[164] Sulaimanov (n 128).
[165] Likosky (n 140).
[166] Daniel Johnston, International Exploration Economics, Risks, and Contract analysis (1st edn, PennWell 2003) 41.
[167] CISG (n 20) art 79 (1)
[168] Johnston (n166).

clause becomes normal, if the renegotiation clause is found in the contract, for dealing possible future or unforeseen changing economic equilibrium events between parties, whether changing event comes from a resource beyond the parties or from the disruptive acts of host government, such as modifying laws, rules or regulations.[169] However, under each form of the pure service contract and the technical assistance contract, the IOC usually does not shoulder the relevant risks of exploration and production operations, and the IOC provides its services depending on its technological and professional potentiality, in exchange for remuneration. In this situation, the IOC appears as a contractor; its tasks may be open to any altering fundamentally events, which affect the economic balance between both parties, so the renegotiation clause inclusion would be suitable and can be triggered.[170]

Generally, although the rate of possibility of application of the renegotiation clause to service contracts is different from form to form, the renegotiation clause can be included into and used in the all service contract forms. Since the petroleum service contracts are long-lasting agreements and, therefore, need modifications,[171] the renegotiation clauses make contracts flexible and dynamic during their lifetimes to adapt them to future disturbing economic balance circumstances, secure the protection of every party's interest against the hardship situations caused to aggrieved parties, due to the inevitable alteration of circumstance which did not exist at the conclusion of the service contracts. It is also a suitable alternative to a stabilization clause.[172] As the host state is a party of such agreements, the inclusion of renegotiation clause would come in handy for protecting the IOC from the fear of the effectiveness of the HS's flexibility of laws and sovereign rights over its national natural resources and for changing laws, rules or regulations connect with economic balance of the contract.[173] In light of the autonomy of the contracting parties, renegotiation clauses may take any form or specify any trigger events and it provides a tool to alter essentially agreed terms, or even leave particular conditions open to be agreed at a later time when it is

[169] Sulaimanov (n 128).
[170] Daniel, Keen and McPherson (n 141).
[171] Liang Peng, 'Renegotiation Clauses in International Investment Contracts' (The Mix Oil and Water, 27July 2011) <http://www.themixoilandwater.com/2011/07/renegotiation-clauses-in-international.html> accessed 29 Jun 2016.
[172] AL-Emadi (152).
[173] Law Teacher (n 159).

impossible to decide at that time.[174] In other words, it can be used as a method to negotiate new required arrangements as it occurred in a contract for the exploration of petroleum between the Government of Qatar and an oil company, Wintershall, and they had agreed that they would return to negotiating table to have negotiation the future arrangements for the usage of natural gas not related to oil discoveries if marketable amounts of such 'non-associated' gas were later discovered in the delimitated contractual area.[175]

2.2.2.4 The Application of the Renegotiation Clause in the Joint Venture Contract (JVC)

The Joint Venture Contract as indicated above is also one of the major international contractual standards. To know whether the inclusion of renegotiation clause in a JVC, it is better to see the supreme standards or articles of the JVC again. Under this form of contract the HS and the IOC share the equity and installments jointly in operations to explore, develop and produce hydrocarbon resources.[176] Also, a Joint Venture Contract establishes a partnership arrangement; the parties are bearing the rights and obligations sharing the risks, costs, management, production and profits, in pursuant to the provisions identified in JVC, even in a case the commercial discovery fails, they jointly subject to losses, which it is not found in the concession and PSCs. The JVAs involve capital commitment for a very long duration.[177] The key disadvantages are that the JV format is ambiguous and inherently needs a great deal of negotiation, much more legal advice from experts in petroleum contracts. In reality, finding a petroleum contract that fits utterly into all of the JVA descriptions is sort of impossible.[178]

Now, it is time to mention the possibility of the incorporation of the renegotiation clause into a JVC form if this type of arrangement is taken as a contract formula between a state party and an IOC. The renegotiation clause as an approach instrument can definitely be included into and used in a JVA by the contracting parties for a number of main reasons, including preventing unilateral modification. Instead, renegotiation clauses aim to fix the mutability of the contract and make contracts

[174] Jeswald W. Salacuse, 'Renegotiation International Project Agreements' (2000) 24 FILJ 1319.
[175] Ibid.
[176] Abd Ghadas and Karimsharif (n 126).
[177] Mazeel (n 138).
[178] Randon (n121)

flexible during their courses, so as to adjust the contracts to changing circumstances, re-build the contractual equilibrium of the transaction and keep the parties to joint venture contracts towards each other against any disrupting acts.[179] In addition, it is worth mentioning that this form of the petroleum production arrangements is broadly compatible with and used to areas, which are located in the onshore and offshore blocks, are encircled by many risks that may affect the success of operations, and it needs joint participation between international petroleum companies and host governments,[180] and JVAs are originally long-term contracts, made on assumptions about the geology of the area and, therefore, require amendments. For example, when the discovery process turns out to be different than estimated, the disadvantaged party may find it iniquitous that it is not commercially profiting much from the exploitation operation and, therefore, requests an 'adjustment' of the articles of the agreement.[181]

2.2.3 The Substantial Consequences of the Renegotiation Clauses in the International Petroleum Contracts

There is no question that incorporating the renegotiation clauses into any type of the international petroleum contracts, will have many legal and practical results on the lifetime of the contracts, since their conclusions until being performed totally. The following points show the key consequences of them.

i. The renegotiation clause in the international petroleum contract ensures both parties that there is a term, sustains the contractual performance in a case, in which the economic balance would not intact.[182]
ii. One of the most significant consequences of the presence of the renegotiation clause in the international petroleum contract is that it makes the contract flexible, whereby the parties can alter the contract provisions when they need to be.[183]
iii. The IOC benefits greatly from such clauses, because the clause provides the contract with stability, prevents the government party treating with the contract or changing national laws, which concern with the petroleum

[179] Law Teacher (n 159).
[180] Mikesell (n 133).
[181] AL-Emadi (n 152).
[182] Likosky (n 140).

[183] Mantysaari (n55).

contract performance unilaterally. It means the clause plays usually the role of stability in the contract, and it has replaced the freezing clause as a stabilization mechanism. So, foreign investors normally endeavored to neutralize governments' authority by familiarizing and fixing stabilization clauses in new agreements with host governments, especially in the Middle East.

iv. It rescues usually the affected contract from long-lasting freeze or termination.[184]

v. The renegotiation clauses in the international petroleum contracts, as the foreign long-term investment contracts can be laid down in a way each of unforeseen events and future possible events trigger the incorporated clauses, while the renegotiation clauses in the international trade contracts often used for unforeseen and unpredictable events.[185]

vi. The inclusion of the renegotiation clause into the international petroleum contracts subsequently can gives rise to the prosperity and economic progression of host state. The renegotiation clauses make the contracts sustainable in many sever situations, as well as they incentivize the international petroleum companies to invest surely.[186]

vii. This type of clause can be used for all kinds of the international petroleum contracts, but it is typically more suitable for concession and product sharing contracts, due to their contents as indicated above.[187]

viii. When a trigging event of renegotiation occurred, the disadvantaged party should note the other party soon and request to renegotiate.

ix. The parties then should start renegotiating to restore economic unbalance and lift the heavy burden on the affected party shoulder, so as the contract to be continuous and ongoing.

x. In a case, if the parties are unable to reach an agreement through renegotiation, they can resort to a court or an international arbitral tribunal. It means that when the renegotiation had not satisfied results, the

[184] Mario Mansour & Dr. Carole Nakhle, 'Fiscal Stabilization in Oil and Gas Contracts: Evidence and Implications' (January 2016) The Oxford Institute for Energy Studies 286084 <https://www.oxfordenergy.org/wpcms/wp-content/uploads/2016/01/Fiscal-Stabilization-in-Oil-and-Gas-Contracts-SP-37.pdf> accessed 24 July 2016.
[185] Sulaimanov (n 128).
[186] Salacuse (n174).
[187] AL-Emadi (n 152).

renegotiation clause does not prevent the parties to contract from exercising other settlement mechanisms.[188]

However, the renegotiation clauses in the international petroleum contracts may have a number of cons or draw backs. For examples, such clauses may negatively affect the contract stability and reduce it, increase the total costs of the transaction, and the renegotiation clause may be used sometimes unfairly to change the agreement, especially when the triggering events of renegotiation are sort of under the host state control, through raising the possibility of that process. Also, when the parties fail to agree through renegotiation and they have resorted to the arbitral tribunal, and the original agreement could not provide the tribunal with enough parameters and facts to adapt the contract, the tribunal at that time may reform the agreement in a way that neither party previously intended. So, investors may sometimes refuse to specify and set out them in their contracts.[189]

[188] UNIDROIT (n 12) art 6 (2) (3).
[189] Law Teacher (n 159).

CHAPTER THREE

The Application of Renegotiation Clause in International Petroleum Contracts in Iraq and the Kurdistan Region of Iraq and their Consequences

3.1 The Application of Renegotiation Clauses in International Petroleum Contracts in Iraq

In fact, Iraq has been considered as a great producing petroleum country in the OPEC and the World too, for long. According to the data of the International Energy Agency (IEA), in 2014, Iraq as an oil producing country seized the 8th position in the list of top ten largest oil producing countries in the world, and it was on 5th place on the map of world proven oil reserves.[190] So, this fact has made Iraq is constantly in need of quite modern and suitable petroleum arrangements and seek to better form of petroleum agreements.

3.1.1 Iraq and Petroleum Industry Arrangements

Historically and practically, in 1925, Iraqi government for the first time agreed to grant the Turkish Petroleum Company (TPC), which had represented the interests of the British, American, Dutch, French companies, a concession to explore and produce oil in a defined area, which located in the north of Kirkuk and known Baba Gurgur field, and the duration of concession was 75 years, in return, the TPC had to pay the Iraqi government a royalty for every ton of produced oil, and the company exercised its right to extract the oil from that field until 1961.[191] Then, during 1932-1938, both branches of Iraq Petroleum Company (IPC), Basra Petroleum Company (BPC) and Musil Oil Company had participated in developing Iraq's petroleum industry in fields of Basra and Musil, and they obtained the same concession. It means that the Iraq's petroleum industry started firstly with the concession form of petroleum agreement. After that, in 1961, the Iraqi Prime Minister leader Abdul Karim Kassem enacted the Law No. 80, by which limited the work of foreign companies in the given fields, and

[190] The international Energy Agency, 'International Energy Statistics' (Iea Beta) <http://www.eia.gov/cfapps/ipdbproject/IEDIndex3.cfm?tid=5&pid=57&aid=6> accessed 1 August 2016.

[191] Ghanim Al-Enaz , 'The Oil Discovery in Iraq' (Almosul) <http://www.almosul.com/library/articles/13/%D8%A7%D9%84%D9%86%D9%81%D8%B7%20%D9%88%D8%A7%D9%83%D8%AA%D8%B4%D8%A7%D9%81%D9%87%20%D9%81%D9%8A%20%D8%A7%D9%84%D8%B9%D8%B1%D8%A7%D9%82.html> accessed 1 August 2016.

they were no longer given new licenses to discover new fields.[192] In1966, the Iraqi government established the Iraqi national oil company (INOC) for searching for new fields and investing nationally petroleum in the whole Iraq, and it was also authorized to manage and lead all affairs of the oil industry in Iraq.[193] In 1972, a great event concerning the petroleum industry in Iraq happened, when a group of oil companies Ltd (IPC) was nationalized by the former Iraqi President Ahmed Hassan al-Bakr, and the nationalization of Iraq's petroleum resources and production was completed by 1975.[194] From 1975 to 2003, oil production process as well as export operations completely became national government operated.[195] Also, In1987, Decree 267 affiliated the INOC to the oil ministry, and it was fallen into several subsidiary oil company branches according to regional divisions. Accordingly, North Oil Company (NOC), which its headquarter is located in Kirkuk and is responsible for petroleum industry in the north part of Iraq, and South Oil Company (SOC), which based in Basra governorate, and it is concerning the petroleum industry in the south part of Iraq are considered the major regional oil companies that play essential role in managing and operating petroleum industry processes in Iraq, such as developing the oil and gas fields, producing oil and gas, managing and executing all financial, administrative, technical and service activities, which associate with petroleum industry in their scope of regional authority.[196]

The period between1980-2003, Iraq went through a succession of international wars, civil wars and unstable political, economic and secure situations, and the severe international sanctions from1990 until the falling down of Saddam Hussein's regime in 2003, which negatively affected the investment and technology levels. All of them made the process of petroleum industry in Iraq decline and caused difficulties for

[192] Jasim Al-Haef, 'Iraq's Oil: From Concessions to Licensing Rounds' (Al-Mada, 31 May 2014)<http://almadasupplements.com/news.php?action=view&id=10460> accessed 1 August 2016.
[193] Petroleum .co.uk, 'Iraqi National Oil Company' <http://www.petroleum.co.uk/iraqi-national-oil-company> accessed 2 August 2016.

[194] David Styan, France and Iraq: Oil, Arms and France Policy-Making in the Middle East (1st edn, I.B. Tauris 2006) 70.
[195] Christopher M. Blanchard, 'Iraq: Oil and Gas Legislation, Revenue Sharing, and U.S. Policy' (3 November 2009) CRS Report for Congress <https://www.fas.org/sgp/crs/mideast/RL34064.pdf> accessed 2 Agust 2016.
[196] Ruba Husari, 'Iraq National Oil Company, an Historical and Political Perspective' (September 2009) 52 MESS 25.

Iraq's petroleum industry infrastructure.[197] However, after 2003 and fall down Baas regime, a new constitution was approved, in which stated in Article 108 that the ownership for oil and gas belong to all Iraqis in every region and governorate.[198]

In 2008, Iraqi government started to announce via oil ministry licensing rounds for progressing oil and gas fields respectively and four rounds of them have been launched yet. The oil licensing rounds have become significant issues currently, by which a new era in the Iraqi oil policy started on the basis of the technical service contracts with foreign oil companies for shortages of modern technological tools and the technical and professional workers, which resulted from the former long-term international sanction that Iraq has seen before and ongoing instability.[199] According to Dr. Ali Hussein as a scholar in petroleum industry, the recent oil licensing rounds, which performed on the basis of technical service contracts, were not economically effective enough, and they have not obviously and greatly participated in increasing Iraqi produced and exported oil amount, and Iraq also will not benefit noticeably from the service contracts only after a long period of time, due to the bad management of petroleum industry, international sanctions and the limited financial investment capacity and the lack of technology used and a shortage of trained manpower and the fact that a large number of competent workers at national petroleum industry had left the country for many years and have not decided to return so far for the security conditions. In return, the scholar prefers PSCs to technical service contracts for Iraq and has suggested resorting to PSCs for progressing petroleum fields in Iraq, because such forms of contracts are subject in their design and formulation to the wishes or wills of the signatory governments, which give this opportunity for Iraq to impose conditions on the contracting companies and get quite good profit for its strong position, include provisions or terms which are compatible with national policy and protect the Iraqi people's rights, interests and the state sovereignty over national mineral resources, and such contract samples also allow the Iraqi oil ministry to announced its contract proposals in the international oil market, so that leading

[197] Haeder Al-Faraji, 'Iraqi Economy of Development Obstacles to the Advancement Elements' (28 Jun 2008) The Center of Studies and Research of Secularism in the Arab World <http://www.ssrcaw.org/ar/print.art.asp?aid=139137&ac=2> accessed 3 August 2016.
[198] The Iraqi New Constitution 2005, art 108.
[199] Reed Smith LLP, 'Iraq Oil and Gas Regime – part II' (Lexology, 4 Jun 2013) <http://www.lexology.com/library/detail.aspx?g=6c78b845-a73f-4554-be26-6ce88d79cea3> accessed 3 August 2016.

international oil companies can enter competition to sign and conclude the PSCs in Iraq. Also, he views that it is possible to incorporate stipulations into the production sharing contracts, by which the contracting companies to be obliged to constitute oil refineries and petrochemical plants in Iraq, so as to be great profitability maker tools for Iraq.[200]

In respect of the natural gas, Iraq's gas production is usually controlled by associated gas and has followed the oil production. Historically, Iraq began to invest and produce broadly gas processing facilities only in the 1980s, but the expansion and development of this process has not been parallel to the proven volume gas reserves in Iraq.[201]

In the end, it is worth mentioning some facts regarding the Iraq's petroleum industry. Firstly, the Iraq's petroleum industry is characterized with many positive potentialities, which have made it desirable by foreign investors, such as huge proven oil reserves, and low cost in oil extraction is also another significant pro of Iraqi petroleum industry. Secondly, the vast amount of Iraq's proven oil reserves is incompatible with production level, because of the former international sanctions, financial and administrative corruption, sabotage of oil pipelines as well as the failing of Iraqi Parliament in passing the oil and gas draft law, and low cost in oil extraction is also another significant pro of Iraqi petroleum industry.[202] Thirdly, Iraq's fiscal policy relies on petroleum income for its annual budget, and according to statistics, 98% of Iraq's government budget usually is coming from oil revenues.[203]

3.1.2 The Application of Renegotiation Clauses in International Petroleum contracts in Iraq

The international petroleum contracts, which are valid and effective now in Iraq for the production of oil and the progress of the petroleum industry, especially oil industry have been signed with international oil companies recently, through four

[200] Dr. Ali Hussein, 'Our Oil Industry between PSCs and Service Contracts' (Al-Jarida, 2006) <http://www.aljaredah.com/paper.php?source=akbar&mlf=interpage&sid=14255> accessed 5 August 2016.

[201] Luay J. AL-Khateeb,'Natural Gas in the Republic of Iraq' (18 November 2013) Rice University's Baker Institute Center for Energy Studies <http://belfercenter.ksg.harvard.edu/files/CES-pub-GeoGasIraq-111813.pdf> accessed 5 August 2016.

[202] Al-Hssan (n 79) 118-119.

[203] Muhammad Abed Mazeel, Iraq Constitution: Petroleum Resources Legislation and International Policy (1st edn, Diplomica Verlag GmbH 2010) 4.

previous licensing rounds, which announced firstly in 2008,[204] because from 1975 to 2003 all the activities of the petroleum industry in Iraq completely became national government operated.[205] Also, those contracts were formed on the basis of technical service form and standards, so it can be incorporated renegotiation clauses into them for respond both the possible future changing events and unforeseen occurrences, which may happen during the performance course of the contracts.[206] Additionally, the essence of the form of technical service contract as mentioned before is that the foreign oil company performs research studies and provides training and technical assistance in exchange for receiving cash as the remuneration fee, and it is not investing profoundly, it is only offering a service to the national oil company.[207] For example, the technical service contract was rewarded to the consortium of BP and the China National Petroleum Corporation (CNPC), by the Iraqi oil ministry, for producing the most oil, for the Rumaila field in southern Iraq at the agreed and fixed remuneration fee, during the first licensing round in 2009,[208] in a way in return for providing service the companies would receive $2 per barrel as their remuneration fee.[209]

Accordingly, including the renegotiation clauses into the technical service contracts are undeniably significant to treat with future developments, by which one party especially state party faces economically a heavy burden, for petroleum price swings.[210] Incidentally, there is sort of an ongoing example about the importance of the presence of the renegotiation clauses in the lately Iraqi technical service contracts. This importance appeared when the price of oil in the world markets started declining, in 2015 rapidly, and this case affected negatively the Iraqi government, in terms of giving the international petroleum companies their remuneration fee, in a way that, in 2015 it made the oil minister Adil Abdulmahdi call for the renegotiation upon this

[204] Abdul Mahdy Al-Ameedi, 'Presentation on Iraq's Oil Service Contracts & Bidding Rounds' (Iraq-businessnews, 29 February 2016) <http://www.iraq-businessnews.com/2016/02/29/presentation-on-iraqs-oil-service-contracts-bidding-rounds/> accessed 6 August 2016.
[205] Blanchard (n195).
[206] Sulaimanov (n 128).
[207] Nick Antil and Robert Arnott, 'Valuing Oil and Gas Companies: A Guide to the Assessment and Evaluation of Assets, Performance and Prospects' (2nd edn, Woodhead Publishing Limited 2000) 139.
[208] CNPC, 'CNPC in Iraq' <http://www.cnpc.com.cn/en/Iraq/country_index.shtml> accessed 7 August 2016.
[209] Terry Macalister, 'BP has Gained Stranglehold over Iraq' (Theguardian, 31 July 2011) the Guardian <https://www.theguardian.com/business/2011/jul/31/bp-stranglehold-iraq-oilfield-contract> accessed 7 August 2016.
[210] Talus (n156) 130.

unwanted situation, and he requested for reviewing the signed oil production agreements with international operating firms,[211] precisely with Britain's BP , Italy's Eni and Russia's Lukoi, due to falling crude prices and the financial cost of existing service contracts, which including fixed fee that has become too heavy to bear. The oil minister meant to restore the economic balance between both sides, which was underlined because of falling crude oil prices in the world, and so that the contracts remain alive and ongoing.[212] Moreover, the oil minister Adil Abd al-Mahdi indicated that the Iraqi oil ministry did not seek to convert the now forms of the contract into the production sharing contract model totally, but it meant to adjust and improve the existing technical service contracts (TSCs) so as to get better forms, in a way those newly changed contracts serve both parties' interests, and to ensure that all parties share justifiably in both the perils and rewards of oil price swings.[213] So if there were renegotiation clauses and mentioned trigger events in those lately service contracts obviously, the processes of requesting and reviewing the oil production agreements on the basis of renegotiation clauses would be really easier, and all those steps ultimately will participate in the progress of Iraqi petroleum industry and then the economic infrastructure of the country in general.

3.2 The Application of Renegotiation Clauses in International Petroleum Contracts in the Kurdistan Region of Iraq

According to the Iraqi new constitution of 2005, Iraq is a federal state, which it could be consisted of regions. Accordingly, Kurdistan Region of Iraq is still the only region in frame of Federal Iraq that recognized by the new constitution as a region, which has sort of legally, politically, economically and administratively autonomy from central government in Baghdad by virtue of its own regional parliament and government.[214] It is worth mentioning that the Kurdistan region's economy depends mainly on the oil industry that its potential oil reserves estimated around 45 billion barrels. Now, Kurdistan Region of Iraq is in relationship contractually with many

[211] The Economist Intelligence Unit, 'Energy: Iraq Looks to Renegotiate Oil Contracts' (EIU, 18 March 2015) <http://www.eiu.com/industry/article/442989028/iraq-looks-to-renegotiate-oil-contracts/2015-03-18> accessed 8 August 2016.

[212] Reuters, 'Iraq Says Crude Price Fall Prompts Review of Oil Contracts' (Reuters, 2 March 2015) <http://www.reuters.com/article/iraq-oil-contracts-idUSL5N0W437F20150302> accessed 8 August 2016.

[213] Ben Lando, 'Iraq Oil Contracts Renegotiations Begin' (Iraq Oil Report, 1 April 2016) Iraq Oil Report <http://www.iraqoilreport.com/news/iraq-oil-contract-renegotiations-begin-14326/> accessed 9 August 2016

[214] Iraqi Constitution (n 198) arts 1,116 and 121.

huge and prominent international oil companies to produce hydrocarbons in the region.[215] Undoubtedly, the renegotiation clauses as necessary provisions in the Kurdistan region's petroleum contracts as a recent developing region will play significantly role in this field.

3.2.1 Kurdistan Region of Iraq and Petroleum Industry Arrangements

At the level of the oil sector, three most important events have taken place in the oil policy of the Kurdistan Region. The first event is the approval of oil and gas law in the region in 2007, as a principal legislative tool to arrange legally the oil and gas industry in the Region. A second development is that a set of petroleum contracts in the field of oil and gas have been signed, in a way that Kurdistan Region Government has entered into about 50 contracts with international oil companies to explore and produce oil so far, in order to raise the amount of oil production from 250,000 barrels per day to around 2 million barrels a day by 2019, by virtue of existing and expected discoveries for its vast oil reserves estimated at around 45 billion barrels, which covers 31% of the total Iraqi oil reserves estimated at 141.35 billion barrels. The third important event is that the Region is actively seeking to establish the infrastructure of the petroleum industry, which is capable of storing and exporting of the increase in produced oil in the Region as well as natural gas in the near future.[216]

Historically, in 2004, Kurdistan Region Government (KRG) signed the first contract for oil exploration and production with DNO, a Norwegian oil company, for producing oil in Tawke field, Duhok. The form of contract was a production sharing contract.[217] In 2007, the parliament of the Kurdistan Region passed the law of oil and gas to form a legal frame, by which KRG is capable to contract with international companies for the production of petroleum, and the law also indicated the production sharing form, which can be considered as a base for negotiation and a model for petroleum contracts, in a way the contractors bear commercial and technical risk in

[215] Invest in Group, 'Reshaping Kurdistan's Regional and Global Footprint: Energy' (Invest in Group, October 2013) <http://investingroup.org/review/238/reshaping-kurdistans-regional-and-global-footprint-energy-kurdistan/> accessed 11 August 2016.

[216] Ammar Al-Shahin, 'The Kurdistan Region's Oil File Management' (Akhbaar, 26 November 2014). <http://www.akhbaar.org/home/search/?sq=%D8%A7%D8%AF%D8%A7%D8%B1%D8%A9%20%D9%85%D9%84%D9%81%20%D8%A7%D9%84%D9%86%D9%81%D8%B7%20%D9%81%D9%8A%20%D8%A7%D9%82%D9%84%D9%8A%D9%85%20%D9%83%D8%B1%D8%AF%D8%B3%D8%AA%D8%A7%D9%86> accessed 12 August 2016.

[217] DNO, 'Kurdistan region of Iraq' <http://www.dno.no/en/operations/where-we-operate/kurdistan1/> accessed 11 August 2016.

exchange for a share of production.[218] Then, year by year, the petroleum contracts with the international companies were increasing, which during 2010-2012, a number of the world's dominant energy players, such as Exxon Mobil, Chevron Corporation, BP, Russian Gas Prom, Total SA, Genel Energy and etc., entered into petroleum operations in the region.[219]

Also, having different views during interpreting the Iraqi constitution articles, which relate to regions' authorities, have caused prolonged tension between Iraqi federal government and KRG, such as the issues of how to manage the oil file in the region, concerning the interpretation of Articles 111 and 112 of the Iraqi constitution, concluded contracts form with international petroleum companies, exporting oil mechanism, as well as treating with exported oil revenue, which are considered sources of constant tension between both federal and regional governments.[220] According to the United Press International (UPI) in 2011, KRG's legal and geographical areas contain around 45 billion barrels of oil reserves, which extraction operations of these reserves began widely in 2007,[221] and the KRG called foreign companies to invest in 40 new oil fields in order to increase the regional oil, gas and associated gas productions noticeably over the following 5 years.[222] In July 2012, Turkey and the KRG reached on an agreement, that Turkey will provide the KRG with refined petroleum products in exchange for crude oil.[223]

In terms of Kurdistan Region's natural gas, the ministry of natural resources (MNR) estimates that the Kurdistan Region owns approximately 100-200 TCF of natural gas reserves and 3% of the world's total reserves, gives the Region quite capability to play its role in the gas markets in future,[224] and the Kurdistan Region's plan is to start exporting around 10 billion cubic meters of its natural gas reserves to Turkey by 2019

[218] Oil and Gas Law of the Kurdistan Region-Iraq 2007, art 37.
[219] Ministry of Natural Resources of KRG, 'PSCs Signed' (MNR, 23 August 2013) <http://mnr.krg.org/index.php/en/the-ministry/contracts/pscs-signed> accessed 13 August 2016.
[220] Invest in Group (n 215).
[221] UPI, 'As Iraq Smolders, Kurds Sit on Oil Riches' (UPI, 22 December 2011) <http://www.upi.com/Business_News/Energy-Industry/2011/12/22/As-Iraq-smolders-Kurds-sit-on-oil-riches/97641324580189/> accessed 14 August 2016.
[222] Invest in the Future, 'Invest in Kurdistan Iraq: Underground Resources' <http://www.belkib.com/> accessed 15 August 2016.
[223] International Global Exports LLC, 'We have Now Expanded into Iraq, Mainly in the Kurdistan Region' <http://www.igexports.com/kurdistan-opportunities.html> accessed 16 August 2016.
[224] Ministry of Natural Resources (n219) Gas.

or 2020.[225] Accordingly, Dana Gas is considered as a main operator, which initially came into the Region, engaged with KRG in 2007 to operate in the gas fields, and it is conducting this process on the basis of a service agreement jointly with Crescent Petroleum and the KRG, to produce and supply the necessary natural gas to run the Region's power generation. This has participated to progress the Kurdistan Region's developing electricity sector and to export natural gas to the world markets in the future.[226]

In order to complete the oil industry elements which include exploration and production, the crude oil produced must be transported from the fields to the export and transport network. In order for the process to be effective and useful economically, both operations (production and export oil) must be undergone parallel, and therefore the KRG and Turkish government have accomplished an independent oil pipeline between both sides, to transport Kurdistan Region's crude oil through this pipeline to the Turkish port of Ceyhan and then to the world markets, beside the former Iraq-Turkey pipeline, which carries crude oil from the Kirkuk oil fields to the Turkish port of Ceyhan.[227] This was a significant step to increase export capacity to cover the increase in oil product through creating an export outlet. For that reason, KRG launched with Turkey in 2012 the construction of oil pipeline system to export oil despite the objection of the central government in Baghdad at the time and the process was completed in 2014.[228] In 2013, according to Reuters sources and a news about an undeclared agreement between Turkish government and the Kurdistan region government leaked into medias , by which the region's oil and gas would be exported to the world markets via oil pipelines through Turkey, but the agreement and its contents did not announced obviously.[229] Now, the process of exporting of the crude oil from the Kurdistan region to Turkey's Ceyhan port via pipeline is being operated

[225] Rudaw, 'Kurdistan Region to begin natural gas exports to Turkey in 2019-20' (Rudaw, 16 January 2016) <http://rudaw.net/english/kurdistan/16012016> accessed 18 August 2016.
[226] Danagas, Operations: Kurdistan Region of Iraq' (Danagas, 2015) <http://www.danagas.com/en-us/operations/iraq> accessed 19 August 2016.
[227] Al-Shahin (n 216).
[228] Massimo Morelli and Costantino Pischedda, 'The Turkey-KRG Energy Partnership: Assessing Its Implications' (2014) Vol.21, No. 1 MEPC.
[229] Reuters, 'Turkey, Iraqi Kurdistan Ink Landmark Energy Contracts' (Reuters, 29 November 2013) <http://www.reuters.com/article/us-turkey-iraq-oil-idUSBRE9AS0BO20131129> accessed 19 August 2016.

independently from the Baghdad government control, and this process has been started since June 2016.[230]

3.2.2 The Application of Renegotiation Clauses in International Petroleum Contracts in the Kurdistan Region of Iraq

The 2007 oil and gas law of the Kurdistan Region-Iraq indicated the standards of PSC form and also service contracts as models of petroleum contracts, which can be taken and regarded petroleum contracts designs during the conclusion of the exploration and production hydrocarbons contracts in the Kurdistan Region by the KRG with international oil companies, such as stated in both Articles 37 and 39 of the ACT.[231] Accordingly, almost all of the oil contracts which have been concluded between KRG through the ministry of natural resources in recent years with oil companies are based on production sharing contracts form.[232] As it was mentioned before, the PSC is a most common style of contract concluded between a government and a petroleum company, by which the government party awards the right of the performance of exploration and production operations to the petroleum company. The petroleum company normally accepts financial risk of exploration, and it develops and eventually produces the field as required. In case of operations success, the company is allowed to use the money from produced oil in exchange for its operational costs, called as cost oil, and then the remaining money which is called as profit oil will be divided between the host government and the company. Also, changes in oil price in the world markets or in production amount affect usually the company's share of production. PSCs can be really helpful to the states which are lacking the inadequate expertise and capital to exploit their mineral resources and seek to encourage international petroleum companies to come to those states for investment purpose, and they can be quite moneymaking tools for the involved oil companies as well as involve financial risks.[233]

In terms of the incorporation of renegotiation clauses into the Kurdistan regions petroleum contracts with international oil companies, which are based on production

[230] Daily News, 'KRG selling Oil Independently of Baghdad' (Hurriyetdailynews, 9 June 2015) <http://www.hurriyetdailynews.com/krg-selling-oil-independently-of-baghdad-deputy.aspx?pageID=238&nID=85204&NewsCatID=348> accessed 20 August 2016

[231] Oil and Gas Law (n235) arts 37 and 39

[232] Ministry of Natural Resources (n 219) Signed Contracts.

[233] Basak Beyazay, The Nature of the Firm in the Oil Industry (1st edn, Routledge 2016).

sharing form, if there was this clauses in the signed contracts clearly, this step would improve the contents of the contracts more, and it was also affirmed in the oil and gas law of the Kurdistan Region-Iraq in Article 50, s 2 (2), when it mentioned that If the parties to a petroleum contract are not able to resolve the dispute, which relates to the contract through negotiation, they can resort to arbitration. It means this law showed a recommendation that the parties should consider negotiation as a settlement dispute mechanism,[234] and they additionally can include the renegotiation clauses into their petroleum contracts, so as to serve both sides legal and fair ambitions, financial interests and make the contracts to be performed normally.[235]

Although there is no a provision in the contents of the oil contracts of the Kurdistan Region of Iraq with international oil companies, which involves the renegotiation clause literally and obviously, it can be found provisions, by which the parties can use them to request for the renegotiation and they are indicate the renegotiation clauses in implied ways to deal with unforeseen situations and future possible events that lead to economically unbalance in the contract obligations. For example, the contents of those oil PSCs of the Kurdistan Region mention force majeure triggers, which affect negatively the execution of obligations of one or all parties to the contract, resorting to negotiation in case of a dispute arises between the parties during performing the contract obligations, and some other states, when they happen, the parties should start negotiating to resolve them, otherwise the disputes must be submitted to arbitration, such as the state relates to non-associated natural gas when it is discovered during the operations of the oil exploration, the government party is entitled to request in good faith the negotiation about how to treat with this development and amend certain provisions which are necessary.[236] So, those provisions in the petroleum contracts of the Kurdistan Region of Iraq with international oil companies, in which have kind of same functions of renegotiation clauses, bring subsequently many positive potentialities for the contracting parties to treat with unwanted situations and events affecting the contracts balances, so that the contracts to be continuous, and they eventually improve the economy of recent developing the Kurdistan Region as well as incentivize foreign companies to invest more and certainly.

[234] Oil and Gas Law (n2118) art 50, s 2 (2).
[235] Karl P. Sauvant, Yearbook on International Investment Law & Policy 2011-2012 (1st edn, Oxford University Press 2013) 325.
[236] Ministry of Natural Resources (n219).

3.3 The Legal and Economic Consequences of the Incorporation the Renegotiation Clauses into International Petroleum Contracts in Iraq and Kurdistan Region of Iraq

It can be summarized the key legal and Economic Consequences of inclusion the renegotiation clauses into international petroleum contracts in Iraq and the Kurdistan Region of Iraq in these following points:

i. Generally, the existence of renegotiation clauses in international petroleum contracts normally have some general consequences, which entitle the parties to count on those legal terms, where the economic contractual equilibrium is broken, as a result of happening trigging events, in a way that parties are able to renegotiate on some terms to be adjusted, in order to be suitable with new developments.[237]

ii. Because the petroleum contracts have number particular characters, such as long-term duration that they need a long time until they get the production stage, as they need vast costs and may face changing circumstances, so the renegotiation clause can have positive role to deal with those changing circumstances.[238]

iii. The petroleum contracts include the operations of the exploration, mining and extraction of raw materials, as well as the parties are not able to predict the amount of discovery. The host governments sometimes demand to increase the share of state from foreign oil companies, through using their authority by increase or impose new taxes or amending the laws, which regulate economic activities in their states, but if there are the renegotiation clauses in the petroleum contracts, by which the contracting parties can return to negotiation table to adjust and amend intended terms voluntarily and agreeably, and it subsequently prevents the host government from behaving unilaterally and ensure and incentivize foreign companies to invest more and more.[239] So, the renegotiation clauses in this respect serve the economic progress in those

[237] Jeswald W. Salacuse, The Three Laws of International Investment (1st edn, Oxford University Press 2013) 131.

[238] Ling Peng, 'Renegotiation Clauses in International Investment Contracts' (Themixoilandwater, 27 July 2011) <http://www.themixoilandwater.com/2011/07/renegotiation-clauses-in-international.html> accessed 29 August 2016.

[239] Hibat Hazah, The Balance of Foreign Investment Contracts (1st edn, Al-Halabi Legal-Publications 2016) 166-167.

states, especially recent developing countries and regions, such as Iraq and the Kurdistan Region of Iraq.

iv. The technical service contracts of Iraq for oil and gas exploration and production, by which the IOCs provide technical services and shoulder all capital expenditure and risks, in exchange for remuneration fees per barrel (RFB), and the production PSC contracts of the Kurdistan Region for oil exploration and production, which the IOCs and the producing Kurdistan Region of Iraq share together revenues and operative costs, and both forms of petroleum contracts include more risks and costs and need vast capital expenditure as well as long duration of time.[240] Accordingly, the adding or incorporating the renegotiation clauses into those contracts would have positively economic results on the contracting parties' interests, so that they can invoke the renegotiation clauses to restore the economic balance between contracting parties, during trigging events, such as change in oil and gas prices in the world markets and the volume of discovered or produced oil and gas, the expiration of the duration of the contracts, or any other changing developments, by which break the economic equilibrium,[241] and it consequently make the IOCs motive to continue investing and Iraq and the Kurdistan Region of Iraq economically progressive, especially they are now in the beginning of the developing process.

v. Finally, fixing the renegotiation clauses as the legal instruments in the petroleum contracts of Iraq and the Kurdistan Region of Iraq provide the contracting parties with confidence and flexibility to amend the contracts during the execution course of contracts, rather than ending their relationship completely.[242] Due to these descriptions, the renegotiation clauses in the international petroleum contracts of Iraq and the Kurdistan region of Iraq can be useful and would culminate in the progression in the economic sectors.

[240] 2b1st Consulting, 'Technical Service Contracts' (2b1stconsulting, 10 August 2012). <http://www.2b1stconsulting.com/categoryabout-us/> accessed 30 August 2016.

[241] Lorenzo Cotula, Investment Contracts and Sustainable Development: How to Make Contracts for Fair and More Sustainable Natural Resource Investments (1st edn, IIED 2016) 72-73.

[242] John Y Gotanda, Renegotiation and Adaptation Clauses in International Investment Contracts, Revisited (August 2003) 36 VJTL 1461.

CONCLUSION AND RECOMMENDATIONS

Conclusion

Actually, after I researched through many scientific and academic resources during writing my master thesis, entitled 'The Renegotiation Clauses in International Petroleum Contracts', I have drawn as a researcher these key following conclusions.

i. Legally and contractually, the renegotiation clause is a legal and contractual term, which is considered as a part of the contract that should involves automatically the necessary elements of a contract, such as the presence of agreement, legal capacity to treat, consideration by the parties, and no unenforceable circumstances, as well as it must be evidenced in writing form.

ii. Through researching and writing this thesis, it has been realized to me as a researcher that this clause for international petroleum contracts is more proper than other legal exemption terms, because of being more flexibility, and it makes contracts able greatly to treat more unforeseen or even possible future events.

iii. The primacy behind the inclusion of renegotiation clause into a long-term contract by the parties is to treat fairly with new developments either unpredicted events or possible future occurrences, by which disrupt the economic equilibrium of the contract parties and cause a burdensome state for one party or more in performing the contract obligations, and it can be invoked by the injured party to request to renegotiate for the modification of certain provisions, in order to mitigate the sever effects of supervening events. In this context, the renegotiation clauses can be set up in frame of all types of international petroleum contracts due to the long duration of those types of contract.

iv. The philosophy behind the evolving of renegotiation clause is the principle of justice, by which the disadvantaged party request to restore the economic equilibrium and share all parties to bear the gigantic loss that the disadvantaged party fell in due to an changed circumstance, for the purpose of the continuation of performing the contract obligations, after it has faced halt, due to an event which was beyond the parties' control and will.

v. The situations whereby affect negatively the contract performance, or in other words the triggering events usually are out of the contracting parties' capacity. Also, the events which trigger a renegotiation clause usually belong to changed economic or political or social situations in severe forms.

vi. Flexibility also is another helpful description of the renegotiation clause, in a way that the existence of renegotiation clause in a contract gives the contract plasticity trait, and the contract provisions can be changed into new and suitable terms easily.

vii. Actually, renegotiation clause can become an appropriate alternative to the classical stabilization methods, such as freezing, intangibility, good faith and hybrid clauses, which each of them provides essentially kind of guarantee that the contract would be protected against any destabilization and unilateral acts by the sovereign government, such as modifying of governing laws or rules like tax laws, terminating the contract or any action that affects the economic balance, contractual obligations and relationship between the parties. Also, it many times happens that those classical mechanisms have not been respected by host states nor can response more new situations. However, the renegotiation clause as a modern stabilization mechanism works to bring all contracting parties together to review some contract terms multilaterally, to restore economic equilibrium of the contract, particularly in case of the disruption of the economic balance of the contract.

viii. There are similar and different elements between renegotiation clause and other legal exemption terms, such as hardship, frustration, impracticability, force majeure, Act of God, impossibility. The main similarities among all of them are that all concepts count on the principles of justice and fairness, unpredictability of the changing circumstances, the changing situations are unavoidable and beyond the parties control and the changing event make performing the contract burdensome or impossible and breaks the economic balance of the contract, plus by virtue of some of them, especially hardship and force majeure clauses, parties to contracts can resort to have renegotiation the contracts' provisions to restore economic balance. In return, there are some main differences between renegotiation clause and

others. For example, the legal scope of renegotiation clause is wider than others', in a way the renegotiation clause addresses all conditions that other legal exemption terms involve and can become triggering events for renegotiation clause, the renegotiation clause should be incorporated into the contract as a provision, so as to be invoked by the parties, while the others can be treated as doctrines and general and legal principles, which can be followed without being incorporated into the contracts, and the presence of renegotiation clause in a contract obliges legally and normally the parties to obey its provision and stipulation and resort to renegotiate to solve the issue, the parties can submit the issue to arbitration in case they could not reach an settlement, but the other doctrines may allow the parties to resort to arbitration directly.

ix. Triggering events in the renegotiation clause during drafting by the parties can be determined clearly so as not to face problems when a party claims that an event was triggered and ask to renegotiate and review some of the contract terms or when they eventually submit the issue to the arbitration, the presence of triggering events apparently make the arbitrators' work easier.

x. We should make difference between the normal disputes arise during contract execution course that can be solved through negotiation or arbitration and the situation in which an event of triggering the renegotiation clause is occurred, which breaks the economic equilibrium of the contract obligations between the contracting parties.

xi. Most times, the renegotiation clause does not appear as an independent term and is not mentioned its name as itself in the contracts specifically and obviously, but it can be found out in other terms and through other expressions instead.

xii. In general, the renegotiation clause as a legal modern settlement mechanism to treat the changing circumstances that touch the contractual equilibrium, to bring back the balance to the contracting parties' obligations which were economically broken, due to an event whether it was predicted or unable to be predicted to happen. The clause certainly participates in improving legally the contract contents. Moreover, the clause economically assists the parties'

interests, because it provides the contracting parties with confidence and sureness that there is a tool considered as a legal guarantee in the contract, which can be used when a party experiences economically burdensome situation and cannot perform his or her obligations. Furthermore, the host governments especially in developing states benefit economically from this clause more, in cases of occurring the changing events which affect the performance of the host state contractual obligations, requesting to modify some laws, rules or some the contract provisions that have association with the contract economically, the host government can request to renegotiation on the basis of the renegotiation clause, and this equation is right to the international oil companies that they notice there is a mechanism which help them when they fall economically in troubles due to changing situations, encourages the companies to invest their capital fearlessly, and it ultimately make the contract to be performed consistently and serves the progression and economic interests of all contracting parties.

All in all, I have argued as a researcher that the inclusion of renegotiation clause into international petroleum contracts as long-term contracts due to these considerations above affects positively the developing countries' economy and makes them economically viable. I have definitely concluded that the more advantages of the existing the renegotiation clause in a contract, make the renegotiation clause become a really necessary and more suitable than other contractual terms, improves the contract and serves the economic interests of the contracting parties, include HSs and IOCs, especially in the recent developing countries because they need more stabilization for implementing the contract obligations, lack the expertise and capital for developing their mineral resources, and they hope to attract international oil companies to invest in their countries. So, the renegotiation clause is needed for the achievement of the long-term contracts' objects like international oil contracts, and continued existence of the contract.

Recommendations

After I have concluded through researching that there is no question that the presence of renegotiation clause in international petroleum contracts is really significant, because such kind of contracts is long-term, needs long time for their execution course, is possible to face changing circumstances, and the renegotiation clause at the same time is very suitable legal mechanism, which can responses those conditions of such kind of contracts, and I have noticed that the contents of international petroleum contracts more often do not involve typically the renegotiation clauses as independent terms and they can be seen in other terms in indirect methods instead. So, my key recommendations as a researcher are that the contracting parties of international petroleum contract should try to set up the renegotiation clauses in their agreements, because this type of clause allows the parties to make essential alteration in some intended provisions of the contract in necessary conditions. Also, it is better to arrange and place renegotiation clauses in the international petroleum contracts and mention the supervening events trigger the renegotiation clauses in independent terms specifically by the contracting parties, so that the parties easily can know whether the triggering events of the renegotiation clause arose or not as well as it provides the arbitrators with facility through arbitration tribunal, due to their being significant during the performance courses of those contracts, especially for recent developing countries and regions such as Iraq and the Kurdistan Region of Iraq. Additionally, the formulation of the renegotiation clause contents should be generally such enough clear that cannot be differently interpreted or misused by the parties to avoid a bad or unprofitable bargain by a party.

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