



# Principles of international negotiations in terms of constancy in oil and gas contracts

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**Abstract:** *Constancy principle is a commitment that host government accepts through a contract not to have any right to change the contract or terminate it unilaterally out of the terms and conditions of agreement between, during execution of the contract. Such terms, noting sensitive nature of exploration and extraction in oil fields, are not only parts of foreign investors' interests, but also they are in line with some interest of host government, too, in some cases (like terms of second negotiations and conformity). Constancy terms are in different types including direct constancy term, imperceptible, economic ones and second negotiations, that have been ruled in many court's votes and judge's rote, although development countries have criticized it based on theory of contract requirements and developing countries have criticized it using doctrine of basic principle of state sovereignty over natural resources. Constancy principles could protect the contract content during execution of project completely constant and unchanged. It would be an unrealistic view to know when and why constancy terms were used in the past and how judges treat with constancy terms that are important for both companies and host countries. Registering constancy terms and economic balance in international oil contract are contract mechanism for economic and political risk management ruling over such contracts that have been focused by legal experts of international oil companies from the first year after nationalization and confiscation of large-scale actions in the nineteenth and twentieth century. In later years, many disputes were referred to the court of international/Arbitration regarding nationalization in developing countries and confiscation of property of foreign companies. The experts from oil companies claimed that since the topic dispute (oil contract) contains constancy terms, the host countries are not allowed to nationalize or confiscate property of foreign companies. In one hand, host countries also claimed that states' ownership over natural sources is considered to be a jus cogens and no commitment against it is not deemed valid. The international judges have tried in oil claims of decades 70 and 80 B.C. to indicate legal validation of constancy terms. In line with international transaction changes and evolutions (the tendency was from benefit toward. Collaboration and service contract); constancy terms have been changed, too and moved forward economic equilibrium terms. Since the terms are generated recently, arbitrary procedure is not made yet. Most of international lawyers rely on international conventions like convention of 1969 in Vienna regarding international contracts and international known terms like promise-keeping principle, to interpret legal validation of the terms. The international oil companies have relied on principles like proper and fair manner or non-discriminatory behavior in disputes announced to international arbitrary courts against host states in recent years, instead of relying on constancy terms.*

**Keywords:** *Constancy · contract · negotiation · extraction*

## INTRODUCTION

One of the actions carried out by oil and gas contracting companies, is the effort to minimize the risk resulted from control over the contract. Because exploration and exploitation of gas and oil, places the oil company in a

commercial condition in front of foreign country, that is so complicate. Owner state links the sources with international oil companies where volatility of capital receives a burden of risks and profits. The important issue in oil contracts is security of the process of contract, in contracting companies' view. The main question regarding security of oil transactions is nature and the extent of risk on the way of investment. Sources with long life and energy plans including exploration and extraction of oil need more constancy and stability compared with short life plans. The companies seek constancy for the present situation (Zahdi, 2013, 47). constancy. One way to decrease the risks is applying the constancy terms in international contracts .

1) Understanding constancy principle in oil and gas contracts:

The constancy term is a commitment in which the host government accepts in the contract not to have any right to change or terminate the contract unilaterally without observing rules and terms of agreement. There are different ideas suggested regarding constancy term that discussed in following.

The first idea suggests that in fact, constancy term is an emphasis on promise-keeping term in contract; so, maybe the term seems to be a tool to prefer the necessity of contract to be on basis of permanent sovereignty of nations on natural sources.

The second idea could be suggested as following:

1. Oil actions are associated with permanent sovereignty of states over natural capital directly.
2. The states are required to exploit the sources the best for welfare and interest of the nation.
3. Accordingly in case of calls for the public interest.
4. In case of lost and harm for the private party as a result of the changes, the injured party has the right to claim for lawsuit and damages because of stewardship and causality loss resulted from government' s action.
5. Regarding the first view, it is to say that the obligation principle is the primary rule but national sovereignty principle must be based on protecting public interest; therefore, this rule would be secondary. As a result, in executing the rules, the secondary is prior to the primary rule, since, otherwise there would be no space for secondary rules to be executed, and its validation would become ineffectual and ineffective, and since legislator doesn't perform in vain, national sovereignty rule is prior to the primary rule (obligation principle) in execution and inserting the aforementioned principle in contract lacks legal validity and enforcement.
6. Due to American law, the government is not allowed to insert the constancy term in the contracts and to deprive from right to change or terminate. The united states supreme Court has suggested in this regard that, private property confiscation to be used by public against fair compensation payment is something being necessary repeatedly because of government' s duties to be done properly and that' s why the mentioned Authority is a fundament basis regarding country' s life.

7. Based on English law, government's action to change or terminate the contract is permitted and is not deemed contract violation, since the changes are based on government's sovereignty right and a private contract is not to avoid the country from having the right over the country's natural sources (Lotfi, 2013, 53).

2) The concept of constancy principle in oil and gas contracts:

The constancy term is used in contracts with a long execution time, like oil and gas international contracts. The constancy term is registered in such contracts, aiming to protect the contract from actions may happen after ratification by host nation against the contract and law, ruling at the time of ratification. The actions of host state to avoid the execution of contract may be done through legislation (legislation of the law) or execution (rules). According to the procedure of state's activities, there is a distinction between the constancy principle in specific sense and not invasive term. The constancy principle in its specific sense is used when new nation's competence in legislating new law is deprived by the host government in order not for the contract to be executed. And not invasive term means that none of executive systems of the government not to be allowed to prevent the contract implementation (Doust Mohammadi, 2016, 29).

3) The relation of obligation principle with constancy principle in oil contracts:

In the present century, oil has been changed into one of the most important goods of the modern world, A good that is considered to be vital for national guidelines and indicator of international politics. All the same time with the modern industry of oil advent in developing countries in which the industries are almost and usually owned by state, international companies of oil are in authority to control the oil sources' exploration and exploitation by necessary capital and expertise. This situation requires the government and international oil company to come to agreement in some oil sources' extension. Since the oil agreements need so much money and long-time investments, it made international oil company to be subject to serious risks for a long time. The international oil company could take actions to decrease the risks using the contents of contract. One of the terms that registering it can cause specific problems and is so important; is the constancy principle. In fact, constancy principle is away to seek to guarantee the contract against future actions of state or changes made in law or legislation. The contract is declared in consortium agreement, article 41: "NO legislative or official action containing direct or indirect, and other actions of any kind (from Iran or authorities in Iran could lead to termination of the contract, and cannot change or modify the rules and cannot prevent or disturb its proper execution". In the hand, all the contracts based on law, are in line with a series of rules and principles. Civil legislator has introduced the joint rules and principles in articles 219 until 225 titled "general rules of contracts". The first principle discussed by legislator is the constancy principle. Thus, one of the legal principles ruling the international oil contracts is "the obligation principle of contracts"( Mostafavi, 2015, 91).

#### 4) Role of constancy principle in oil and gas contracts:

The constancy principles are present in all contracts particularly oil contracts, having a specific role in preventing the host state from enacting rules in contrary to contract and changing the law governing the contract.

The following factors are functions of constancy principle:

The government can use the special powers to modify the contract covering rules unilaterally; The constancy principle is used to do such unilateral actions. The governments often apply such a guarantee as a form of investment progress. Of course, the results are not always observed completely. Investors should pay enough attention in planning such mechanisms.

The constancy principles often have effort on order to decrease the government's power in changing concept of law. There is a technical to limit law controlling domain. Tunisian contract model is as following: "contractor must control the conditions of the contract to the same extent that all rules and guidelines have been enacted duly by granting authority that is not inconsistent and in conflict with convention or contract. It is also agreed that no new regulation or amendment, conflicting change or inconsistent one should be enacted according to the rules of contract or convention that is executable of course. Some rules fix the system in order to prevent any kind of changes in future in line with the condition of the selected law system as the rule governing the contract. Special terms regarding compensation of contractor with state are presented directly or indirectly in order to compensate the losses as a result of contract on the expenses by the contractor country (Lotfi ,2013 ,53).

#### 5) Grouping constancy terms in oil and gas contract:

Constancy principle is a special commitment based on which the foreign country is not allowed to change the content of contract through legislating or any other tool, without the other party's consent. By accepting constancy principle, the foreign government puts away the right in changing the commitments unilaterally and trusts the foreign oil company. This requirement is performed in both direct and indirect forms (Zahdi, 2013, 47)

#### 6) Classifying the constancy principles in oil and gas contract:

##### 6-1. direct constancy term:

It is done through stipulation in investment treaties based on commitment not to deprive the ownership by nationalizing the property and rights of citizens of the contracting parties regarding investment or through registering in the text of contract. The state's obligation to not change the terms is contractual (Talebi, 2014, 27).

##### 6-2. Indirect or intangible principle:

It is done through removing the portion of national law in the host country, in order for later changes not to be executed in contract in one hand, and in case of government's interference in contract, government's action is considered to be illegal in another hand, and the foreign company has the right to receive compensation. Other kind of constancy principle is a condition in which it is stipulated in the contract that understanding and goodwill should be noticed during execution. In each case, all have some aim that is, supporting private party in c contract in government's sovereignty.

7) The role of international arbitrary in settlement of disputes relating to constancy principle in oil and gas contracts:

The origin of oil claims is often violation of contract or nationalization of right and benefits of foreign oil companies by governments owning oil, that cause claims against the contract's governmental party naturally and as a consequence, judicial or arbitration procedures. For example, perhaps the host country increases the taxes without beforehand and written notice and announcement or violates the constancy principles affecting on benefits of foreign investor by enactment of new regulations and laws.

Thus, an exact foreigner investor stipulates with mentioning arbitrary term in the petroleum (gas and oil) contract that if the dispute is not settled by parties, referring to judge is necessary. In addition to above factors, arbitral principle should declare that arbitral verdict is absolute and binding for both parties. The host countries often prefer exploiting their legal and juridical system in settlement of disputes that of course, it may not be useful to foreigner investor, since the probability of host state's interference exists in court's verdict (Doust Mohammadi, 2016, 29).

8) Promise-fulfillment principle in constancy terms of oil and gas contracts:

One of the other principles being so important in legal rule execution basically is promise-fulfillment principle, so that kalsen hierarchical legal system is based on it and it is called basic principle and fundamental rule. Kalsen declares it as basis of international law and a principle in introduction of charter of all international juridical rules and guidelines leading to the above principle and contractual. It would definitely be said that promise-fulfillment principle has a particular validity and sanctity in all of juridical systems, maybe because it has roots in human's nature. If the juridical system governing on the contract is the international law and the constancy principle is mentioned in the contract, then international law is executed in case of one-way interference of government in contract to realize violation of host state's commitment and its responsibility against investor (Lotfi, 2013, 53).

International law per se cannot be implemented on any license agreement. The oil company should take actions to internationalize the contract in order to gain support. Contract's internationalizing doctrine that is called transnationalization or non-localization or non-nationalization, too, is taking actions to guarantee a form of binding dispute settlement not being under the control of contractor party country. Due to the theory of nationalization, some contracts are international based on their nature and therefore, they should follow

the international law. The reason is mutual consent of parties. The parties' consent has been accepted as a global and approved principle in line with principle of will independence. Internationalizing the license agreements on this basis, has brought fans during the previous decades and it encouraged most of judges to accept internationalizing the license agreements, since the parties came to consent when having contractual negotiations over the topic( Mostafavi ,2015 ,91).

Despite the above view, the domestic law sovereignty proposal on international license agreement was not supported, unless there is no direct conflicting ambiguity or provision or term. Developed countries which their follower countries eager to be private party of agreement, insist on the issue that the governing states should adhere to contractual commitments and international law must rule relating disputes regarding commitments. Therefore, the violating party must whether follow the commitments or pay the loss in cash equal to the value of all expectations that was to be reached through executing the contract.

9) Validity of constancy principle from national law perspective:

Some believe that contract programming technique can not restrict the power granted to the government due to constitution law or other rules for the right of legislation or sovereignty. As a consequence, a principle that is not of negotiator's power limit and out of regulations in constitution law cannot bring legal and legitimate rights for beneficiary based on representativeness from negotiator party.

10) Validity of constancy principle in international law:

To assess it in international law, the issue should be studied from two views:

10-1. The applicability of international law:

The court know the constancy term and its applicability valid after unilateral changes from governing party of juridical contract just in case that international law be one of the governing rule elements in the contract.

If a commitment and guarantee is accepted at the time of contract that is out of legal power limits of contractual negotiators, the guarantee would not be supported by the international law. Despite, as the international transactions engage the state, the constancy principle engages the state, too.

10-2. confliction of obligation principle with national sovereignty:

If the governing legal system is international law and the constancy principle is also mentioned in the contract, then the international law is executed in case of unilateral interference of government in order to recognize host state's violation from commitment, then the international law is implemented to do the responsibility against investor.

Supporters of constancy principle validity stated that in fact, it is an emphasis on the international contract's necessity to be followed and in another hand, maybe the constancy rule is a tool of preferring the obligatory

nature of contracts against permanent sovereignty of nations on underground sources, and finally, such a condition leads to complete compensation of loss or restoring the situation. In the opposite side, opponents of the constancy principle believe that this principle is a deviation and innovation against nation's sovereignty principle. A group of them believe on a combination of the two views and believe that perhaps the government limits itself in sources by mentioning the constancy principle. By the explanation that although the government has a power to change the contractual relation with foreign investor unilaterally, the constancy principle effect on such a unilateral action is to pay a loss for fixed.

11) Procedure of international arbitrary in constancy principle of oil and gas contracts:

The international procedure regarding constancy principle leads to a conclusion that first, the constancy principle's validity in international law system is faced with serious doubts and second, even supposing that validity of such a principle is so pious by which the contracts lacking the principle are among official contracts (Doust Mohammadi, 2016, 29).

According to above information, the conclusion from related discussion on constancy principle is that a government is allowed to legislate rules and regulations regarding oil contracts, although, the new regulations may put validity of contracts subject to risk. Of course provided that the regulations must not be discriminatory or they should be in line public interest. This is the main approved subject in international law. Also a group of lawyers especially those who supported oil international company's benefit and were often from oil-owning companies claimed that the aforementioned contracts are qualified to be an international contract and as a result, they fall under the principles governing international contracts like principle of adherence to contracts,. Another group agencies who are usually introduced to be representative of oil-producing governments believe that the governing law on such contracts is the host country's law and the government can make some changes in law in line with public interest. Despite the two viewpoint, most of authors believe that the sanctity of contracts has not been complied, and few contracts will remain unchanged, because of government's interference practically or through second negotiations and alike (Doust Mohammadi, 2016, 29).

12) The principle of contractual freedom:

In civil code of most of countries, this principle is controlled by limiting factors although it is respected and its territory is so that not hurting others' social rights and freedom. In is clear that the contractual freedom principle doesn't mean not limiting will of individuals in setting and preparing contracts and determining effects and conditions. Today, against the belief and opinion of individual isms of the 19<sup>th</sup> century not believing limits for individuals' freedom nearly no layer supports unlimited freedom of individuals' willing, and legislator considered some limitations in order to avoid chaos, disturbance in public peace, and maintaining social requirements, while respecting and keeping legitimacy of the principle contractual

freedom. Therefore, the principle of freedom of will isn't absolutely valid. The most important limiting factors in this principle includes: 1. Law 2. Public peace 3. Good behavior ( Mostafavi ,2015 ,91)

### 13) Criticisms on principle of will sovereignty:

Some experts in the field of private international law believe that the principle makes deception easier in law and allows the parties to agree with another law's governing based on the principle of will sovereignty to get free from commitment, and in other hand, it makes distrust.

Implementing will sovereignty principle in selecting governing law on contract causes logical cycle, too, since in normal condition, contract's accuracy is to be determined by law it is the law that as parties will, bring validation while the will that is creature of law, determines the law. In such a situation, a logical cycle is made. Thus, according to opponents, the law governing on contract must be determined by regulations, not will of parties. Because the reason of obligation is law. Iran's legislator stated a verdict in articles 10, 968 and 975 of civil code, relating to the principle of freedom: by legislation of article 10 in civil code, not only dispersion of votes regarding freedom principle is ended, but also the answer to some juridical disputes are provided (including discussion about accuracy or nullity in elementary conditions, and Matat in jurisprudence). It is obvious that there are limitations like public peace. Good behavior and jus cogens in other juridical systems. It is mentioned in article 975 of civil code that court is not allowed to execute the foreign rules or private contracts against good behavior or legislated by hurting the feeling of people in society or those rules that are against the public peace by any reason, even though the mentioned rules are basically authorized. In article 6 of civil trial procedure, it is stated that: agreements and contracts disturbing the peace or those that are against good behavior will not be effective. Therefore, Iran's legislator has determined the stance of law governing on contract explicitly. Thus, the contract made in Iran could be subordinate of a law than Iran's law in which the parties be foreigner. In article 968 of civil code, it is presented that: law sovereignty of the contract's location is a magisterial rule and any agreement against it that leads to change in governing law, would be against public peace and ineffective. In author's idea, the relation between a basic law and governing law is comparable with the issue of moving conflicts that are against the law. In law's confliction, a separation can be considered between the law of having the right and governing law in the field of international effect of right. The reason is clear, since in case of lack of separation, the fundamental principle of observing the acquired rights, will be damaged and dissipated. In case of changing conflicts, it is suggested that right is generated with observing all the conditions in the source government, it will be effective and executable in the other government, unless it is in conflict with the government's public peace (Lotfi ,2013 ,53).

### 14) Reviewing no obligation in international oil and gas contracts:

The obligation principle of contracts and its exceptions in oil contracts are divided into binding and authorized contracts regarding obligation levels of two parties while contracting. In Iran's jurisprudence and also law,

jurists and lawyers believe on obligatory principle in contracts, and terminating it is exceptional and against the principle. Exceptions on obligatory principle in oil contracts are those conditions that must be reckoned by one of parties due to the right of termination that leads to the end of contract automatically. Not predicting these items in contract in which in case of one party's willing the contract will be ended, are so troublesome. There are two views presented regarding legal condition of international oil contracts: one group believes it subordinate to legal condition of international oil contracts and are therefore under sovereignty of international law principles. The other group believes that contracts are follower and subordinate of legal system in the host country and claims of this regard must be settled down in the host country. This though caused advent and appearance of a legal organization named governmental contracts. These contracts are followers of legal system of the host country and the government is authorized completely to change or even end the contracts. Even the compensation system in these is also completely different from private contract (Zahdi, 2013, 47).

15) Validity of constancy principle in international law of oil and gas contracts of international kind:

Execution of court's international law knows the constancy principle and its implementing valid following the changes of unilaterally kind in legal condition of contract from the government only when international law is one of the laws governing on the contract. If a guarantee or commitment is accepted out of legal authority limitations of negotiators in contract, this guarantee will not be supported by international law. Despite as the international agreements engage the government, the constancy principle engage the government, too. Also, the confliction of obligatory principle with national sovereignty; if the legal system of governing the contract is international law and constancy principle is also mentioned in the contract, then the international law is executed to identify host government's violation in commitment and in its responsibility to investor in case of unilateral interference of government. Supports of constancy principle validity declared that in fact, it is an emphasis on the obligation of international contract and in other hands, perhaps the constancy principle is a tool to prefer obligation principle in conflict to permanent sovereignty of nations on their underground sources and at the end, such a condition leads to complete compensation or restore the situation and in contrast, the opponents of constancy principle believe that the principle is a deviation and innovation against nations sovereignty and a group believe by combining the two beliefs that government may limit its dominant power by mentioning the constancy principle; knowing that although government is authorized to change the contractual relation with foreign investor unilaterally, the effect of constancy principle on such a unilateral activity is to pay a fixed compensation (Talebi, 2014, 27).

16) International arbitrary procedure in constancy principle:

There is an expression regarding international arbitrary procedure in constancy principle: first, constancy principle validity in international law system is faced with serious doubts and second, even supposing that such a principle is so pious in which the contracts lacking it are among official contracts. Based on what mentioned above, the conclusion of the related discussion on the constancy principle is that a government has

the right to legislate law and rule regarding oil contracts, although the laws, put the oil contract's validity subject to risk. Of course provided that the law and rules are not discriminatory and it line with public interest.

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