ARTICLES

RISK MITIGATION IN INTERNATIONAL PETROLEUM CONTRACTS

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ABSTRACT

Risk mitigation provisions in an upstream petroleum contract between host government (HG) and international oil company (IOC) can make the difference between success and failure when the HG exercises its legislative competence unilaterally to take a greater share of project value. Over the course of a century of sometimes highly contentious dealings between HGs and IOCs, a complex system of contract stabilization developed, typically on a one-off basis in negotiation of a concession or production sharing agreement. To be most effective, this system requires stabilization clauses, choice of law provisions, and agreements to submit disputes to international arbitration. After identifying the reasons HGs and IOCs employ these provisions, this Article examines ten basic types of contract stabilization, plus hybrid systems comprising multiple clauses. Choice of law provisions form an essential element of risk mitigation for these projects and may themselves constitute stabilization mechanisms. The HG wants its municipal law to govern the parties' relationship; the IOC often wants to expand the governing law to include international laws and norms and to limit the scope of the HG's law to an agreed set of laws. The applicable law provisions in international arbitration rules, as well as the arbitration seat, can directly impact the effectiveness of the stabilization protections. The Article concludes with a series of recommendations for mitigating IOC risk in international petroleum contracts.

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An earlier version of this article was published by the Rocky Mountain Mineral Law Foundation in the manual of the Special Institute on International Mining and Oil & Gas Law, Development, and Investment (2019).

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I. INTRODUCTION: CONTRACT STABILIZATION STRATEGIES

From the earliest Middle East concessions to today, international oil companies (IOCs)[1] have frequently required host governments to provide stabilization assurances before agreeing to risk their capital, time, and talent in a large-scale investment.[2] The famous Agreement of May

1. IOCs as used in this article include all upstream oil and gas companies operating outside their home countries, including national oil companies (NOCs).

2. For major works on the historical development of international petroleum contracts between IOCs and host governments or their NOCs, see, for example, GORDON H. BARROWS, WORLDWIDE CONCESSION CONTRACTS AND PETROLEUM LEGISLATION (1983); PETROLEUM INVESTMENT POLICIES IN DEVELOPING COUNTRIES (Nicky Beredjick & Thomas Wälde eds., 1988); KEITH W. BLINN, INTERNATIONAL PETROLEUM EXPLORATION AND EXPLOITATION AGREEMENTS: LEGAL, ECONOMIC AND POLICY ASPECTS (1986); HENRY CATTAN, THE EVOLUTION OF OIL

28, 1901, between the Shah of Persia and William Knox D'Arcy declared: "[a]ll lands granted by these presents to the concessionaire [or] that may be acquired by him . . . , as also all products exported, shall be free of all imposts and taxes during the term of the present concession."[3] The first book devoted to government guarantees to foreign investors expressed the need for stabilization guarantees this way:

> The guaranteeing states have to commit themselves as to the future, to promise that certain measures are not going to be taken, that certain others will continue to be taken, or that the investor will be compensated for any loss due to changes in such measures. Foreign investors have to be assured that they will receive, both today and in the future, a definite legal treatment, specified in the relevant legal instruments, and that consequently they need not fear any major changes in local legal

CONCESSIONS IN THE MIDDLE EAST AND NORTH AFRICA (1967); ROSALYN HIGGINS, THE LEGAL CHARACTER OF PETROLEUM LICENCES: A COMPARATIVE STUDY (T. Daintith ed., 1981); CHRISTOPHER R. W. DIETRICH, OIL REVOLUTION: ANTICOLONIAL ELITES, SOVEREIGN RIGHTS, AND THE ECONOMIC CULTURE OF DECOLONIZATION (2017); CLAUDE DUVAL ET AL., INTERNATIONAL PETROLEUM EXPLORATION AND EXPLOITATION AGREEMENTS: LEGAL, ECONOMIC & POLICY ASPECTS (2d ed. 2009); ZHIGUO GAO, INTERNATIONAL PETROLEUM CONTRACTS: CURRENT TRENDS AND NEW DIRECTIONS (1994); JENS EVENSEN, REPORT ON OIL POLICY PROBLEMS: VIEWED AGAINST THE BACKGROUND OF OIL LEGISLATION AND CONCESSION POLICIES OF OTHER NATIONS (Jan. 1971); J. E. HARTSHORN, OIL COMPANIES AND GOVERNMENTS (2d ed. 1967); KAMAL HOSSAIN, LAW AND POLICY IN PETROLEUM DEVELOPMENT (1979); W.J. LEVY CONSULTANTS CORP., THE SEARCH FOR OIL IN DEVELOPING COUNTRIES (1960); TENGKU NATHAN MACHMUD, THE INDONESIAN PRODUCTION SHARING CONTRACT (2000); RAYMOND F. MIKESELL, FOREIGN INVESTMENT IN THE PETROLEUM AND MINERAL INDUSTRIES (1971); RAYMOND F. MIKESELL, PETROLEUM COMPANY OPERATIONS AND AGREEMENTS IN THE DEVELOPING COUNTRIES (1984); GEORGE PHILIP, OIL AND POLITICS IN LATIN AMERICA (1982); MUHAMAD A. MUGHRABY, PERMANENT SOVEREIGNTY OVER OIL RESOURCES: A STUDY OF MIDDLE EAST OIL CONCESSIONS AND LEGAL CHANGE (1966); FRANCISCO PARRA, OIL POLITICS: A MODERN HISTORY OF PETROLEUM (2004); SIMON G. SIKSEK, THE LEGAL FRAMEWORK FOR OIL CONCESSIONS IN THE ARAB WORLD (1960); DAVID N. SMITH, & LOUIS T. WELLS, JR., NEGOTIATING THIRD-WORLD MINERAL AGREEMENTS (1975); EARNEST E. SMITH, INTERNATIONAL AND PETROLEUM TRANSACTIONS 420-508 (3d ed. 2010); BERNARD TAVERNE, PETROLEUM, INDUSTRY AND GOVERNMENTS: A STUDY OF THE INVOLVEMENT OF INDUSTRY AND GOVERNMENTS IN EXPLORING FOR AND PRODUCING PETROLEUM (3d ed. 2013); SHAVARSH TORIGUIAN, LEGAL ASPECTS OF OIL CONCESSIONS IN THE MIDDLE EAST (1972); LOUIS TURNER, OIL COMPANIES IN THE INTERNATIONAL SYSTEM (3d ed. 1983); UNITED NATIONS CENTRE ON TRANSNATIONAL CORPORATIONS, MAIN FEATURES AND TRENDS IN PETROLEUM AND MINING AGREEMENTS: A TECHNICAL PAPER (1981); DANIEL YERGIN, THE PRIZE: THE EPIC QUEST FOR OIL, MONEY & POWER (2009).

3. Agreement of May 28th, 1901, between the Government of His Imperial Majesty the Shah of Persia and William Know D'Arcy Now Held by the Anglo-Persian Oil Company Ltd., art. 7, LEAGUE OF NATIONS – OFFICIAL JOURNAL, Dec. 1932, at 2305-06.

> or political conditions that would be unfavorable to their interests.[4]

Fast forward to 2014, the CEO of the Malaysian state oil company Petronas warned the British Columbia provincial government that Petronas was ready to call off a $10 billion liquified natural gas (LNG) project in western Canada because of delay in project approvals, a new LNG tax, and lack of appropriate incentives to develop the industry. According to the Petronas CEO, "[r]ather than ensuring the development of the LNG industry through appropriate incentives and assurance of legal and fiscal stability, the Canadian landscape of LNG development is now one of uncertainty, delay and short vision."[5]

To be most effective a system of contract stabilization requires three elements: stabilization clauses in the host government contract, a choice of law provision which "internationalizes" that contract or restricts application of the host country's law, and an agreement on international arbitration to resolve future disputes.[6] These three elements "lean on" each other—they are correlative—and together they form a robust "stabilization architecture."[7] Two other sources of contract stability sometimes come into play through stabilization assurances in the petroleum or investment law or a project-specific decree[8] and through investment protections granted to foreign investors under

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4. A.A. FATOUROS, GOVERNMENT GUARANTEES TO FOREIGN INVESTORS 63 (1962).

5. Gary Lamphier, *Malaysia's Petronas Threatens to Cancel its $10-billion LNG Project in B.C.*, EDMONTON JOURNAL (Sept. 25, 2014), http://edmontonjournal.com/business/energy/malaysias-petronas-threatens-to-cancel-its-10-billion-lng-project-in-b-c (last visited Feb. 26, 2019).

6. *Cf.* Frank C. Alexander, *The Three Pillars of Security of Investment Under PSCs and Other Host Government Contracts*, 54 INST. OF OIL & GAS L. § 7.01, at 7-2 (2003) (identifying the right to monetize, stability, and enforcement of international arbitration as the "three pillars of security of investment").

7. Waivers of sovereign immunity from jurisdiction and from execution of judgments on arbitral awards represent a fourth element of potential relevance to contract stabilization, but are not dealt with in this article because: (1) their terms are relatively simple and straightforward; (2) the national laws governing sovereign immunity can be extensive and complex; (3) questions of jurisdiction and enforcement lie outside the scope of this article. *Cf.* JESWALD W. SALACUSE, THE THREE LAWS OF INTERNATIONAL INVESTMENT § 7.3(e), at 148-55 (2013) (stating that investors attempt to rely on four clauses in particular for protection from undesirable legal change: choice of law provisions, dispute settlement provisions, sovereign immunity waivers, and stabilization clauses). The IOC should not, however, overlook the importance of these waivers to the ultimate enforceability of host government's stabilization obligations. For an example of these provisions, see Ass'n of Int'l Petrol. Negot. (AIPN), 2017 Model Dispute Resolution Agreement § V(J), at 18, http://www.aipn.org/model-contracts/ (last visited July 25, 2019).

8. *See generally* A.F.M. Maniruzzaman, *National Laws Providing for Stability of International Investment Contracts: A Comparative Perspective*, 8 J. WORLD INV. & TRADE 233 (2007).

applicable bilateral and multilateral investment treaties. The exact combination of these elements varies from country to country, contract to contract, and project to project, as host government willingness to grant stabilization assurances changes over time and ultimately depends on several factors that influence the strength of government desire for private investment.

Host governments offer contract stabilization for a variety of reasons. First and foremost, they offer stabilization to attract investment. "Developing countries accept stabilisation clauses in order to gain an economic advantage in attracting foreign investment in the petroleum sector by making their investment climate more competitive and favourable to the foreign investor."[9] They may be most inclined to offer stabilization to attract "First Movers" in the hope of developing a new upstream petroleum industry. As noted by one industry expert, "competition among countries with unproven petroleum potential and faced by high oil import bills had resulted, especially in the 1990s, in the framing of many 'frontier' fiscal packages, featuring special investment incentives."[10] Writing in 1995, Dr. Chakib Khelil, then with The World Bank and soon to become Algerian Minister of Energy and Mines and President of Sonatrach, noted that governments responded to market forces in setting terms and conditions, but that they set these terms and conditions primarily on a regional basis for two reasons.

> First, some governments, particularly those of smaller countries, have limited information about fiscal terms and conditions around the world, but usually have better knowledge of the terms in neighboring countries. Second, it is often difficult for governments to defend terms and conditions significantly more favorable to foreign oil companies than those set by their neighbors.[11]

9. Abdullah Faruque, *Validity and Efficacy of Stabilisation Clauses: Legal Protection v. Functional Value*, 23 J. INT'L ARB. 317, 335-36 (2006); *see also* SALACUSE, *supra* note 7, § 1.4, at 13 (observing that "countries and communities seeking to attract or encourage investment will try to find ways to increase returns, for example by building roads or granting investors tax exemptions, or to reduce risk, for instance by making stabilization agreements promising not to increase the regulatory burden on the investment or by guaranteeing to purchase the product produced by the investment. In general, governmental actions that increase return or reduce risk encourage investment. Conversely, actions that reduce returns or increase risk discourage investment.").

10. Bryan Land, *Capturing a Fair Share of Fiscal Benefits in the Extractive Industry*, 18 TRANSNAT'L CORP. 157, 169 (Apr. 2009).

11. Chakib Khelil, *Fiscal Systems for Oil*, WORLD BANK NOTE NO. 46, May 1995, at 2.

Host governments may be most likely to offer contract stabilization commitments during periods of low petroleum prices.[12] But Kenneth Dam described what is probably the most compelling reason that governments give, or should give, stabilization incentives in his discussion of the auction method for allocating petroleum licenses in his book *Oil Resources: Who Gets What How?* "By affording greater protection against state repudiation, the state will not merely receive higher bids, but will also extract more of the economic rent. Indeed, a condition of extracting all of the economic rent through an auction would be absolute protection against state repudiation."[13]

For their part, IOCs request, and in some cases demand, contract stabilization for at least four reasons. First, stabilization clauses in host government contracts deter adverse government actions.[14] Second, these provisions promote negotiated resolution of disputes when governments, despite the deterrent power of these provisions, exercise their legislative and executive competence to diminish the value of contract rights unilaterally.[15] In this situation, these provisions mitigate investor losses. Third, international arbitral tribunals enforce stabilization commitments freely granted by host governments unless the investor entered into an equivocal or illusive stabilization commitment or waived its stabilization rights by acceding without protest to government demands for contract revisions or by making a tactical decision not to aggravate an already fraught host government relationship by invoking or pursuing its stabilization rights.[16] Last, the presence of

12. *See* Gordon Barrows, *A Survey of Incentives in Recent Petroleum Contracts*, *in* PETROLEUM INV. POLICIES IN DEVELOPING COUNTRIES 225 (N. Biredjick ed., 1988) (discussing need for incentives following the oil price crash of 1986); PEDRO VAN MEURS, GOVERNMENT FISCAL STRATEGIES UNDER LOW OIL PRICES AND CLIMATE CHANGE 34-77 (Apr. 18, 2016), https://vanmeursenergy.com/documents/FiscalStrategiesChangeLowOilPrices.pdf (last visited Mar. 5, 2019) (discussing proper host government response to the new low oil price environment).

13. KENNETH W. DAM, OIL RESOURCES: WHO GETS WHAT HOW? 175 (1976). The presence of contract stabilization may also maximize IOC capital investment for exploration, development, and production. *See* Philip Daniel & Emil M. Sunley, *Contractual Assurances of Fiscal Stability, in* THE TAXATION OF PETROLEUM AND MINERALS: PRINCIPLES, PROBLEMS AND PRACTICE 408 (P. Daniel, M. Keen & C. McPherson eds., 2010).

14. *See* Faruque, *supra* note 9, at 334.

15. *Cf.* Wolfgang Peter, *Stabilization Clauses in State Contracts*, 8 INT'L BUS. L.J. 875, 886 (1998) ("The effectiveness of stabilization clauses lies partly in the fact that they strengthen the private contractor's bargaining position. The prospect of a dispute over contract renegotiation going to court or arbitration, where the stabilization clause could develop its full legal effect, is an incentive to compromise.").

16. *See, e.g.*, Perenco Ecuador Ltd. v. Rep. of Ecuador, ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and Liability, ¶ 400 (Sept. 12, 2014) ("In sum, the Tribunal holds that: (i) Law 42 fell within the taxation modification clauses of both Contracts; (ii) as the

stabilization clauses reinforces host country obligations under investment treaties by providing strong documentary evidence of the investor's legitimate expectations when entering into the investment agreement or by triggering a right under some investment treaties to expand protections to tax or other areas otherwise expressly carved out from treaty protections.[17]

II. Stabilization Provisions in Host Government Contracts

A. *Types of Contract Stabilization*

Stabilization clauses seek to protect the investor from governmental action that adversely affects the value of the investment contract, and underlying investment, by preventing that action, by insulating the contract from the action, by shifting to the host state or national oil company the financial burden of that action, or by modifying the terms of the contract to restore all or part of the contract's original value in response to that action.[18] A review of stabilization provisions in host government laws and contracts reveals ten main types: (1) state guaranties of stability, (2) exemptions from taxes and other fiscal obligations, (3) clauses that "freeze" applicable law, typically by incorporating by reference a specific vintage or subset of laws, (4) clauses that "freeze" contract terms by according them "enclave" status, either expressly in

party claiming that the law had an impact on the Contracts' economy, it was incumbent upon Perenco to pursue negotiations with the new administration at least until they were shown to be futile; and (iii) Perenco did not do so, preferring instead to adopt a 'wait and see' approach with the new Correa Administration. In these circumstances, the Tribunal does not find a breach of clauses 11.12 and 11.7 of the two Contracts.").

17. *See generally* Sophie J. Lamb & Aimee-Jane Lee, *The Relevance of Stabilisation Clauses in Oil & Gas Investment Treaty Arbitration, in* THE LEADING PRACTITIONERS' GUIDE TO INTERNATIONAL OIL & GAS ARBITRATION 115, 137 (James M. Gaitis ed., 2015) (noting among other things that "arbitral awards have consistently shown that the existence of a stabilisation clause will almost always mean that the investor was entitled to expect that the law would not adversely change (or at least not without the investor being appropriately compensated), contrary to the clause.").

18. *See generally* PETER D. CAMERON, INTERNATIONAL ENERGY INVESTMENT LAW: THE PURSUIT OF STABILITY (2010); MUSTAFA ERKAN, INTERNATIONAL ENERGY INVESTMENT LAW: STABILITY THROUGH CONTRACTUAL CLAUSES (2011); Samuel K.B. Asante, *The Concept of Stability of Contractual Relations in the Transnational Investment Process, in* LEGAL ASPECTS OF THE NEW INTERNATIONAL ECONOMIC ORDER 234 (Kamal Hossain ed., 1980); A.Z. El Chiati, *Protection of Investment: Petroleum Agreements*, 1987 IV HAGUE RECUEIL DES COURS 19-169 (1988); Faruque, *supra* note 9, at 317; Bertrand Montembault, *The Stabilization of State Contracts Using the Example of Oil Contracts*, 8 INT'L BUS. L.J. 593 (2003); Esa Paasivirta, *Internationalization and Stabilization of Contracts versus State Sovereignty*, BRIT. Y.B. INT'L L. 315 (1990); Wolfgang Peter, *Stabilisation Clauses in State Contracts*, 8 INT'L BUS. L.J. 875 (1998); Mario Mansour & Carole Nakhle, *Fiscal Stabilization in Oil and Gas Contracts: Evidence and Implications*, OXFORD INST. FOR ENERGY STUD. 37 (Jan. 2016), http://www.oxfordenergy.org/wpcms/wp-content/uploads/2016/01/Fiscal-Stabilization-in-Oil-and-Gas-Contracts-SP-37.pdf (last visited Oct. 4, 2019).

the form of "inopposability" provisions or indirectly in the form of "intangibility" provisions, (5) allocation of risk clauses, by which the host government or NOC agrees to bear fiscal risk as its "area of responsibility," (6) renegotiation clauses that provide a contractual mechanism to modify the investment contract in response to a change in law and/or a change in circumstances, (7) clauses that require the host government to adopt the contract as the "law," (8) clauses that "contractualize" governing law by repeating its terms in the contract as an obligation of the host government or NOC, (9) anti-expropriation clauses, and (10) anti-stabilization nullification provisions.[19] Frequently, a host government petroleum contract contains multiple forms of contract stabilization that may interrelate, and unless carefully drafted, even contradict one another. When multiple forms can be found in a contract, they are called "hybrid" provisions or "hybrid" stabilization systems. As Professor Prosper Weil stated in one of the earliest examinations of forms of contract stabilization, there exists an "infinite variety" of these provisions.[20]

These provisions are sometimes included in a contract's fiscal terms or choice of law provisions, but often they appear in other places in the contract, sometimes popping up to surprise the reader. Stabilization provisions have been known to inhabit the preamble, the definitions section, provisions stating the purpose or juridical nature of the contract, warranty provisions, lifting provisions or annexes, contract termination clauses, the accounting procedure, and perhaps most often of all, the miscellaneous provisions at the end of the contract.[21] Sometimes the clause or section captioned "STABILIZATION" may represent only one of several forms of stabilization in the contract. Sometimes the parties seem to have deliberately sought to hide the presence of these

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19. *Cf.* SALACUSE, *supra* note 7, at 153-55 (identifying the principal variations in stabilization clauses to include intangibility clauses, consistency clauses, freezing clauses, issue stabilization clauses, and economic equilibrium clauses).

20. PROSPER WEIL, *Les clauses de stabilisation ou d'intangibilité insérées dans les accords de développement économique, in* MÉLANGES OFFERTS À CHARLES ROUSSEAU 301, 304 (1974).

21. Occasionally, the parties include stabilization commitments in annexes and appendices to the host government contract. *See, e.g.*, Agreement on the Joint Development and Production Sharing for the Azeri and Chirag Fields and the Deep Water Portion of the Gunashli Field in the Azerbaijan Sector of the Caspian Sea, State Oil Company of the Azerbaijan Republic, Amoco Caspian Sea Petroleum Limited, BP Exploration Limited, et al., app. V, Sept. 20, 1994, https://www.resourcecontracts.org/contract/ocds-591adf-8987387726/view#/pdf (last visited Mar. 6, 2019) (containing extensive stabilization commitments reinforcing and in addition to the stabilization obligations in the underlying contract, and including an express commitment to submit disputes arising under these guarantees to international arbitration).

provisions from the casual reader.[22] For these reasons, whenever a question of stabilization comes up, the contract must be reviewed carefully from front to back for any stabilization due diligence to be accurate and complete.

B. *Government Guaranties of Stability*

An early authority on this subject, Roland Brown, who served as Chief Legal Advisor at the United Nations Commission on Transnational Corporations, stressed its complexity, cautioning that "[t]here is no lazy man's one-line which can be slotted into place to achieve the right result."[23] He took particular issue with the following approach: "[t]he Government hereby guarantees the stability of the terms set forth in this Agreement." According to Brown, "[t]he truth is that the issue of stability has many different dimensions and the problem of finding a *modus vivendi* will not yield to any facile solution."[24]

This basic form of stabilization, however facile, can be found in a 1995 Gabon Exploration and Production Sharing Contract (EPSC): "the State guarantees to the Contractor for the duration of the Contract the stability of the financial and economic conditions, such as these conditions result from the Contract or from the regulations in force on the Effective Date."[25] But this EPSC also contains allocation of risk and exemption provisions, an unusual non-aggravation and equilibrium provision, an anti-expropriation clause, and an intangibility clause.[26]

A more nuanced provision of this type appears in the 2006 Ghana Deepwater Tano Petroleum Agreement:

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22. For example, the Model Development & Production Sharing Agreement of 2002 Between The Government of Qatar and Contractor (North Field) (on file with author) [hereinafter Qatar Model Agreement] contains multiple stabilization provisions (art. 18.12 Economic Stabilization: mandatory modification provision requiring Qatar's NOC to restore Contractor's economic position; art. 22.5 Income Tax Paid By Government: allocation of risk provision; art. 22.7 Other taxes: exemption provision), but the provision confirming the Government's support for the project and requiring it to "take all steps necessary to restore the economic benefits" of Contractor in response to any discriminatory Government Order can be found at the end of the Agreement in Article 39.12 Government Support, among the Miscellaneous Provisions.

23. Roland Brown, *Contract Stability in International Petroleum Operations*, 29 CTC REP. 56, 56 (Spring 1990).

24. *Id.*

25. Exploration and Production Sharing Contract between Republic of Gabon and Vaalco Gabon, Inc. art. 43.1, July 7, 1995, https://www.resourcecontracts.org/contract/ocds-591adf-5358845209/view#/pdf (last visited Feb. 26, 2019) [hereinafter Gabon EPSC].

26. *See id.* arts. 26.1(e), 26.6, 26.7, 43.1, 43.3, 43.4.

> As of the Effective Date of this Agreement and throughout its Term, the State guarantees Contractor the stability of the terms and conditions of this Agreement as well as the fiscal and contractual framework hereof specifically including those terms and conditions and that framework that are based upon or subject to the provisions of the laws and regulations of Ghana (and any interpretation thereof) including, without limitation, the Petroleum Income Tax Law, the Petroleum Law, the GNPC Law and those other laws, regulations and decrees that are applicable hereto.[27]

This provision appears in the "MISCELLANEOUS" article at the end of the Petroleum Agreement, along with the parties' choice of Ghana law consistent with rules of international law, four other forms of contract stabilization, and an "upside" provision.[28] The drafters of these hybrid provisions clearly took Brown's admonition concerning "facile solutions" to heart.

C. *Exemption from Taxes and Other Fiscal Obligations*

While most early concessions contained provisions providing for total exemption from taxes, requiring only payment of a modest royalty and possibly bonus payments and surface rentals, some subsequent concessions imposed a more significant fiscal burden on the IOC, explicitly stipulating the amount of fixed annual payments and the percentages of royalties and taxes on net profits, while exempting the IOC from all other fiscal charges.[29] For example, the 1956 Agreement between the Kingdom of Jordan and Edwin W. Pauley exempted

27. Petroleum Agreement among Government of the Republic of Ghana, Ghana National Petroleum Corp. and Tullow Ghana Limited, Sabre Oil and Gas Limited, and Kosmos Energy Ghana HC in respect of Deepwater Tano Contract Area art. 26.2, Mar. 10, 2006, http://www.tullowoil.com/Media/docs/default-source/5_sustainability/petroleum_agreement_deepwater_tano.pdf?sfvrsn=4 (last visited Feb. 26, 2019) [hereinafter Ghana Petroleum Agreement].

28. *See id.* arts. 26.1, 26.3-26.5, 26.10.

29. *Compare* Agreement between H.H. The Ruler of Abu Dhabi and Petroleum Development (Trucial Coast) Ltd. arts. 4, 6 (Jan. 11, 1939), *in* OPEC, SELECTED DOCUMENTS OF THE INTERNATIONAL PETROLEUM INDUSTRY PRE-1966 120-25 (1983) (imposing signature and other bonuses, annual payments, and royalty of three Rupees per ton of oil extracted), *with* Convention Governing Petroleum Exploration, Exploitation, and Transport between Republic of Chad and Continental Oil Company of Chad arts. 19-23, *in* BARROWS SOUTH & CENTRAL AFRICA BASIC OIL LAWS AND CONCESSION CONTRACTS, Supp. No. XLII (42) (1976) (imposing royalty of 12.5 percent for liquid hydrocarbons and a direct tax on profit at rate of 50 percent).

Pauley, his operations, income, profits and property for the period of their agreement, from all present and future income taxes or taxes of any nature whatsoever, but in consideration thereof required Pauley to make the payments provided in Articles 30, 31, and 32.[30]

The 1967 Oil Concession Agreement between Kuwait, Kuwait National Petroleum Company, and Hispanica de Petroleos allowed the Companies to export their share of Petroleum free of customs and import or export duty and taxes or other charges and exempted all income derived from operations and all payments whether by way of dividend or otherwise during the period of the Agreement from "all present and future taxation, imposts and charges whatsoever (other than tax payable under the Tax Decree)." Notwithstanding these exemptions, the Companies agreed to submit to the Income Tax Law "in the precise terms set out in Annex 3 attached hereto" and to other future income tax laws provided that these laws applied to all corporations carrying out business in Kuwait.[31]

Following emergence of production sharing contracts (PSCs) in the mid-1960s in Indonesia, various host governments have combined the allocation of risk form of contract stabilization with exemption from other taxes.[32] Under the 2002 Qatar Model Development & Production Sharing Agreement (North Field), "The GOVERNMENT shall assume, pay and discharge or cause to be discharged on behalf of CONTRACTOR all Qatar income tax of the CONTRACTOR," with Qatar Petroleum to perform these duties.[33] This PSC exempted Contractor "from any other tax, or royalties, excise, or similar charge payable to the GOVERNMENT or its Affiliates with respect to Petroleum Operations or Petroleum marketing, or capital or property utilised in Petroleum Operations, income derived from such operations . . . ."[34]

The Model Production Sharing Agreement offered by the Arab Republic of Egypt (ARE) in its 2018 International Bid Round follows a

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30. Agreement between Hashemite Kingdom of Jordan and Edwin W. Pauley art. 17, Exemption from Texas [sic] (Feb. 2, 1956), *in* 2 BARROWS MIDDLE EAST BASIC OIL LAWS AND CONCESSION CONTRACTS at Jordan A-9 (1959) (art. 30 prescribed annual fixed payments; art. 31 imposed a 50/50 net profits tax; art. 32 assessed a 16 2/3 percent royalty).

31. Oil Concession Agreement between the Government of the State of Kuwait and Kuwait National Petroleum Company, K.S.C. and Hispanica de Petroleos, S.A. arts. 14(1), 14(5) (May 3, 1967), *in* OPEC, SELECTED DOCUMENTS OF THE INTERNATIONAL PETROLEUM INDUSTRY 1968 175-76 (1983).

32. For discussion of the allocation of risk form of contract stabilization, see *infra* notes 57-66 and accompanying text.

33. Qatar Model Agreement, *supra* note 22, art. 22.5.

34. *Id.* art. 22.7.

similar pattern, allocating responsibility for Contractor's income tax to the Egyptian General Petroleum Corporation (EGPC), with EGPC to assume, pay, and discharge, in the name and on behalf of Contractor, Contractor's Egyptian income tax out of EGPC's share of Petroleum produced and saved, with Contractor and Operating Company exempt from all other taxes and duties, whether imposed by the Government or municipalities.[35] The contract addresses the possibility of future changes to the Egyptian fiscal regime: "[a]ll exemptions from the application of the A.R.E. laws or regulations granted to EGPC, CONTRACTOR, the Operating Company, their contractors and sub-contractors under this Agreement shall include such laws and regulations as presently in effect or hereafter amended or substituted."[36]

Among all the many taxes, fees, duties, and imposts worthy of exemption, one in particular stands out, given the impact this fee could have on the assignment (farm out) of a contractual interest: the transfer fee. The Petroleum Agreement between Guyana and Esso Exploration and Production Guyana Limited states:

> Notwithstanding any provision to the contrary in this Article, assignments of any kind between Contractor and Affiliated Companies as well as any assignment of any kind made in accordance with this Agreement (including one to an unrelated party) shall be exempt from any duty & taxes, including Capital Gains Tax in each respect, but shall be subject to a fee payable to the Government account for the Ministry Responsible for Petroleum upon approval for the assignment in the amount of one hundred thousand United States Dollars (US $100,000) payable in respect of the assignment.[37]

This provision requires Contractor to pay a reasonable fee for the right to make an assignment without impairing the transferability of an interest, subject of course to the prior written consent of the Minister.

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35. Egypt 2018 Model Concession Agreement for Petroleum Exploration and Exploitation arts. III(g)(4), XVIII(c) (on file with author) [hereinafter Egypt 2018 Model Concession Agreement].

36. *Id.* art. XVIII(g).

37. Petroleum Agreement between Government of the Cooperative Republic of Guyana and Esso Exploration and Production Guyana Ltd. art. 15.13, June 27, 2016, https://gyeiti.org/wp-content/uploads/Petroleum-Agreement-Oct-7-2016.pdf (last visited Oct. 19, 2018).

D. *Clauses That "Freeze" the Applicable Law*

In theory, clauses that purport to "freeze" the law take two forms. In a contract entered into by the host government with the investor, the government may promise not to change the law governing the contract. This promise does not, however, prevent the government from exercising its executive and legislative competence. It operates as a guaranty of legal stability,[38] and its breach renders the government liable for damages. That an international arbitral tribunal or an award enforcement court would seek to enforce this promise by ordering a government to rescind a new law or change in law would be inconceivable today,[39] assuming the government complied with its own laws in the first place.[40] The sole arbitrator in *BP Exploration Co. (Libya) v. Government of Libya* held that when by the exercise of sovereign power a state commits a fundamental breach of a concession agreement by repudiating it through nationalization of the assets, the concessionaire is not entitled to call for specific performance by the Government of the agreement and reinstatement of his contractual rights; his sole remedy is an action for damages.[41]

On the other hand, host governments cannot evade their obligations when freely entered into with IOCs by invoking the doctrine of permanent sovereignty over natural resources. This doctrine emerged during the decolonization period following World War II, as less developed countries sought not only political but also economic independence from the colonial powers and their transnational corporations, including IOCs.[42] It found expression in a series of resolutions of the U.N. General Assembly from the early 1950s to the late 1970s, and in the

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38. For discussion of stabilization guaranties, see *supra* notes 21-24 and accompanying text.

39. *Cf.* Peter, *supra* note 15, at 878 ("It is not worth to insist upon another technique consisting in freezing the municipal applicable law."). The tribunal's decision ordering Libya to perform its obligations under the concession – i.e., ordering *restitutio in integrum* – in Texaco Overseas Petroleum Co. v. Government of Libyan Arab Republic, Award on Merits, ¶¶ 92-112 (Jan. 19, 1977) 17 I.L.M. 1 (1978), stands out as an exception to this view.

40. *See generally* Jan Paulsson, *Unlawful Laws and the Authority of International Tribunals*, 23 ICSID REV.-FOREIGN INV. L.J. 215 (2008) (discussing the corrective norms that can exist in national laws that may obviate the need to rely on international investment standards).

41. BP Expl. Co. (Libya) Ltd. v. Gov't of the Libyan Arab Republic, Award (Merits) (Oct. 10, 1973), 53 I.L.R. 297, 354 (1973) [hereinafter BP Award]; *accord* Libyan Am. Oil Co. (LIAMCO) v. Gov't of the Libyan Arab Republic, Award (Apr. 12, 1977), VI Y.B. Com. Arb. 89, 105-06 (1977) [hereinafter LIAMCO Award].

42. *See generally* CHRISTOPHER R. W. DIETRICH, OIL REVOLUTION: ANTICOLONIAL ELITES, SOVEREIGN RIGHTS, AND THE ECONOMIC CULTURE OF DECOLONIZATION (2017); KENNETH A. RODMAN, SANCTITY VERSUS SOVEREIGNTY: THE UNITED STATES AND THE NATIONALIZATION OF NATURAL RESOURCE INVESTMENTS (1988); NICO SCHRIJVER, SOVEREIGNTY OVER NATURAL RESOURCES (1997).

writings of many publicists.[43] As expressed in Resolution 1803 in 1962, "[t]he right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned."[44] It reached its high point in 1974 in the Charter of Economic Rights and Duties of States, which declared: "[e]very State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities."[45] Today it constitutes an accepted principle of international law, recognized for example in the 1966 Human Rights Covenants and the 1994 Energy Charter Treaty.[46] It does not function, however, as a get-out-of-jail free card for states intent on breaching their stabilization commitments.[47]

The Right Honourable The Lady Higgins, known as Her Excellency Dame Rosalyn Higgins when at the International Court of Justice, perhaps best expressed the prevailing view on this subject when she wrote in 1981:

> [T]he doctrine of permanent sovereignty over natural resources does not operate as an implied term in a contract voluntarily entered into by a government, leaving it free to revoke or otherwise alter these rights later. Unless such an eventuality is

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43. *See* SCHRIJVER, *supra* note 42, at 36-112; STEPHEN M. SCHWEBEL, *The Story of the United Nations Declaration on Permanent Sovereignty over Natural Resources*, *in* JUSTICE IN INTERNATIONAL LAW: SELECTED WRITINGS OF JUDGE STEPHEN M. SCHWEBEL 401-15 (1994); IAN BROWNLIE, *Legal Status of Natural Resources in International Law (Some Aspects)*, *in* I RECUEIL DES COURS 253-71 (1979). *See generally* Karol N. Gess, *Permanent Sovereignty Over Natural Resources*, 13 INT'L & COMP. L.Q. 398 (1964); Texaco Overseas Petro. Co. v. Gov't of the Libyan Arab Republic, Award on Merits, 17 I.L. M. 3 (1978).

44. G.A. Res. 1803 (XVII), at 15 (Dec. 14, 1962).

45. G.A. Res. 3281 (XXIX), at 52 (Dec. 12, 1974).

46. *See* SCHRIJVER, *supra* note 42, at 260-61.

47. *See, e.g.*, M. Sornarajah, *The Myth of International Contract Law*, 15 J. WORLD TRADE L. 187, 210 (1981) ("In the theory underlying the principle, sovereignty over natural resources resides in the people and the state merely acts as an agent for the people. It follows that the supreme test to be applied as to the validity of the contract is whether the contract benefits the people as a whole. Where, at any stage, a state permitting the exploitation of its resources, perceives such exploitation or the terms of the contract to be detrimental to the interests of the people or the economy of the country, it can intervene in the investment, terminate it or renegotiate the terms so that it reflects the benefit to the people. Thus, the acceptance of the principle creates a constitutional limitation on the state in international law to deal with its natural resources except in accordance with the interests of its people. This would mean that a state cannot validly agree not to change the terms of the agreement on the exploitation of natural resources or to submit disputes to a foreign arbitral tribunal.").

> written into the contract, the contract is to be read as a voluntary exercise by the government of its sovereign right to bind itself for the duration of the contract, operating within the framework of (rather than subject to) its permanent sovereignty over its natural resources.[48]

To put this principle in stronger terms, as expressed by the arbitral tribunal in the *Aminoil* case, the claim lacks all foundation that permanent sovereignty over natural resources has become an imperative rule of *jus cogens* prohibiting states from affording, by contract or treaty, guarantees of any kind against the exercise of the public authority in regard to all matters relating to natural riches.[49]

The second, much more widely employed method to "freeze" the law recognizes the host government's and NOC's power to agree that the parties' contract will be governed by the law as in effect on the date of its signing or as of its effective date. As explained by several commentators:

> Parties may agree themselves that the law at the time of the agreement shall apply. This is known as a stabilization clause which effectively freezes the content of the applicable law as between the parties to a particular point in time. Agreements of this kind stop any unilateral change of essential variables

48. Rosalyn Higgins, *The International Law Perspective*, *in* THE LEGAL CHARACTER OF PETROLEUM LICENCES: A COMPARATIVE STUDY 35, 42-43 (T. Daintith ed., 1981); *see also* Saudi Arabia v. Arabian Am. Oil Co. (ARAMCO), Final Award (Aug. 23, 1958), 27 I.L.R. 117, 168 (1958) [hereinafter ARAMCO Award] ("By reason of its very sovereignty within its territorial domain, the State possesses the legal power to grant rights which it forbids itself to withdraw before the end of the Concession, with the reservation of the Clauses of the Concession Agreement relating to its revocation."); SCHRIJVER, *supra* note 42, at 264 ("In conclusion, it is now commonly accepted that the principle of permanent sovereignty precludes a State from derogating from the essence of the exercise of its sovereign rights over its natural resources . . . but that a State may by agreement *freely entered into* accept a partial limitation on the exercise of its sovereignty in respect of certain resources in particular areas for a specified and limited period of time.") (emphasis in original). *But see* Subrata R. Chowdhury, *Permanent Sovereignty and its Impact on Stabilization Clauses, Standards of Compensation and Patterns of Development Co-operation*, *in* PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES IN INTERNATIONAL LAW 42, 57 (Kamal Hossain & Subrata R. Chowdhury eds., 1984) ("Whether or not a particular treaty or a particular provision therein, including stabilization or immutability clauses, amount to an alienation of sovereignty requires careful scrutiny. If it be found there is in fact such an alienation in the enjoyment and/or exercise of the right to sovereignty, it should be held that the particular agreement or treaty or particular offending provisions are *ultra vires* the *jus cogens* principle of permanent sovereignty.").

49. *See* Gov't of Kuwait v. Am. Indep. Oil Co. (AMINOIL) Final Award (Mar. 24, 1982), 21 I.L.M. 976, 1021-22, ¶ 90(2) (Sept. 1982) [hereinafter AMINOIL Final Award].

> defined in the clause. Such variables include the applicable tax regime, import and export regulations, currency exchange regulations, investment legislation, etc.[50]

Thus, in its 1993 model arbitration clauses, the International Centre for the Settlement of Investment Disputes (ICSID) proposed as an applicable law provision, under the subheading "Specification of System of Law," as "a law frozen in time or subject to certain modification," Clause 10: "[a]ny Arbitral Tribunal constituted pursuant to this agreement shall apply specification of system of law [as in force on the date on which this agreement is signed] [subject to the following modifications: . . .]"[51] In this way, the parties can incorporate by reference the law of a certain vintage.

Similarly, they can agree that a specific law will govern their relationship for the life of their contract. "This Concession shall, throughout the period of its validity, be construed in accordance with the Petroleum Law and Regulations in force at the time of granting the Concession."[52] An Algerian Model PSC contained, in the applicable law clause, an example of this form of partial "freezing" clause with reference to the number and date of the Algerian Hydrocarbons Law (Law 86-14) and its amendments: "[t]he Contract shall be governed by and interpreted under the laws of Algeria in effect, in particular Law No. 86-14 of August 19, 1986 as modified and completed by Law 91-12 of September 7, 1991, Law No. 91-21 of December 4, 1991, as well as their implementation texts."[53]

Incorporation of a set of laws by reference should be distinguished from a choice of law provision, which implicitly recognizes the possibility of changes to the substantive law during the parties' contractual relationship.

> Under the circumstances, it is not truly the law of the state that is the *lex contractus* but a set of rules coinciding with the law of the state at a given point in time and incorporated into the contract. The contract is, then, from the legal standpoint that the

50. JULIAN D. LEW ET AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION ¶¶ 18-37, at 449 (2003).

51. ICSID Model Clauses, ICSID Doc. 5/Rev. 1, cl. X, at 13 (1994).

52. Libya Model Deed of Concession cl. 16(2) (attached as Schedule 2 to Libya Petroleum Law No. 25 of 1955), *in* OPEC, SELECTED DOCUMENTS OF THE INTERNATIONAL PETROLEUM INDUSTRY PRE-1966, at 30-53 (1983) [hereinafter Libya Model Concession].

53. Algerian 2002 Model Production Sharing Contract art. 34.1, *reprinted in* JAMES BARNES, INTERNATIONAL PETROLEUM AGREEMENTS ALGERIA 1-45 (2002).

> arbitrator adopts, shielded from policy changes by the contracting state. Not that the state will be unable to change its legislation, but if it applies any such change to the contract containing the freezing clause, it will be answerable for it before the arbitration tribunal and may have to compensate the other contracting party.[54]

According to one well-respected authority, by incorporating a law into their contract, the parties agree that they cannot invoke a change to that law to excuse a breach of contract.[55] This means that this stabilization mechanism protects the investment even when the investor enters into a petroleum contract with an NOC rather than directly with the government of the NOC's home country.

E. *Contract Stabilization Through Non-Application of Inconsistent Laws*

In an "inopposability" provision, the state commits not to apply eventual changes to the law to its counter-party.[56] For example, the 1966 services agreement between the National Iranian Oil Company and ERAP stipulated:

> The provisions of the Mining Act of 1957 shall not be applicable to this Agreement, and any other laws and regulation which may be wholly or partly inconsistent with the provisions of this Agreement shall to the extent of any such inconsistency be of no effect in respect of the provisions of this Agreement.[57]

Nearly 50 years later, the Trinidad & Tobago Model Deepwater Production Sharing Contract used even stronger language to declare that the terms of the contract would prevail over inconsistent law:

> So much only of the [Petroleum] Act and the Regulations as are not excluded by the Contract shall apply to Contractor, and where any provision of the Act or the Regulations is modified by this Contract for purposes of this Contract, the Act and the

54. CHARLES LEBEN, THE ADVANCEMENT OF INTERNATIONAL LAW 10 (2010).

55. Nour E. Terki, *The Freezing of Law Applicable to Long-Term International Contracts*, 6 J. INT'L BANKING L. 43, 47 (1991).

56. *See* WEIL, *supra* note 20, at 310-11.

57. Agreement between National Iranian Oil Company (NIOC) and Entreprise de Recherches et d'Activites Petrolieres (ERAP), *in* OPEC, SELECTED DOCUMENTS OF THE INTERNATIONAL PETROLEUM INDUSTRY: 1966 art. 44, at 172 (1983).

> Regulations shall be read and construed accordingly, and where there is any conflict or variance with reference to any matter between the provisions of this Contract and the Act or the Regulations, the provisions of this Contract shall prevail.[58]

The law may change, but the changes do not affect the parties' agreement, which acquires an "enclave" status. If despite these promises the host government applied the change in law to the parties' contract, the IOC would be entitled to damages from the government for breach of contract.

F. *Stabilization by Requiring Mutual Agreement Concerning Any Contract Changes*

Clauses that prohibit unilateral changes of contract by the host government date back to early concessions in the Middle East. A 1937 Concession entered into by the Sultanate of Muscat and Oman with Petroleum Concessions, Ltd. provided:

> No alteration shall be made in the terms of this Agreement by either the Sultan or the Company except in the event of the Sultan and the Company jointly agreeing that [sic] is desirable in the interests of both parties to make certain alterations, deletions or additions to this agreement.[59]

Called "intangibility" provisions, they frequently appear in host government contracts along with inopposability provisions:

> This agreement and the rights and obligations specified herein may not be modified, amended, altered or supplemented except upon the execution and delivery of a written agreement executed by the Parties. Any legislative or administrative act of the State or any of its agencies or subdivisions which purports to vary any such right or obligation shall, to the extent sought

58. Trinidad & Tobago Production Sharing Contract of 2014 art. 38.2, https://www.resourcecontracts.org/contract/ocds-591adf-6764376338/view#/search/Trinidad%20%26%20Tobago%20Production%20Sharing%20Contract%20 (last visited Feb. 26, 2019).

59. Agreement between Petroleum Concessions, Ltd. and Sultanate of Muscat and Oman art. 25 (June 24, 1937), *in* BARROWS MIDDLE EAST BASIC OIL LAWS AND CONCESSION CONTRACTS, Supp. No. III, Muscat & Oman A-1 to A-12.

> to be applied to this Agreement, constitute a breach of this Agreement by the State . . . .[60]

While this form of contract stabilization may read like any clause in a standard commercial contract that gives effect to amendments only when in a writing signed by all parties, the history of the use of these provisions in host government contracts, including their use in close proximity with other forms of contract stabilization, militates forcefully against dismissing them as mere boilerplate. They can apply even in a contract between a state enterprise and an IOC to bind a non-signator host government, rendering it liable for its actions that unilaterally amend the parties' contract, when included along with a provision which expressly recognizes the government's obligations under the contract upon parliament's enactment of the contract into law.[61]

G. *Allocation-of-Risk Form of Contract Stabilization*

These clauses assign fiscal risk to the host government or its NOC; they arose in conjunction with PSCs.[62] Under the PSC system, the IOC enters into a contract with the state or its NOC or both.[63] When the IOC and NOC enter into a PSC without the state as a party, the NOC must make the stabilization promises. An NOC, however, could not normally make promises that a new law would not apply to its contract. Accordingly, to ensure a stable contract, the NOC agrees to be responsible for some or all fiscal obligations imposed by the government. Without these assurances, the parties could spend months negotiating the production split under their PSC, only for the government to impose new fiscal terms in the form of taxes and other imposts as soon as the contract was signed. In other words, without these assurances, the agreement on production shares would be meaningless. These clauses have

60. Ghana Petroleum Agreement, *supra* note 27, art. 26.3.

61. *Cf.* Amoco Int'l Fin. Corp. v. Iran, 15 Iran-U.S. Cl. Trib. Rep. 189 (1987) (Brower, J. Concurring Opinion) (discussing the legal effect of Article 21(2) of the Khemco Agreement, which provided: "Measures of any nature to annul, amend or modify the provisions of this Agreement shall only be made possible by the mutual consent of NPC and AMOCO.").

62. *See* Thomas Wälde & George Ndi, *Stabilizing International Investment Commitments: International Law versus Contract Interpretation*, 31 TEX. INT'L L.J. 215, 262-64 (1996).

63. *See* Honoré L. Leuch, *Recent Trends in Upstream Petroleum Agreements: Policy, Contractual, Fiscal, and Legal Issues*, *in* THE HANDBOOK OF GLOBAL ENERGY POLICY 127, 133 (Andreas Goldthau ed., 2013); Silvana Tordo et al., *Petroleum Exploration and Production Rights: Allocation Strategies and Design Issues,* 10, World Bank Working Paper No. 179 (2010); UNITED NATIONS CENTRE ON TRANSNATIONAL CORPORATIONS, ALTERNATIVE ARRANGEMENTS FOR PETROLEUM DEVELOPMENT: A GUIDE FOR GOVERNMENT POLICY MAKERS AND NEGOTIATORS 52 (1982).

been called "tax paid" and "taxes in lieu" provisions,[64] and PSCs that impose this obligation on the host government or NOC are called "pay on behalf" PSCs.[65] That the NOC will pay the IOC's share of taxes and other fiscal liabilities would be taken into account in allocating the production between the parties. Generally speaking, under this system, the IOC can take a foreign tax credit in its home country for the taxes paid on its behalf by the NOC;[66] it can also book those barrels as reserves.[67]

The first PSCs in Indonesia employed this form of contract stabilization. The "typical Indonesian PSC" published by OPEC required Pertamina, Indonesia's NOC, to pay and hold the contractor harmless from all Indonesian taxes and exactions of any government authority. If for any reason the contractor pays any tax for which it is entitled to be held harmless, Pertamina agreed to reimburse the person paying the tax within 60 days.[68] As can be seen, the provision uses language of indemnification in describing this obligation.

By the mid-1990s, this form of stabilization had become widespread. Professor Thomas Wälde wrote:

> In our view, the predominant 'modern' stabilization clause no longer looks towards the government as such, but makes the state enterprise responsible for unilateral intervention by its own government. Indeed, current practice has moved towards allocating the risk of government action to the state company—on the theory that the state company is better positioned to influence such risk, is closer to the source of the risk and is likely to have the resources for shouldering such risk.[69]

Not long thereafter, Bernard Mommer, known later for his role as Vice Minister for Energy during the Chavez government in Venezuela,

64. *See* DANIEL JOHNSTON, INTERNATIONAL EXPLORATION ECONOMICS, RISK, AND CONTRACT ANALYSIS 155, 195-96, 266 (2003).

65. *See* Carolle Nakhle, *Petroleum Fiscal Regimes: Evolution and Challenges*, *in* THE TAXATION OF PETROLEUM AND MINERALS: PRINCIPLES, PROBLEMS AND PRACTICE 89, 101 (Philip Daniel et al. eds., 2010).

66. *See* DANIEL JOHNSTON, INTERNATIONAL PETROLEUM FISCAL SYSTEMS AND PRODUCTION SHARING CONTRACTS 196-98 (1994).

67. *See* Society of Petroleum Engineers, Guidelines for Application of the Petroleum Resources Management System § 10.4.1, at 175 (Nov. 2011), https://www.spe.org/industry/docs/PRMS_Guidelines_Nov2011.pdf (last visited Mar. 6, 2019).

68. *Typical Indonesian Production Sharing Contract*, *in* OPEC, SELECTED DOCUMENTS OF THE INTERNATIONAL PETROLEUM INDUSTRY: 1968 ¶ 5.2.2, at 88 (1969).

69. *See* Wälde & Ndi, *supra* note 62, at 263.

acknowledged that these provisions had spread to joint ventures and production services contracts. He observed:

> [O]ne typical feature of upstream contracts in recent years – be it joint ventures, PSAs or production services contracts – is the presence of a 'stabilisation clause'. According to that clause the NOCs as partner or contracting parties fully assume the so-called 'sovereign risk'. In other words, the landlord states may increase, sovereignly, taxation, but the whole increase will be paid for by their national oil companies, out of their own share, on behalf of the private investors.[70]

In 2002, Dr. Khelil, by then Algeria's Minister of Energy and Mines, similarly explained that under the system of production sharing the foreign partner can remain "off shore" since all fiscal obligations are assumed by the national company: the partner is content to take, free of all charges and taxes at the port of loading, its cost oil (reimbursement of its costs of exploration and exploitation) and its profit oil (remuneration).[71]

The allocation-of-risk form of stabilization rests on the legal concept of "areas of responsibility." According to Dr. Karl-Heinz Bockstiegel, a leading international arbitrator and noted authority on state contracts:

> Sometimes, even if not expressly dealt with in the contract, the general conception and structure of the contract as well as conclusions from specific contractual clauses may permit one to define 'areas of responsibility' for each of the parties. And if the impossibility of performing certain contractual obligations then is due to causes within one of such areas of responsibility, the respective party may be held responsible for non-fulfillment or at least for damages even if the respective cause is not due to that party's fault.[72]

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70. Bernard Mommer, *Oil Prices and Fiscal Regimes*, OXFORD INST. FOR ENERGY STUD. (May 1999).

71. Chakib Khelil, *Third Forum of University of Constantine* (Dec. 24, 2002), https://web.archive.org/web/20190311111226/http://www.energy.gov.dz/francais/index.php?page=741 (last visited Mar. 5, 2019) (unofficial translation).

72. Karl-Heinz Bockstiegel, *The Legal Rules Applicable in International Commercial Arbitration Involving States or State-Controlled Enterprises, in* 60 YEARS OF ICC ARBITRATION: A LOOK AT THE FUTURE 117, 133 (1984).

At least three modern arbitration awards have enforced the allocation-of-risk form of contract stabilization against the host government's state enterprise.[73]

H. *Renegotiation Clauses in Host Government Contracts*

These clauses do not stabilize the law or the contract; instead, they stabilize the value of the investment by adjusting contract terms in response to adverse government actions.[74] To protect the IOC's investment, the clauses should contain the following elements: (1) a triggering event that adversely affects the investor's economic benefits, economic equilibrium, or rights and obligations; (2) a mandatory procedure requiring renegotiation to modify the parties' contract in response to the triggering event; (3) a statement of the end result to be achieved by this procedure, i.e., an agreement to restore investor's economic benefits, economic equilibrium, or rights and obligations; and (4) a provision calling for recourse to international arbitration when the parties cannot reach agreement on the appropriate changes to their contract.[75] For the most part, IOCs successfully resist requests by host governments and NOCs for a mutual—two-way—right of renegotiation, especially when host governments and NOCs want to define the triggering event broadly to include a change of circumstances.[76]

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73. *See, e.g.*, Himpurna Cal. Energy Ltd. v. PT. (Persero) Perusahaan Listruik Negara, Ad-Hoc Award, ¶¶ 101, 132-135 (May 4, 1999); Mobil Cerro Negro, Ltd. v. Petroleos de Venez., Case No. 15416/JRF/CA, Final Award, ¶¶ 543 (Dec. 23, 2011); Phillips Petrol. Co. Venez. Ltd. et al. v. Petroleos de Venez., Case No. 16848/JRF/CA, Final Award, ¶¶ 205-217 (Sept. 17, 2012) (on file with author).

74. *See generally* WOLFGANG PETER, ARBITRATION AND RENEGOTIATION OF INTERNATIONAL INVESTMENT AGREEMENTS (2d ed. 1995); ADAPTATION AND RENEGOTIATION OF CONTRACTS IN INTERNATIONAL TRADE AND FINANCE (Norbert Horn ed., 1985); Zeyad A. Al Quarshi, *Renegotiation of International Petroleum Agreements*, 22 J. INT'L ARB. 261 (2005); Piero Bernardini, *The Renegotiation of the Investment Contract*, 13 ICSID REV. FOREIGN INV. L.J. 411 (1998); Paul Kuruk, *Renegotiating Transnational Investment Agreements: Lessons for Developing Countries from the Ghana-VALCO Experience*, 13 MICH. J. INT'L L. 43 (1991); Jeswald W. Salacuse, *Renegotiating International Project Agreements*, 24 FORDHAM INT'L L.J. 1319 (2001); Thomas W. Wälde, *Renegotiating Acquired Rights in the Oil and Gas Industries: Industry and Political Cycles Meet the Rule of Law*, 1 J. WORLD ENERGY L. & BUS. 55 (2008).

75. *Cf.* Klaus Peter Berger, *Renegotiation and Adaptation of International Investment Contracts: The Role of Contract Drafters and Arbitrators*, 36 VAND. J. TRANS. L. 1347, 1363-68 (2003) (discussing trigger events, duty to negotiate versus duty to agree, and arbitration as means of contract adjustment); Piero Bernardini, *Stabilization and Adaptation in Oil and Gas Investments*, 1 J. WORLD ENERGY. L. & BUS. 98 (2008) (discussing triggering events, including change of circumstances, and role of arbitrators in adapting contracts).

76. In the case of Ghana, however, the petroleum law required each petroleum agreement to provide for a review of its terms at any time a significant change occurs in the circumstances

The 1993 Production Sharing Contract between Esso Exploration and Production Nigeria Limited and the Nigerian National Petroleum Corporation contains a well-drafted renegotiation provision. Clause 19.2 provides:

> In the event that any enactment of or change in the laws or regulations of Nigeria or any rules, procedures, guidelines, instructions, directives or policies, pertaining to the Contract introduced by any Government department or Government parastatals or agencies occurs subsequent to the Effective Date of this Contract which materially and adversely affects the rights and obligations or the economic benefits of the CONTRACTOR, the Parties shall use their best efforts to agree to such modifications to this Contract as will compensate for the effect of such changes. If the Parties fail to agree on such modifications within a period of ninety (90) days following the date on which the change in question took effect, the matter shall thereafter be referred at the option of either Party to arbitration under Article 21 thereof. Following [the] arbitrator's determination, this Contract shall be deemed forthwith modified in accordance with that determination.[77]

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prevailing at the time the parties entered into the agreement (or since the last review of the agreement). *See* Ghana Petroleum Exploration and Production Law, 1984, P.N.D.C.L. 84 § 13 (Ghana). Accordingly, the Petroleum Agreement covering the Deepwater Tano Contract Area contains provisions providing for a party to give notice when it considers that a significant change in circumstances occurred. While the provisions require the parties to meet to engage in negotiations regarding contract modifications, they do not require the parties to reach agreement. *See* Ghana Petroleum Agreement, *supra* note 27, arts. 26.4-26.5. The 2016 Petroleum (Exploration and Production) Act, enacted after the parties entered into the Deepwater Tano Petroleum Agreement, states that the terms of a petroleum agreement may be reviewed by the parties to the agreement where there is a material change in the circumstances that prevailed at the time the agreement was executed or at the last review of the agreement. *See* Petroleum (Exploration and Production) Act, 2016 (Act 919) § 20 (Aug. 19, 2016) (Ghana).

77. Production Sharing Contract between Nigerian National Petroleum Corporation and Esso Exploration and Production Nigeria Limited cl. 19.2 (May 21, 1993) (on file with author). The arbitral tribunal in Esso Expl. and Prod. Nigeria Ltd. and Shell Nigeria Expl. and Prod. Co. v. Nigerian Nat'l Petrol. Corp., Final Award ¶ 370, at 106 (Oct. 24, 2011) (on file with author), determined that Claimants proved "they are entitled to relief under the stabilization clause [Clause 19.2] to prevent future overlifting by NNPC based on the changes in the FIRS' [the Nigerian tax authority's] policies." They also found that all four requirements under Clause 19.2 had been met, and ordered modification of the PSC to add a provision at Clause 8.1(i) to allocate Profit Oil to Contractor in the future to ensure its compensation in the event that the change in FIRS' policy results in a future difference between Tax Oil as it existed on the effective date of the PSC and Tax Oil resulting from application of the policy as it exists as of the date of the Final Award.

This provision stands out because of the simplicity and clarity with which it sets forth Contractor's right of renegotiation, the detailed list of legal rules and norms whose change could trigger renegotiation, the identification of "rights and obligations or the economic benefits of the Contractor" (but not economic equilibrium) that could be adversely affected by those changes, the explicit right of recourse to arbitration if agreement on contract modifications cannot be reached, and the unusual coda that the PSC shall be deemed modified by the arbitrator's determination. An example of a supremely robust, much more complex renegotiation provision favoring Contractor can be found in Article 40.2 Change of Law of the 1997 Kashagan PSC.[78]

I. *Enactment of the Contract into Law*

While under civil law systems a contract has the force of law,[79] enactment of the host government contract into law by the parliament of the host country takes the legal status of this contract an important step further. Some countries, notably Azerbaijan and Egypt, have historically included a provision in the host government contract requiring its approval by the government. Leaving no doubt about the primacy of the contract over the law resulting from this approval, the Azerbaijan PSCs state:

> Upon approval by the Parliament of the Azerbaijan Republic of this Agreement, this Agreement shall constitute a law of the Azerbaijan Republic and shall take precedence over any other current or future law, decree or administrative order (or part thereof) of the Azerbaijan Republic which is inconsistent with or conflicts with this Agreement except as specifically otherwise provided in this Agreement.[80]

The Egyptian PSCs reinforce the effect of approval by the competent authorities in similarly forceful terms by stating that the petroleum

78. Production Sharing Agreement in North Caspian Sea to Engage in Exploration and Production art. 40.2 (Nov. 18, 1997) (on file with author).

79. *See, e.g.*, CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1134 (Fr.); Civil Code art. 147 (Egypt); Codigo Civil de la Republica de Venezuela [CIV. CODE] art. 1159 (Venez.).

80. *See, e.g.*, Agreement on the Exploration, Development and Production Sharing for the Karabakh Prospective Structure and Area Adjacent in the Azerbaijan Sector of the Caspian Sea art. 22.1 (Nov. 10, 1995) (on file with author) [hereinafter Karabakh PSC]. For a thorough examination of the legal status of Azerbaijan PSCs as contracts, contracts with force of law, contacts as the law, or international treaties, see Alum Bati, *The Legal Status of Production Sharing Agreements in Azerbaijan*, 21 J. ENERGY & NAT. RESOURCES L. 153 (2003). By 2003, Azerbaijan concluded 17 active PSCs.

agreement shall not be binding on any party unless and until the competent authorities issue a law authorizing the Minister of Petroleum to sign the agreement. This law gives the agreement full force and effect of law notwithstanding any countervailing government enactment.[81]

J. *"Contractualization" of Host Country Investment Protections*

Instead of adopting the contract into law, another stabilization method adopts the law as part of the contract, "contractualizing" stabilization protections set out in the investment or petroleum law by repeating key elements verbatim in the contract, so that they govern the parties' relationship for the life of their agreement. As one knowledgeable commentator noted about investment protections conferred by law, "[t]hese legislative protections only offer a limited guarantee to investors to the extent that what the law gives, it can also take away. As a result such mechanisms are often contractualized . . . ."[82]

From the late 1980s until adoption of the 2005 Hydrocarbons Law, Algeria "contractualized" a core investment protection accorded contractors under the 1986 Hydrocarbons Law in the Algerian PSCs. Article 39 of that law included an allocation of risk form of stabilization:

> The national company shall pay royalties on the whole production and the corresponding income tax, when it carries out its activities alone or when the foreign partner's profit-sharing is in another form than as specified in article 38 above. In this case, the national company shall make available to the foreign partner the share of the production of the discovered field owed to him as profitsharing, FOB port of loading, free of all charges and taxes as well as petrofiscal obligations or repatriation of funds.[83]

The Algerian NOC, Sonatrach, "contractualized" this language in its PSCs, usually including it in the lifting provision.[84] For example, Article

81. *See, e.g.*, Model Concession Agreement for Petroleum Exploration and Exploitation between Egypt, EGPC & Contractor, art. XXXI (2016), https://apexintl.com/wp-content/uploads/2018/04/7-2016-EGPC-Model-Agreement.pdf (last visited Feb. 26, 2019).

82. Montembault, *supra* note 18, at 600.

83. Law No. 86-14 (Concerning Activities of Prospection, Research, Exploitation and Pipeline Transportation of Hydrocarbons) art. 39, JORA 35 (Aug. 27, 1986) (Alg.).

84. In the 1993 Production Sharing Contract between Sonatrach and LL&E, the parties included this language in the definition of "FOB". *See* Contract for Exploration and Production of

19.2 of the 1997 Model PSC reads: "[t]he PARTNER shall lift its share of Crude Oil production free of all charges and taxes (except the income tax paid on its behalf by SONATRACH), and of any petroleum fiscal liabilities and/or liabilities associated with fund repatriation."[85] Sonatrach owned all hydrocarbons produced at the wellhead, and Contractor only took title to its share of production once the hydrocarbons passed through the flange connecting the hose at the loading berth to the marine export vessel at the port of loading.[86]

K. *Anti-Expropriation Clauses*

Foreign investors can anticipate the possibility of expropriation or nationalization of their investments in their contracts with the host government or NOC in three ways.[87] They can exact a promise from the government that it will not expropriate their contract or investment. Alternatively, they can address the method of compensation. And of course the investment contract could both prohibit expropriation and specify the remedy if it occurs.

An express, bluntly worded guaranty of stability would seem sufficient to protect against even the most extreme type of adverse governmental action, an outright taking of the investment. However, in the arbitral award in the *Aminoil* expropriation case concerning Kuwait's termination of its concession, the tribunal famously declared:

> No doubt contractual limitations on the State's right to nationalize are juridically possible, but what that would involve would be a particularly serious undertaking which would have to be expressly stipulated for, and be within the regulations governing the conclusion of State contracts; and it is to be expected that it should cover only a relatively limited period.[88]

Hydrocarbons art. 2.11 (Sept. 21, 1993), *in* BARROWS NORTH AFRICA BASIC OIL LAWS & CONCESSION CONTRACTS Supp. 138 at 45 (2002).

85. Model Algerian Contract for the Exploration and Exploitation of Hydrocarbons between Sonatrach and Partner art. 19.2 (1997) (on file with author).

86. *See id.* art. 24.

87. Expropriation refers to the taking by the State of the property, including contractual rights, of the owner of that property, while nationalization refers to the unilateral transfer by the State to the State or its nationals of the property and activities of an entire industry or economic sector. *See* SCHRIJVER, *supra* note 42, at 285-86.

88. AMINOIL Final Award, *supra* note 49, at 1023.

Article 17 of the parties' Concession Agreement of 1948 provided in part: "[t]he Shaikh shall not by general or special legislation or by administrative measures or by any other act whatever annul this Agreement . . . ." Despite the presence of this provision, the tribunal determined that "[t]he case of nationalization is certainly not expressly provided against by the stabilisation clauses of the Concession."[89] The tribunal found that the contract had undergone great changes since 1948, changes conceded often unwillingly, but conceded nevertheless, by the Company, which brought about a metamorphosis of the whole character of the Concession.[90]

A 1995 Gabon EPSC addresses the issue of compensation for expropriation elegantly in very few words: "[t]otal or partial nationalization or expropriation of the Contractor's rights entail just and equitable compensation in accordance with internationally accepted rules and principles."[91] A Kazakhstan contract of about the same vintage includes a more elaborate approach worth quoting in full:

> If any of the Joint Company's rights or those of the Joint Company Parties, interests or property provided for herein are expropriated, nationalized or otherwise taken by reason of any act of the Government or any other authority of the Republic, then the arbitrators shall apply the principle of indemnification at the full market value, on the basis of an ongoing concern, assuming a willing buyer and seller in a non-hostile environment, and disregarding the unfavorable circumstances under which or following which the Joint Company or the Joint Company Parties shall be deprived of its rights, interests or property. The arbitrators shall select an investment bank of good international reputation for purpose of appraising the full market value of said rights, interests or property of the Joint Company, or the Joint Company Parties.[92]

This provision gets right to the point by addressing the subject of compensation in the context of an arbitration. In an unusual proviso, it specifically requires the arbitral tribunal to engage an investment bank of good international reputation to value the loss.

89. *Id.* ¶ 94.

90. *Id.* ¶ 97.

91. Gabon EPSC, *supra* note 25, art. 43.3.

92. Petroleum Exploration, Development, Production and Marketing Contract between Kazakhstan and Kazakhturkmunai Ltd. art. 23.9 (May 31, 1994) (on file with author).

L. *Anti-Stabilization Nullification Provisions*

These provisions foresee the possibility that the host government may adopt a law or issue a decree that purports to render stabilization provisions in existing investor-state contracts inoperative or unlawful.[93] In other words, these provisions are designed to protect against direct attack by the government on prior promises of contract stability. While rarely encountered, they do exist. They may take a direct or indirect approach to this ultimate threat to an investment. More than a basic stabilization guaranty, these provisions acknowledge the possibility and prohibit the application of any new law to the contract that presumes to strip the investor of the protection of promises of stability made by the government or NOC in the host government contract. Anti-stabilization nullification provisions protect the stabilization provisions by expressly excluding them from the parties' choice of the host government's law, as in the applicable law provisions of a Mozambique EPCC: "[r]eferences in this EPC to applicable law [Mozambican law] are without prejudice to the rights of the Parties under Article 27.14 when such applicable law is Mozambican law."[94] The referenced article contains a mandatory renegotiation provision, with a health-safety-environmental carve-out. This form of anti-stabilization nullification provision specifically shields the renegotiation provision from application of the host government's law that could render it inoperative or nullify its terms. Alternatively, the contract could include an explicit promise by the NOC not to assert the invalidity or unenforceability of stabilization provisions in a future arbitration or other legal proceeding.[95]

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93. For example, in adopting the tax on exceptional profits in July 2006 by amending Article 101 of the 2005 Hydrocarbons Law, Algeria declared at the end of Article 101 that any agreement contrary to the above provisions is null. This nullification declaration targeted the stabilization provisions in the Algerian PSCs. *See* Order No. 06-10 (July 29, 2006), amending and completing Law No. 05-07 of Apr. 28, 2005 relating to hydrocarbons, JORA 9 (Alg.).

94. Exploration and Production Concession Contract between Government of the Republic of Mozambique and ENI East Africa S.p.A. and Empresa Nacional de Hidrocarbonetos, E.P., for Area 4 Offshore Rovuma Block art. 31.3 (Dec. 2006), https://www.resourcecontracts.org/contract/ocds-591adf-2561344209/view#/pdf (last visited Feb. 26, 2019).

95. *Cf.* Terki, *supra* note 55, at 47 (stating that "whenever a State or public body agrees in full knowledge of the matter to underwrite a clause freezing applicable law in a long-term international contract, this means that it has by that very fact consented to an assurance that its foreign partner's interests will be safeguarded, by undertaking not to avail itself of any legislative or regulatory modifications that may take place a posteriori. In other words, even though the State obviously preserves all its sovereign powers to enact new laws or regulations, these innovations cannot be invoked against the firm benefiting from such a guarantee . . . .").

M. *Hybrid Stabilization Clauses and Systems*

More often than not, the presence of one stabilization provision indicates the presence of others in a host government contract. Sometimes, more than one type appears in the same clause. Clause 16, Company's Rights Ensured, of the 1955 Libya Model Deed of Concession includes four types of contract stabilization in two short paragraphs:

> (1) The Government of Libya will take all steps necessary to ensure that the Company enjoys all the rights conferred by this Concession. The contractual rights expressly created by this concession shall not be altered except by mutual consent of the parties.
>
> (2) This concession shall, throughout the period of its validity, be construed in accordance with the Petroleum Law and the Regulations in force at the time of granting the Concession. Any amendment to or repeal of these regulations shall not affect the contractual rights of the Company without its consent.[96]

These two paragraphs contain, in order of appearance, a guaranty of stability, an intangibility clause, a "freezing" by incorporation provision, and an inopposability provision, all neatly packed together. But sometimes the provisions can be found in multiple, disparate parts of the contract, for example, in the taxation, lifting, applicable law, and miscellaneous provisions, creating a complicated hybrid stabilization system. This makes keeping tabs on the various provisions challenging during the drafting and negotiation of the contract and also later when a dispute arises.

To maximize stabilization protection in an investment contract, the drafter should take care to preserve the independence of the different stabilization mechanisms. This need becomes acute when, as often the case, the contract also contains a renegotiation provision. When a dispute arises, host governments and NOCs may argue that the presence of a renegotiation clause indicates that the contract contains no other form of contract stabilization. By making this argument, the government or NOC seeks not only to dismiss the possibility of other provisions, but to channel the dispute through a renegotiation process that may have an uncertain outcome, depending largely on whether the

96. Libya Model Concession, *supra* note 52, cl. 16.

agreement to renegotiate constitutes an agreement to agree or merely an agreement to negotiate.

As one way to try to minimize the appeal of this argument, avoid including a renegotiation clause in the same article of the contract with other forms of contract stabilization. As one way to address this issue head on, the contract could declare the parties' intention that all stabilization clauses provide maximum investment protection to Contractor and that the presence of one form of stabilization should not be construed to undermine or negate any other form. An equally effective approach, and one probably less likely to give offense, would be to state unambiguously that Contractor can invoke its stabilization rights separately or collectively in its sole discretion based on the nature of the dispute and any losses suffered thereby.[97] The contract could also expressly carve out the other mechanisms from the right to renegotiate. Exercise of the right to renegotiate should be discretionary, but once invoked, the requirement to reach agreement should be mandatory.

Hybrid stabilization systems can be complex and present significant drafting challenges. The investment protections set out in the Russian Federation 1995 Law on Production Sharing Contracts contain: an inopposability provision (Art. 1(4)); a tax exemption (Art. 13(1)); an allocation of risk provision (Art. 13(1)); inopposability, intangibility, and renegotiation provisions (Art. 17(1)); a renegotiation provision (Art. 17(2)); a guaranty of stability (Art. 18(1)); and another inopposability provision (Art. 18(2)).[98] The Ghana Deepwater Tano Petroleum Agreement contains: an exemption from taxes, duties, fees, or other imposts, subject to certain explicit exceptions (Arts. 12.1-12.2); a guaranty of stability (Art. 26.2); intangibility, inopposability, and "upside" provisions (Art. 26.3); renegotiation provisions (Arts. 26.4-26.5); and a contract-as-the-law provision requiring ratification of the Petroleum

97. For example, as previously noted, the Qatar Model Agreement, *supra* note 22, makes the Government responsible for paying Qatar income tax on behalf of Contractor and exempts Contractor from any other tax. Separately, in Article 18.12 the Agreement gives Contractor the right to request from the state company Qatar Petroleum (QP) a modification of the Agreement to restore Contractor's economic position if the Government or QP subjects Contractor to any additional taxes. This system of stabilization gives Contractor the choice of how to respond to the imposition of new taxes: make a claim for breach of the Government's promise or make a request to QP for contract modification.

98. FEDERAL LAW NO.225-FZ ON PRODUCTION SHARING AGREEMENTS (Dec. 30, 1995) (Russ.), https://www.wto.org/english/thewto_e/acc_e/rus_e/WTACCRUS48_LEG_76.pdf (last visited Mar. 5, 2019).

Agreement by the Ghanian Parliament (Art. 26.10).[99] The 2007 Kurdistan Regional Government of Iraq Model PSC may represent current day state-of-the-art in upstream contractual stabilization systems, as it contains: allocation of risk provisions (Arts. 16.14, 25.9, 26.9, 29.5, 29.9(a)); a guaranty of stability (Art. 43.2); a guaranty coupled with a renegotiation provision (Art. 43.3); a renegotiation provision requiring submission to arbitration if parties are unable to agree within 90 days (Art. 43.4); an "upside" provision (Art. 43.5); an intangibility provision (Art. 43.7); and a provision stating that the Ministry of Natural Resources in the Kurdistan Region approves the Contract (Art. 43.10).[100] The 2018 Egypt Model Concession Agreement for Petroleum Exploration and Exploitation contains the following stabilization protections: allocation of risk provisions (Art. III (g)); inopposability provisions (Arts. XVIII(a), XVIII(e), XXIV(h)); intangibility provision (Art. XVIII(d)); renegotiation provisions (Art. XIX); and a contract-as-the-law provision (Art. XXXI).[101]

III. Choice of Law in Host Government Contracts

A. *Expansion and Limitation of Host Country's Law*

Choice of law stands as the second "pillar" of contract stabilization, together with stabilization clauses and international arbitration.[102] In

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99. Ghana Petroleum Agreement, *supra* note 27, arts. 12.1-12.2, 26.2-26.5, 26.10.

100. Kurdistan Regional Government of Iraq 2007 Model Production Sharing Contract arts. 16.14, 25.9, 26.9, 29.5, 29.9(a), 43.2-43.5, 43.7, 43.10, *in* James Barnes, Sample Granting Instruments, Iraq-Kurdistan 1-112 (2012) [hereinafter Kurdistan 2007 Model PSC].

101. Egypt 2018 Model Concession Agreement, *supra* note 35, arts. III(g), XVIII(a), XVIII(d), XVIII(e), XIX, XXIV(h), XXXI.

102. *See generally* Ahmad A.K. Al Saedan, *The Law Governing Oil Concession Agreements and the Permanent Sovereignty of States over their Natural Resources, with Special Reference to Islamic Shari'ah Law* (Feb. 1992) (Ph.D. thesis); Bernard Audit, *Choice of the Applicable Law By the Parties, in* 11 The Application of Substantive Law by International Arbitrators 1, 10-21 (Fabio Bortolotti & Pierre Mayer eds., 2014); Taida Begic, Applicable Law in International Investment Disputes 13-25 (2005); Piero Bernardini, *Law Applied by International Arbitrators to State Contracts, in* Law of International Business and Dispute in the 21st Century 51-66 (Robert Briner et al. eds., 2001); Karl-Heinz Bockstiegel, Arbitration and State Enterprises: A survey on the national and international state of law and practice 27-34 (1984); Henry Cattan, Law of Oil Concessions in the Middle East and North Africa (1967); Richard H. Kreindler, *Law Applicable to International Investment Disputes, in* Arbitrating Foreign Investment Disputes 401-24 (Norbert Horn ed., 2004); Odilon Evrard Ngoundou, A Study of the Legal Problems of State Contracts: The case of Petroleum Contracts 47-66 (2011); Wolfgang Peter, Arbitration and Renegotiation of International Investment Agreements 131-200 (2d ed. 1995); D.A.G. Sarre, *Arbitration Clauses in the Oil Industry in the Middle East, in* International Commercial Arbitration: Documents and Collected Papers 336-93 (Clive M. Schmitthoff ed., 1974-1975) [hereinafter D.A.G. Sarre]; Simon G. Siksek, Legal Framework for Oil Concessions in the

fact, choice of law provisions sometimes consist of stabilization clauses in the form of "freezing" by incorporation and inopposability provisions.[103] Brown emphasizes the importance of choice of law for contract stability:

> [The anxieties of the foreign investor] are more likely to focus on the possibility that the contractual obligations of the government may be discharged or modified by an exercise of the legislative competence of the State. If such an event occurs the contract as originally agreed between the parties no longer exists, and remedies for breach of it may not be strictly in point. It follows that in a situation in which the dominant concern of the foreign investor is with the legislative competence of the State, attention, in the first instance, at least, must focus on questions concerned with the proper law of the Contract.[104]

ARAB WORLD 15-42 (1960); SHAVARSH TORIGUIAN, LEGAL ASPECTS OF OIL CONCESSIONS IN THE MIDDLE EAST 34-98 (1972); A. Broches, *Choice-of-Law Provisions in Contracts with Governments, in* INTERNATIONAL CONTRACTS: CHOICE OF LAW AND LANGUAGE 64-76 (Willis L.M. Reese ed., 1962); Georges R. Delaume, *Proper Law of State Contracts Revisited*, 12 ICSID REV.-FOREIGN INV. L.J. 1 (1997); A.B. Derman et al., *Choice of Law Provisions when Drafting Arbitration Provisions for International Oil and Gas Agreements*, 3 TDM 2 (Apr. 2006); Ahmed S. El-Kosheri & Tarek F. Riad, *Law Governing a New Generation of Petroleum Agreements: Changes in the Arbitration Process*, 1 ICSID REV.-FOREIGN INV. L.J. 257 (1986); Abolbashar Farmanfarma, *Oil Agreement between Iran and the International Oil Consortium: The Law Controlling*, 34 TEX. L. REV. 259 (1955); Carmen Otero Garcia-Castrillón, *Reflections on the Law Applicable* to *International Oil Contracts*, 6 J. WORLD ENERGY. L. & BUS. 129 (2013); F.A. Mann, *Law Governing State Contracts*, 21 BRIT. Y.B. INT'L L. 11 (1944); Andrew N. Onejeme, *Law of Natural Resources Development: Agreements Between Developing Countries and Foreign Investors*, 5 SYRACUSE J. INT'L L. & COM. 1 (1977); Rouhollah K. Ramazani, *Choice-of-Law Problems and International Oil Contracts: A Case Study*, 11 INT'L & COMP. L.Q. 508 (1962); Eduardo Silva Romero, *Dialectic of International Arbitration Involving State Parties: Observations on the Applicable Law in State Contract Arbitration*, 15 ICC INT'L COURT ARB. BULLETIN (Fall 2004); Pierre-Yves Tschanz, *Contributions of the Aminoil Award to the Law of State Contracts*, 18 INT'L L. 245 (1984).

103. The Libya Model Deed of Concession states: "This concession shall, throughout the period of its validity, be construed in accordance with the Petroleum Law and the Regulations in force at the time of granting the Concession. Any amendment to or repeal of these regulations shall not affect the contractual rights of the Company without its consent." *See* Libya Model Concession, *supra* note 52, cl. 16(2). The choice of law clause in the dispute resolution provisions in the 2004 Ghana West Cape Three Points Petroleum Agreement directs any arbitral tribunal constituted pursuant to the agreement to apply the laws of Ghana in force on the Effective Date of the agreement, consistent with such rules of international law as may be applicable, including rules and principles applied by international tribunals. *See* Petroleum Agreement among Republic of Ghana, Ghana Nat'l Petroleum Corp., Kosmos Energy Ghana HC, and E.O. Grp. art. 24.8 (July 22, 2004), https://www.tullowoil.com/Media/docs/default-source/5_sustainability/petroleum_agreement_west_cape_three_points.pdf?sfvrsn=4 (last visited Sept. 23, 2019).

104. Roland Brown, *Choice of Law Provisions in Concession and Related Contracts*, 39 MODERN L. REV. 625, 632-33 (1976).

When negotiating choice of law with a host government, the investor normally wants to "internationalize" the applicable law, in order to subject the Sovereign to rules and norms not entirely within its control to define,[105] while the host government, as Sovereign, naturally wants only its law to apply.

Unless the host country agrees to application of the law of the investor's home country or of a third country or of international law, without application of its own law—a rare but not unknown occurrence[106]—the investor can proceed down two paths in negotiations with the host government over the applicable law. Those two paths may also intersect. The investor can seek to expand application of the host government's laws to include extra-state laws and norms, seek to limit or restrict application of the host government's laws, or pursue both options at the same time. Governments agree to go down these paths for basically the same reasons they agree to include stabilization provisions in their investment contracts.[107]

B. *Expanding Governing Law to Include Additional Laws and Norms*

No doubt exists that governments and investors can negotiate and enter into agreements that depart to greater or lesser extent from the law of the host countries. "[I]t is an accepted universal principle of both domestic and international laws that the parties to a mixed public and private contract are free to select in their contract the law to govern their contractual relationship."[108] If the parties fail to specify the applicable law in their investment contract, an arbitral tribunal asked to choose the applicable law may conclude that that failure indicates the

105. *Cf.* NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 3.137, at 198 (6th ed. 2015) ("One established safeguard against unfair or arbitrary action by the state party to the contract is to stipulate that the state's own law will apply only in so far as it accords with either public international law, the general principles of law, or some other system with accepted minimum standards.").

106. *See, e.g.*, Kurdistan 2007 PSC, *supra* note 100, art. 43.1. (providing that the Contract shall be governed by English law, together with any relevant rules, customs, and practices of international law, as well as by principles and practices generally accepted in petroleum producing countries and in the international petroleum industry).

107. For discussion of the reasons host governments accept contract stabilization, see *supra* notes 7-11 and accompanying text.

108. LIAMCO Award, *supra* note 41, at 92; *see* Convention on the Settlement of Investment Disputes between States and Nationals of Other States art. 42(1), Oct. 17, 1966, 575 U.N.T.S. 159 ("The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties.").

parties prefer another set of laws to govern their relationship.[109] Possible sources of expanded law include: (1) principles of law common to the home countries of the host government and the investors; (2) law of a third country; and (3) international law, including general principles of law.

A 1985 Syrian Exploration, Development and Production of Petroleum Contract offers a glaring example of what to avoid with respect to choice of law with multiple parties, each from a different country:

> Taking into account their different nationalities, this Contract shall for the purpose of arbitration be given effect and be interpreted and applied in conformity with principles of law common to the SYRIAN ARAB REPUBLIC, the UNITED STATES OF AMERICA, THE NETHERLANDS and the UNITED KINGDOM, and the FEDERAL REPUBLIC OF GERMANY, and in the absence of such common principles, then in conformity with the principles of law normally recognized by civilized nations in general, including those which have been applied by International Tribunals.[110]

This approach promises months if not years of testimony and deliberations by the tribunal on the applicable law, with recourse eventually to international law.[111]

The Azerbaijan Republic included English law and the law of the Canadian province of Alberta as part of the elaborate choice of law provisions in its PSCs:

> This Agreement shall be governed and interpreted in accordance with principles of law common to the law of the Azerbaijan Republic and English law, and to the extent that no

109. *Cf.* ARAMCO Final Award, *supra* note 48, at 156 ("The Arbitration Tribunal holds, therefore, that it has to ascertain the law to be applied to the merits according to the indications given by the Parties and, failing adequate indications of the Parties, to determine this law taking all the circumstances of the case into consideration.").

110. Syrian Arab Republic Contract for the Exploration, Development and Production of Petroleum art. 23, (Aug. 21, 1985), *in* 26 INT'L LEGAL MATERIALS 1186, 1213 (1987).

111. This provision appears modeled on Article 46 of the Consortium Agreement of 1954 between Iran and the National Iranian Oil Company on the one hand and a group of American, British, Dutch, and French oil companies on the other hand, which settled the dispute over Iran's 1951 nationalization of Anglo-Iranian Oil Company (renamed British Petroleum in 1954). *Cf.* D. A.G. Sarre, *supra* note 102, at 339–43, Annex I, n. 3 (discussing the evolution of choice-of-law provisions in Iranian petroleum contracts).

> common principles exist in relation to any matter then in accordance with the principles of the common law of Alberta, Canada (except for laws regarding conflicts of laws).[112]

Historically, Alberta has been the main oil producing province in Canada.[113] Possibly inspired by nearby Azerbaijan, the Kurdistan Regional Government of Iraq established an oil company-friendly legal regime in its 2007 PSC based on English law, "together with any relevant rules, customs and practices of international law, as well as by principles and practice generally accepted in petroleum producing countries and in the international petroleum industry."[114]

The famous choice of law provision in the 1955 Libya Model Deed of Concession seems to present a shorter path than the one laid out in the Azerbaijan and Kurdistan contracts; it provides for application of the host country's law plus international law:

> This Concession shall be governed by, and interpreted in accordance with, the principles of law of Libya common to the principles of International Law and in the absence of such common principles then by and in accordance with the general principles of law, including such of those principles as may have been applied by International Tribunals.[115]

The Turkmenistan 1997 Model Production Sharing Agreement takes choice of the host country's law, plus international law, to the next level. It states: "[t]his Agreement shall be governed by, interpreted and construed in accordance with the Law of Turkmenistan and as applicable, the principles of international law and the decisions of international tribunals and international treaties to which Turkmenistan is a party."[116] The last phrase brings into the model contract Turkmenistan's investment treaty obligations.

What does it mean when an IOC and host government agree on application of international law? Article 38(1) of the Statute of the International Court of Justice identifies four sources of International

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112. *See, e.g.*, Karabakh PSC, *supra* note 80, art. 22.1.

113. *See* Nigel Bankes, *Canada*, *in* UPSTREAM LAW AND REGULATION 401, 401 (Eduardo G. Pereira & Kim Talus eds., 2017).

114. *See* Kurdistan 2007 Model PSC, *supra* note 100, art. 43.1.

115. Libya Model Concession, *supra* note 52, cl. 28(7).

116. Model Production Sharing Agreement for Petroleum Exploration and Production in Turkmensitan pt. 1, art. 29.1 (Mar. 20, 1997), http://www.fao.org/faolex/results/details/en/c/LEX-FAOC081989 (last visited Jan. 31, 2020).

Law: international conventions establishing rules expressly recognized by the contesting states; international custom, as evidence of a general practice accepted as law; the general principles of law recognized by civilized nations; and judicial decisions and writings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[117] While host government contracts rarely expressly incorporate Article 38(1) by reference, one concession did so in 1933, requiring that the arbitral "award shall be based on juridical principles contained in Article 38 of the Statutes [sic] of the Permanent Court of International Justice. There shall be no appeal against the award."[118]

Professor Salacuse defines "international conventions" as used in Article 38(1) in the following way:

> International conventions are binding agreements between or among states. International conventions have a variety of designations: treaty, agreement, protocol, pact, convention, and covenant, among others . . . Despite their differences in name, each . . . has the same binding effect on the states that have consented to them. The particular name given to an international agreement has no consequence as to its legal force or the binding effect it has on its parties.[119]

He further notes that if a treaty gains wide acceptance among states, it will be deemed to constitute international customary law and will have binding effect even on non-signatories.

Customary international law requires two key elements: (1) a relatively uniform and consistent state practice regarding a particular matter, and

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117. Statute of the International Court of Justice art. 38(1), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993; *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 (AM. LAW INST. 1987) (declaring under the heading "Sources of International Law": "A rule of international law is one that has been accepted as such by the international community of states (a) in the form of customary law; (b) by international agreement; or (c) by derivation from general principles common to the major legal systems of the world.").

118. Anglo-Persian Oil Company Concession Agreement art. 22(F) (Apr. 29, 1933), *in* D.A.G. Sarre, *supra* note 102, at 336, Annex I, n. 2. The AIPN 2017 Model Dispute Resolution Agreement, *supra* note 7, § V(J), at 4, provides in part: "The substantive law of ____ [designate state/country], to the extent consistent with international law, as defined in Article 38 of the Statute of the International Court of Justice . . . shall apply to the determination of [disputes, claims, or controversies of any nature arising out of or relating to this Agreement . . .] between or among the Parties."

119. SALACUSE, *supra* note 7, § 13.2, at 306.

(2) a belief among states that such practice is legally compelled.[120] Under customary international law, a state is responsible for economic injury to nationals of other states resulting from a taking by the state of the property of the national of another state that is not for a public purpose, or is discriminatory, or is not accompanied by provision for just compensation.[121] A state may also be responsible under customary international law for injury resulting from a repudiation or breach by the state of a contract with a national of another state where the repudiation is discriminatory or motivated by non-commercial considerations, and compensatory damages are not paid, or for injury from other arbitrary or discriminatory acts or omissions by the state that impair property or other economic interests of a national of another state.[122]

General principles of law recognized by civilized nations constitute the third source of international law under Article 38(1) of the ICJ Statute.[123] The drafters of this article regarded general principles of law as a type of safety net in the event that neither treaty nor custom provided the rules necessary to resolve a dispute.[124] They include principles that exist in national laws of states worldwide, general principles of law derived from the specific nature of the international community, principles intrinsic to the idea of law, and general principles of law that appear to arise from notions of natural law or natural justice.[125] These principles include: duty of good faith; *pacta sunt servanda* (contract should be honored); doctrine of unjust enrichment; estoppel and acquiescence; respect for acquired rights; rights must not be abused; obligation to repair a wrong; principle of res judicata (a final judgment on merits is conclusive between parties); passage of time as a defense to a claim; no one may be judge in his own case; non-aggravation of dispute before tribunal.[126]

120. *See* SEAN D. MURPHY, PRINCIPLES OF INTERNATIONAL LAW 78 (2006); *see also* SALACUSE, *supra* note 7, § 3.4, at 45 (noting "a customary rule of international law must meet two criteria: 1) it must be a general practice of states, and 2) states must engage in that practice out of a sense of legal obligation").

121. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 712 (AM. LAW INST. 1987).

122. *See id.*

123. *See generally* Emmanuel Gaillard, *Use of General Principles of International Law in International Long-Term Contracts*, 27 INT'L BUS. L. 214 (May 1999); Lord McNair, *The General Principles of Law Recognized by Civilized Nations*, 33 BRIT. Y.B. INT'L L. 1 (1957); JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 34-37 (2012).

124. *See* HILARY CHARLESWORTH, *Law-making and Sources*, *in* THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW 187, 195-96 (James Crawford & Martti Koskenniemi eds., 2012).

125. *See* Murphy, *supra* note 120, at 86-88.

126. *See id.*; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §102 cmt. l, rep. n. 7 (AM. LAW INST. 1987); RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 79 (2d ed. 2012).

The principle of *pacta sunt servanda*, as an expression of the principle of good faith,[127] when applied to international petroleum contracts, should stabilize their terms. The Association of International Petroleum Negotiators (AIPN) 2017 Model Dispute Resolution Agreement suggests as the governing law the substantive law of [designate state/country], to the extent consistent with international law, as defined in Article 38 of the Statute of the International Court of Justice, and to the extent the laws of [designate state/country] are not consistent with international law, then general principles of international law shall prevail.[128]

While the host country's law may already recognize most or all of the legal principles mentioned above, expanding the applicable law to encompass *both* the host country's law and international law, or general principles of international law, provides protection for investments based on application of international principles and doctrines (such as good faith, unjust enrichment, estoppel, and respect for acquired rights) as interpreted and applied by international tribunals. International law becomes especially useful in circumstances in which it may be deemed to prevail over contrary national laws promulgated by the host government after the parties entered into their contract.

C. *Limiting Application of Host Country's Law*

As noted, in addition to or in the alternative to expanding the host country's law to include principles of international law, the investor can negotiate to limit or reduce application of that law by insisting on one or more of the stabilization devices discussed above when confronted by the host government's demand that its law govern their contractual relationship. In this way, the investor can accede to the government's demand, but subject to inclusion of provisions in the contract that: (1) "freeze" the law by incorporation of a specific set of laws; (2) require the host government's law to be consistent with the terms of the investment contract; (3) require mutual written agreement to amend, modify, supplement, or vary the contract; (4) "contractualize" key provisions of the law; (5) allocate risk as the government or NOC's area of responsibility constituting a *lex specialis*; (6) limit the effect of changes in the law by requiring renegotiation to restore the original value of the contractual relationship; or (7) require enactment of the contract into law. As

127. *See* BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 113 (1953).

128. AIPN 2017 Model Dispute Resolution Agreement, *supra* note 7, ¶ 1(B), at 4.

discussed in the next section, the parties' choice of arbitral rules can also play an important role in limiting application of the host country's law.

IV. International Arbitration of Future Disputes

International arbitration offers the foreign investor and host government a neutral forum in which to resolve disputes under well-established, fair procedures. It represents the third "pillar" of contract stabilization. The prospect of effective, fair dispute resolution reinforces the host government's stabilization commitments and puts all parties on notice of the availability of an impartial legal forum for application of the parties' choice of law in the event of a dispute.[129] For projects in any country where political risk represents a significant investor concern, the investor should require, and the host government should accept, submission of disputes to international arbitration. Stabilization mechanisms and choice of law may mean very little when disputes, at the end of the day, must be settled in the host country's courts. In terms of investment protection, only two essential elements of an international arbitration agreement need to be mentioned here: choice of arbitral rules and designation of the seat (legal place) of arbitration.

A. *Reinforcement of Stabilization Promises through Choice of Arbitral Rules*

The parties' choice of arbitral rules provides the procedural framework for the arbitration process, and they should be incorporated by reference in the arbitration clause. They can be administered by an arbitral institution or non-administered. For purposes of contract stabilization, the applicable law provisions in these rules can carry important consequences. Typically, they recognize the parties' power to choose the applicable law, and they indicate what the tribunal should consider when the parties have not made that choice and determination of the applicable law falls to the tribunal. In addition, in several sets of arbitral rules the applicable law provisions provide for the arbitration tribunal to "take account" of the terms of the contract and trade usages. For example, Article 21(2) of the ICC Rules of Arbitration states: "[a]n arbitral tribunal shall take account of the provisions of the contract, if any,

129. *Cf.* Salacuse, *supra* note 7, § 2.6, at 34 ("The prospect of a suit in court or in arbitration and its associated costs will presumably encourage both government and private parties to respect and carry out the legal commitments that they have made with respect to the investment. Enforcement mechanisms are thus intended as constraints on human behavior that will assure predictability that is so vital to the international investment process.").

between the parties and of any relevant trade usages."[130] But other sets of arbitral rules, notably the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, the Swiss Arbitration Rules, and the Singapore International Arbitration Centre (SIAC) Rules, require that "[i]n all cases, the arbitral tribunal shall decide in accordance with the terms of the contract . . . ."[131]

According to the leading treatise on the UNCITRAL Rules:

> The significance of Article 35(3) is subtle and potentially important. . . . In essence, it could be said that in choosing the UNCITRAL Rules, the parties–in addition to, for example, making an explicit choice as to applicable rules of law–also direct the tribunal to decide in accordance with the terms of the contract. This is sometimes surprising to some: having chosen the applicable rules of law, the tribunal is nonetheless directed by Article 35 (3) to decide in accordance with the terms of the contract. This twist is in part a device aimed at fulfilling party expectations by avoiding surprises in the rules of law chosen that otherwise would disturb expectations expressed in the contract.[132]

The authors consider this directive in Article 35(3) to have established "[t]he strict primacy of the contract," and cite the drafting history of this provision.[133] In other words, this requirement, incorporated by reference into the parties' investment contract by the parties' choice of arbitration rules, can act as an anti-stabilization nullification provision, shielding the stabilization provisions in the contract from nullification

130. Int'l Chamber of Commerce [ICC], *Rules of Arbitration* art. 21(2) (Mar. 1, 2017).

131. G.A. Res. 65/22, UNCITRAL Arbitration Rules art. 35(3) (Dec. 6, 2010) (UNCITRAL is the United Nations Commission on International Trade Law); Swiss Chambers Arbitration Inst. [SCAI], *Swiss Arbitration Rules* art. 33(3) (June 2012); Singapore Int'l Arbitration Ctr. [SIAC], *Arbitration Rules* rule 31.3 (Aug. 1, 2016). The Arbitration Rules of the International Centre for Dispute Resolution speak in similar terms: "In arbitrations involving the application of contracts, the tribunal shall decide in accordance with the terms of the contract . . . ." International Centre for Dispute Resolution [ICDR], *Arbitration Rules* art. 31(2) (June 1, 2014). The new Arbitration Rules of the German Arbitration Institute may be the most emphatic on this point: "The arbitral tribunal shall decide on the merits in accordance with the provisions of the contract between the parties . . ." German Arbitration Institute [DIS], *Arbitration Rules* art. 24.3 (Mar. 1, 2018).

132. DAVID D. CARON & LEE M. CAPLAN, THE UNCITRAL ARBITRATION RULES: A COMMENTARY 121 (2d ed. 2012).

133. *Id.* & n.65.

by the host country's laws.[134] This would be true whether the parties or the tribunal chooses the applicable law.

B. *Key Role of Seat of Arbitration in Risk Mitigation*

The parties' designation of the seat (legal place) of arbitration also has important consequences for contract stabilization. The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (known as the New York Convention), approved by the U.N. General Assembly meeting in New York City in June 1958, provides the international legal framework for the enforcement of agreements to arbitrate and arbitral awards.[135] It applies to both foreign awards and "non-domestic" awards, the latter referring to awards not considered as domestic awards in the state where their recognition and enforcement are sought. Under Article V(1)(e) of the New York Convention, an arbitral award can normally only be set aside in its country of origin—the seat of arbitration.[136] This would mean, for example, that if the parties to an investment contract agreed to New Delhi as the seat of arbitration, only the national courts in India could set aside the award. In addition, the choice of the seat of arbitration determines the *lex arbitri* (the national arbitration law governing the arbitration

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134. Significantly, the PNG LNG Project Fiscal Stability Agreement expressly refers to Article 33.3 of the 1976 UNCITRAL Arbitration Rules [predecessor to Article 35(3) of the 2010 Rules] to reinforce its stabilization system. *See* PNG LNG Gas Agreement exhibit P cl. 5.3 (May 22, 2008) (PNG LNG Project Fiscal Stability Agreement), https://www.banktrack.org/download/png_lng_gas_agreement/080522_pnglngagreementexecutionversion.pdf (last visited Feb. 27, 2019).

135. Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V(1)(e), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38; *see also* Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, O.A.S.T.S. No. 42, 1438 U.N.T.S. 245 (hereinafter Panama Convention). For a comparison of the New York and Panama Conventions, see JOHN P. BOWMAN, PANAMA CONVENTION AND ITS IMPLEMENTATION UNDER THE FEDERAL ARBITRATION ACT 19-62 (2002).

136. Under Article V(1)(e) of the New York Convention, recognition and enforcement of the award may be refused on proof that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made. For this reason, the IOC must be careful that the language used in the applicable law provision does not suggest that the arbitration will be governed by the law of the host country. Otherwise, the courts there may have the power under the Convention to set aside the foreign award. *See* BLACKABY ET AL., *supra* note 105, ¶ 10.05, at 570; GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION § 22.04[A][1], at 2989-93 (2d ed. 2014); ALBERT JAN VAN DEN BERG, NEW YORK ARBITRATION CONVENTION: TOWARDS A UNIFORM JUDICIAL INTERPRETATION 349-50 (1981).

process),[137] and the choice of seat also confers on the courts at the place of arbitration personal jurisdiction over the parties to the agreement to arbitrate for court actions in aid of arbitration.[138] Under most circumstances, an IOC would not want to grant the power of "life or death" over an arbitration award concerning its investment to the courts of the host government. For that reason, most investors insist on a designation of the seat of arbitration outside the host country, for example, in Geneva, London, New York, Paris, Singapore, or Stockholm.

V. Recommendations Regarding Risk Mitigation in Investment Contracts with Host Governments or National Oil Companies

To ensure a robust risk mitigation system, the IOC should seek the following commitments:

- basic guaranty of legal and fiscal stability for the life of project (carve out health, safety, and environment (HSE) so long as HSE requirements in accordance with international standards and practices)
- tax incentives and exemption from other charges and/or express agreement on the specific fiscal terms that will apply to the project
- in the alternative to express agreement on the specific fiscal terms to apply to the project, a "freeze" of fiscal terms in the applicable law by incorporation by reference as of the date of signing host government contract
- inopposability provision assuring investors that any changes in law, regulations, or administrative decisions inconsistent with contract terms will not apply
- intangibility clause requiring that any amendments, modifications, supplements, or variations to the contract must be agreed in writing by all parties
- allocation of fiscal risk to host government or state enterprise
- renegotiation provision in event of adverse governmental action only if host government agrees that investors can

137. *Cf.* Blackaby et al., *supra* note 105, ¶ 3.54, at 172 (recognizing that the New York Convention continues the clear territorial link between the place of arbitration and the law governing that arbitration, the *lex arbitri*).

138. *See, e.g.*, Merrill Lynch, Pierce, Fenner & Smith Inc. v. Lecopulos, 553 F.2d 842, 844 (2d Cir. 1977) ("Merrill Lynch argues that the agreement to resolve disputes by arbitration in New York constituted consent to personal jurisdiction in New York. Merrill Lynch is correct.").

exercise right to renegotiate at their discretion and that other stabilization protections are independent of and enforceable in arbitration for breach thereof without recourse to renegotiation

- submission to arbitration by investors of any matter submitted to renegotiation that cannot be agreed within 90 days of notice, with arbitrators expressly empowered to modify contract to restore investors' rights and obligations and economic benefits
- anti-expropriation clause that calls for compensation based on full fair market value determined by international consultancy appointed by the parties or the arbitral tribunal
- applicable law to be host government's law to the extent consistent with international law, including general principles of law
- anti-stabilization nullification provision that insulates stabilization provisions from changes in host government's law
- arbitration in accordance with UNCITRAL Arbitration Rules
- seat of arbitration outside host country

Naturally, the extent to which the IOC can obtain all or some of these commitments remains to be seen. Specifically, the host government or NOC in question may ultimately refuse to accept some of the terms and commitments recommended above (or consider them not to comport with municipal law). As negotiations progress, the above list can be adjusted to ensure that the IOC and its co-investors obtain robust protections in a way commercially acceptable to government authorities and legally viable as a matter of host government law.

A minimum core set of commitments would comprise a guaranty of stability, inopposability provision, allocation of fiscal risk provision, choice of host government's law and international law, UNCITRAL Rules, and seat of arbitration outside host country.