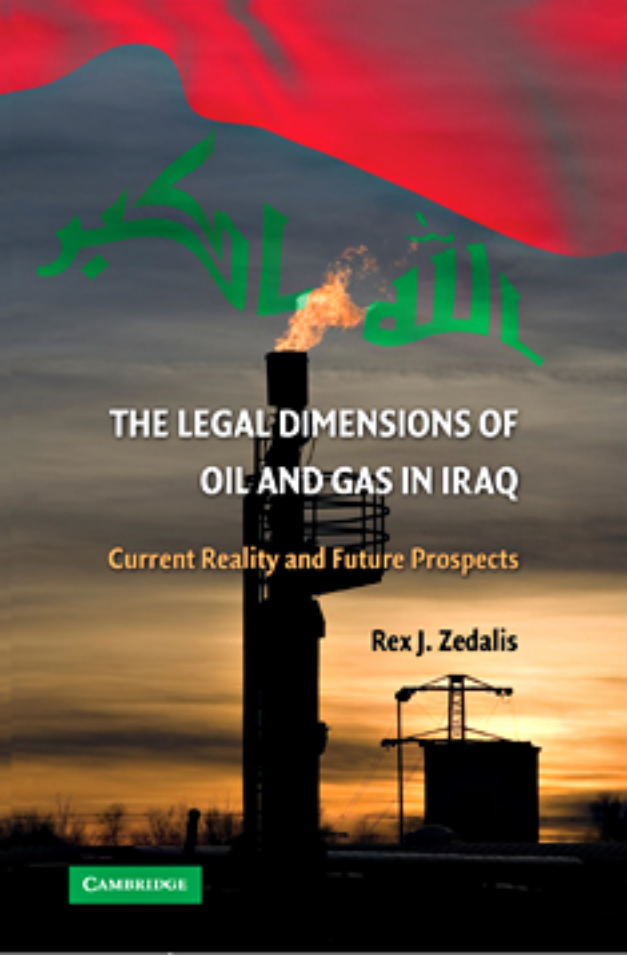

CAMBRIDGE www.cambridge.org/9780521766616

This page intentionally left blank

THE LEGAL DIMENSIONS OF OIL AND GAS IN IRAQ

Current Reality and Future Prospects

This book is the first and only comprehensive examination of current and future legal principles designed to govern oil and gas activity in Iraq. This study provides a thorough-going review of every conceivable angle on Iraqi oil and gas law, from relevant provisions of the Iraqi Constitution of 2005; to legislative measures comprising the oil and gas framework law, the revenue-sharing law, and the laws to reconstitute the Iraq National Oil Company and reorganize the Ministry of Oil; to the Kurdistan Regional Government's 2007 Oil and Gas Law No. (22) and its accompanying Model Production Sharing Contract; and to the apposite rules of international law distilled from both controlling UN resolutions addressing Iraq and more generally applicable principles of international law. This text is essential to the reading collection of every practitioner, business executive, government official, academic, public policy maven, and individual citizen with an interest in the details and controversial aspects of Iraqi energy law.

Rex J. Zedalis is a member of the faculty at the University of Tulsa, College of Law, where he has received numerous awards for his outstanding teaching, including an award in 2004 for the university's most outstanding professor. He has also been recognized for his extensive publication record in both U.S. and European international law journals. He has served as Director of the Comparative and International Law Center (CILC) at the University of Tulsa and as a Fellow with, and a former Assistant Director of, the College of Law's National Energy Law & Policy Institute. Professor Zedalis has also acted as a consultant to international organizations, foreign governments, and domestic as well as international law firms during his nearly 35-year career.

The Legal Dimensions of Oil and Gas in Iraq

CURRENT REALITY AND FUTURE PROSPECTS

Rex J. Zedalis

Comparative and International Law Center
University of Tulsa

CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE UNIVERSITY PRESS
Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore,
São Paulo, Delhi, Dubai, Tokyo

Cambridge University Press
The Edinburgh Building, Cambridge CB2 8RU, UK

Published in the United States of America by Cambridge University Press, New York

www.cambridge.org
Information on this title: www.cambridge.org/9780521766616

First published in print format 2009

ISBN-13 978-0-511-59652-0 eBook (NetLibrary)

ISBN-13 978-0-521-76661-6 Hardback

This book is dedicated to my wife, Cathe, and my sons, Ian and Bryce, who have taught me the most important, valuable, and enduring lessons in life; to my closest personal friend, kindred spirit, and former colleague, John Forrester Hicks; as well as to those men and women of indefatigable courage who have labored both on the ground and in the negotiating room to mold what is in their vision a more stable, just, and equitable system of governance for Iraq, an integral component of which is the development of a rational legal regime for the exploitation of Iraqi oil and gas.

CONTENTS

PART TWO: THE COMPLICATIONS ASSOCIATED WITH IRAQI LEGISLATIVE MEASURES

FOREWORD

As any lawyer knows, the law is not only illusive but transitory. To define it at one point-in-time is to attempt to put a living thing under the lens. This is particularly so with law in Iraq, a country not only in turmoil and transition, but in formation; a country poised between autarchy and democracy, between dictatorship and the rule of law. Despite the troop "surge," sectarian violence continues and the viability of the Iraqi Central Government itself is not assured when U.S. troops finally depart. Some in government seek to right the wrongs to their brand of the faith over the last decades; others attempt to regain prewar dominance; yet another group seeks to establish an Iranian-style theocracy. Many want only to attain personal wealth in this turbulent era.

Into this maelstrom steps Professor Rex J. Zedalis to detail and discuss the developing oil and gas law of this troubled nation. Rather than decry or be intimidated by this volatile and transitory state of affairs, Zedalis has proceeded to outline the current state of the oil and gas law in Iraq and its various possible futures with a perceptiveness and thoroughness that is admirable if not astounding.

The author faces another unique challenge. For more than a year, the Iraqi framework oil and gas law, thought to be a hard-won consensus between factions, has languished unadopted, yet unrejected. The end of this legal purgatory into which this law was cast in February 2007 cannot be predicted. Furthermore, the current state of the statute can only be partially relied upon to indicate the state of Iraqi oil and gas law in the future. Although it is clear that this pending statute contains many elements that will eventually find their way into the law that is settled upon, it is also clear that some will not. It is also known that sentiment for a substantial change in the Iraqi Constitution itself is not insignificant.

Since February 2007, the political middle ground seems to have shifted a bit, making it likely that the now-pending framework law will be changed. Word on the street, as it were, for the past 18 months is that there is a grand compromise brewing. During this period of stalemate on the framework law, much has occurred. The Kurds have signed more than two dozen production-sharing

contracts, and the Central Government has declared them to be unlawful. At the same time, the Central Government has unsuccessfully attempted to negotiate technical service agreements with major international oil companies (IOCs), but has entered tentative service agreements only with the Chinese and the Indians. The Status of Forces Agreement with the United States has been reached, setting forth a deadline for withdrawal. This withdrawal, and the end of the UN resolutions supporting U.S. presence, will usher in another new era in Iraq. Basra now seems to be seeking status as a region on par with the KRG. Sectarian violence seems to have subsided only to remain barely below the surface.

Obviously, Iraqi energy potential is huge. Currently at almost 2.5 million barrels per day (mbpd), it is not unreasonable to anticipate 6 mbpd of production within the decade or sooner. Current production levels result in more than $100 million per day of net inflow. Much of Iraq's wealth will have to go to developing additional production and the hydrocarbon infrastructure – refineries, pipelines, gas plants, and so forth. A petroleum boom of historic proportions is in the offing. If this boom is to proceed, it is essential that the law of Iraq be understood and accepted as reasonably reliable. Exploration of such is the object of this book.

Part One provides a useful summary of the Iraqi oil industry (Chapter 1), after which Zedalis addresses the energy-related portions of the Constitution (Chapter 2). These provisions are critical not only to understanding future energy development, but to several major issues in the larger complex of Iraqi governance. Revenue sharing, Iraqi federalism in regard to oil and gas development agreements, and the difference between "present" and "future" oil fields are examples that are discussed in detail. Part Two pertains to the federal Oil and Gas Framework Law (Chapter 3), the Model Iraqi and KRG Production-Sharing Agreements (Chapter 4), the Revenue-Sharing Law (Chapter 5), and the likely shape of the Iraq National Oil Company and Ministry of Oil (Chapter 6).

In Part Three, Zedalis addresses four critical future issues. First, he considers the thorny issue of the massive creditor claims against Iraq that remain to be paid. UN SC Resolutions 1790 and 1859 provide immunity from attachment and creditor claims but they are destined to expire, presenting the possibility of an era of vigorous litigation and attempts to attach Iraqi petroleum assets. This is sure to be one of the more useful portions of the book.

Second, in Chapter 8, he considers the critical issue of the central government's ability to strike oil and gas development agreements in the absence of a framework law. This chapter also should prove to be one of the most important in the book. Third, in Chapter 9, Zedalis discusses the distribution of oil profits in the absence of a binding and final revenue-sharing law. Finally, in Chapter 10, the author analyzes the worst-case scenario: the state of the law in the fractured federalist country or the absolute Iraqi breakup.

In brief, Zedalis has faced head-on and with scholarly vigor the challenge of the unstable status quo and varied Iraqi futures. He has considered every conundrum of current law and every mystery of the law to come. In the process he has made a significant contribution to legal scholarship. What is more, he has contributed to an understanding of Iraq itself. Such understanding is essential to a positive future for this struggling country.

R. Dobie Langenkamp
Former Professor of Law and Director
National Energy Law and Policy Institute
Former Deputy Assistant Secretary
U.S. Department of Energy
Consultant to the U.S. Department of
Energy on Iraqi Energy Law
December 2008

ACKNOWLEDGMENTS

Although any and all errors in the pages that follow are entirely mine, the tremendous support and assistance of those here and abroad who both provided me with both documentary materials and insightful observations require special recognition and an expression of thanks. Particular attention and thanks should also be accorded to John Berger at Cambridge University Press, who appreciated the timeliness and significance of my original proposal; to Janet K. Levit, Dean of the University of Tulsa College of Law, for her continued encouragement and counsel; and to those still living and now gone who have provided me over the years with their wisdom and mentoring: W. T. Mallison, Jr., of George Washington University Law School; Oscar Schachter and Louis Henkin of Columbia University Law School; and my friends Kurt Deketelaere of the Institute for Environmental and Energy Law, Katholieke Universiteit Leuven, and Thomas Walde, former Director, Center for Energy, Petroleum and Mineral Law & Policy, Dundee University.

Particular thanks are due to David Gay, international and comparative law librarian, at the University of Tulsa College of Law, for his tireless efforts assisting the research associated with this study, and to the College of Law's Faculty Development Stipend program for providing financial assistance enabling work on the project to continue during the summer months without the need to engage in summer teaching. Thanks need also be accorded to Cyndee Jones and Sharon Miller of the law school secretariat for their dependable and competent work and support in the production of the final version of this book, and to Gina Bradley, who reliably came to my assistance on a number of occasions to resolve a large variety of technical computer issues that required addressing in order to get print on the page. Finally, my good friend and colleague, R. Dobie Langenkamp, law professor, lawyer, legal consultant on Iraqi oil and gas, oilman, former high-ranking official in the U.S. Department of Energy for two different administrations, gentleman rancher, and conservationist, merits especial commendation. Not only did he plant the seed that germinated into this final product, but he provided valuable guidance, encouragement, and a wealth of contacts throughout its maturation.

PROLOGUE

From all indications, Iraq's proven oil reserves are in the 115 billion barrel (bbl) range,[1] which, depending upon how one runs the numbers, would rank it as having somewhere between the second and the third largest proven reserves in the world.[2] It is also speculated that Iraq may possess an additional 45 to 100 bbl in its largely unexplored western desert.[3] As far as natural gas reserves are concerned, information suggests Iraq has proven reserves of around 112 trillion cubic feet (Tcf), placing its proven reserves at tenth in the world, with probable

[1] See Energy Information Administration, U.S. Department of Energy, Official Energy Statistics from the U.S. Government (Aug. 2007), available at www.eia.doe.gov/emeu/cabs/Iraq/Oil html (accessed Oct. 9, 2007) (hereinafter Official Energy Statistics). For other estimates, see Iraq: Oil and Economy – Sands of Iraq Hold World's 2nd Largest Oil Reserves (112 billion barrels), available at http://usgovinfo.about.com/library/weekly/aairaqioil htm (accessed Oct. 10, 2007); Gal Luft, How much oil does Iraq have? Global Politics Iraq Memo 16 (May 12, 2003), The Brookings Institution (indicating Center for Global Energy Studies and Petrolog & Associates suggested proven and unproven of 300 billion barrels), available at www.brookings.edu/views/oped/fellows/luft20030512.htm (accessed Oct. 10, 2007).

[2] See Iraq: Oil and Economy, id. (2nd largest proven reserves); Lawrence Kumins, CRS Report to Congress – Iraq Oil: Reserves, Production, and Potential Revenues (Apr. 13, 2005) (2nd largest proven reserves at 11% of world's total reserves), available at www.fas.org/spg/crs/mideast/RS21626.pdf (accessed June 27, 2008); Energy Information Administration, U.S. Department of Energy, Official Energy Statistics from the U.S. Government (Aug. 2007), available at www.eia.doe.gov/emeu/cabs/Iraq/Background html (accessed June 27, 2008) (3rd largest proven reserves).

[3] See Official Energy Statistics, supra note 1. See also Weshah Razzak, Iraq: Private ownership of oil and the quest for democracy, MPRA Paper No. 54 (Oct. 2006), available at http://mpra.ub.uni-muenchen.de/54/01/MPRA_paper_54.pdf (accessed Oct. 10, 2007) (suggesting unproven reserves of at least 100 billion barrels); Foreign firms covet Iraq oil reserves, global energy, Iranxe Daily (Feb. 6, 2006) (suggesting as much as 265 billion barrels), available at www.iran-daily.com/1384/2494/html/energy.htm (accessed Oct. 10, 2007). See also Report paints pretty picture of Iraqi oil reserves, Iraq Updates (Apr. 23, 2007), available at www.iraqupdates.com/p_articles.php/article16673 (accessed Oct. 17, 2007) (doubling of Iraqi reserves); Iraqi oil: more plentiful than thought, Iraq Updates (Apr. 25, 2007), available at www.iraqupdates.com/p_articles.php/article16789 (accessed Oct. 17, 2007) (215 billion barrels); Iraq's enormous unexploited oil wealth, Iraq Updates (Jul. 31, 2007), available at www.iraqupdates.com/p_articles.php/article20112) (accessed Oct. 17, 2007).

additional gas reserves at 275 to 300 Tcf.[4] As will be seen in the materials that follow, Iraq has been capable in the past of producing as much as 3 million to 3.5 million barrels of oil per day (mbpd), but most recently has struggled to produce in the 2 to 2+ mbpd range, though it plans to increase that number in the near future. Its domestic consumption of crude oil demands about one quarter of its recent production,[5] and an extremely large portion of the natural gas produced in Iraq is associated with the lifting of crude oil and simply winds up being flared or reinjected to assist oil recovery.[6]

In terms of world demand for crude oil, it has been suggested by the internationally acclaimed energy scholar and chairman of Cambridge Energy Research Associates, Daniel Yergin, that between the years of 1998 and 2002, world demand for oil increased by 4+ mbpd, to a level of 78+ mbpd by 2002.[7] By way of comparison, however, between the years of 2003 and 2007 it accelerated by 8+ mbpd,[8] to a level of nearly 87 mbpd by 2007.[9] This is an increase of 100% in the span of 5 short years, an increase due in large part to booming economic development in places such as China and India and a resumption of economic progress elsewhere following the turnaround of financial markets after their collapse in 2000 and the suffering of a follow-on blow with the rise of international terrorism in 2001. Though prices have fallen substantially of late, at the end of 2007 and the first half of 2008, oil prices experienced a completely unimaginable run-up, reaching levels in the vicinity of (U.S.)$150 per barrel, with some opining that, in the near term, $200 to $250 per barrel was not beyond the realm of possibility.[10] All along, natural gas prices have also increased markedly, in some respects in sympathy with oil prices. A variety of usual suspects – for example, domestic political disturbances in places such as Nigeria, and geopolitical developments in places such as Iran – and new forces – for example, the decline of the U.S. dollar relative to other currencies, and the "commoditization" of oil by investors and speculators looking to now make another move along the chain that extends from the "dotcoms" to real estate to basic materials – have contributed importantly to oil's price jump. Fundamentally, however, in recent years, oil-consuming nations have been confronted with the reality of

[4] See Energy Information Administration, U.S. Department of Energy, Official Energy Statistics from the U.S. Government (August 2007), available at www.eia.doe.gov/emeu/cabs/Iraq/NaturalGas html (accessed June 28, 2008).

[5] See Chapter 1, text accompanying note 53.

[6] See Chapter 1, text accompanying note 24.

[7] See Oil-World Oil Production and Consumption, available at www libraryindex.com/pages/1499/OIL-WORLD-OIL-PRODUCTION-CONSUMPTION.html (accessed July 1, 2008).

[8] See Oil at the Breakpoint, Testimony of Daniel Yergin before the Joint Economic Committee, U.S. Cong. (June 25, 2008), available at http://jec.senate.gov/index.cfm?FuseAction=Files.View+FileStore_id=6e9e2a7f-4186–47ac-a336-d47ef1961ac (accessed June 30, 2008).

[9] See Oil Consumption Continues Slow Growth, World Watch Institute, available at www.worldwatch.org/node/5666 (accessed July 1, 2008).

[10] See id. It should be noted that, with the world financial crisis of fall 2008, prices collapsed by half for oil and gas but were expected to resume their climb once economic growth returns.

an ever-shrinking margin or cushion between production levels and stockpiles available and consumption demands, as world production of oil now hovers around the 87-mbpd level.[11] And this is where Iraqi oil and gas production comes in, because success at enhancing such and ensuring its delivery to the international market could supply just enough of an additional buffer, when operating with more thoughtful energy utilization by consumers, and possible restoration of a portion of the supply lost to domestic disturbances in some African nations in particular, to take a bit of the edge off of the overall economic consequences associated with the sudden and rapid rise in energy costs experienced in the past couple of years.[12]

Although there is no doubt that outside investment and know-how are central to enhanced Iraqi oil and gas production, it seems just as certain that the existence of a comprehensive, clear, and, at least from the perspective of most Iraqis, fair and equitable oil and gas legal regime is a sine qua non for attracting genuine and committed investment from the widest possible spectrum of international players. The radical change in Iraq's governing structure accompanying Gulf War II's removal of Saddam Hussein from power, the U.S-led military occupation, and the temporary control of Iraq by the Coalition Provisional Authority, as well as the eventual reemergence of self-governance among the local population all suggest alteration of the preexistent legal situation. Uncertainty regarding the nature of any such alteration would seem to be addressed by various provisions of the Iraqi Constitution of late 2005 and the four major pieces of oil and gas legislation offered by the government of Prime Minister Nouri al-Maliki in implementation of those provisions – the basic oil and gas framework law, the revenue-sharing law, the law reorganizing the Iraqi Ministry of Oil, and the law reconstituting the Iraq National Oil Company (INOC). Similarly, the status, in relation to Iraq's creditors, of the nation's oil and gas resources and monies generated by their sale or transactions involving such, would also appear addressed by UN Security Council resolutions.

Interestingly, however, as is so often the case, the political compromises requisite to developing what might be argued as clear and unequivocal statements of law belie the fact that the statements themselves, whether in constitutional, legislative, or multilateral form, are susceptible to various interpretations. In other words, what the political branches that formulated the statements considered more than adequate to clarify controversial matters really represents but a step in a process aiming at a legal regime providing thorough, clear, and fair

[11] See Carola Hoyos & Javier Blas, IEA warns of tightening oil supplies, FT.com (July 1, 2008), available at www.ft.com/cms/s/0/cd683aa0–4764-11dd-93ca-000077b07658 html?nclick_ check=1 (accessed July 2, 2008).

[12] The author is aware of the "Hubbard" peak oil arguments advanced by some who may suggest that today's high prices are just the beginning of a price spike trajectory, because of having finally reached optimum production levels of a finite resource, and that going forward, prices will move in only one direction.

rules; rules able to allay the nervousness and apprehension of potential investors. It is, however, not the political branches that take the final and definitive step when it comes to a legal regime's comprehensiveness, clarity, and fairness. If a particular legal regime is not found by those trained in legal analysis to be adequately complete, reasonably free from legitimate doubt, and equitable in the way it handles the matters with which it is concerned, then the advice of legal counsel provided to those making the ultimate decisions about investment could prevent one from moving forward, barring the existence of a situation where the potential rewards of investment far exceed the risks associated with such.

In the pages of this study, an attempt will be made to provide just such a legal analysis of the relevant rules affecting Iraqi oil and gas law as set forth in the provisions of the Iraqi Constitution, the framework law on oil and gas, the national revenue-sharing law, and the laws reorganizing and reconstituting both the Iraqi Ministry of Oil and INOC. Additionally, an examination of important UN Security Council resolutions will be undertaken to determine their particular effect on the various aspects of Iraqi oil and gas law, including the effect they may have produced for ensuring that both the resources and the revenues generated from transactions involving such serve to benefit the Iraqi people. With greater specificity, this study is separated into three major parts: the contextual background surrounding Iraqi oil and gas law; the various Iraqi legislative measures designed to address the matter of oil and gas; and an examination of some of the more prominent legal problems that will have to be addressed by those endeavoring to create the Iraqi oil and gas regime. At the outset, however, it must be cautioned that Iraq's law on some of these matters has not completely solidified in final legal texts. This certainly appears so with respect to the federal government's oil and gas framework law, which is still undergoing some revision and new undisclosed drafts, and the laws reconstituting INOC and reorganizing the Oil Ministry – both of which have been negotiated in great secrecy and have not yet even been leaked to the public. The existence of these "loose ends," however, should not detract from the significant value of an early and very close examination of what is known so far. This prompts another important caution. In view of the fact that many of the chapters in this study will subject legal texts that have been produced by negotiators to careful and extremely detailed scrutiny, one should be prepared to periodically make the intellectual shift from reading general background and contextual information, to carefully and assiduously parsing the precise language of specific legal measures.

The contextual background surrounding Iraqi oil and gas law involves both the factual situation concerning such, including the legal status of the oil and gas at the time of the resumption of Iraqi self-governance, as well as the position of the Iraqi Constitution on the distribution of powers over the country's hydrocarbon patrimony. The factual situation requires attention be devoted to

the historical evolution of, and the present statistics related to, Iraqi oil and gas production, pipelines, and refining capacity. The historical evolution, of course, begins with the Turkish Petroleum Company's (TPC's) 1925 oil and gas concession from the Iraqi authorities. Regarding the present statistical situation, it bears noting that what is presented is a summary or overview of those relevant aspects of the industry, not a detailed and exhaustive account. Just by way of illustration, in the context of discussing the pipeline and refining capacity of Iraq, little if anything is said about pipelines or refineries that supply the internal domestic needs of the Iraqi people, or local pipelines within oil and gas fields; the focus is principally on those that serve, or are capable of serving, external needs of export markets. Rounding out the contextual background also requires reference to the legal situation in which oil and gas resources in Iraq found themselves following the combination of UN sanctions imposed after Gulf War I, the removal from power of the Saddam Hussein government and the U.S.-led military occupation of Iraq after Gulf War II, and the interregnum political control of Iraq by the Coalition Provisional Authority. After all, to the extent it might be found that gaps exist in the Iraqi Constitution, the oil and gas framework law, or other measures, it would be critical to know whether the UN, the military occupant, or the Coalition Provisional Authority changed the nature of the legal regime applicable to Iraq's oil and gas resources. And with specific regard to the relevant provisions of the Iraqi Constitution that speak to the matter of oil and gas, reference is made in the materials that follow to the distribution of constitutional authority between federal and subcentral governmental entities. This has been a matter of virtually interminable debate between the central government in Baghdad and regional government entities in Iraq's Kurdish north.

Switching to the study's second part, that concerning the various legislative measures designed to deal with Iraqi oil and gas, attention will be focused on a couple of groups of items. One of these groups involves the aforementioned four major pieces of national legislation that, as a unit, are designed to establish the fundamental parameters of Iraqi oil and gas law for the ensuing years – the oil and gas framework law, the federal revenue-sharing law, the law reconstituting INOC, and the law reorganizing the Oil Ministry. The other group involves the terms of the basic contractual instruments to be utilized in the most aggressive or ambitious sorts of legal undertakings between appropriate government authorities and international oil companies interested in providing know-how and assistance in developing Iraq's oil and gas in return for obtaining a share in the country's hydrocarbon deposits. These are the contractual instruments referred to as exploration, development, and production contracts or "production-sharing" agreements. With respect to the four pieces of national legislation, various nuances and complications will be examined. Illustrative would be questions about whether the revenue-sharing law applies to oil and gas activities of subcentral governmental agencies, or only those at the federal

level, as well as whether the activities involving oil and gas must take some particular legal form in order to trigger the law's requirements. Similarly would be numerous questions about the manner by which the law requires the distribution of revenues that have been collected from appropriate oil and gas activities. With respect to the terms of exploration, development, and production contracts or "production-sharing" commitments obtained in return for helping Iraq develop its petroleum resources, both the peculiarities and the general nature of what the national government might settle upon in its model oil and gas field contracts and what has made its way into the Kurdish region's model production-sharing agreement and accompanying regional petroleum law all merit attention. However, as with the federal government's framework law on oil and gas, and its measures reconstituting INOC and reorganizing the Ministry of Oil, there has been a paucity of information made available regarding federal model oil and gas field contracts, apart from some early releases of what have been characterized as reflecting thinking at the federal level. The points of similarity and contrast between the approaches of the central and the subcentral governments with respect to the terms model contracts will be focused upon. Observations on similarities and contrasts would seem important, given the ever-present possibility that ethnic and sectarian tensions in Iraq could result in disintegration of extant efforts to forge a permanent "national" government with an accompanying national legal regime. Although disintegration of such efforts would prove both troublesome and unfortunate, it suggests the need for sensitivity regarding alternative visions of the legal landscape for Iraqi oil and gas.

The third and final section of the study concentrates on some of the more pressing current issues connected to Iraqi oil and gas, and some of the future problems that may confront scholars and legal advisors working in the area. As just mentioned, it would be an untoward development, but one clearly not beyond the realm of possibility, were the labors of those Iraqis committed to the fashioning of a democratic and truly federal system of government to falter and collapse. The possibility of this happening serves as an impetus for taking up the task of offering speculative comment on some of the likely oil and gas legal scenarios in the event that comprehensive federal legislation on the subject never fully takes root, or Iraq itself devolves into either a nation in name only, or several distinct and separate governing units or countries. But apart from this, the final section of the study also examines the topic of the central government's legal authority to enter into various oil and gas development agreements in the absence of effective national oil and gas framework legislation. Also examined is the question of creditor claims against either Iraqi oil and gas proper or revenues generated by the sales of such. As will be noted, the Gulf Wars, and the commercial and business dislocations associated with them, led to substantial economic claims, many of which remain outstanding. Various UN Security Council resolutions, including resolutions 1790, adopted during the last two weeks of 2007, and 1859, adopted on December 22, 2008, address the

matter of such claims, and, in doing so, touch on the susceptibility of Iraqi oil and gas, and revenues from its sale, to various sorts of legal actions. The terms and impact of these resolutions, and their related predecessors, receive extensive consideration in the materials that follow. Finally, because it is possible that, like the framework law on oil and gas, the federal revenue-sharing law could wind up failing to take hold, an assessment is provided of legal requirements from other sources applicable to the question of the distribution of oil and gas revenues. It is not inconceivable that few such requirements may exist. However, given the substantial and increasing levels of income the producing regions of Iraq can expect from hydrocarbon activities, it is critical to know whether or not, and if so, how, revenues are to be shared.

The significance of a complete understanding of the legal dimensions of the three broad and general areas that comprise the various sections of this study cannot be too strongly emphasized. Iraq's proven oil reserves alone constitute approximately 10% of the world's total proven reserves, and fully restoring that nation's contribution to the consumption demands of a growing international economy could prove extremely beneficial in approaching the inflationary and price strains constantly confronting the international marketplace. And, to the extent that the nature of the oil and gas legal regime in Iraq is comprehended, deficiencies, gaps, problem areas, and possible improvements in that regime can more readily be addressed, thereby providing the opportunity for increased Iraqi oil and gas production. No doubt, the reality of witnessing comprehension of such matters being translated into alterations and changes in the legal regime is complicated by the ethnic and sectarian rivalries that have riven that nation's political system over the past few years. Without the existence of a genuine national will tending toward rationality, compromise, and tolerance – and not just a public persona uttering the trite platitudes of such – the chances of lasting success on that front seem reduced. The way forward demands authentic flexibility and open-mindedness, not the external appearance of such followed by reversion in private to the narrow-minded, rigid, and atavistic ways that have long been familiar. A clear, thorough, and sensible oil and gas regime can attract investment from outside, improve the efficient operation of indigenous government and quasi-government enterprises functioning in that sector, and facilitate greater Iraqi contribution to world energy demands.

Tulsa, Oklahoma
December 2008

Part One THE CONTEXTUAL BACKGROUND

The various chapters of this study are grouped into three separate parts. In Part One the focus is on the contextual background related to Iraqi oil and gas. Part Two deals with the complications associated with the various Iraqi legislative measures that are designed to shape the future of that nation's oil and gas regime. Part Three, on the other hand, examines some of the principal current legal issues that bedevil lawyers and policymakers working hard to stabilize and move the hydrocarbons sector of the economy forward at a rapid pace.

Part One's attention to the contextual background concentrates on a variety of subjects and is reflected in two distinct chapters. The operative premise is that a complete and nuanced understanding of the developing Iraqi oil and gas law depends upon an appreciation of at least the bare essentials concerning both the factual setting regarding Iraqi oil and gas and the legal situation that antedated the growth of Iraqi self-governance following Gulf War II. Even beyond these two matters, however, any such understanding would also seem to depend upon a basic familiarity with the fundamental terms of the Iraqi Constitution that impact oil and gas activity and the revenues associated therewith, as well as some of the important disputes and controversies generated by the language of the Iraqi Constitution.

Chapter 1 takes up both the matter of factual setting and that of the legal situation confronting international oil and gas companies interested in engaging in petroleum development activities up to the time of Saddam Hussein's ouster and the beginning of a new political era in Iraq. By way of factual setting, both Iraqi oil and Iraqi natural gas reserves are reviewed and discussed, as well as the evolution of the industry and its involvement with foreign entrepreneurs, concessionaires, and developers. Additionally, the chapter provides basic information regarding both the main pipeline systems connecting Iraqi oil and gas fields to export terminals and background about the growth of the nation's refinery network. Concluding Chapter 1 is a survey of the status of legal relations with foreign oil and gas operators, spanning the time concerning the commencement of nationalization of the industry in the 1960s, rule under Saddam's regime, and

the imposition and eventual removal of United Nations sanctions under a series of Security Council resolutions.

In Chapter 2, attention is turned to a description and analysis of provisions of the Iraqi Constitution that bear on the matters of oil and gas exploration, development, and production. This is cast against the backdrop of an overall understanding of the Iraqi Constitution, and then elaborated by focus on the specific and extremely controversial issues of the role of subcentral governmental units in Iraqi oil and gas activity; the distribution and sharing of revenues between the federal and subcentral levels; and the question of whether exploration, development, and exploitation rights differ when it comes to oil and gas fields denominated as "present" or "current" fields, as opposed to "future" fields. Later chapters in other parts of the book expand on various detailed and technical aspects of both the differing perspectives of the federal government in Baghdad and the regional or provincial governments in Erbil and elsewhere on both the distribution of oil and gas and other revenues, and the role of central versus subcentral governments in the matter of oil and gas activities.

1 FACTS REGARDING IRAQI OIL AND GAS RESERVES AND THEIR LEGAL STATUS PRIOR TO SELF-GOVERNANCE

I. INTRODUCTION

It is standard fare to note that several thousand years ago the ancient Greek historian Plutarch called attention to the eternal fires of the hydrocarbon fields of Baba Gurgur near Kirkuk in what is now northern Iraq.[1] After the first major drilling of oil in the Baku area of Azerbaijan in the 1870s,[2] and with the intense interest of the world's major naval powers at the end of the nineteenth and the beginning of the twentieth centuries in moving from coal to oil as their fuel of choice, the gaze of acquisition was cast toward the Middle East by both oil companies and the governments of their home countries.[3] By 1901, the British entrepreneur William Knox D'Arcy, who made his fortune in the Australian gold fields, had successfully landed an oil and gas concession from what is now Iran.[4] After fruitless prospecting efforts that drained his resources, D'Arcy in 1905 enlisted the assistance of Glasgow-based Burmah Oil Company, and in 1908 substantially reduced his own debilitating financial commitment to the concession. By 1909, Burmah, which had operational control of the concession, formed the Anglo-Persian Oil Company (APOC) (predecessor to the Anglo-Iranian Oil Company, or BP), which shortly thereafter managed to find substantial crude oil deposits.[5]

[1] See Mirella Galletti, Kirkuk: The Pivot of Balance in Iraq Past and Present, 19 Journal of Assyrian Academic Studies (No. 2) 21 at 23 (2005).

[2] See generally Mir Yusif Mir-Babayev, Azerbaijan's Oil History, 10 Azerbaijan International (No. 2) 34–40 (Summer 2002), available at www.azer.com/aiweb/categories/Magazine/ai102_folder/102_articles/102_oil_chronology html (accessed June 25, 2008).

[3] See Rashid Khalidi, Resurrecting Empire: Western Footprints and America's Perilous Path in the Middle East 83–7 (2004); John A. DeNovo, Petroleum and the United States Navy before World War I, 41 The Mississippi Valley Historical Review (No. 4) 641–56 (1955).

[4] See R. W. Ferrier & J. H. Bamberg, The History of the British Petroleum Company: The Developing Years 1901–1932 at 27–42 (1982) (hereinafter The Developing Years).

[5] See Jennifer Siegel, Endgame: Britain, Russia and the Final Struggle for Central Asia at 179 (2002).

In 1911, British financial interests controlling the National Bank of Turkey collaborated with Deutsche Bank to form African & Eastern Concessions, Ltd., with the aim of seeking oil and gas concessions from the Ottoman Empire in what is now Iraq, but was then known as Mesopotamia.[6] In 1912, that venture reorganized itself as the Turkish Petroleum Company (TPC), bringing in the Dutch-British venture Royal Dutch Shell that earlier, through the efforts of oil entrepreneur Calouste Gulbenkian, had joined together the oilman Henri Deterding's Royal Dutch company and Marcus Samuel's British Shell Transport & Trading Company.[7] The year 1914 saw the Turkish-born Armenian entrepreneur Gulbenkian, a King's College London–trained engineer and a British citizen since 1902, successfully pair up TPC and the rulers of the Ottoman Empire in a putative oil and gas concession covering much of Iraq.[8] According to TPC organizational rules, the concession was held by the British-controlled National Bank of Turkey at a 50% share, with Deutsche Bank and Royal Dutch Shell both holding 22.5% shares and Gulbenkian a 5% nonvoting share.[9] That same year, the National Bank of Turkey's British interest had been purchased by APOC,[10] in which the British government by then held the controlling interest.[11]

World War I broke out in August 1914. The Ottoman Empire's alignment with Germany prevented rights under the concession from being exercised and resulted in British sequestration of Deutsche Bank's share in TPC.[12] The secret Sykes-Picot wartime agreement of 1916 between the British and the French suggested that the postwar period would place much of Iraq, and especially the northern portion suspected to contain rich oil and gas deposits, within France's postwar sphere of influence.[13] Under the prodding of, among others, Winston Churchill, who had served as First Lord of the Admiralty until the naval disaster at Gallipoli and then later as Secretary of War and as Minister for Munitions, British forces ensured that at the conclusion of military operations they would confront France with a fait accompli by controlling Iraq's northern territories. The situation resulted in extremely tense and heated discussions between

[6] See George P. Nowell, Mercantile States and the World Oil Cartel, 1900–1932 at 65–8 (1994).

[7] See The Developing Years, supra note 4 at 165. On the Royal Dutch/Shell merger, see Toyin Falola & Ann Genova, The Politics of the Global Oil Industry 30–1 (2005).

[8] The 1914 document has been styled as a Letter of Intent by some. See Michael A. G. Bunter, Early Concessions in Iraq and the Middle East, 1 Oil, Gas and Energy Law Intelligence (No. 1) (Jan. 2003), available at www.gasandoil.com/ogel/samples/freearticles/roundup_01 htm (accessed Aug. 20, 2008).

[9] See David Styan, France & Iraq: Oil, Arms and French Policy Making in the Middle East at 13 (2006).

[10] See Helen Chapin Metz, Iraq: A Country Study, The Turkish Petroleum Company (1988), available at http://countrystudies.us/iraq/53 htm (accessed July 15, 2008).

[11] See Marian Kent, Moguls and Mandarins: Oil, Imperialism, and the Middle East in British Foreign Policy, 1900–1940 at 36 (1993).

[12] On sequestration, see David Styan, supra note 9 at 14.

[13] See Edward P. Fitzgerald, France's Middle Eastern Ambitions, the Sykes-Picot Negotiations, and the Oil Fields of Mosul, 1915–1918, 66 Journal of Modern History 697 (Dec. 1994).

French Prime Minister Georges Clemenceau and British Prime Minister David Lloyd George during the Versailles peace talks.[14] The British, though, were extremely concerned with forging a counterweight to the large American oil companies that controlled much of the international market and sought to guarantee reliable sources of supply from the Middle East, and they ultimately settled upon the notion of accommodating French consternation over Iraq by bringing France into TPC through transfer of Deutsche Bank's share.[15] This was effected through the San Remo Agreement of 1920, which also legitimated British control over Iraq and promised to provide the Iraqis with 20% participation in TPC operations.[16] The Americans objected that the war had nullified the earlier 1914 putative concession with the Ottoman Empire.[17] In 1921, the League of Nations' British Mandate over Iraq evolved to the establishment of the Iraqi Hashimite monarchy with the British-sponsored ascendancy of King Faisal.[18]

From 1921 to 1925, TPC, as well as the governments of the relevant companies' home countries, engaged in extensive negotiations with each other and with Turkey and Iraq regarding the conclusion of a new, indisputable concession agreement.[19] During that same time, France formally established Compaigne Francais de Petroles (CFP),[20] the predecessor to TotalFinaElf, with its objective being to hold and manage France's share in TPC. By the mid-1920s, and under diplomatic and other pressures from the United States, TPC acceded to the efforts of major American oil companies to gain a share in its operations.[21] The American companies were to participate through a company they called the Near Eastern Development Company,[22] headed by Walter Teagle, chairman of what was then Standard Oil of New Jersey, the modern-day Exxon.[23] The accommodation of the Americans readjusted the shares in TPC so that the four principal partners – the British, the Dutch, the French, and the newly taken-on Americans – each held 23.75%, with Gulbenkian the remaining 5% nonvoting beneficial interest.[24] In 1925, a new concession was concluded with Iraq, having a term of 75 years, with royalties to be paid on the basis of profits

[14] See James A. Paul, Great Power Conflict over Iraqi Oil: The World War I Era, Global Policy Forum (Oct. 2002), available at www.globalpolicy.org/security/oil/2002/1000history htm (accessed Aug. 20, 2008).

[15] See The Developing Years, supra note 4 at 257–9.

[16] See, for example, Edward M. Earle, The Turkish Petroleum Company – A Study in Oleaginous Diplomacy, 39 Political Science Quarterly 265 at 273–5 (June 1924); Ferruh Demirmen, Oil in Iraq: The Byzantine Beginnings, Global Policy Forum (Apr. 25, 2003), available at www.globalpolicy.org/security/oil/2003/0425byzantine htm (accessed June 28, 2008).

[17] See James A. Paul, supra note 14.

[18] See Charles R. H. Tripp, The Middle East Online; Series 2: Iraq, 1914–1974 at 1, available at www.galeuk.com/iraq/pdfs/Introductory%20Essay.pdf (accessed Aug. 20, 2008).

[19] See Brian S. MacBeth, British Oil Policy, 1919–1939 at 65–75 (1985).

[20] See History of TOTAL, available at www.total-ural.ru/total_eng html (accessed Aug. 21, 2008).

[21] See Brian S. MacBeth, supra note 19.

[22] See David Styan, supra note 9 at 26.

[23] See Ferruh Demirmen, supra note 16.

[24] See Helen Metz, supra note 10.

earned by TPC.[25] By 1927, TPC made a major oil discovery at Baba Gurgur, just outside of Kirkuk, and in 1928 entered into the so-called Red Line Agreement, designed to prevent competition for concessions between participants in the area of the old Ottoman Empire.[26] TPC then reorganized itself as the Iraq Petroleum Company (IPC) in 1929.[27]

As indicated in the Prologue, the modern history of oil and gas in Iraq begins with the 1925 concession agreement between Iraq and TPC,[28] an agreement supplemented on several occasions in the 1930s with subsidiaries and affiliates to cover essentially all of Iraq. Though interest in and geological investigations regarding Iraqi oil and gas had been ongoing for some time, TPC's 1927 Kirkuk discovery served to consolidate earlier efforts.[29] Beginning in 1934, the crude available as a consequence of that discovery was shipped by pipeline to the Iraqi town of Al-Hadithah, where the pipeline then split and sent it on for export from Iraq to either the Lebanese port city of Tripoli or what was then the British League of Nations' Palestine mandate city and is now the Israeli city of Haifa.[30] The latter route took the oil across British-controlled Jordanian territory, and the former across French-controlled Syrian territory.

As expected, early export levels on the Al-Hadithah pipeline were not great. By 1938, however, Iraq began exporting markedly greater amounts of crude over the route, with levels of roughly 550,000 barrels reached annually, lasting from 1938 until the commencement of major hostilities associated with World War II and the closing of the Mediterranean to commercial shipping.[31] Despite the expectations of the Iraqi government, TPC and its successor, IPC, delayed wide-scale crude oil production until 1940. Presumably, the objective in doing so was to provide TPC and its successor with a means to better regulate total Mideast production and consequent price levels, because the reach of the company throughout the entire region was substantial.[32] The delay in wide-scale

[25] See Ferruh Demirmen, supra note 16.

[26] See The Developing Years, supra note 4 at 158–60 (on Kirkuk discovery), and The Red Line Agreement, U.S. Department of State, available at www.state.gov/r/pa/ho/time/id/88104 htm (accessed Aug. 10, 2008) (on Red Line Agreement).

[27] See The International Petroleum Cartel, Staff Report to the Federal Trade Comm'n, U.S. Senate, 83d Cong., 2d Sess. at 47–55 (1952), available at www.mtholyoke.edu/acad/intrel/Petroleum/ftc4 html (accessed June 15, 2008).

[28] See The International Petroleum Cartel, Staff Report to the U.S. Federal Trade Comm'n, "Turkish Petroleum Company, Limited Convention with the Government of Iraq, March 14, 1925," pp. 84–112 (1952), available at www.mtholyoke.edu/acad/intrel/Petroleum/ftc5 html (accessed June 15, 2008) (hereinafter The International Petroleum Cartel).

[29] See The Turkish Petroleum Company, available at http://countrystudies.us/iraq/53 htm (accessed June 16, 2008).

[30] See id.

[31] See id., reporting exports of 4 million tons per year. As there are approximately 7.3 barrels in 1 ton of oil, 4 million tons is the equivalent of roughly 550,000 barrels per year.

[32] See Ferruh Demirmen, supra note 16 (discussing, among other things, the so-called "Red Line" agreement, settled upon at Ostend, Belgium, in 1928, and forbidding the British, French, Dutch, and American oil companies forming TPC/IPC from individually seeking concessions within the territories of the former Ottoman Empire).

production, as well as the revenue structure of TPC/IPC concession agreements, the building of refineries, and Iraqi participation in IPC, proved to be sources of constant irritation with the government of Iraq.[33] From various analyses, the matter of the revenue structure proved problematic for two reasons. The first was that IPC and its predecessor were never envisioned as profit-making entities, but rather as simple production and transportation enterprises that would deliver crude oil to their organizers (companies that would eventually become BP, Royal-Dutch Shell, TotalFinaElf, Exxon, and Mobil), which would themselves sell the crude on the international market and rake in whatever profit was available to be made.[34] And second, those who had negotiated the 1925 concession for TPC were careful to avoid agreeing to terms that would set forth a clear and transparent formula for ensuring that the host country of Iraq would receive substantial royalties, taxes, and profits for the granting of the right to produce oil and gas.[35] In fact, some have suggested that, until the time of nationalization of the Iraqi oil and gas fields in the 1960s and 1970s, IPC and its subsidiaries and affiliates not only limited production but also flared all gas and remained uninterested in the construction of Iraqi refineries.[36]

With the onset of World War II, exports of oil through Tripoli and Haifa were stopped. As a result, IPC was instrumental in the construction of crude oil refineries in Tripoli in 1939 and in Haifa in 1940.[37] Their product was apparently for use in the region, because seagoing commerce in the Mediterranean was quite perilous, and exports were therefore extremely unlikely. Following the conclusion of World War II, exports of both crude and some refined products resumed. At the outbreak of the 1948 war in Palestine between Arabs and would-be Israelis, shipments of crude by pipeline to Haifa were interrupted[38] and eventually ended altogether, the pipeline being mothballed. By the 1950s, the combination of increasing post–World War II global economic development and the absence of opportunity to export through Haifa resulted in a push to produce crude from fields in the southern portion of Iraq, fields explored extensively following World War II, with discoveries in Zubair in 1948, Rumaila and Bai Hassan in 1953, and Jambur in 1954.[39] From these fields, crude could be exported directly from Iraq, through the Persian Gulf port city of Basra, rather than having to pass initially through intermediaries such as Syria in order to reach the export point of Tripoli.[40]

[33] See id.
[34] See The International Petroleum Cartel, supra note 28.
[35] See id.
[36] See Kamil Mahdi, Iraq's Oil Law: Parsing the Fine Print, World Policy Journal at 12 (Summer 2007).
[37] See The International Petroleum Cartel, supra note 28.
[38] See Ferruh Demirmen, supra note 16.
[39] See Mohammad Al-Bailani, Assessing Iraq's Oil Potential (Oct. 2003), available at www.geotimes.org/oct03/feature_oil html (accessed June 19, 2008).
[40] See generally, Phebe Marr, The Modern History of Iraq (Westview Press, 1985); Edith T. Penrose, The Large International Firm in Developing Countries: The International Petroleum Industry (MIT Press, 1969).

The many sources of long-standing Iraqi discontent with IPC, coupled with the growing assertiveness around the world of former colonial nations and the rise of pan-Arab nationalism, resulted in December 1961 in the adoption of Law No. 80 nationalizing all nonproducing fields held by IPC under the 1925 and all subsequent concessions.[41] Within the space of a couple of years, the Iraq National Oil Company (INOC) was established and vested with the right to control and produce those untapped fields, amounting to roughly 99.5% of lands formerly under IPC concession. INOC pursued this course through cooperative arrangements with other international oil companies. In response to the 1961 nationalization, IPC threatened to institute lawsuits against anyone found to have purchased product from the Iraqi government or its operating company, INOC. Circumventing the IPC threat, INOC made sure its transactions were barter in nature.[42] The tensions between Iraq and IPC following the 1961 nationalization may have suggested to some the wisdom of backtracking on Law No. 80 and attempting to improve relations. The 1967 Arab-Israeli War and the way it served to enhance the standing of the pan-nationalist Baath Party in Iraq and elsewhere virtually ended the viability of such thoughts, wherever they might have previously existed.[43] And by the 1971–1972 period, Iraq moved forward to complete the total nationalization of all IPC operations within the country with the adoption in June 1972 of Law No. 69.[44] Law No. 69, however, did not apply to IPC's subsidiaries and affiliates, the Basra Petroleum Company (BPC) and the Mosul Petroleum Company (MPC). Following the start of the 1973 Arab-Israeli War, American and Dutch interests in BPC were nationalized, and by 1975 all remaining foreign interests in BPC and MPC were taken.[45]

Just to put the effects of full nationalization in context, it has been suggested by some authorities of the Iraqi oil and gas industry that in 1973, the first year following the completion of IPC nationalization, crude oil production in Iraq ran in the neighborhood of about 2 million barrels per day (mbpd). By 1979, crude oil production had jumped substantially to 3.5 mbpd, with a 1995 target production level of 6 mbpd.[46] Focusing not on actual production but rather on additions to proven reserve figures, levels had increased substantially as well, growing from roughly 33 billion barrels of proven reserves in 1973 to 74 billion barrels of reserves in 1979.[47] The same authorities have also noted that IPC's meager investment commitment to Iraqi-based refineries was reversed

[41] See id.
[42] See id.
[43] See id.
[44] See id.
[45] See An-Najah National University – Zajel, The Iraq Petroleum Company 1914–1982 (Feb. 1, 2005), available at www.zajel.org/article_view.asp?newsID=4519&cat=15 (accessed June 19, 2008) (hereinafter The Iraq Petroleum Company 1914–1982).
[46] See Kamil Mahdi, supra note 36 at 12–13.
[47] See id.

through a heavy commitment by INOC to add refinery capacity.[48] Despite the comparative success of INOC, rivalries, suspicions, and power struggles within the Saddam Hussein regime eventuated in INOC's abolition in 1987 and the transfer of authority over Iraqi oil and gas matters to the Ministry of Oil.[49] The Ministry exercised that authority until Iraq was subjected to United Nations–established sanctions and, in the end, the oil-for-food program, in the wake of Gulf War I.

II. IRAQI OIL AND GAS PRODUCTION

No one disputes that Iraq's oil and gas reserves are substantial. Before getting into some of the specifics regarding the production of those reserves, it seems appropriate to note that the great bulk of the nation's export earnings comes from the export of oil, with essentially none coming from natural gas trade, except for a very small amount generated by liquefied natural and propane gas shipments. In fact, the historical record suggests that approximately 60% of the natural gas produced in Iraq is flared in conjunction with the production of crude oil, and a substantial portion of that not flared is then reinjected to assist in the recovery of crude.[50] Some of the gas produced in conjunction with the production of crude and other so-called nonassociated gas, is captured and made available for use, almost exclusively domestic in nature. In 2007, for instance, it was estimated that Iraq produced around 124 billion cubic feet (bcf) of gas, with approximately 52 bcf being flared and only 30 bcf being consumed by end users.[51]

Overall, Iraqi natural gas production has fallen substantially since 1990. Information suggests that total natural gas production in Iraq in 1989 ran at about 215 bcf for the year.[52] By 2005, with both associated and nonassociated gas activity affected as a result of Gulf War I in 1991 and Gulf War II in 2003, annual production had dropped to 87 bcf.[53] In terms of exports, before Iraq's invasion of its southern neighbor, Kuwait, there had been some natural gas export activity to Kuwait over a 105-mile-long pipeline that had the capacity to carry up to 400 million cubic feet (mcf) per day between sources of supply in

[48] See id.

[49] See www.revenuewatch.org/our-work/countries/iraq-extractive.php (accessed June 16, 2008).

[50] See Energy Information Administration, Official Energy Statistics from the U.S. Government, Iraq: Natural Gas (Aug. 2007), available at www.eia.doe.gov/emeu/cabs/Iraq/NaturalGas html (accessed June 19, 2008) (hereinafter EIA: Natural Gas).

[51] See CIA, The World Factbook: Iraq, available at www.cia.gov/library/publications/the-world-factbook/print/12.html (accessed June 19, 2008) (reporting 3.5 billion cubic meters (bcm) produced, 1.48 bcm flared, and 980 million cubic meters consumed; there are approximately 35.3 cubic feet in 1 cubic meter).

[52] See EIA: Natural Gas, supra note 50.

[53] See id.

Iraq's Rumaila hydrocarbon fields and Kuwaiti receiving facilities at Ahmadi.[54] More recently, consideration has been given to restarting gas exports between the two and commencing development of a natural gas pipeline into Turkey capable of joining with other trans-Turkey gas lines going into the international market.[55] However, one of the complications seems to be concern on the part of Iraqis that there exist substantial deficiencies in the domestic electric power generation area, and Iraqi natural gas could serve as feedstocks for such electric power.[56]

Iraq has generated virtually all of its export earnings through its production of crude oil. Over the many years of production, the trend line has moved in one direction and then another. For purposes of placing production in the immediate pre–Gulf War I period in context, it should be noted that informed authorities report production, essentially by IPC, in 1954 to have run at a rate of approximately 30 million tons annually, or 600,000 bpd.[57] In 1955, that number increased to 32.7 million tons for the year, or 650,000 bpd.[58] The 1956 Suez Crisis and Arab-Israeli War affected production negatively for both that year and the next. The year 1956 saw production of 30.6 million tons, or the equivalent of basically 600,000+ bpd,[59] and 1957 registered a serious decline to 21.36 million tons, or 427,200 bpd.[60] By 1958 the upward production trend had resumed, with 34.93 million tons, or 698,000 bpd, produced.[61] In 1959 there were 40.9 million tons of crude produced by IPC in Iraq, the equivalent of 818,000 bpd.[62] Obviously, improved recovery technology, increased production activity, and the sense within IPC that pressure on various fronts was building from the Iraqi government resulted in production jumping in 1960 to 47.5 million tons, or 950,000 bpd.[63] With the adoption of Law No. 80 in 1961, production over the preceding year increased only marginally to about 49 million tons, or 980,000 bpd, with the same being the case for 1962.[64]

If one compares the 980,000 bpd production rate in the immediate wake of the 1961 nationalization with the production rate generated by the activities of IPC and INOC and its international oil company collaborators at the time of the

[54] See id.
[55] See id.
[56] See id.
[57] See The Iraq Petroleum Company 1914–1982, supra note 45. It should be noted that the 600,000-bpd figure, and subsequent bpd figures associated with reports of millions of tons of crude oil, was arrived at by multiplying each ton of oil by 7.3, the number of barrels per ton of oil, and then dividing the product by 365 days.
[58] See id.
[59] See id.
[60] See id.
[61] See id.
[62] See id.
[63] See id.
[64] See id.

adoption of Law No. 69, the second and more comprehensive nationalization measure adopted by Iraq in 1971–1972, it is clear that the initial move toward nationalization spurred production considerably. Information indicates that the 1971 rate of production was 83.7 million tons for the year, or basically 1.6 million bpd (mbpd).[65] 1972 saw production at the 1.5-mbpd rate.[66] And by 1979, Iraqi crude oil production had increased to a level of 3.5 mbpd.[67]

The Iraq-Iran War broke out in September 1980, and crude oil production figures for the 1980 to 1981 period ran in the neighborhood of 2.5 mbpd.[68] By 1982–1983, production had dropped to roughly 1.0 mbpd, climbing again in 1985 to the vicinity of 1.1 mbpd, and by 1988 to approximately 2.0 mbpd.[69] Following the conclusion of the Iraq-Iran War in 1988, and up until the time of Saddam Hussein's invasion of Kuwait in the summer of 1990, Iraqi production of crude oil had climbed from 2.5 mbpd in 1989[70] to the earlier 1979 high level of 3.5 mbpd by 1990.[71] The invasion of Kuwait and the international community's response had serious repercussions for Iraqi crude oil production. Anyone who experienced that period has indelible memories of burning Iraqi oil fields, in large measure a wound self-inflicted by Saddam's own henchmen. Production for the 1991 to 1992 period dropped to less than 500,000 bpd.[72]

In the immediate aftermath of Gulf War I, not only the impact of the military action on Iraq's oil fields, but the United Nations' imposed economic sanctions kept Iraqi crude oil production in the 500,000- to 600,000-bpd range from 1991 to 1996.[73] The UN-developed oil-for-food program, designed to permit limited and regulated Iraqi oil export sales to recommence, facilitated a climb in production to roughly 2.6 mbpd by 2001.[74] Production ramped up rapidly following the program's announcement in 1996, so that by the first 8 months of 1998, crude production had reached 2 mbpd.[75] Production stayed solid right up to the time of the March 2003 outbreak of hostilities in Gulf War II. Reports for the preinvasion year suggest production at the 2.6-mbpd rate, with production capacity said to have been in the 2.8- to 3.0-mbpd range.[76]

[65] See id.
[66] See U.S. Energy Information Administration, U.S. Department of Energy (1998), available at www.arabchamber.com/arab-countries/iraq/Y/iea2 htm (see graph) (accessed June 19, 2008) (hereinafter ArabChamber).
[67] See id.
[68] See Energy Information Administration, Official Energy Statistics from the U.S. Gov't, Iraq: Oil (Aug. 2007), available at www.eia.doe.gov/emeu/cabs/iraq/Oil.html (see graph) (accessed June 19, 2008) (hereinafter Iraq Oil).
[69] See id. (graph).
[70] See id. (graph).
[71] See ArabChamber, supra note 66 (graph).
[72] See Iraq Oil, supra note 68 (graph).
[73] See id. (graph).
[74] See id. (graph).
[75] See ArabChamber, supra note 66 (graph).
[76] See Iraq Oil, supra note 68.

As with Gulf War I, the effects of the second Gulf War on the oil fields were serious. These effects have been further compounded by the continuing sectarian and ethnic turmoil besetting the nation. Reports of Iraqi crude oil production from 2006 indicate that it came in at 2.0 mbpd, more than half a million bpd short of prewar production.[77] 2007 estimates suggested a production rate basically in the same vicinity.[78] However, U.S. Department of State reports from the Iraq Transition Office suggested that production actually ended the year at 2.3 to 2.4 mbpd.[79] Interestingly, the historical pattern suggests that domestic Iraqi consumption has remained essentially steady at about 250,000 to 500,000 bpd, leaving production amounts above that level to be available for export to the international market.[80] And furthermore, of total crude production, about two thirds has come from the southern oil fields and one third from the north. Indeed, it appears that in 2007, somewhere between 1.5 and 1.9 mbpd came from the north and south Rumaila field, in southern Iraq, and only about 200,000 bpd came from the Kirkuk field in the country's north. It has been suggested that, prior to Gulf War II, as much as 680,000 bpd was coming from the Kirkuk field.[81] The drop-off in northern Iraq production can be somewhat attributed to the number of pipeline and oil facility attacks in that area. However, in a media report from early summer 2008, there were indications from the Iraqi Oil Ministry that attacks in the area had been significantly reduced, allowing production and consequent shipments by pipeline to world market terminals in Turkey to be increased to as much as 450,000 bpd.[82]

III. MAIN IRAQI PIPELINES

Iraq has approximately 4,400 miles of main pipelines serving its oil and gas industry.[83] Historically, the earliest pipelines ran from the northern oil fields in Kirkuk across Syria and into Lebanon, and across Jordan and into what is now Israel. In the second half of the twentieth century, pipelines were also developed north through Turkey to the port of Ceyhan, south across the lower half of Iraq and to the Iraqi Gulf port terminals surrounding Basra, and through Saudi Arabia to its export terminals on the Red Sea.

[77] See id.
[78] See id. (graph "Iraq's Oil Production & Consumption").
[79] See U.S. Department of State, Iraq Transition Office, Essential Indicators Report at 4 (Oil Production) (Feb. 21, 2008). It is not unusual to see some divergences on Iraqi oil production numbers depending on their source.
[80] See Iraq Oil, supra note 68 (graph "Iraq's Oil Production & Consumption").
[81] See id.
[82] See Sameer N. Yacoub (Associated Press), Iraq Increases Oil Exports, Albuquerque Journal, (June 21, 2008), at B6, col. 2.
[83] See Energy Information Administration, Official Energy Statistics from the U.S. Government, Iraq: Oil Exports (Aug. 2007), available at www.eia.doe.gov/emeu/cabs/Iraq/OilExports html (accessed June 17, 2008) (hereinafter Iraq: Oil Exports).

As already indicated, the original 12-inch pipelines were constructed by IPC in 1934 to carry crude oil from the Kirkuk fields to Al-Hadithah and then on to Tripoli, Lebanon, and Haifa, modern-day Israel.[84] In 1946, construction on parallel 16-inch pipelines was begun, and the branch to Haifa was almost operational when the 1948 conflict between Palestinians and would-be Israelis permanently shut down the Haifa line.[85] In 1952, in order to take up the loss resulting from the closure of the Haifa branch, the branch into Syria toward Tripoli benefited from the addition of a new trunk line running to the Syrian central-coastal port of Banias.[86] On and off in the two decades following the Iraqi nationalization of IPC in 1961, the Iraq-Syria-Lebanon (ISL) branch was

[84] See text accompanying supra note 30. See also James H. Bamberg, The History of the British Petroleum Company: The Anglo-Iranian Years, 1928–54 at 163–5 (Cambridge University Press, 1994) (discussing pipeline construction to Haifa and Tripoli).

[85] See Wafaa' A-Natheema, Iraq's Oil Pipeline to Israel (Oct. 11, 2005), available at http://weekly.ahram.org.eg/2005/762/re2.htm#1 (accessed June 16, 2008).

[86] See Oil Exports: Part 3, APS Review of Downstream Trends (Mar. 20, 2006), available at http://goliath.ecnext.com/coms2/gi_0199–5336616/Syria-Part-3-Oil-Exports html (accessed

shut down as a result of squabbles between Iraqi and Syrian authorities over various matters, including transit fees for Iraq's use of Syrian territory to reach access to export terminals on the Mediterranean, and nationalist sabotage.[87]

Knowledgeable sources have suggested that the ISL pipeline's capacity had increased over the years to easily carry 700,000 bpd, with the potential to expand to 1.4 mbpd.[88] The outbreak of the Iraq-Iran War in the early 1980s caused shipments of Iraqi crude over the pipeline to be discontinued from 1982 to 2000, because Syria favored Iran during that conflict.[89] Syrian needs for crude over that period were met by shipments from both Saudi Arabia and Kuwait. From reports, portions of the ISL pipeline situated within Syria were put to use by the Syrian authorities during that time to ship its own crude oil produced at Dair al-Zur to refineries and terminals in Banias and, after some conversion, to carry natural gas to facilities at Homs.[90] Beginning in 2000, Saddam Hussein's interest in trying to break UN-imposed sanctions under which Iraq had suffered since the conclusion of Gulf War I in 1991 resulted in relations between Iraq and Syria thawing sufficiently to permit a resumption of crude shipments along the ISL by 2001 at the rate of 200,000 bpd.[91] With the U.S.-led coalition's invasion of Iraq in March 2003, Gulf War II resulted once again in the closing of the ISL pipeline.[92] Consideration has been given to repair of pumping and pipeline capacity along the ISL, with an eventual resumption of use, but the dissatisfaction of the U.S. government with policies of Syrian authorities on matters ranging from insurgents in Iraq, to meddling in Lebanon, to the continuing Palestinian-Israeli dispute has seriously complicated the possibility of Iraqi officials successfully moving in that direction. The most recent reports, though, suggest that Iraq may be prepared to go its own way on that matter.[93] Interestingly, there have also been media reports about the possibilities of restarting pipeline shipments of crude to Haifa. This would necessitate either substantial reconstruction of portions transiting Jordan, given reports of this portion's dismantling, or the building of an entirely new line.[94]

June 16, 2008). For the suggestion that the Banias line was not operational until 1954, see An-Najah National University – Zajel, The Iraq Petroleum Company 1914–1982, Free Republic (Apr. 10, 2006), available at www.freerepublic.com/focus/f-chat/16222/posts (accessed June 19, 2008).

87 See id.

88 See Iraq: Oil Exports, supra note 83.

89 See id.

90 See id.

91 See id.

92 See id.

93 See Iraq, Syria to Reopen Joint Pipeline, IraqUpdates (Aug. 12, 2008), available at www.iraqupdates.com/p_articles.php/article/35056 (accessed Aug. 12, 2008).

94 See generally Hooman Peimani, In the Pipeline: More Regime Change, Asia Times Online (Apr. 4, 2003), available at www.atimes.com/atimes/Middle_East/ED04Ak01.html (accessed June 23, 2008); Amiram Cohen (Haartrez), U.S. Checking Possibility of Pumping Oil from Northern Iraq to Haifa, via Jordan (Apr. 14, 2008), available at www.iraqwar.mirror-world.ru/article/161844 (accessed June 23, 2008); and, www.flashpoints.info/countries-conflicts/Iraq-web/Iraq-briefing htm (accessed June 24, 2008).

The crude oil pipeline route across the Kurdish northern portion of Iraq to the Turkish Mediterranean port city of Ceyhan (Iraq-Turkey Line or ITL) has been composed principally of two lines: the first a 40-inch line operational in 1976, and the second a 46-inch line operational in 1987.[95] The lines were constructed and operated under a August 27, 1973, agreement between Iraq and Turkey,[96] and within Turkey they are owned and controlled by the government-held company BOTAS. Collectively, the two lines are approximately 950 miles in length,[97] with one having a transport capacity of 1.1 mbpd and the other a capacity of 480,000 bpd.[98]

Shipments of crude over the ITL were suspended at the beginning of the 1990s as a consequence of UN sanctions in response to Iraq's invasion of Kuwait and Gulf War I.[99] Limited exports over the ITL were again permitted by the UN under its oil-for-food program beginning in 1996, only to be interrupted by Gulf War II in early 2003. Shipments since that time have been intermittent because of serious sabotage against pipelines in the north of Iraq.[100] BOTAS reports, however, that total shipments to Ceyhan during 2007 reached nearly 40 million barrels.[101] That same year, official U.S. government sources reported that a variety of problems with the ITL have reduced its usable capacity to 300,000 bpd.[102]

For years prior to 1985, the Saudis had pumped crude oil from a variety of fields and collection points, across its so-called Petroline, to export terminals and facilities at its Red Sea port city of Yanbu. In 1985, during the midst of the Iraq-Iran War, the Saudis, long suspicious of the Shiite-led government in Iran, permitted the Sunni-dominated Iraqi government of Saddam Hussein to construct a pipeline in the south from Az Zubair, Iraq, that tied in to the Saudis' Petroline.[103] From indications, that spur line was replaced in 1989 by a parallel line running the entire distance to Yanbu. Construction on that line, which was said to remain under Iraqi control over its entire length by virtue of

[95] See Economic Commission for Europe: Inland Transport Committee, UN Economic and Social Council at 17, UN Doc. TRANS/WP.5/2002/1/Add.1 (May 31, 2002), available at www.unece.org/trans/doc/2002/wp5/TRANS-WP5–2002-01a1e.doc (accessed June 17, 2008).

[96] See id.

[97] See www.botas.gov.tr/eng/activities/iraq.asp (accessed June 17, 2008) (reporting 1,876 kilometers).

[98] See Iraq: Oil Exports, supra note 83.

[99] See www.botas.gov.tr/eng/activities/iraq.asp (accessed June 17, 2008).

[100] See Ben Lando, Securing its Oil Pipeline, Iraq Can Increase Production and Exports (June 13, 2008), available at www.upi.com/Energy-Resources/2024608/06/13/Securing-its-oil-pipeline-Iraq-can-increase-production-and-exports (accessed June 17, 2008).

[101] See id.

[102] See Persian Gulf Region: Export Routes, Energy Information Administration, U.S. Department of Energy (2007), available at www.eia.doe.gov/cabs/Persian_Gulf/ExportRoutes html (accessed June 17, 2008).

[103] See www.photius.com/countries/iraq/economy/iraq-economy-oil-in-the-1980s.html (accessed June 17, 2008); Helen Chapin Metz (U.S. Library of Congress, Federal Research Division), Iraq: A Country Study, Chapter 3: Economy, sec. "Oil in the 1980s," available at www.pos1.info/iraqstud htm#1_0_52 (accessed June 17, 2008).

a special arrangement with the Saudis, was begun in late 1987 by a Japanese-South Korean-Italian-French consortium.[104] The initial tie-in was reported to have provided Iraq with a capacity of 500,000 bpd over the Iraq Petroline Saudi Arabia (IPSA). With the completion of the parallel line, an additional 1.15 mbpd was said to have been added.[105] In the late 1980s, Iraq was said to have been exploring the construction of a new line running through Jordan to the Gulf of Aqaba, but plans for that were apparently shelved in 1988.[106] Since the initiation of Gulf War I in 1991, the branches of the IPSA itself have been shut down.[107]

Following the steps in the full nationalization of the Iraqi oil industry in 1961 and 1971–1972, the southern oil and gas fields received increased development attention. Cognizance of the Iraqi government regarding the precariousness of its access to world export markets, especially prior to the completion in 1976 of the first phase of the ITL to Ceyhan, and driven home by the intermittent troubles with Syria over exports along the ISL pipeline, turned Iraqis toward developing national export terminals in the south near Basra. Three facilities and a corresponding web of pipelines arose to meet this objective. By the late 1970s and early 1980s, pipelines, some of which were two-directional, like Iraq's so-called 1975 Strategic Pipeline, consisting of two parallel 700,000-bpd lines, could carry crude from southern and northern Iraq fields to Iraqi-controlled export terminals at Mina al Bakr, Khawr al-Amaya, and Khawr al-Zubayr, all situated in the vicinity of Basra, or north over the ITL for export through Ceyhan.

As built, the Mina al Bakr facility consisted of four 400,000-bpd capacity oil-tanker berths. It was affected by both the Iraq-Iran War and the Gulf Wars. As repaired, reports suggest it has a total capacity of somewhere between 600,000 bpd and 1.2 mbpd, largely because of deficiencies in the facility's separation and storage areas.[108] The Khawr al-Amaya facility, destroyed during the Iraq-Iran War, was repaired in 1995 with claims that it has capacity of 600,000 bpd, with estimates suggesting its capacity could be as high as 1.2 mbpd.[109] Unlike the other two, the Khawr al-Zubayr facility has largely serviced the liquefied natural gas export market, though it is said to have some capacity for small seagoing tanker shipments of refined products and is undergoing retrofitting for loading crude oil as well.[110]

Many of the pipelines throughout Iraq remain affected by the years of war, neglect, and sabotage endured by the nation's infrastructure. At present, most

[104] See id.
[105] See id.
[106] See id.
[107] See Iraq: Oil Exports, supra note 83.
[108] See NONAV-Iraq-Oil Market Size, Business Intelligence: Middle East (Jan. 22, 2006), available at www.bi-me.com/main.php?id=383&t=1&c=34&cg= (accessed June 19, 2008); www.arabchamber.com/arab-countries/iraq/Y/iea2 htm (accessed June 16, 2008).
[109] See id.
[110] See id.

shipments of crude are made by way of the port facilities in the Basra area, with some passing irregularly by truck and pipeline to the Turkish port of Ceyhan. In addition to media reports about government authorities considering the renewal of pipeline shipments to Syria and Israel and constructing a new pipeline across Jordan to Aqaba, ongoing discussions have been occurring between Iraqi and Iranian officials regarding the building of two parallel pipelines from southern Iraq to refinery facilities at Abadan, Iran. Presumably, the idea would be to ship Basra crude to Iran and receive imports of refined products from the facilities in Abadan. Iraqi Kurdish authorities have also been contemplating the construction of a new northern pipeline to carry crude to Ceyhan. The idea would be to follow a route that would bypass the strife-troubled areas where the existing ITL remains subject to frequent bombings.

IV. IRAQI REFINERIES

On the topic of nationalization of IPC's operations by the Iraqi government, most consider the adoption of Law No. 80 in 1961 to be the seminal and instrumental event. Interestingly, there is some reason to believe the Iraqis' initial foray into nationalization in the oil and gas industry actually came a decade earlier when they nationalized the sole refinery IPC had operating in the country and supplying domestic needs. It appears that before the construction of refineries in Tripoli and Haifa in 1939 and 1940, IPC had operated a refinery in Iraq, but it was capable of meeting only about two-thirds of Iraq's domestic fuel needs, with the other one-third being imported from the Iranian refinery at Abadan. With the movement toward Iranian nationalization of foreign oil and gas operations at the turn of the 1950s, imports from Abadan were seriously interrupted, driving home for the Iraqis their long-standing grievance with IPC over the lack of local refining capacity. As a consequence, in 1951 the Iraqi government, with the payment of compensation, confiscated IPC's Iraqi refinery, and shortly thereafter it also hired the American firms Foster Wheeler and Kellogg, Brown, and Root to construct a new refinery facility near Baghdad, the thought being to enhance operations and secure a stable supply of refined product for domestic needs.[111]

The new refinery near Baghdad became the Daura refinery, one of the four major refining operations in Iraq. Different sources suggest slightly different dates, but there seems to be a consensus that the Daura refinery was built in the 1953–1955 time frame, and later expanded in 1996.[112] The other three major

[111] See Iraq – Post World War II Through the 1970s, available at http://conuntrystudies.us/iraq/54 htm (accessed June 20, 2008).

[112] See ArabChamber, supra note 66; Master Plan Urged for Iraq's Downstream Industries, Oil & Gas Journal, available at www.ogj.com/articles/save_screen.cfm?ARTICLE_ID=193853 (accessed June 20, 2008) (hereinafter Master Plan Urged).

refineries are the Basra refinery, in the south, as well as Baiji North and Baiji Salaheddin, both in north-central Iraq.[113] Information indicates that the Basra refinery was constructed in 1972 and expanded 7 years later in 1979. Baiji North was built in 1982, during the midst of the war with Iran, as was Baiji Salaheddin, the latter being constructed in 1987 by a consortium of Japanese, Czech, and French companies.[114]

It was believed that Iraqi refining capacity immediately prior to Gulf War I had grown to approximately 700,000 bpd,[115] enough capacity to meet domestic needs and provide a cushion of sorts. By March 1991, however, it was indicated that actual refinery production had been cut to only 60,000 bpd because of the effects of the Gulf War.[116] It was thought that production had largely been restored to actual prewar production levels by 1993.[117] Nonetheless, a report from the later 1990s suggests that Iraqi refinery capacity from the four major facilities had been so damaged by the effects of Gulf War I and the subsequent UN economic sanctions that Daura was able to produce about 100,000 bpd, Basra 126,000 bpd, Baiji North 150,000 bpd, and Baiji Salaheddin 140,000 bpd.[118] At that time, Iraq was said to be exploring the possibility during the postsanction period of refinery upgrades and building a new (U.S.)$1 billion, 290,000-bpd facility near Baghdad.[119] Clearly, though, the continued controversy surrounding Iraq's seeming intransigence regarding suspected weapons activities, when combined with the events of September 11, 2001, and the subsequent concern about international terrorism, resulted in the U.S.-led coalition's invasion that marked the commencement of Gulf War II, thereby preventing the Saddam Hussein regime from experiencing any postsanction period.

By late 2007, more than 4 years after the Gulf War of 2003, there were indications that the direct consequences of the war, and its follow-on civil strife, had reduced Iraq's installed refinery capacity to no more than 597,500 bpd.[120] The four major refineries were thought to have installed capacity of about 560,000 to 570,000 bpd, with various other small facilities making up the balance.[121] The Daura refinery, Iraq's oldest, was thought to still have 100,000 bpd of capacity but was looking at an expansion to 240,000 bpd under a (U.S.)$110 million contract with a Texas and Czech group consortium. Security remained a problem for moving forward with the contract.[122] The two sister refineries at Baiji were viewed as having a combined capacity of 310,000 bpd.

[113] See id.
[114] See Master Plan Urged, supra note 112.
[115] See ArabChamber, supra note 66.
[116] See id.
[117] See id.
[118] See id.
[119] See id.
[120] See Iraq Oil, supra note 68.
[121] See id.
[122] See id.

But given operational problems, some of which were associated with the fact the facilities were refining crude from the Kurdish north while being situated in a non-Kurdish locale, the refineries were said to be actually operating at about only 75% of capacity. The refinery at Basra was estimated to have a capacity of 150,000 bpd, slightly above its late 1990s capacity.[123] So-called topping plants, small refineries able to add minor supplemental amounts to the refined product generated by the major refineries, were noted to exist at Mosul-Qaiyarah, Kirkuk, Khanaqin, K3-Hadithah, Muftiah, Najaf, Maysan, and Nassiriyah-Samawah. These were said to be responsible for low-grade kerosene, diesel, and asphalt.[124]

Since 2003, there have been few significant enhancements in Iraqi refinery capacity or operation. In late 2006, a 10,000-bpd facility was brought online in Najaf. A 20,000-bpd facility was also scheduled to be completed in Sulaymaniyah in late 2007.[125] The ethnic and sectarian rivalry that has gripped the nation since the bombing of the Golden Mosque in Samara a couple of years ago has complicated any plans to enhance refinery capacity. From various indications, the government of Iraq has given consideration to a (U.S.)$4 billion plan to raise refinery capacity to 1 mbpd over the course of several years. This would include the addition of a 250,000-bpd refinery at Dohuk, construction on which was scheduled to begin during summer 2007 under the auspices of Make Oil AG, a Lebanese company; a 300,000-bpd facility to be completed by a consortium between the Iraqi Ministry of Oil and a Japanese partner and situated in Msaib/Nassiriyah; a 140,000-bpd refinery in Karbala scheduled for 2009–2010; and an additional 150,000-bpd facility in Basra also scheduled for 2010.[126]

V. LEGAL STATUS OF IRAQI OIL AND GAS RESERVES PRIOR TO SELF-GOVERNANCE

As indicated in the Prologue, Iraq has substantial proven oil and gas reserves, and the estimates of reserves yet unknown are equally as staggering. No one would question the Iraqi government's total, complete, and absolute autonomy and control over those reserves in the years between the 1961 nationalization and the period immediately prior to Gulf War I in 1990–1991. Even in the three decades preceding nationalization, a period controlled by oil and gas concessions granted to IPC and its subsidiaries and affiliates, few would question the ultimate sovereignty of Iraq over its natural resource patrimony. What is of concern in this section of Chapter 1, however, is the effect that was produced on the Iraqi government's autonomy and control over its oil and gas reserves by

[123] See id. discussing capacity at the four refineries.
[124] See id.
[125] See id.
[126] See id.

the various UN Security Council resolutions adopted in connection with and after Gulf War I – including those establishing the economic sanctions against Iraq, creating the UN oil-for-food program, and setting up the Development Fund for Iraq (DFI) to be supplied by monies from sales of Iraqi oil and gas – as well as by those adopted during the time between Gulf War II and the recognition of Iraqi self-governance in summer 2004. Conceivably, it might be maintained that the assertions of authority found in those internationally binding legal pronouncements of the Security Council altered the juridical landscape so as to divest Iraq of legitimate power over its own oil and gas and transfer it to the international community acting as a trustee or fiduciary for the benefit of Iraq itself. As will be explained hereafter, any such understanding of the pertinent Security Council resolutions would be mistaken.

Prior to taking up those particular resolutions, one would do well to keep in mind that, between the Gulf War I resolutions of the Security Council and the resolutions adopted in the wake of Gulf War II, Iraq fell for a time under the control of the U.S.-led coalition occupying military forces. And immediately thereafter, given the lack of any extant indigenous governing structure, Iraq had little choice but to submit to the will of the U.S.-appointed, and UN-endorsed, Coalition Provisional Authority (CPA).[127] As will be observed later in Chapter 8, no debate exists about the fact that prevailing principles of international law governing occupying military forces forbid, as a general matter and subject to exception only in cases of genuine necessity, changes in the legal system of an occupied territory.[128] In full recognition of the puissance of this basic and fundamental notion, at least in regard to the Iraqi oil and gas industry and its resources, legal pronouncements of the CPA made clear that it was in no way acting to alter, modify, or impair the nature of the applicable legal regime.[129] In fact, when the Iraqi Constitution was adopted in 2005, the year after the CPA relinquished authority to the Iraqis, it contained a provision, article 130, specifically providing that laws existing at the time of the Constitution's adoption would remain in force in the absence of annulment or amendment.[130] This

[127] For UN recognition of the CPA, see both UN Security Council resolution 1483 (22 May 2003), UN Doc. S/Res/1483, available at http://daccess-ods.un.org/doc/UNDOC/GEN/No3/368/53/PDF/N0336853.pdf?OpenElement (accessed June 20, 2008) (thirteenth para. of Preamble "recognize[es] the specific authorities, responsibilities, and obligations under applicable international law of . . . states [in Iraq] as occupying powers under unified command (Authority)," and then para 4 of the resolution's substantive provisions "[c]alls upon the Authority, consistent with the Charter . . . and other relevant international law, to promote the welfare of the Iraqi people"), and resolution 1511 (Oct. 16, 2003), available at http://daccess-ods.un.org/doc/UNDOC/GEN/No3/563/91/PDF/N0356391.pdf?OpenElement (accessed June 20, 2008) (substantive para. 1 "underscore[ing] . . . the temporary nature of the exercise by the Coalition Provisional Authority (Authority) of the specific responsibilities, authorities, and obligations under applicable international law recognized and set forth in resolution 1483 (2003)").

[128] See Chapter 8, text accompanying notes 45–46.

[129] See id., text accompanying notes 73–75.

[130] See Iraqi Constitution at art. 130, available at www.export.gov/iraq/pdf/iraqi_constitution.pdf (accessed May 5, 2008).

would clearly seem to confirm the intent, among other things, to leave unaffected the status of preexistent oil and gas law.

If focus is shifted to the UN Security Council resolutions adopted in connection with Gulf War I, it would seem that exactly the same thing could be said. Three resolutions in particular are relevant – resolutions 661, 687, and 986 – yet none of them, or any of the other associated resolutions, attempted to change the legal regime that found Iraqi oil and gas under the control of Iraqis during the years intervening between the First and Second Gulf Wars. It clearly came to pass that the consequence of Gulf War I was the resounding defeat of the military forces of Saddam Hussein, their unceremonious removal from Kuwait, and the imposition of a multiyear UN regime of economic sanctions against Iraq. In no way, however, did any of these events individually or collectively, or the Security Council resolutions adopted in connection with them, remove legal authority over Iraqi oil and gas from the hands of the Iraqi people and its government. As will be observed momentarily, the UN economic sanctions may have served to limit the latitude of Iraq with respect to dealings concerning its oil and gas resources, but the sanctions neither sought nor accomplished the divestment of Iraqi title authority or ownership over the nation's resources. Iraqi oil and gas remained the patrimony of Iraq, but exports and sales of those resources were subjected to regulation by the international community.

Resolution 661, adopted following Iraq's invasion of Kuwait in summer 1990, initiated the process of regulation without any divestment of Iraqi ownership or authority over its oil and gas resources.[131] Paragraph 3(a) of that resolution evidenced this by providing that, with the resolution's adoption, the Security Council "decides that all States shall prevent . . . [t]he import into their territories of all commodities and products originating in Iraq . . . exported therefrom after the date of the present resolution."[132] The effect was to outlaw UN member states from importing Iraqi oil and gas. In regard to earlier efforts to eliminate the former apartheid regime in South Africa and accomplish other objectives in connection with other sensitive international problems elsewhere around the globe, trade sanctions had previously been used by the United Nations. As in so many of the other cases, though, nothing in resolution 661 attempted to wrest ownership or title authority from Iraq of legal right to its natural resources. Paragraph 6 of the resolution did establish a "Committee" to oversee compliance with the resolution's dictates,[133] but in doing so did not signify that ultimate legal power over Iraqi oil and gas transferred to the Committee itself.

With the coalition's removal of Iraqi forces from Kuwait and the defeat of Saddam's military henchmen in spring 1991, Security Council resolution 687

[131] See the text of Security Council resolution 661 (Aug. 6, 1990), available at www.iraqwatch.org/unscresolutions/s-res-661 htm (accessed Nov. 28, 2006).

[132] See id. at para. 3(a).

[133] See id. at para. 6.

was adopted.[134] As with resolution 661, it had no effect on Iraqi ownership or title authority over its hydrocarbon resources. In addressing those resources, and a variety of other significant matters such as inspections regarding weapons of mass destruction (WMD) and return to Kuwait of looted items, however, resolution 687 did contain two important provisions. The first, paragraph 19, indicated that a UN Compensation Commission was being established to address the issue of Iraq liability for war-related claims, and that such claims should be paid by sales for "export[] of petroleum and petroleum products from Iraq."[135] The second provision, paragraph 22, picked up on this theme of loosening of the earlier embargo on exports of Iraqi oil and gas and provided that, at some point ideally in the near future, Iraq would meet all of its UN-imposed obligations – and especially those related to WMD inspections – thereby permitting the lifting of the trade sanctions and resumption of oil and gas exports. The paragraph's precise words were that Iraqi compliance with its obligations would lead to a situation where "the prohibitions against the import of commodities and products originating in Iraq . . . contained in resolution 661 (1990) shall have no further force or effect."[136] Again, although evidence of regulatory intent exists, nothing in either paragraph suggests Iraqi loss of ultimate ownership or title authority over its oil and gas resources.

During the 4 years intervening between the adoption of resolution 687 and the Security Council's 1996 action in adopting resolution 986, the world community tried on a couple of occasions to maneuver Iraq into a position where it would endorse an international legal regime that would trade a permission to resume limited oil and gas exports in return for a commitment to dedicate sales revenues to food, medicine, and humanitarian needs, as well as compensation for Gulf War I claims. The impetus for this was the growing humanitarian crisis brought on in Iraq by the effect of the embargo imposed by resolution 661, and the ineptitude of the Saddam Hussein government. Two important early illustrations of such efforts were Security Council resolutions 706 and 712, both adopted in mid-1991. Resolution 706 speaks, in the ninth paragraph of the Preamble, of monies needed to fund the humanitarian and compensation demands coming from sales of Iraqi petroleum and petroleum products.[137] Obviously, this would have necessitated the removal of the extant embargo. Paragraph 1 of the substantive provisions of the resolution then declared the Council's willingness, assuming Iraqi consent, to permit resumption of limited sales to generate revenue for humanitarian and compensation needs.[138]

[134] See the text of Security Council resolution 687, available at www.iraqwatch.org/unscresolutions/s-res-687 htm (accessed Nov. 30, 2006).
[135] See id. at para. 19.
[136] See id. at para. 22.
[137] See Security Council resolution 706 at ninth para. of Preamble, available at www.iraqwatch.org/un/unscresolutions/s-res-706.htm (accessed Dec. 4, 2006).
[138] See id. at para. 1.

Although it is true that paragraph 1(b) envisioned the use of an escrow account to ensure that sales revenues were utilized in a manner consistent with the resolution's overall objectives,[139] the very fact the UN was sensitive to the need for Iraqi consent for such a program indicates cognizance of Iraqi ownership or title authority over its own oil and gas. Unfortunately for the Iraqi people, the Iraqi government was not prepared, at that date, to accede to either resolution 706 or 712.[140] With the adoption of resolution 986 nearly half a decade later, sales of Iraqi oil and gas on a limited basis did eventually resume.

But even with the resumption of Iraqi hydrocarbon export sales on a limited basis under the oil-for-food program, nothing changed regarding the ownership or title authority over Iraq's oil and gas resources. Nothing appears in the language of Security Council resolution 986 to suggest effective assertion by the UN of legal supremacy over title to Iraq's oil and natural gas patrimony.[141] When the terms of the resolution are examined in conjunction with the mid-1996 Memorandum of Understanding (MOU) worked out between the Secretary General and the government of Iraq, the operative instrument actually initiating export sales, it is clear that the Security Council remained committed to the notion that Iraq's hydrocarbon resources belonged to Iraqis and that the UN was prepared to go no farther than regulating how those resources, and the revenues from their sale, were utilized. This is evident in the fact that paragraph 1 of 986 simply lifted the embargo, subjected sales to oversight by a committee of Security Council members, and called for proceeds from sales to be held in an escrow account.[142] Paragraph 7 then did nothing but subject that account to independent audit, with reports to be made by the Secretary General to the Iraqi government about the status of and activity in the account.[143] The follow-on paragraph 8 added to this by merely insisting that the escrow funds be used for identified purposes, especially the humanitarian needs of the Iraqi people.[144] Paragraphs 14 and 15 just insulated Iraqi petroleum and petroleum products from legal action until title passed to a purchaser and bestowed upon the escrow account the same privileges and immunities accorded the UN.[145] The insulation from legal action until title passes to a purchaser plainly acknowledges Iraqi, and not UN, control over ownership.[146] This theme is reiterated in the MOU

[139] See id. at para. 1(b).

[140] See Security Council resolution 712, available at www.iraqwatch.org/un/unscresolutions/s-res-712 htm (accessed Dec. 4, 2006). On the Iraqi rejection of these proposals, see UN Office of the Iraq Programme: Oil for Food – Origins (7 Dec. 2006), available at www.un.org/Depts/oip/background/index html (accessed Dec. 7, 2006).

[141] See Security Council resolution 986, available at www.iraqwatch.org/un/unscresolutions/s-res-986.htm (accessed Dec. 1, 2006).

[142] See id. at para. 1.

[143] See id. at para. 7.

[144] See id. at para. 8.

[145] See id. at paras. 14 and 15.

[146] This matter is taken up in Chapter 7 in connection with creditor claims against Iraqi hydrocarbons and the revenues from its sales.

implementing and fleshing out the various paragraphs of the resolution, and in particular in paragraphs 1–5 of the MOU's Annex II, which clearly look toward the Iraqi government or its state oil marketing organization (SOMO) having the final say regarding endorsement of all oil and gas purchase contracts and associated documents.[147] Had the UN entertained the notion that it, and not the government of Iraq, exercised or would in the future exercise ownership or title authority over Iraqi hydrocarbons, it would seem such a concession to Iraqi contract approval would never have appeared in the language of the MOU.

The two central Security Council resolutions adopted in the period between the commencement of Gulf War II and the CPA's turnover of governmental authority in summer 2004 to the Iraqis took precisely the same kind of approach. Both resolutions asserted UN regulatory control over export trade in Iraqi hydrocarbon resources, the aim being to restrict Iraq to generating revenue for the humanitarian needs of its people, but neither undermined the idea of exclusive Iraqi ownership or title authority over the nation's hydrocarbon resources. The first, resolution 1483, was adopted in late May 2003,[148] within weeks of the removal of Saddam from power. The various substantive provisions of the resolution addressed many issues, from the obligations of the occupying coalition military forces to the objective of having the Iraqi people determine their own political destiny as quickly as possible and the task of the CPA in assisting the establishment of a transitional governing structure.[149] With respect to the sales of petroleum and petroleum products, the revenues that had been generated by such over the intervening more than half-dozen years, and the legal protection that the UN had, extending back to resolution 986, accorded the revenues and the oil and gas resources of Iraq, resolution 1483 acted to give effect to the reality that had drastically changed with the downfall of Saddam Hussein. As will be discussed at great length in Chapter 7, oil and gas revenues and the natural resources themselves were provided legal protection.[150] The so-called Development Fund for Iraq (DFI) and the International Advisory and Monitoring Board (IAMB) were established and charged with the responsibility of overseeing what would now be free and unlimited sales of Iraqi oil and gas and subsequent disbursements of revenues for the benefit of the Iraqi people, with the exception of 5% to be used to pay war claims.[151] And the Secretary General was charged with the task of transferring all accumulated oil-for-food

[147] See the specifics of the MOU in Letter Dated 20 May 1996 from the Secretary-General Addressed to the President of the Security Council, UN Doc. S/1996/356, available at http://daccessdds.un.org/doc/UNDOC/GEN/N96/127/71/PDF/N9612771.pdf?OpenElement (accessed Dec. 6, 2006).

[148] See Security Council resolution 1483 (22 May 2003), available at http://daccess-ods.un.org/doc/UNDOC/GEN/No3/368/53/PDF/N0336853.pdf?OpenElement (accessed June 24, 2008).

[149] See, for example, id. at paras. 4–9.

[150] See id. at paras. 20 and 21.

[151] See id. at paras. 12–14.

program money to DFI itself.[152] Nowhere in the substantive provisions of the resolution was anything suggested that would derogate from the idea of Iraqi ownership and title authority over the nation's hydrocarbons. In fact, quite to the contrary, the fourth paragraph of the resolution's Preamble spoke directly to the matter of Iraqi legal power over its hydrocarbon resources by "[s]tressing the right of the Iraqi people freely to determine their own political future and control their own natural resources. . . ."[153]

In mid-October 2003, the Security Council adopted the second of the two central post-Gulf War II resolutions that predated the ascendancy of Iraqi self-governance and offered insight on the then-extant legal status of Iraqi oil and gas – resolution 1511.[154] Again, as with its predecessor 1483, resolution 1511 addressed a variety of matters, but most importantly the matter of quick restoration of governing authority by the CPA to the Iraqi people. Paragraph 1 of the resolution indicated plainly that by the adoption of the resolution the Security Council "[r]eaffirms the sovereignty and territorial integrity of Iraq, and underscores, in that context, the temporary nature of the exercise by the Coalition Provisional Authority (Authority) of the specific responsibilities, authorities, and obligations under applicable international law recognized and set forth in resolution 1483 (2003)."[155] Aside from this important objective, the Security Council used the resolution to once again hold forth on the question of ownership or title authority over Iraq's oil and gas resources. As in the fourth paragraph of resolution 1483's Preamble, the second paragraph of resolution 1511's Preamble not only "[u]nderscore[d] that the sovereignty of Iraq resides in the State of Iraq, [but also] reaffirm[ed] the right of the Iraqi people freely to determine their own political future and control their own natural resources. . . ."[156] From such language, it seems indubitable that the United Nations intended to reaffirm its full and complete recognition that the legal status of Iraqi hydrocarbons was one of ownership by Iraq. The removal of Saddam from power minimized – rather than eliminated – the apprehension of the world community regarding how Iraqi oil and gas resources would be used. After all, the country had a paucity of experience with democratic self-governance. This accounts, as will be seen in future, for the guarded nature of the Security Council's approach to according Iraqis unsupervised latitude in dealing with their oil and gas resources and the revenues generated by the sale of such. Yet this differs not at all from the long-prevailing utilization by the Security Council of the distinction between regulatory control, exercised by the UN, and ownership or title authority over the nation's oil and gas, retained by the Iraqis themselves.

[152] See id. at para. 17.
[153] See id. at fourth para. of Preamble.
[154] See Security Council resolution 1511 (Oct. 16, 2003), available at http://daccess-ods.un.org/doc/UNDOC/GEN/No3/563/91/PDF/N0356391.pdf?OpenElement (accessed June 25, 2008).
[155] See id. at para. 1.
[156] See id. at second para. of Preamble.

VI. CONCLUSION

The purpose of this opening chapter is to establish the context for a legal analysis of important developments in Iraqi oil and gas law. It is understood that among the various strands examined in summary, overview form in this chapter, much opportunity exists for additional extensive and detailed elaboration. Nonetheless, from what has been presented, it seems clear Iraq has roughly a century-long tradition in the field of oil and gas. Further, the dynamics both inside and outside the country that led to the push for nationalization of the industry certainly contributed to a marked increase in oil and gas production, as well as the accelerated development of its pipeline and refinery systems. The effects of the two Gulf Wars and the UN-imposed economic sanctions against Saddam Hussein have left every aspect of the industry with serious problems. The nature and extent of Iraq's oil and gas reserves and the tempered interest of the international oil industry therein suggest some reason for cautious optimism. As is well known, however, Iraq has been slow to develop the political consensus necessary to move more rapidly toward rehabilitation of its petroleum industry and a greater contribution to helping meet the world's pressing energy needs.

What is clear from the review just completed is that in the wake of Gulf War I, the United Nations Security Council did nothing to alter the general notion of exclusive Iraqi ownership and title authority over the nation's oil and natural gas resources. The resolutions adopted by the Council were directed, instead, at regulating export sales of those resources so that the regime of Saddam Hussein would neither reconstitute its military to permit threatening its neighbors nor develop deliverable WMD, seen as an especial peril in the aftermath of the terrorist attacks of September 11, 2001. The defeat of Iraq and the removal of Saddam's government by coalition military forces in Gulf War II, along with the adoption of new Security Council resolutions prior to the ascendancy of Iraqi self-governance in summer 2004, changed nothing. Both the existing international law applicable to military occupation and the official pronouncements of the CPA stressed a reluctance to alter the legal status of Iraqi oil and gas resources. Such had previously been under Iraqi ownership, and nothing was being done to displace or modify that arrangement. Similarly, the central post-Gulf War II Security Council resolutions antedating the resumption of full Iraqi political autonomy left the situation unchanged. The UN recognized Iraqi independence, autonomy, and control over Iraqi natural resources, and for all the Security Council's pronouncements dealing with those resources or the revenues from their sale, the UN was not asserting any degree of ownership or title authority regarding those resources.

2 THE PROVISIONS OF THE IRAQI CONSTITUTION ADDRESSING OIL AND GAS ACTIVITIES: OF THE ROLE OF SUBCENTRAL GOVERNING ENTITIES, HANDLING OF REVENUES, AND "PRESENT" VERSUS "FUTURE" FIELDS

I. INTRODUCTION

The Iraqi Constitution was adopted in an October 15, 2005, referendum of the Iraqi people,[1] thereby displacing the former Law of Administration for the State of Iraq for the Transitional Period (TAL).[2] The TAL, which came into effect on June 28, 2004, had been drafted in late 2003–early 2004 through the efforts of a body selected by the Coalition Provisional Authority (CPA) and advised by the United States and the United Nations.[3] During calendar year 2005, an Iraqi Constitutional Committee established by the transitional government that assumed power after the June 2004 handover of authority from the CPA put together the terms of the Constitution itself.[4] The nationwide referendum on the Constitution witnessed approximately a 63% turnout of all eligible voters,[5] with nearly 80% voting in support of the new governing document.[6] Indications are that of the eighteen Iraqi governorates that make up the country, only two recorded "no" votes exceeding the required two-thirds

[1] See Council on Foreign Relations, Monitoring the Iraq Constitution Referendum, available at www.cfr.org/publication/8973/monitoring_the_iraqi_constitution_referendum html (accessed May 2008).

[2] Available at www.cpa-iraq.org/government/TAL html (accessed May 1, 2008).

[3] See Iraq's political system under fire, BBC News (Apr. 11, 2005), available at http://news .bbc.co.uk/2/hi/middle_east/4359559.stm (accessed May 1, 2008).

[4] See John Burns, Iraq legislators set up panel to draft a constitution, NY Times (May 11, 2005), available at http://query.nytimes.com/gst/fullpage html?res+9407EFD81330F923A25756 COA9639C8B63 (accessed May 1, 2008).

[5] See Robin Wright, U.S. lauds voter turnout in Iraq, Washington Post (Oct. 16, 2005), available at www.washingtonpost.com/wp-dyn/content/article/2005/10/16/AR2005101600301 html.

[6] See John Anderson, Sunnis Failed to Defeat Iraq Constitution, Washington Post (Oct. 26, 2005), available at www.washingtonpost.com/wp-dyn/content/article/2005/10/25/AR2005102500357 .html (accessed May 1, 2008).

to reject the document.[7] In large measure, the Constitution represents a compromise among Sunni Arabs, Shiite Arabs, and the Kurds, as well as between secularists and nonsecularists, centralists and federalists. It has been suggested by some that the Constitution's emphasis on the role of religion came at the expense of neglecting a variety of other interests not adequately dealt with.[8]

Without wading into that and the many other controversies surrounding the Constitution, what is focused on here relates to the allocation of constitutional powers to subcentral governmental entities in the area of oil and gas, how the Constitution handles the matter of revenue collection and distribution, and what that document says about oil and gas fields considered "present" as opposed to "future" in character. Chapter 5 will take up the federal revenue-sharing law, in particular, and examine its many nuances at length. The present chapter will be limited to what the Constitution itself has to say about that question. Much of this chapter's attention will be devoted to the preliminary issue of whether subcentral governmental entities are empowered by the Constitution to negotiate and operate under oil and gas development agreements with international petroleum companies. Later, in Chapter 8, attention will be devoted to the constitutional authority of the central government to enter into oil and gas development agreements; thus, little will be offered here on that particular question. Nonetheless, to the extent that the Constitution provides for differing levels of control by central as opposed to subcentral governmental entities when it comes to oil and gas fields that differ in character, this chapter will devote attention to that specific matter.

For purposes of contextual background, it should be recalled that of Iraq's proven oil reserves, somewhere between 70% and 80% are found in oil fields in the southeastern part of the country,[9] an area subject to Shiite dominance. Of Iraq's proven natural gas reserves of roughly 112 trillion cubic feet, about two-thirds is said to be associated with oil fields, thus placing a large portion of this in southeastern Iraq, whereas about 20% is unassociated with such fields – the majority of this being in the northern Iraqi areas of Ajil, Bai Hassam, Jambur, Chemchemal, Kor mor, Khaslm, Al-Ahmar, and Al-Mansuriyah – and about 10% is connected with salt domes located elsewhere.[10] Most all of the controversy surrounding the constitutional authority of subcentral governmental units to enter into oil and gas development agreements has pitted the Kurdistan Regional Government (KRG) against the central government in Baghdad. Given the ethnic and sectarian divisions within the country, it

[7] See id.

[8] See Ronald Jonkers, Senior Advisor-Petroleum Law, Memo: USAID-Funded Economic Governance II Project: National Hydrocarbon Working Group/Legislative Drafting Committees (July 27, 2006).

[9] See Energy Information Administration, U.S. Department of Energy, Official Energy Statistics from the U.S. Government (August 2007), available at www.eia.doe.gov/emeu/cabs/Iraq/Oil html (accessed Oct. 10, 2007).

[10] See id., available at www.eia.doe.gov/emeu/cabs/Iraq/NaturalGas html (accessed May 5, 2008).

is not inconceivable that the same controversy could spread to other sections as well.

The dispute between the KRG and the central government over hydrocarbons dates from at least as early as 2006, when the Norwegian company DNO, the first foreign enterprise to begin actual drilling for Iraqi oil in the wake of Gulf War II, indicated that the production-sharing agreement it had earlier struck with the Kurds to produce oil from the 50,000 barrel per day (bpd) Tawke field and get it into the international market through Turkey was the subject of objection from the central government.[11] Shortly thereafter, the Turkish company Genel Energi and the international exploration and development company Addax Petroleum announced that they had entered into efforts with the KRG to renegotiate a production-sharing agreement originally struck in 2004 to exploit the Taq Taq field.[12] Almost simultaneously with the announcement of the renegotiation efforts of Genel Energi and Addax, the Norwegian company Schtat Oil indicated it too was in talks with the Kurds, but was concerned about stability and the reaction of the central government.[13] Irritation expressed by the central government over these discussions and arrangements led the KRG to indicate it was prepared to move forward on its own oil and gas development agreements, irrespective of the views of Baghdad or the fact the central government desired to place everything on hold until a new oil and gas law regime could be finalized.[14]

By early spring 2007, there were also indications that the United Arab Emirates' Dana Gas, a private-sector operation, was in talks with the Kurds about their own production sharing agreement in the north of Kurdistan.[15] Given the frustrations encountered by Baghdad in even bringing civil stability to the center of the country, by summer 2007 Baghdad was mounting increased opposition to the array of oil and gas development agreements being negotiated by the KRG.[16] Some speculated that the Kurds were moving forward rapidly to make up for time lost under the regime of Saddam Hussein. In addition to the previously referenced companies, the Kurds had also negotiated arrangements with the Canadian companies Western Sands and Heritage Oil, as well as the British company Sterling Energy, all to the continued consternation of the

[11] See DNO sees no threat to Kurdistan oil deal, in Iraq Updates (Nov. 19, 2006), available at www.iraqupdates.com/p_articles.php/article/11920 (accessed May 5, 2008).

[12] See Genel Energi and Addax Petroleum announce the execution of a revised production sharing agreement in respect to the Taq Taq field, in Iraq Updates (Nov. 23, 2006), available at www.iraqupdates.com/p_articles.php/article/12038 (accessed May 5, 2008).

[13] See The Norwegian Schtat Oil holding talks with the Kurds, in Iraq Updates (Nov. 24, 2006), available at www.iraqupdates.com/p_articles.php/article/12051 (accessed May 5, 2008).

[14] See Iraq's Kurds to go it alone on oil deals, in Iraq Updates (Mar. 23, 2007), available at www.iraqupdates.com/p_articles.php/article/15813 (accessed May 5, 2008).

[15] See Dana Gas, Kurdish PSA plan, in Iraq Updates (Apr. 23, 2007), available at www.iraqupdates.com/p_articles.php/article/16717 (accessed May 5, 2008).

[16] See Foreign companies digging oil wells in Kurdistan, in Iraq Updates (July 2, 2007), available at www.iraqupdates.com/p_articles.php/article/18939 (accessed May 5, 2008).

central government.[17] Aspiring to increase its total oil production from in the neighborhood of 200,000 bpd to about 1 million bpd within a 5-year time frame, the KRG suggested in July of that year that it was considering announcing bids on as many as forty new oil production projects.[18] Then, by the end of summer 2007, Sterling Energy announced successful progress on further talks with the KRG.[19]

Early in autumn of that year, the Dallas-based Hunt Oil Company indicated that it had struck a new production sharing contract with the Kurds, the first since the KRG had developed its own new oil and gas legal regime. From news reports, Hunt was partnering with Impulse Energy Corporation, a provider of capital and know-how for projects in developing and underdeveloped regions.[20] Within weeks of that announcement, Heritage Oil was also publicizing its successful completion of talks on further activities in the Miran Block in the southwest portion of the Kurdistan Region. The arrangement with Heritage also included a joint venture operation with the KRG itself to construct and operate a 20,000-bpd refinery in Kurdistan.[21] Simultaneously, the KRG informed sources that it had also hammered out a production-sharing contract with the French company Perenco to develop the Sindi/Amedi Block, a high-risk area along the Kurdish-Turkey border. The KRG indicated that this and three other recent deals would add to investment in its oil and gas industry from these four transactions by about half a billion dollars. In the estimation of the Kurds, despite the objections of the central government, all arrangements were consistent with Iraq's Constitution.[22]

The very end of October 2007 saw the announcement of a new production-sharing contract between the Kurds and Reliance Oil, an exploration and development firm headquartered in India. From reports, the arrangement was to develop the potential associated with two unspecified blocks in the Kurdistan region.[23] In early November, it was announced that the KRG had entered into seven new production-sharing contracts. Among the beneficiaries were the German company OMV Petroleum Exploration, granted rights in both the Mala

[17] See Flush with oil, Kurdistan draws Western producers and explorers, in Iraq Updates (July 4, 2007), available at www.iraqupdates.com/p_articles.php/article/19044 (accessed May 8, 2008).

[18] See Iraqi Kurds open 40 new sites to foreign investors, in Iraq Updates (July 9, 2007), available at www.iraqupdates.com/p_articles.php/article/19228 (accessed May 5, 2008).

[19] See Sterling eyes Kurdish deals, in Iraq Updates (Aug. 20, 2007), available at www.iraqupdates.com/p_articles.php/article/20837 (accessed May 5, 2008).

[20] See Texas oil company signs deal with Kurdistan government, in Iraq Updates (Sept. 10, 2007), available at www.iraqupdates.com/p_articles.php/article/21523 (accessed May 5, 2008).

[21] See Heritage oil awarded production-sharing contract in Iraq, in Iraq Updates (Oct. 3, 2007), available at www.iraqupdates.com/p_articles/php/article22476 (accessed May 5, 2008).

[22] See KRG Natural Resources Ministry announces new Kurdistan Region petroleum contracts, in Iraq Updates (Oct. 3, 2007), available at www.iraqupdates.com/p_articles.php/article/22468 (accessed May 8, 2008).

[23] See The Reliance Industries signs new Iraqi Kurdistan oil contract, in Iraq Updates (Oct. 31, 2007), available at www.iraqupdates.com/p_articles.php/article/23484 (accessed May 6, 2008).

Omar and the Sharisk blocks; Kalegran Limited, a wholly owned subsidiary of the Hungarian company MOL Hungarian Oil & Gas; and the UK-listed Gulf Keystone Petroleum International. The latter two entities were granted rights in the Shaikan, Rovi, and Sarta blocks.[24] The KRG was once again insisting these arrangements were consistent with the Iraqi Constitution and that the region now had deals with about twenty international oil companies.[25] A week thereafter, the Bazian oil field, estimated to hold more than 500 million barrels, was said to be the subject of a production-sharing contract involving the Kurdish National Oil Company (KNOC), the South Korean national oil company, SK Energy, and a variety of other consortium partners.[26] The rash of new production-sharing contracts negotiated by the Kurds aggravated the central government to the extent that in the closing months of 2007 it began to indicate it was considering excluding foreign oil firms that had executed such contracts from doing business in Iraq.[27]

II. STRUCTURE OF THE IRAQI CONSTITUTION

Keeping firmly in mind the contextual background of the dispute between the central governmental authorities and those in the region of Kurdistan over the right of subcentral units to enter into oil and gas development agreements, the basic structure of the Iraqi Constitution can now be described.[28] Although the particular goal of this chapter is clarification concerning not only the constitutional power of subcentral units to negotiate such agreements, but also the nature of the Constitution's expressions on the distribution of revenues and on its distinction between "present" and "future" oil and gas fields, the reader is best served by having some general understanding of the overall structure of the Iraqi Constitution. In the broadest of senses, and apart from its final and transitional provisions, the Constitution is broken into five parts: the statement of so-called fundamental principles; the explanation of rights and liberties; the distribution of powers between the branches of government; the identification of the powers of the federal authorities; and the identification of powers held

[24] See Seven new petroleum contracts for the Kurdistan Region announced by Ministry of Natural Resources; five existing contracts reviewed, in Iraq Updates (Nov. 7, 2007), available at www.iraqupdates.com/p_articles.php/article/23731 (accessed May 6, 2008).

[25] See id.

[26] See South Korean consortium to explore Iraqi Kurdistan oilfield, in Iraq Updates (Nov. 13, 2007), available at www.iraqupdates.com/p_articles.php/article/23925 (accessed May 6, 2008).

[27] See Baghdad to exclude oil firms with KRG deals – Oilmin, in Iraq Updates (Nov. 15, 2007), available at www.iraqupdates.com/p_articles.php/article/23995 (accessed May 6, 2008); Baghdad slams KRG oil deals, in Iraq Updates (Nov. 15, 2007), available at www.iraqupdates.com/p_articles.php/article/24030 (accessed May 6, 2008).

[28] For an English-language translation see Iraqi Constitution, available at www.export.gov/iraq/pdf/iraqi_constitution.pdf (accessed Nov. 15, 2007). See also translation available at www.krg.org/articles/detail.asp?1ngnr=12&=0430000&=107&=12329 (accessed Sept. 20, 2008).

by subcentral authorities. These parts appear in the Constitution's Sections 1–5, respectively. The final and transitional provisions appear in Section 6 of the Constitution. Obviously, for present purposes, the most significant portions of the Constitution will involve the powers designated as belonging to the federal authorities, and those said to exist in the subcentral governmental units.

Prior to taking up those specific powers in sweeping, outline form, however, a few brief comments should be offered about the Constitution's provisions on fundamental principles, rights and liberties, and distribution of powers between the branches of government. With respect to some of the fundamental principles, Islam is guaranteed its place as the official religion and the foundation of all legislation;[29] law is declared sovereign over all;[30] transfers of power are directed to be peaceful and through democratic processes;[31] terrorism is denounced;[32] and Baghdad is designated the nation's capital.[33] More relevant here, though, are both articles 1 and 13. Article 1 declares Iraq to be "a single federal, . . . state,"[34] and article 13, First, that the "Constitution is the preeminent and supreme law in Iraq and shall be binding in all parts of Iraq without exception."[35] Article 13, Second, follows this by noting that any law at the central level, or constitutional provision or law at the subcentral level, "that contradicts this Constitution shall be considered void."[36] The combined effect of articles 1 and 13 is to look towards the nation pulling together, and to elevate the provisions of the nation's Constitution above all inconsistent measures at either the federal or subcentral level.

With respect to rights and liberties identified as deserving of mention, the Constitution indicates that all Iraqis are considered equal;[37] they enjoy the rights of life, security and liberty;[38] and they have protection of their personal privacy.[39] The judiciary is also entitled to complete independence,[40] and individuals before it are considered innocent until proven guilty.[41] Furthermore, all Iraqi citizens, whether male or female, are entitled to participate in public affairs, including by voting and serving in public office.[42] The Constitution at length also protects what it designates as economic, social, and cultural liberties,

[29] See Iraq Constitution, id. at art. 2.
[30] See id. at art. 5.
[31] See id. at art. 6.
[32] See id. at art. 7.
[33] See id. at art. 11.
[34] See id. at art. 1.
[35] See id. at art. 13, First.
[36] See id. at art. 13, Second.
[37] See id. at art. 14.
[38] See id. at art. 15.
[39] See id. at art. 17, First.
[40] See id. at art. 19, First.
[41] See id. at art. 19, Fifth.
[42] See id. at art. 20.

including the right to work,[43] to receive health care[44] and education,[45] and to expect an environment that is safe and free from toxins.[46] It also provides for freedom of expression[47] and association,[48] as well as religion and travel,[49] and the rights not to be displaced or deprived of the ability to return to one's homeland.[50]

In terms of the Constitution's distribution of powers between the various branches, it recognizes the familiar legislative, executive, and judicial trifurcation and declares the principle of separation of powers as the operative rule.[51] The legislative branch consists largely of the so-called Council of Representatives, elected by the Iraqi people to voice and address their concerns.[52] The Council of Representatives is vested with many common legislative powers,[53] and it is also empowered to elect the President of the Republic.[54] In most areas the President's executive powers are clearly distinct from the legislative powers of the Council of Representatives.[55] The executive branch itself, though, exercises power both through the President and through the President's Council of Ministers (i.e., cabinet).[56] The Council of Ministers, from which the Prime Minister is selected, is formed at the request of the President, but largely by the efforts of the controlling bloc in the Council of Representatives.[57] The powers of the Ministers are distinct from those of the President and quite substantial.[58] When the Ministers' powers are combined with those of the President, a complete picture is obtained of the reach of the executive branch's constitutional authority.

The judicial branch authority enunciated in the Constitution consists of several aspects. Loosely, these can be described as administrative or managerial, and adjudicative. The administrative or managerial aspect of the judicial branch authority is reflected in the constitutional provisions that speak of a so-called Higher Juridical Council, a body charged with managing and supervising the federal judiciary,[59] nominating the Chief Justice of the Federal

[43] See id. at art. 22.
[44] See id. at art. 31.
[45] See id. at art. 34.
[46] See id. at art. 33, First.
[47] See id. at art. 38
[48] See id. at art. 39.
[49] See id. at arts. 43 and 44.
[50] See id. at art. 44, Second.
[51] See id. at art. 47.
[52] See id. at arts. 48, 49.
[53] See id. at art. 61, First, Second, Fourth, Fifth, Sixth, Seventh, Eighth, and Ninth.
[54] See id. at art. 61, Third.
[55] See id. at art. 73.
[56] See id. at art. 66.
[57] See id. at art. 76.
[58] See id. at art. 80.
[59] See id. at art 91, First.

Supreme Court and the members of the lower federal courts, as well as the chief state prosecutor,[60] and preparing the federal judiciary's budget for submission to the Council of Representatives.[61] The adjudicative aspect, on the other hand, involves the Constitution's provisions reiterating the independence of the judiciary,[62] noting that the Federal Supreme Court is to have jurisdiction over constitutional questions, the application of federal law, the settling of disputes between the federal government and subcentral governmental entities, and disputes between subcentral entities themselves.[63]

Having outlined the basics of the Iraqi Constitution's provisions that address fundamental principles, rights and liberties, and the distribution of powers among the legislative, executive, and judicial branches, attention is now turned to Sections 4 and 5, dealing with the powers of the federal government and those of the subcentral units. Any detailed examination of specific questions will have to await upcoming portions of this chapter. Nonetheless, the present aim is to provide a broad-brush picture of the relevant constitutional provisions, emphasizing those bearing most directly on the important matters significant to this chapter – subcentral governmental authority to enter oil and gas development agreements, revenue distribution, and the distinction between "present" and "future" oil and gas fields.

The powers of the federal government are spelled-out in some of the provisions spanning articles 109 through 115 of the Iraqi Constitution. Those provisions not touching at all on powers of the federal government, or doing so only with respect to matters beyond the scope of this study, would be articles 109 and 113. Consonant with the directive in article 1 of the Constitution that Iraq is considered a single, federal state,[64] article 109 opens by obligating the federal authorities to preserve the "unity . . . of Iraq and its federal democratic system."[65] Article 113 addresses items and places of archeological or cultural significance, and it provides the federal government with jurisdiction and authority over such, though advising cooperative efforts with regions and governorates.[66] The remaining five provisions break into four categories: provisions listing powers designated as "exclusive" to the federal government; provisions denoting matters where federal authorities are to share competence with subcentral governmental units; provisions speaking very explicitly to the matter of oil and gas; and, finally, a residual provision addressing powers not exclusive to the federal government, and conflicts in instances where both federal authorities and subcentral units share competency.

[60] See id. at art. 91, Second.
[61] See id. at art. 91, Third.
[62] See id. at art. 88.
[63] See id. at art. 93.
[64] See text accompanying supra note 34.
[65] See Iraqi Constitution, supra note 28 at art. 109.
[66] See id. at art. 113.

Article 110 contains a lengthy listing of powers styled as "exclusive" to the federal government. Without specifying them all, they include foreign policy matters, whether diplomatic or economic in nature,[67] national security concerns,[68] fiscal policy and commercial matters involving the crossing of regional or governorate boundaries,[69] investment and budgetary concerns,[70] policies affecting water coming into Iraq,[71] and matters of citizenship and population.[72] As for areas of federal competence shared with subcentral units, article 114 provides that some of these include the management of customs, the regulation of the main sources of electricity, the development of environmental policy, and the formulation of growth and planning policy, as well as internal water policy. Interestingly, the residual provision of the Constitution, article 115, second sentence, provides that in the areas of shared competency, "priority" is to be accorded subcentral law in the event of a conflict with federal measures. That same provision indicates, in its first sentence, that powers not specified as being assigned exclusively to the federal authorities are possessed by the subcentral units.[73]

In terms of the provisions of the Constitution speaking explicitly to the matter of oil and gas, article 111 and 112 are key. The language of the former recognizes the importance of the nation's oil and gas resources to the restoration of stability and the eventual development of the country. And as other provisions of the Constitution seem to suggest a sense of equality in a nation populated by diverse ethnic and sectarian groups, the language endorses the opportunity of all to share in the benefits of Iraq's oil and gas resources. The exact language of article 111 provides that "[o]il and gas are owned by all the people of Iraq in all the regions and governorates."[74] As if endeavoring to both provide content to the general notion articulated in article 111, and dovetail with the basic objective of articles 109 through 115 of distributing particular powers to the federal government, with some to be shared with subcentral units, article 112 holds forth with a degree of specificity on oil and gas and revenues from its production and sale. Article 112 does so through two separate paragraphs, the opening one dealing with the management of oil and gas activity and the distribution of the revenues associated with such,[75] and the latter with the partnership between the federal government and the subcentral units in the formulation of long-term development policies and objectives.[76]

[67] See id. at art. 110, First.
[68] See id. at art. 110, Second.
[69] See id. at art. 110, Third.
[70] See id. at art. 110, Seventh.
[71] See id. at art. 110, Eighth
[72] See id. at art. 110, Ninth.
[73] See id. at art. 115.
[74] See id. at art. 111.
[75] See id. at art. 112, First.
[76] See id. at art. 112, Second.

Article 112, First, indicates that the federal government, in cooperation with the subcentral units, is to manage oil and gas extracted from so-called present fields.[77] However, it attaches a proviso to this grant of authority. The proviso relates directly to the fact that oil and gas is recognized as providing the lion's share of revenues likely to be generated by Iraqi commercial activity. As a consequence, the proviso conditions the federal government's authority in the management of oil and gas from present fields upon the meeting by the federal government of an obligation to disburse revenues in a fair manner that takes into account population distribution in the nation, a special allotment for regions of the country damaged by the Saddam Hussein regime or thereafter, and the need to ensure balanced development. The language of this initial paragraph of article 112 drives home the importance of revenue disbursement by concluding with the directive that the matter "shall be regulated by a law." Thus derives the requirement for a revenue-sharing law like that discussed later in Chapter 5.

Article 112, Second, empowers the federal government, not on its own, but with the subcentral governmental units, to conceptualize and develop the long-term, strategic policies relative to permitting oil and gas to be tapped in a way that produces the largest benefit for the Iraqi people. It also directs that the strategic policies concerning oil and gas activity call for employment of the most advanced techniques and market principles, all while doing so in a way that encourages investment. A major significance of this second paragraph resides in the fact it relates to long-term oil and gas development policies, whereas article 112, First, concerns the more immediate management of oil and gas extracted, and then only from the so-called "present" fields. Both article 112, First, and 112, Second, though, begin with emphasizing that it is the federal government – albeit in collaboration with the subcentral units – that is empowered to act in the respective areas of competence.

Moving beyond the constitutional powers of the federal government, articles 121, First, and 122, Second, set forth the powers of the subcentral units, regions, and governorates not organized into regions. These two provisions are situated among a host of ten provisions. Without elucidating on the vagaries of all of these provisions, it is worth noting they are broken into two broad categories: those addressing regional governmental units, and those dealing with governorates not organized into regions. Two other provisions take up the matter of Baghdad being its own independent region[78] and the matter of protection accorded to various nationalities, including the Turkmen, Chaldeans, Assyrians, and others.[79] It is, however, important to call attention to the fact that a couple of the provisions categorized as those addressing regional governmental units acknowledge the ability of governorates not organized into regions to be able to

[77] See id. at art. 112, First.
[78] See id. at art. 124.
[79] See id. at art. 125.

so organize through a referendum process.[80] Historically, Iraq has been divided into a number of political and administrative regions. Currently, though, under the terms of the Constitution, only the Kurdistan Region is formally recognized as a region,[81] and there have been serious problems getting the referendum off the ground regarding whether Kirkuk would be able to join that Kurd region.[82] The point is that referenda on regionalization of other areas are complicated and controversial matters.

With particular respect to article 121, First, and article 122, Second, the former indicates in very explicit terms that regions have the constitutional power to exercise legislative, executive, and judicial authority in all areas where the Constitution has not assigned exclusive power to the federal government.[83] The follow-on paragraph of article 121 builds on the earlier expressed idea that, where the federal and the subcentral units have shared powers, the measures of the subcentral units are to be accorded priority.[84] After addressing regions specifically, however, the paragraph notes just that regions can amend the application of a conflicting federal measure within the region, whenever it concerns matters outside the exclusive authority of the federal government.[85] Article 121 then succeeds this paragraph with another weighing-in on the distribution of revenues. Specifically, it provides that regions (as well as governorates) are to be allocated a fair share of national revenues, so as to permit them to discharge their responsibilities. Moreover, the allocation is to take account of the resources, needs and population of each region and governorate.[86]

In spelling out the constitutional powers of governorates not organized into regions, article 122, Second, notes that they have "broad administrative and financial authorities" to allow them to manage their own affairs. As is indicated, this is consistent with the basic thrust of establishing a decentralized administrative structure in Iraq.[87] What is noticeably absent from this grant of constitutional power is any reference to executive, legislative, or judicial authority being vested in governorates. Under the terms of the Constitution, it seems clear there exist specific areas of executive, legislative, and judicial authority exclusive to the federal government. Where the federal government is not said to have exclusive authority, regional governmental units – such as the KRG – possess the power that remains. In other areas, the federal government is to share power with the regions. Governorates not organized into regions, however, seem

[80] See id. at arts. 118–119.
[81] See id. at art. 117, First.
[82] See Iraq: Kirkuk Referendum Delayed by Six Months (Dec. 21, 2007), available at www.rferl.org/featuresarticle/2007/12/43A4F894–4431-47CF-A120–0573F7412542 html (accessed May 7, 2008).
[83] See Iraqi Constitution, supra note 28 at art. 121, First.
[84] See text accompanying supra notes 72–73.
[85] See Iraqi Constitution, supra note 28 at art. 121, Second.
[86] See id. at art. 121, Third.
[87] See id. at art. 122, Second.

to remain subject to federal executive, legislative, and judicial authority, because they possess no more than the administrative and financial authority needed to handle their own day-to-day affairs.

In concluding this broad and sweeping description of the basic structure of the Iraqi Constitution, it should be noted that the only provisions to address oil and gas in particular are articles 111 and 112. Both of these appear in the portion of the Constitution enunciating the powers of the federal government. Not a single provision in the portion stating the powers of the regions or governorates explicitly mentions oil and gas as such. In spite of this, three points require emphasis. First, there can be no doubt that in article 112 in particular, the federal government is said to have a conditional role with respect to managing oil and gas extracted from present fields, with that role being predicated upon its satisfaction of revenue distribution obligations. Second, the language of the Constitution also seems clear in noting that executive, legislative, and judicial powers not assigned exclusively to the federal government are granted to the regions. And third, article 112 makes plain that both regions and governorates have a role to play in connection with the federal government's management of oil and gas extracted from present fields, as well as the development of long-term, strategic policies of the federal government relating to developing the nation's oil and gas resources.

III. REVENUE SHARING: ARTICLES 112 AND 121

Given the significance of revenue sharing to article 112's grant of constitutional power to the federal government over the management of oil and gas extracted from present fields, and the fact that this matter is susceptible to being disposed of rather rapidly, the relevant constitutional provisions addressing revenues will be taken up first of all. Again, the two relevant provisions are article 112, First, where the power of the federal government is conditioned upon a revenue distribution obligation, and article 121, Third, where equitable sharing of revenues with regions and governorates is mandated.

For purposes of analysis, the precise relevant language of article 112, First, states that the federal government, with regions and governorates, is to undertake the management of oil and gas extracted from present fields, "provided that it distributes its revenues in a fair manner in proportion to the population distribution in all parts of the country, specifying an allotment for a specified period for the damaged regions which were unjustly deprived of them by the former regime, and the regions that were damaged afterwards in a way that ensures balanced development in different areas of the country."[88] The language of article 121, Third, on the other hand, states that "[r]egions and governorates shall be

[88] See id. at art. 112, First.

allocated an equitable share of the national revenues sufficient to discharge their responsibilities and duties, but having regard to their resources, needs, and the percentage of their population."[89]

What derives immediately from the juxtaposition of these two sets of language on revenue sharing is that they establish standards aimed at entirely distinct goals. Article 112's standard endeavors to ensure a distribution that not only comports with population concentrations, but also makes amends for past harm inflicted on populations living in certain portions of the country and attempts to achieve a certain balance in the progress of economic and social development in the various regions. Article 121 recognizes the need for revenue distributions to parallel population. Rather that seeking to provide reparations for past harm, however, it aims at distributions that meet the administrative, managerial, and social program needs established by each region, due regard, of course, being given in the allocation decisions to the existing resources had by each region.

Aside from distinctions that spring readily to mind, there are a couple of other important observations with respect to the relevant language of articles 112 and 121. One of those observations concerns the just-referenced requirement established by article 121, Third, that national revenue distributions take into account several factors, including existing resources available (or not) to the beneficiary regions and governorates. Again, the language reads that regions and governorates are to receive equitable shares of national revenues sufficient to meet their needs, but "having regard to [the] resources" of the regions and governorates.[90] As has been indicated in Chapter 1, not all areas in Iraq find themselves equally blessed by the fates with proven natural resource deposits. Therefore, this directive of the Constitution would require that consideration be given to shaping the level of revenue distribution on the basis of, among other things, the level of natural resources known to exist in specific regions and governorates. Interpreting article 121, Third, in this fashion comports perfectly with the notion of article 111 that oil and gas are owned by all of Iraq's people, irrespective of the region or governorate in which they might find themselves.[91] Article 111 seeks to ensure that Iraqi oil and gas resources, wherever located, come to benefit all the people of that nation. How better to accomplish that goal than to require revenue distributions take into consideration, as one factor, the existing resource situation in each region and governorate?

Another observation worthy of note has to do with the fact article 112, First, speaks of distribution of "its revenues" after referencing oil and gas extracted from present fields, whereas the analogous language of article 121 refers to "national revenues." Is there any possibility of a distinction between the revenues to which the standards of 112 and 121 apply? That is to say, is it conceivable that

[89] See id. at art. 121, Third.
[90] See id. at art. 121, Third.
[91] See text accompanying supra note 74.

121 establishes the distribution standard for regions and governorates receiving their share of the entire "national revenue[ ]" pool, whereas 112 sets the standard for the distribution of revenues derived from oil and gas activity alone? In large measure, even accepting such a distinction, at present it seems to amount to a distinction without a difference, because the overwhelming bulk of national revenues come from oil and gas activity. As the hoped-for stability takes hold and economic development proceeds apace, the portion of national revenues derived from non-oil and gas activity may be expected to increase, at least marginally, thereby raising the relevancy of any possible distinction between the revenues spoken to in article 112 and those in article 121. However, when the language of article 112, First, is examined closely, there seems little question that the words "its revenues," even though they appear in the context of an earlier reference to oil and gas extraction activity, refer to national revenues taken in by the federal government, whether from oil and gas production or other sources. The precise language reads that the federal government is to undertake, in collaboration with the governorates and regions, the "management of oil and gas extracted from present fields, provided that it distributes its revenues" in a fair manner and in accordance with specific standards. In this context, it seems hard to read the words "its revenues" as meaning anything other than the revenues had by the federal government, regardless of the source of those revenues. After all, the immediately preceding reference to "it" in the phrase "provided that it distributes" is undoubtedly a reference to the federal government. Therefore, the use of the term "its" in the phrase "its revenues" must mean revenues of the federal government.

The final observation that should be raised is with regard to the standard under article 112 that is to guide revenue distributions. Previously the standard was referenced in connection with pointing out that it diverges in some respects from the standard in article 121, Third. Presently, though, article 112's standard is referenced to get at its own many nuances and complexities. In particular, 112 requires revenue distributions to bear some relation to regional population concentrations, acknowledgment of harm inflicted and inequitable revenue distributions made during the Saddam Hussein years or thereafter, and the idea of striking a needed balance in development across the entirety of Iraq. As quoted earlier,[92] the language of article 112, First, calls for a disbursement of revenue "in proportion to the population distribution" in the country, taking account of damaged regions "unjustly deprived of [revenues]" by Saddam or "damaged afterwards," all the while attempting to ensure "balanced development" in the different areas of the country.[93] Although it may seem that one can easily determine whether revenue disbursement is proportionate to the distribution of population, it is far from clear under article 112's standard whether

[92] See text accompanying supra note 88.
[93] See Iraqi Constitution, supra note 28 at art. 112, First.

proportionality on this score trumps the article's other stated measures of assessing the appropriateness of revenue distribution. Similarly troubling is the fact that the idea of damage suffered at the hands of the former regime because of being "unjustly deprived" of revenues is not self-defining. Surely this leaves the door ajar for interpretive abuse. And likewise with respect to the notions of taking account of "damage[] afterwards" suffered and endeavoring to ensure that revenue distribution promotes "balanced development." These are undefined concepts that not only prove nettlesome from an interpretive perspective, but, because they are part of a standard designed to guide actual distributions, and indeed serve to condition the validity of the federal government's claim to power over the management of oil and gas in present fields, the concepts invite disputes and challenges that could threaten to exacerbate an already perilous security situation.

As will be seen in Chapter 5 on the federal revenue-sharing law, legislation exists that attempts to implement the revenue-sharing obligations explicit in articles 112 and 121 of the Iraqi Constitution. The legislation clearly applies to revenues from all sources, not just from oil and gas activities, and in this sense proves consistent with the language of both the relevant constitutional provisions. In many respects, it also tracks the distributional standards and objectives of article 112 and article 121. However, ambiguities reviewed that are inherent in the language of article 112 have not been entirely clarified. In fact, there is every reason to believe that federal revenue-sharing legislation simply introduces a host of new ambiguities of its own. Chapter 9 will revisit the matter of what the Iraqi Constitution says about revenue sharing, not only examining articles 112 and 121 much more closely from the perspective of determining the existence and nature of a distributional obligation in the absence of federal legislation on such, but also examining various other constitutional articles that touch indirectly and inexplicitly on the question of whether and how revenues are to be shared.

IV. AUTHORITY OF SUBCENTRAL UNITS TO ENTER OIL AND GAS DEVELOPMENT AGREEMENTS: AN ASSESSMENT OF THE CONSTITUTIONALITY OF EFFORTS BY THE KRG

By some estimates, roughly 20% of Iraq's proven oil reserves are located in the Kurdish-dominated north. Most of the reserves are found in the areas near Kirkuk, Mosul, and Khanaquin.[94] Though the oil-field development agreements negotiated with international partners over the past couple of years have the Kurds optimistic about the prospects for total production, the northern

[94] See Energy Information Administration, U.S. Department of Energy, Official Energy Statistics from the U.S. Government (August 2007), available at www.eia.doe.gov/emeu/cabs/Iraq/Oil html (accessed Oct. 9, 2007).

Iraqi fields were producing during 2007 in the range of about 200,000 bpd.[95] As noted at the beginning of this chapter, however, the agreements on which Kurdish optimism is based have been the source of much controversy with the central government in Baghdad, which insists that little constitutional foundation is present to support the legal validity of such agreements. Kurdish leaders disagree,[96] and, in fact, in August 2007 they adopted their own Oil and Gas Law of the Kurdistan Region-Iraq in order to lend support to their position.[97] Although no clear and simple answer exists on the matter of constitutional authority, an analysis of the sum of the relevant provisions of the Iraqi Constitution suggests that the KRG finds itself in the stronger legal position.[98] This should not be taken to mean that the constitutional authority to enter oil and gas development agreements is vested solely in the subcentral governmental units. As is discussed near the end of this book in Chapter 8, the fact that subcentral regions possess power under the Constitution to negotiate and conclude oil and gas development agreements does not render the federal government powerless to participate in the same economic realm by striking deals of its own.

Aside from the just-examined language of article 112, which speaks quite explicitly and directly to the matter of constitutional power over oil and gas activities, the other basic constitutional provisions that bear reference on this score are articles 110, 114, 115, and 121. Reviewed previously in connection with the overall structure of the Iraqi Constitution, articles 110 and 114 specify, respectively, the powers exclusive to the federal government and those shared between the federal government and its subcentral units. Article 121, First, notes that powers not delineated as exclusively federal can be exercised by the regions. And article 115, also reviewed earlier, indicates that powers not given

[95] See id.

[96] See KRG responds to Dr. Shahristani's recent statements on oil, in Iraq Updates (Sept. 12, 2007), available at www.iraqupdates.com/p_articles.php/article/21660 (accessed May 9, 2008); Iraq's Kurdish administration wants oil minister sacked, in Iraq Updates (Sept. 17, 2007), available at www.iraqupdates.com/p_articles.php/article/21837 (accessed May 9, 2008); Iraq's Kurdistan defends oil deals, in Iraq Updates (Oct. 9, 2007), available at www.iraqupdates.com/p_articles.php/article/22691 (accessed May 9, 2008).

[97] See Law No. (22) 2007, available at www.krg.org/uploads/documents/Kurdistan%20Oil%20and%20Gas%20Law%20English_06_h14m0s42.pdf (accessed May 8, 2008). For the earlier draft version, see Petroleum Act of the Kurdistan Region of Iraq (22 Oct. 2006), available at www.krg.org/pdf/Kurdistan_Act_COM_draft_22_October_2006.pdf (accessed May 8, 2008). See also the Explanatory Memorandum for the Draft Petroleum Act of the Kurdistan Region of Iraq (October 22, 2006), available at www.krg.org/pdf/EM_Kurdistan_Petroleum_Act_22_October_2006.pdf (accessed May 8, 2008).

[98] For agreement on this see James Crawford: Opinion, The Authority of the Kurdistan Regional Government over Oil and Gas under the Constitution of Iraq (January 29, 2008)(an opinion written by Prof. Crawford of Cambridge University, and commissioned by the law firm of Clifford Chance for the KRG), available at www.gasandoil.com/ogel/members/recentlypublished/welcome.html?v0=138 (accessed May 8, 2008). See also Rex J. Zedalis, Recent oil contracts with Iraqi Kurdish authorities: Are they legally valid?, 2008 International Energy Law Review 16 (Issue No. 1).

exclusively to the federal government belong to the regions and governorates, and in the area of shared powers, priority is to be accorded to the measures of the regions and governorates.

Analyzing these four constitutional provisions as a collective package, there are several reasons for concluding that, although not in clear, explicit, and incontrovertible language, they are best read as vesting subcentral units such as the KRG with authority to enter oil and gas development agreements. The first reason has to do with the fact that article 110's enumeration of powers reserved exclusively to the federal government makes no reference whatsoever to a power over oil and gas. This means it cannot be contended that subcentral units fail to possess such power because of it being assigned to the federal government alone.

Of the relevant powers said to be exclusive to the federal government, only the powers to "[f]ormulat[e] . . . economic and trade policy,"[99] and "[f]ormulat[e] fiscal . . . policy . . . and regulat[e] commercial policy across regional and governorate boundaries"[100] come anywhere close to approaching a basis for authority affecting oil and gas. Yet there seems a plain distinction between negotiating and concluding an oil and gas development agreement on the one hand, and either the formulation of policy related to economics or trade or fiscal concerns or the regulation of commercial policy across regional and governorate boundaries on the other. Policy formulation or regulation implies the identification of general and specific goals and objectives and the creation of generally applicable strategies and mechanisms for their implementation. The striking of an agreement or contract related to oil and gas development involves the significantly more mundane, technical, and tailored task of crafting a formal legal instrument that might seek to effectuate or reflect the goals and objectives of formulated policies or promulgated regulations. Thus, it is difficult to conclude that because article 110 of the Constitution provides for policy formulation powers with respect to economic, trade, and fiscal matters or regulatory powers concerning commerce across boundaries, it excludes the subcentral units from striking oil and gas development agreements with international partners.

Some might suggest a second reason for concluding that subcentral units possess constitutional authority to enter oil and gas development agreements, because article 114 provides that such units share with the federal government the power to "formulate development and general planning policies."[101] This seems a seriously flawed suggestion, however. To begin with, if one accepts the presence of a distinction between article 110's policy and regulatory formulation powers concerning economic, trade, fiscal, and commercial matters and the notion of negotiating an oil and gas development agreement, then the same seems true with respect to any shared power to formulate development and

[99] See Iraqi Constitution, supra note 28 at art. 110, First.
[100] See id. at art. 110,Third.
[101] See id. at art. 114, Fourth.

planning policies. The negotiation and concluding of an oil and gas development agreement containing specific provisions concerning the relationship between a subcentral entity and an international business partner differs markedly from the formulation of development and general planning policies.

Even more substantial, such a putative second reason for concluding that subcentral governments possess constitutional authority seems plagued by the fact that article 114 contains another provision virtually excluding the possibility of interpreting the reference to "formulat[ing] development and general planning policies" as implying such subcentral power. Specifically, that other provision of article 114 indicates that one of the powers shared between the federal government and the subcentral units is that involving the "regulat[ion] [of] the main sources of electric energy."[102] The mere fact of the inclusion of language in article 114 that refers to one particular source of energy – electric energy – and yet leaves aside any analogous reference to oil and gas, another source, suggests that, in refraining from naming as a shared power the power over oil and gas, the article did not envision powers like that involving the "formulat[ion] [of] development and general planning policy" encompassing oil and gas. Article 114's language articulating a shared power over electric energy precludes the shared power over development and planning policies from being read as extending to oil and gas.

All of this is not to say that no valid second reason exists for concluding that subcentral governmental entities possess constitutional power to enter into oil and gas development agreements. It is indubitable that a second can be found in the language of article 115 of the Iraqi Constitution. Again, that language speaks to situations where a power has not exclusively been assigned to the federal government, and to those where there happens to be a conflict between how the federal government and a subcentral unit act to handle a matter of shared power. The opening sentence provides that "[a]ll powers not stipulated in the exclusive powers of the federal government belong to the authorities of the regions and governorates that are not organized in a region."[103] This residual powers language allocates to the regions and governorates what has not been specified as exclusive to the federal government. Given that article 110, which articulates those federal powers, contains neither an explicit assignment over oil and gas development agreements nor a general power that includes such, the language of the first sentence of article 115 makes clear that power regarding such resides in the subcentral units. Thus, notwithstanding the fact article 114, designating certain identified powers as shared between federal and subcentral authorities, contains no language extending to oil and gas development agreements, the opening sentence of article 115 fills the void through the operation of its residual powers provision – such power resides at the subcentral level.

[102] See id. at art. 114, Second.
[103] See id. at art. 115, first sentence.

Corroboration on this conclusion seems evident in the language of article 121, First. It provides that regional powers have the right to exercise "executive, legislative, and judicial powers in accordance with this Constitution, except for those authorities stipulated in the exclusive authorities of the federal government."[104] Because article 110 assigns no power exclusive to the federal government to negotiate and conclude oil and gas development agreements, article 121 plainly reserves the power to deal with such to entities at the subcentral level. In combination with the first sentence of article 115, article 121, First, leaves little room for any other conclusion. As for the second sentence of article 115, the sentence providing that "[w]ith regard to . . . powers shared between the federal government and the regional government, priority shall be given to the law of the regions and governorates . . . in case of dispute,"[105] the obvious implication is that, any conflict between the way federal and subcentral entities handle matters of oil and gas development agreements is to be resolved in favor of the latter. Again, this drives home the significance of the role had by subcentral units in matters over which they possess constitutional power.

A third and final reason for construing the terms of the Iraqi Constitution as supporting the view that the KRG and any other subcentral government can enter into oil and gas development agreements concerns article 112 itself. That provision is important for a couple of reasons. To begin with, it provides quite clearly for a role of the federal government in matters of oil and gas, thus setting up situations in which it may be essential to have reference to the second sentence of article 115, as alluded to previously. Conflicts can occur between the view of how federal authorities and those at the subcentral level think oil and gas development agreements with international partners ought best to be handled. In addition, as the language of article 112 explicitly and directly addresses oil and gas, it would suggest the inappropriateness of reading other provisions of the Constitution, such as article 110's assignment of powers exclusive to the federal government, in an expansive and strained way that precludes subcentral entities from claiming any constitutional power with respect to oil and gas development agreements. Undeniably, the Iraqi Constitution makes reference to the assignment of a constitutional power connected to matters of oil and gas. Given that, it seems hard to make the case that the more general language of the Constitution's article 110, in providing for powers exclusive to the federal government, contains phraseology that has the effect of preventing subcentral

[104] See id. at art. 121, First. It should be noted that this provision applies only to "regions," not to governorates. In regard to the latter, article 122 specifies their powers – administrative and fiscal. The combination of these might lead one to conclude that, as between articles 110, 114, 115, 121, and 122, regions can claim a power to enter development agreements, but governorates cannot. After all, article 122, as noted, by contrast with article 121, does not reach beyond administrative and fiscal powers. However, article 115, first sentence, makes clear that what is not explicitly assigned to the federal government alone, resides in the regions and governorates as well.

[105] See Iraqi Constitution, supra note 28 at art. 115, second sentence.

units from claiming a constitutional power to negotiate and conclude oil and gas development agreements. And the last reason for 112's importance has to do with the fact that it does not merely refuse to indicate that the federal government has some exclusive power with respect to oil and gas; it goes in exactly the opposite direction and indicates that any federally recognized power in the area must be exercised in conjunction with the subcentral units. As the exact verbal configuration of article 112 states, the federal government, "with the producing governorates and regional governments," has certain prescribed powers over oil and gas activities.[106] Thus is confirmed the existence of some constitutional power of subcentral political units when it comes to oil and gas.

V. CONSTITUTIONAL AUTHORITY OF SUBCENTRAL UNITS AND THE MATTER OF "PRESENT" VERSUS "FUTURE" FIELDS

Accepting the view that the combined effect of articles 110, 114, 115, and 121 is to vest subcentral governmental units, albeit indirectly and inexplicitly, with constitutional authority to strike oil and gas development agreements and that article 112 of the Iraqi Constitution appears to confirm that fact, the significance of article 112's totality also merits attention, and especially in connection with the article's notion of oil and gas fields considered "present" as opposed to "future." As will be recalled from what was reviewed earlier in connection with article 112 and the revenue-sharing obligation,[107] that obligation serves to condition the role of the federal government in the context of the management of oil and gas extracted from present fields. After this opening provision of the article, article 112, Second, assigns the federal government a role in regard to the formulation of long-term strategic policies on the development of the nation's oil and gas resources.

Although the language in both provisions of article 112 stating that "[t]he federal government, with the producing [governorates and regional governments,]"[108] is to manage oil and gas and create strategic development policy for such, the language indicates only that the federal government is to take the lead in the context of oil and gas management and development policy. That lead role, however, is not one that cuts out the subcentral governmental units. Whether with respect to management or development policy, the subcentral units have been constitutionally assigned a role in connection with oil and gas. Additionally, the federal government's lead role is not irrevocable and absolute, as the precise language of article 112, First, makes the retention of management power conditional upon the federal government complying with specific revenue distribution obligations. The conditional nature of such management power

[106] See id. at art. 112, First.
[107] See supra Section III.
[108] See Iraqi Constitution, supra note 28 at art. 112, First and Second.

thus exposes the fact that subcentral governing units were extremely reluctant to endorse a constitutional assignment that left them without any basis for claiming power over oil and gas.

The preceding points are certainly important to keep in mind with respect to article 112. There are additional points of even greater significance, however. One is the distinction drawn by the language of article 112, First, between so-called present as opposed to what might be referred to as future oil and gas fields. Again, the relevant language provides the federal government, with the producing subcentral units, the power to undertake the "management of oil and gas extracted from present fields."[109]

As simple as this language appears, it raises a variety of extremely interesting and provocative questions. For instance, is an oil and gas field considered "present" if it is known to exist and perhaps, has been surveyed, assayed, and tested, but has not yet even begun to enter the first stages of active development? In other words, is a known oil and gas field considered "present" if being developed, or must such pass beyond that and to the stage of actual production or lifting of oil and gas in order to be so denominated? Further, even if one is concerned with a field from which production has occurred, must the production have taken place by the time of the adoption of the Iraqi Constitution in order for the field itself to be thought of as "present"? That is to say, is it not enough to qualify as a "present" field that oil and gas production from the field commence some time after the Constitution's adoption? And finally, within a field itself, various geologic strata may exist. Would the fact that one is producing from a stratum or formation specifically identified at the time of the Constitution's adoption, and not from another situated above or below but not known to contain oil and gas, or known yet inaccessible, mean that the latter could be regarded as within the "present field[ ]"? Stated in another fashion, is a field that is considered "present" inclusive of all strata and formations geologically falling therein, whether or not they are part of the current production efforts, and whether or not they are known to contain oil and gas?

With respect to first of these questions, whether an oil and gas field that is thought of as "present" must be one that has gone beyond discovery, identification, and initial development to the point of actual production, neither the language of article 112, First, nor any other provision of the Constitution provides a definition of the term "present" that can be referenced for clarification. The best that is offered is indirect and inferential interpretive assistance: other references in article 112, First, provide guidance that is instructive with regard to the meaning of the term "present." Specifically, the language uses two other words that indicate the very strong likelihood that "present" implies oil and gas fields that have gone beyond mere pre-production development and have actually produced oil and gas. These two words are "producing"

[109] See id. at art. 112, First.

and "extracted";[110] again, used in connection with the idea that it is the federal government, with the "producing" governorates and regional governments, that shall undertake the management of oil and gas "extracted" from present fields. The word "producing" leaves no question about its meaning, and the word "extracted" certainly suggests something well beyond mere developments preparatory to production. From the fact article 112, First, employs these words in conjunction with the notion of "present" oil and gas fields, there seems good reason to interpret that notion as meaning fields that are producing, as opposed to those that may produce at some point in the future. It should be observed that, although the Constitution offers little additional assistance on this matter, annexes to the publicized version of the federal oil and gas framework law, as will be seen in Chapter 3, propose to list "present producing fields" and distinguish them from "discovered (undeveloped) fields." The intensity of the controversy between federal and regional authorities, and especially the KRG, concerning these annexes cannot be overstated.[111] Nonetheless, no matter how the framework law distinguishes between such fields, the question of how the term "present field" is to be interpreted under the Iraqi Constitution is an entirely distinct issue.

As for the second matter – that of whether production must have been occurring at the time of the adoption of the Constitution in order for a field to fully qualify as "present" – this seems clearly the whole reason for the document's utilization of that quoted term. Were "present" used in conjunction with the term "future,"[112] then irrespective of when a field commenced production, it would come within the reach of the federal role specified in article 112, First. The significance of the use of the term "present" alone, however, should not be ignored by attributing to it a reading that would allow it to automatically pull within its range of influence all oil and gas fields from the instant they commence production. The idea behind article 112, First's, use of "present" was to bring fields producing at the time of the Constitution's adoption within the ambit of article 112 and leave aside all those that may have been unknown or known but not under production. Fields falling into the latter categories would remain outside the lead role granted by article 112, First, to the federal government. And given the fact that powers not granted to the federal government could

[110] See id.

[111] See, for example, Statement from Minister of Natural Resources, Kurdistan Regional Government-Iraq, The Kurdistan Regional Government (KRG) clarifies its position regarding the latest developments in the Draft Oil Law (27 Apr. 2007), available at www.krg.org/pdf/MNR_Statement_20070427.pdf (accessed May 11, 2008).

[112] It is interesting to note that both art. 2 of the draft proposed Petroleum Act of the Kurdistan Region of Iraq, 2006, available at www.krg.org/pdf/Kurdistan_Act_COM_draft_22_October_2006.pdf (accessed May 11, 2008) and art. 1 (17) of the in-place Oil and Gas Law of the Kurdistan Region-Iraq, Law No. (22), see infra Chapter 3, note 120, defines the term "Future Field" to mean one not under commercial production prior to 15 August 2005, as well as those that may have been or subsequently have come to be discovered through exploration.

be exercised by the subcentral units, fields either unknown at the time of the Constitution's adoption or known but nonproducing could be subjected to the authority of subcentral governmental units.

On the question of whether a "present field[]" consists of all strata and geologic formations that lie within particular geographical parameters, the language of article 112 and the other provisions of the Constitution are again completely silent. As a consequence, the language of the article seems susceptible to the interpretation that every stratum or geologic formation within an area recognized and designated on a surface petroleum map as a field comes within the concept of a present field if it was producing at the time of the Constitution's adoption. The key would be continuity, unity, or singularity between producing strata or formations. In other words, if particular strata or formations, even though not now being produced, are regarded as mere extensions of other strata or formations under production, then whether they are located above or below or beside areas now being tapped, they are to be regarded as part of the present field. Though far from determinative of this important question of constitutional interpretation, the basic Iraqi oil and gas framework law, an earlier draft proposed Kurdish petroleum law, and the Kurds' existing 2007 Oil and Gas Law express a similar understanding on what falls within the parameters of an oil and gas field. Article 4 (10) of the former defines the concept of a "[f]ield" as meaning "an area consisting of a single Reservoir or multiple Reservoirs connected to the same individual geological structural feature or stratigraphic condition."[113] Article 2 of the Kurds' earlier draft proposal and article 1 (15) of their existing law define "[p]etroleum [f]ield" to mean "a Reservoir or group of Reservoirs within a common geological structure or feature from which Petroleum may be commercially produced under the prevailing technical and economic conditions."[114] The consonance between the understandings of the two entities most likely to become embroiled in controversy regarding the reach of the concept of "present fields" offers much to recommend the interpretation upon which they both agree.

Aside from the questions about whether the "present fields" language of article 112, First, extends to nonproducing fields, those not producing at the time of the Constitution's adoption, or strata or formations not tapped in conjunction with producing from other strata or formations, that same language presents three other interesting matters that require comment. First, the relevant portion of article 112 points out that present fields are subject to authority of the federal government, with the "producing" governorates and regional governments. The use of the term "producing" leaves no doubt that not all the governorates and

[113] See art. 4 (10) of Draft Iraqi Oil and Gas Law No. of 2007 (15 Feb. 2007), available at www.iraqrevenuewatch.org/documents/oil_law_english_20070306.pdf (accessed May 11, 2008).

[114] See art. 2 "Petroleum field," Petroleum Act of the Kurdistan Region of Iraq, 2006, supra note 112; art. 1 (15) of Oil and Gas Law of the Kurdistan Region, Iraq, supra note 112.

regions have a say in the federal government's lead in supervising present oil and gas fields. A governorate or region must be one that is "producing" oil and gas in order to insist on a role in shaping how the federal government exercises its authority. The language leaves unclear, however, whether every producing governorate or region is entitled to insist on input in connection with exercises of federal authority concerning oil and gas in present fields in other governorates or regions, or only in their own. All that is stated is that it is the federal government, "with producing governorates and regional governments," that shall be involved in overseeing present fields. No clarification is provided as to whether being a producing governorate or region entitles one to intrude on how present fields in other governorates or regions are overseen. Similarly, the language leaves unclear whether production must have taken place by some specific time in order to qualify one as a producing governorate or region. Despite this lack of clarity, it seems logical to assume a certain symmetry between what article 112, First, means in connection with this matter and the earlier discussed matter of "present" fields being those producing as of the adoption of the Iraqi Constitution. After all, a governorate or region with fields producing at the time of the Constitution's adoption would certainly have a legitimate reason for expecting to have a role in federal oversight of ongoing oil and gas exploitation of those same wells. As wells that were not producing when the Constitution was adopted would fall outside federal authority under article 112, First, there would be no reason for concern regarding input from subcentral units.

The second of the three other matters requiring comment involves the extent of the federal role in connection with present fields. As mentioned earlier,[115] by virtue of the language of article 112, First, the authority the federal government is to exercise over present fields, with the governorates and regions, is an authority involving "management" of oil and gas. This is to be distinguished from article 112, Second's, similar grant of power to the federal government to take the lead role, with the governorates and regional governments, in creating long-term, strategic policies for the development of the nation's oil and gas resources.[116] By juxtaposing collaborative "management" authority over present fields with equally collaborative authority to create longer-term development policies for oil and gas generally, the thrust of article 112 is to signify a limited and restricted role for the federal government. For any federally claimed authority to exist under article 112, First, it must not only concern authority over oil and gas fields regarded as "present," but it must also extend no further than to matters of "management." Article 112, Second, permits the federal government to collaboratively exercise policy-creating authority in the realm of oil and gas resource development. In the absence of legislative adoptions signifying

[115] See text accompanying supra note 109.
[116] See Iraqi Constitution, supra note 28 at art. 112, Second.

the exercise of such policy-creating authority, however, the language of article 112, Second, does not provide independent, stand-alone constitutional power for federal action. The Constitution provides such independent, stand-alone federal authority only in the realm of "present" fields, and only with respect to matters of "management." The implication is that subcentral units would be empowered by the Constitution to regulate even "present" fields when it comes to issues not regarded as "management" in nature. Admittedly, while the use of the term "management" injects uncertainty and the potential for dispute regarding what subcentral governmental measures are not management in nature, it seems the very use of "management" by the drafters of the Constitution demands an attempt to distinguish among the differing natures of various subcentral measures.

The third and final matter has to do with article 112, First's, provision indicating that the federal government, with the subcentral units, shall undertake management of oil and gas "extracted" from present fields. Restated, article 112, First, provides for a collaborative federal role in "present" fields when it concerns "management" matters, so long as those relate to the management of oil and gas that have been "extracted."[117] Once again, this limitation or restriction on the role that the federal government may exercise under article 112 drives home the broad powers left by the Constitution in the subcentral units when it comes to matters involving oil and gas, including oil and gas fields thought of as "present." All the power vested in the federal government, in collaboration with the governorates and regional governments, by the language of article 112, First, is narrowly confined to power over the management of oil and gas that has been "extracted" from present fields. Oil and gas that has yet to be lifted from the reservoirs that contain it falls beyond federal desire to manage and is left by the Constitution in the jurisdiction of the respective subcentral units.

By way of context, it should be noted that much discussion has occurred between Iraqi federal government and subcentral government officials concerning the "present" field status of the country's oil and gas reserves. Though the numbers may vary, a frequently used statistic suggests that of the seventy-one known oil and gas fields, twenty-four were in use at the time of the Constitution's adoption,[118] with apparently none of those in use being situated in Kurdistan.[119] Additionally, although this matter has led to much controversy and a lack of negotiated agreement, there have been attempts in the context of the proposed federal oil and gas framework law discussed in Chapter 3 to

[117] See id. at art. 112, First.

[118] See Fouad al-Amir, Discussion on the Iraqi Oil Law, available at www.al-ghad.org/2007/02/20/discussion-on-the-iraq-oil-law (accessed June 14, 2008); Kamil al-Mehaidi, Geographical Distribution of Iraqi Oil Fields and Its Relation with the New Constitution, available at www.iraqrevenuewatch.org/reports/052706.pdf (accessed June 14, 2008).

[119] See Prof. James Crawford, Opinion for the London Office of the Law Firm of Clifford Chance on Authority of the Kurdistan Regional Government over Oil and Gas under the Constitution of Iraq at fn. 8 (29 Jan. 2008), supra note 98.

prepare annexes that would categorize and list Iraqi oil and gas fields. From indications in published sources, federal officials had initially proposed four specific annexes: Annex 1 on fields in production; Annex 2 on those near production; Annex 3 on those undeveloped; and Annex 4 on areas across the country to be opened for exploration and prospecting.[120] The proposal by the federal government, sometimes referenced as the Dubai Annexes, would have placed approximately 93% of known reserves under federal control, with the subcentral authorities having control over the remaining 7%. This has obviously met with resistance and various counterproposals.[121] In terms of the breakdown between the number of fields in the various annexes, the U.S. Department of Energy suggested that, with several of the fields overlapping between annexes, there were twenty-nine fields considered to be in production, twenty-five near such, twenty-seven viewed as undeveloped, and sixty-five large blocks of territory scattered throughout the country that fell into Annex 4's category of land to be opened for exploration and prospecting.[122]

VI. CONCLUSION

The preceding analysis of the various relevant provisions of the Iraqi Constitution proves extremely interesting, but where exactly does it leave us on the question of the extent of constitutional authority for subcentral governmental units in the area of oil and gas development agreements? Obviously, the short answer is that subcentral authority over such agreements is extensive. The federal government has been granted authority with respect to oil and gas, but its authority is extremely circumscribed and focused, and that authority is to be exercised jointly or collaboratively with the governorates and regional governments such as the KRG. Clearly, by granting joint or collaborative power to the federal government, the Constitution does not signify an absence of power on the part of the subcentral governmental units when it comes to oil and gas development agreements.

Both articles 115 and 121, First, are explicit in indicating that powers not assigned exclusively to the federal government may be exercised by the subcentral units. Although article 112 does assign the federal government a role to play when it comes to oil and gas, that role is far from exclusive, because federal authorities must act with the governorates and regional governments. Moreover, when it comes to matters of management of oil and gas, the federal role is limited to oil and gas that has been extracted, and even then it must have been extracted from present fields. As noted, article 112, Second, provides the

[120] See www.al-ghad.org/2007/04/30/krg-rejects-iraq-oil-law/ (accessed June 14, 2008); www.eia.doe.gov/emeu/cabs/Iraq/Oil html (accessed June 14, 2008).

[121] See id.

[122] See www.eia.doe.gov/emeu/cabs/Iraq/Oil html (accessed June 14, 2008).

federal government with an additional role as well in the area of strategic policies to develop Iraq's oil and gas resources. As with the role concerning management, though, the strategic development policy role is one that must be exercised in conjunction with the subcentral units. In a manner of speaking, even though the federal government unquestionably has a role to play in regard to certain aspects of oil and gas, the subcentral governmental units have been indirectly granted through articles 115 and 121, First, much constitutional authority over oil and gas activities.

As a consequence, oil and gas development agreements like those entered into between the KRG and Hunt Oil, Sterling Energy, Western Sands, Addax Petroleum, Dana Gas, and the many other international oil and gas companies interested in the resource riches of the Kurdistan region of Iraq have every reason to be considered constitutionally authorized. Nothing in the language of article 110, listing the powers exclusive to the federal government, nor in article 112, stating the nature of the federal government's role in regard to the management of, and the formulation of strategic policies for developing, Iraq's oil and gas resources, indicates an intent to preclude the exercise of authority by subcentral governmental units. To the contrary: the language of articles 115 and 121, First, make clear that the subcentral units possess extensive constitutional authority in all areas where no exclusivity is assigned to the federal government.

It is true enough that subcentral oil and gas development agreements could result, as they already have, in irritation to federal authorities. Pursuant to its joint and collaborative power under article 112, First, it is more than possible that a federal measure concerning the management of oil and gas extracted from present fields could prove inconsistent with provisions in, or subcentral legislation concerning, international oil and gas development agreements. In such a situation, the language of the second sentence of article 115 of the Iraqi Constitution, in declaring that priority shall be given to the law of the regions and governorates in the event of a conflict with a federal measure, would require consideration. That sentence plainly applies in the case of "powers shared between the federal government and the regional government."[123]

The constitutional powers related to oil and gas and described in article 112 are not, strictly speaking, enumerated among the powers technically designated by article 114 as "shared." In fact, it might be suggested that the article 112 powers concerning oil and gas, being physically situated by the Constitution between the federal government's article 110 exclusive powers and its article 114 shared powers, signifies a grant of hybrid powers not to be regarded as merely shared. Following this line of argument, the priority accorded by the second sentence of article 115 in situations of conflict between federal and subcentral measures might be deemed inapplicable. The problem with such reasoning, however, is that the language of article 112 clearly lists powers that

[123] See id. at art. 115, second sentence. See text accompanying supra note 105.

are admittedly not exclusive to the federal government and are required to be exercised by the federal government "with the [regions and governorates]." Essentially, this results in the powers concerning oil and gas being the functional equivalent of article 114 shared powers. And furthermore, not considering them as the functional equivalent would lead to the highly nettlesome problem of how to determine priority in situations of conflict between differing federal and subcentral approaches over matters of oil and gas. Arguably, it could be maintained that even though article 115's priority provision is, strictly speaking, inapplicable, the lead role assigned by article 112 to the federal government means that the federal position always controls. To take that position discounts the joint and collaborative role accorded to subcentral entities in connection with oil and gas. Why even provide for subcentral input if federal desires always trump those of the subcentral governmental units? Additionally, the severe restrictions and limitations imposed on federal authority by virtue of the totality of the language of article 112 suggest oil and gas as a matter not above that of other shared powers, but important enough to merit its constitutional provision and placement under special consultative and cooperative obligations.

If a subcentral governmental entity were to negotiate and conclude an international oil and gas development agreement that conflicted with a federal measure addressing something other than present fields, or management of extracted oil and gas – even though from fields regarded as present – an entirely distinct situation would result. The subcentral authorities would not require recourse to the constitutional language of article 115's priority provision, because the federal measure itself would likely be characterized as ultra vires and beyond the power of the federal government to enact. If it could not demonstrate that the measure of concern comes within the ambit of the exclusive or the shared powers referenced in articles 110 or 114 of the Constitution, the federal government would be forced to rely on the joint and collaborative powers over oil and gas spelled out in article 112. And given that article 112, First, narrowly restricts the federal government's role over oil and gas to present fields alone, and then only in connection with management of extracted oil and gas, federal measures regulating matters outside this realm would have to be considered constitutionally defective. Once one passes beyond management of oil and gas extracted from present fields, one enters the domain of constitutional powers assigned to the subcentral governmental units.

It is certainly possible that a conflict might arise between federal policies adopted to guide or influence long-range or strategic oil and gas development and the terms and provisions of particular international development agreements entered into by subcentral authorities. In any such case, the language of article 112, Second, clearly empowers the federal government to act, thereby legitimating its strategic development policy decisions, assuming that they have been taken, as is required by the article's directive, jointly and collaboratively. As the language provides, "[t]he federal government, with the producing regional

and governorate governments, shall together formulate" strategic policies aimed at the development of the nation's oil and gas resources.[124] Joint and collaborative policy formulation substantially minimizes, though it may not completely eliminate, the potential for conflict with how particular oil and gas development agreements may address certain matters. However, as with any other conflict that may surface between federal action and what may be provided for in a development agreement, the language of article 115's priority provision would prove instrumental in designating the subcentral action as preeminent. Thus, for example, to the extent that a KRG oil and gas development agreement with an international partner seems inconsistent with strategic, long-range policy for the development of Iraq's oil and gas resources, the former would be entitled to claim a position of constitutional preeminence.

By way of a final observation, it bears noting that, because of dissatisfaction with both the terms of some constitutional provisions and the way that document emerged ready for a vote of the people, it has been subject to examination by a so-called Constitutional Review Committee (CRC) that issued a report on its deliberations in late May 2007.[125] The CRC Report contains a series of suggested amendments to the Iraqi Constitution, including amendments to articles that address the role of subcentral governmental entities in oil and gas activities, the handling of revenues from such activities, and the matter of "present" versus "future" fields. One would do well to be aware of the substance of amendments suggested by the CRC on these matters, at least because they may indicate the direction in which the relevant constitutional principles may move at some future date.

In this regard, the CRC's suggested amendments to article 111 are important. To begin with, what is currently a very short and direct single provision would become an involved article containing six separate paragraphs.[126] But beyond that, because there had been some question about the assignment of power over oil and gas between the federal government and the subcentral units due to the language of article 111 that provides that the nation's oil and gas are owned by all the Iraqi people, "in all the regions and governorates," the suggested article 111, First, would remove the quoted language entirely.[127] Additionally, with relevance to revenues, the suggested article 111, Second, would explicitly provide that "[t]he federal government shall collect the oil revenues and distribute them."[128] In terms of article 112, First, both the references to the federal government, with the producing regions and governorates, having management authority over oil and gas "extracted," and to the extraction being

[124] See id. at art. 112, Second.
[125] See Constitutional Review Committee Report (May 23, 2007), available at www.forumfed.org/pubs/IraqConstitutionalReviewENG.pdf (accessed July 18, 2008).
[126] See id. at art. 111.
[127] See id. at art. 111, First.
[128] See id. at art. 111, Second.

from "present fields," would be completely removed with the CRC's suggested amendment.[129] Though the effect of this suggested amendment may be subject to debate, it clearly would affect the reach of article 112, First, power over oil and gas and render irrelevant any distinction between fields considered "present" as opposed to "future."

[129] See id. at art. 112, First.

Part Two THE COMPLICATIONS ASSOCIATED WITH IRAQI LEGISLATIVE MEASURES

With the understanding supplied by the two opening chapters of the factual background and the basic constitutional provisions affecting Iraqi oil and gas activity, we proceed to a description and analysis of the fundamental legislative measures that also affect that activity. Although it is no doubt accurate to stress the significance of what the Iraqi Constitution of 2005 has to say about the nation's petroleum resources, as is the case with most constitutional documents, it is cast as a foundational instrument and therefore covers a vast diversity of subjects with only the barest of detail. On the matter of oil and gas, the breadth of the general principles set forth in the Constitution purport to be elaborated, fleshed out, and supplemented by four specific legislative measures. An exploration of the nature, peculiarities, and potential problems presented by these four measures forms the core of the chapters appearing in Part Two. It should be observed, however, that one of the legislative measures has a counterpart legal adoption that has been implemented and actually utilized by the Kurdistan Regional Government (KRG) to enter into oil and gas development agreements with several international oil and gas companies. And, because both this latter KRG measure and that put forward by the central government in Baghdad speak of the promulgation of model forms of development agreements, one of the chapters in Part Two examines such model forms of contract so as to establish a degree of awareness with basic contractual instruments, an awareness useful to those requiring familiarity with standard terms and provisions of oil and gas development agreements.

The federal oil and gas framework law – which articulates the seminal principles governing oil and gas activity – and the KRG's Oil and Gas Law of 2007 provide the basic substance for Chapter 3. Apart from examining the many intricacies associated with both measures, some of the central problems and complications emerging out of the exact wording of the two legislative formulations are subjected to analysis. Chapter 4 builds on the fact that, as previously

mentioned, both measures reference the promulgation of model forms of contract to be used to give effect to the contracting powers explicitly identified in the federal framework law and the KRG Oil and Gas Law. Thus, the chapter attempts to unravel the interrelationships between and unique attributes associated with the substantive provisions of the model contracts. As will be seen, the KRG has moved much faster and farther than the central government on this front, but it would be inaccurate to suggest that nothing firm has emerged at the federal level.

Chapters 5 and 6 deal with both the federal revenue-sharing law, and the measures reconstituting the Iraq National Oil Company (INOC) and reorganizing the central government's Ministry of Oil. With respect to the restructuring of INOC and the Oil Ministry, the matter taken up in Chapter 6, the terms of the federal oil and gas framework law clearly and explicitly contemplate the enactment of such legislative measures. The idea is a separation of INOC from the Ministry, with the creation of two distinct, stand-alone entities, each with its own set of tasks. When it comes to the revenue-sharing law, the focus of Chapter 5, not only the basic workings and objectives of that law but also the various potential problems and shortcomings of its wording and terminology are examined at length, all with an eye toward offering critical and useful analysis.

In prefacing the materials taken up in Part Two's four chapters, a couple of specifics should be kept in mind. First, the provisions of the federal oil and gas framework law examined in Chapter 3 are in the process of reconsideration. Though the secrecy surrounding that process has prevented access to the exact language now contemplated, it appears that the principal thrust of the reconsideration process is directed at enhancing the central government's control over oil and gas resources. As a consequence, one should keep this in mind when reflecting on the observations offered in Chapter 3. Second, with respect to Chapter 6's discussion of the reconstitution of INOC and the reorganization of the Ministry of Oil, the complete lack of transparency regarding the two legislative measures has meant that analytical reliance has been placed in the chapter on the relevant terms of various associated legislative provisions, such as certain pertinent provisions of the federal framework law. Any eventual public disclosure of the precise content of the INOC reconstitution and the Oil Ministry reorganization measures would necessitate further close analysis and possible reconsideration of the thoughts and observations offered in Chapter 6.

3 FEDERAL OIL AND GAS FRAMEWORK LAW AND SUBCENTRAL GOVERNMENT RESPONSES

I. INTRODUCTION

The two preceding chapters focused on the background regarding Iraqi oil and gas, and the relevant provisions of the Iraqi Constitution. The matter of background included both the historical and factual context, as well as the legal situation involving oil and gas immediately prior to the resumption of Iraqi self-governance. In terms of the relevant provisions of the Iraqi Constitution, Chapter 2 concentrated on sketching the basic structure of the oil and gas provisions of the Constitution, examining the question of subcentral governmental power to enter into oil and gas development activities, addressing the matter of revenue sharing, and dealing with the distinction between so-called present and future fields. In this chapter, attention will be devoted exclusively to the matter of the current public version of the federal oil and gas framework law and the legislative responses of subcentral governmental authorities, in particular that of the Kurdistan Regional Government (KRG).

The examination of the federal oil and gas framework law and the Kurdish government's regional response to it proceeds by initially taking up the essential structure and contours of the relevant legislative measures, contrasting them with earlier draft proposals. Next, it concentrates on outlining the basic provisions of the measures and follows this with a lengthy discussion of those provisions most relevant to the oil and gas industry. In terms of the provisions, attention is centered on ascertaining the precise oil and gas activities within the reach of the measures, detailing the existence and nature of any public institutions created by the measures with which industry representatives may have to interact or compete, describing the processes to be followed for industry representatives to secure permission to engage in oil and gas activity, and setting forth the essential terms and conditions of any such permission taking contractual form.

This examination is followed by an identification and analysis of some important legal issues presented by the terms of the relevant legislative measures.

Clearly, every piece of legislative drafting is fraught with the potential for disputes deriving from gaps and interstices, some of which reflect oversights by the architects of the measure concerned, with others simply capturing deliberate ambiguities accepted in order to reach final agreement. The objective in identifying and analyzing issues deriving from these gaps is not to present the reader with an exhaustive litany and discussion of all the problem areas. Rather, it is to provide just a sense of a few of the more prominent and important of the legal issues emerging from the various inadequacies of the measures considered. However, the sorts of legal problems likely to arise in connection with the precise terms of a federally or regionally granted contractual permission to engage in oil and gas activity are a matter reserved until Chapter 4. In that chapter, close attention will be devoted to not only squaring the federal model petroleum contracts and KRG-granted model production-sharing contracts (PSCs) with the provisions of the relevant supportive legislation, but also to enumerating the various areas of concern deriving from the ambiguities and uncertainties of the model contracts themselves.

II. BASICS OF THE FEDERAL OIL AND GAS FRAMEWORK LAW

The creation of the current public version of the federal oil and gas framework law has a multi-year and complex history. From media reports, it appears that some in the neo-conservative movement saw Gulf War II as an ideal opportunity to radically alter the world oil and gas landscape. Though the information about this is somewhat mixed, and it seems relatively clear as indicated in Chapter 1 that the Coalition Provisional Authority (CPA) under Paul Bremer was hesitant to impose any meaningful, long-term changes on the Iraqi oil and gas legal regime, stories surfaced by late spring and early summer 2003 that the CPA's principal advisor on energy to the Iraqi Ministry of Oil, Phillip Carroll, former CEO of Shell Oil Company, was not unreceptive to the idea of getting Iraq to sever ties with OPEC, hoping thereby to leverage future Iraqi production into a cartel-busting implement.[1] In part out of recognition of the wealth of expertise available from the international oil industry, Carroll was followed in that, and associated advisory positions, by a line of other industry officials, including Rob McKee, former VP of ConocoPhillips, and Terry Adams of BP. Each brought their own insights and observations, and these were supplemented, distilled, and modified by outside consultants such as BearingPoint, a large Washington, D.C. area-based firm to which the Bush administration had turned for advice on a variety of fronts beginning in the earliest days of the Iraq campaign.

At least as early as summer 2004, the Iraqi transitional governing officials began to formulate the outlines of their own vision for a future oil and gas legal

[1] See Peter S. Goodman, U.S. adviser says Iraq may break with OPEC, Washington Post (May 17, 2003), at E01.

regime. One clear indication of that appears in interim Prime Minister Ayad Allawi's August 2004 policy statement establishing his basic parameters on the matter of oil and gas.[2] Those included distance between the government and running of the oil and gas industry, with increased partnering with foreign actors; a distinction between the treatment accorded existing, producing reserves and those yet to be discovered or considered nonproducing; and a gradual move toward increased privatization.[3] By mid-2006, both the Iraqis and the United States began to accelerate the move toward the drafting of textual language of an oil and gas framework law. Spanning the time between roughly May and July of 2006, the Iraqi Oil Ministry requested a triumvirate of former Iraqi officials (Tariq Shafiq, Farouk al-Qassem, and Thamir al-Ghadban) who were intimately familiar with both industry workings and sensitivities of the local population to work at crafting the language of such a law.[4] It appears that a draft was completed by the end of July and placed before the Council of Ministers, Chaired by Deputy Prime Minister Barham Saleh, a Kurdish nationalist, by early August.[5] During the same time frame, the U.S. Agency for International Development sent a former Overseas Private Investment Corporation assistant general counsel, Ronald Jonkers, then with the D.C. law firm of Hills, Stern & Morley, to provide help to the Iraqis in their drafting efforts.[6]

Ministerial Council consideration of the July 2006 draft eventually resulted in a document that was adopted by the Council and submitted to review by various entities, including some major oil companies, before eventual submission to the parliament. The document was made available for public release in the form of a January 15, 2007, draft oil and gas law,[7] and then revised and reissued as a draft dated February 15, 2007.[8] It is the latter document that serves as the basis for the analysis that follows. The original July 2006 draft proposal prepared by Messrs. Shafiq, Qassem, and Ghadban is not readily accessible, and thus, the few comparisons offered will be limited to the January and February drafts issued by the Council of Ministers.

[2] See Kamil Mahdi, Iraq's Oil Law: Parsing the fine print, 11 World Policy Journal, at 15 (Summer 2007).

[3] See id.

[4] See Dr. Tariq Shafiq, Iraq Petroleum Law Re-visited (presented at the Centre for Strategic & International Studies, Washington, D.C., June 12, 2007), available at www.globalsecurity.org/military/library/congress/2007_hr/070717-shafiq htm (accessed Aug. 1, 2008).

[5] See id.

[6] See Washington Sends Corporate Lawyer to Iraq to Assist with Drafting of Oil Law (Mid-July 2006), available at www historycommons.org/context.jsp?item=JonkersSentIraq&scale#JonkersSentIraq (accessed Aug. 1, 2008).

[7] See 15 Jan. 2007 Federal Draft Oil and Gas Law, available at www.archive.org/download/IraqOilAndGasLawEnglish/Iraq_Oil_Law.pdf (accessed Aug. 1, 2008)(hereinafter January 2007 draft).

[8] See Republic of Iraq Draft Iraq Oil and Gas Law No. of 2007 (15 Feb. 2007), available at www.iraqrevenuewatch.org/documents/oil_law_english_20070306.pdf (accessed Feb. 12, 2008)(hereinafter February 2007 draft).

The most conspicuous structural differences emerging from a comparison between the January and February drafts are two: first, that the latter contains four annexes – the so-called Dubai Annexes – not appearing in the January draft; and, second, that the February draft contains one less substantive provision. The annexes were actually put together and added in the weeks immediately after the conclusion of work on the February draft,[9] and they purport to name, identify, and address the known and producing, as well as discovered but undeveloped, oil and gas fields placed under the authority of the Iraq National Oil Company (INOC); the discovered but undeveloped fields outside the authority of INOC; and all other undiscovered fields.[10] The substantive provision appearing in the February and not the January draft oil and gas law deals with the matter of changes in administrative borders – that is to say, how the law should affect petroleum operations if borders of regions or producing governorates change as a result of political developments.[11] In Section III of this chapter, the latter will be examined as a potentially significant legal issue. A third comparative difference between the earlier and the later drafts concerns the matter of what the Iraqi federal government refers to as production-sharing contracts (PSCs). Language did appear in the provisions of the January draft law referencing PSCs, but it is completely absent from the terms of the February version.

A couple of general observations are warranted with respect to the February version of the federal oil and gas framework law, prior to delving into the details of its relevant provisions. To begin with, that version elevates the role of the federal authorities over oil and gas activities and downplays that of subcentral governmental units. As will be discussed a few paragraphs from now, the February law vests no less than five federal governmental entities with extensive oil and gas responsibilities. In the same basic provision of the law that sets these forth – article 5 – the provision concludes in paragraph (F) with a recitation of the responsibilities of regional and governorate authorities in regard to the entire oil and gas area. For context, it should be recalled, as seen in Chapter 2, that the terms of the Iraqi Constitution of 2005 provide in articles 111, 112, and 115 that oil and gas are owned by all Iraqis in all the regions and governorates; that the federal authorities, in cooperation with the regions and producing governorates, have the power to manage oil and gas extracted from present fields; and that the powers not granted by the Constitution to federal authorities are vested in the subcentral units. By contrast, when it comes to the terms of article 5(F) of the February version of the framework law, it provides subcentral units with the paltry authorities to make "preparations to propose . . . [oil and gas]

[9] See generally, Statement from Minister of Natural Resources, Kurdistan Regional Government-Iraq Clarifying Position Regarding the Latest Developments on the Draft Oil Law (Apr. 27, 2007), available at www.krg.org/pdf/MNR_Statement_20070427.pdf (accessed Mar. 12, 2008) (hereinafter Statement from Minister of Natural Resources, KRG).

[10] See February 2007 draft, supra note 8 at Annexes I–IV.

[11] See id. at art. 41.

activities and plans" that could be incorporated into larger, overarching federal petroleum operation plans; to provide "licensing" of petroleum operations under federal standards and general operational guidance with respect to fields identified under Annex 3 (i.e., discovered but undeveloped fields outside the scope of INOC's control); and, finally, with authority to collaborate with federal entities in providing compliance oversight regarding oil and gas field activities.[12] Clearly, this is far less of a role than contemplated under the terms of the Iraqi Constitution. Pursuant to the framework law, it is the federal government that is vested with the most significant powers to formulate policy regarding petroleum resource development; to create legislation and regulations controlling oil and gas field activities; and to negotiate the terms of complex oil and gas operation agreements.

Another general observation regards having five federal entities empowered by the February framework law to deal with oil and gas matters. The simple fact of the involvement of so many players creates the potential for intragovernment jurisdictional battles either born out of honest confusion regarding who has authority in what area, or associated with the natural tendency of any power center staffed by intelligent and ambitious professionals to accumulate authority others might also claim. It is understandable that the framework law would acknowledge the ultimate legislative authority vested in the Iraqi parliament (i.e., Council of Representatives). And given that parliamentary representatives are sure to be troubled by many other difficult issues requiring attention, it is equally understandable the law would seek to assign regulatory and oversight responsibilities to an executive or quasiexecutive ministerial body. What the framework law has done, however, goes well beyond that, dividing responsibilities for oil and gas activities among various existing, resuscitated, and newly created federal governmental entities, frequently describing the powers of such entities in broad and ambiguous language that may provoke assertions of authority that are likely to overlap and, therefore, conflict with those advanced by one of the others. Knowledgeable observers have suggested that the law "establishes a complex and convoluted hierarchy" charged with managing oil and gas activity in Iraq.[13]

The last general observation concerns international oil companies and the framework law. Although it is no doubt true that many unabashed proponents of the market system would like Iraq to adopt an oil and gas legal structure that permits unlimited access to all fields by major industry representatives under long-term contractual commitments, it is also just as true that the political climate in Iraq is less than supportive of such a structure. The nation's history

[12] See id. at art. 5 (F).

[13] See Iraq Hydrocarbon Legal Framework, Submitted by Yahia Said, Director for Middle East and North Africa, Revenue Watch Inst., to the U.S. House of Representatives Subcommittees on Middle East and South Asia and International Organizations, Human Rights and Oversight at 3 (July 17, 2007), available at www.revenuewatch.org/news/RWI_YahiaSaid_HydrocarbonFramework_071707_pdf (accessed Jan. 21, 2008).

since the move toward nationalization of the oil and gas sector in the 1960s and 1970s reflects marked pride in the competence of indigenous industry officials and workers. In a sense, the February framework oil and gas law represents somewhat of a concession to those in both camps. It is clear the law seeks to preserve as much of a role for a national oil and gas industry as possible, while permitting the use of and reliance upon the expertise and experience of industry representatives from outside of Iraq. Illustrative of this role for international oil companies is the language of the ninth paragraph of the Preamble, and some of the language in both articles 8 and 9 of the February law. The Preamble's ninth paragraph acknowledges Iraqi recognition that "rehabilitation and further development of the Petroleum industry will be enhanced by the participation of international . . . investors of recognized technical, managerial and operational skills."[14] Article 8 (A), in emphasizing the need to restore and increase production from existing fields, indicates that relevant Iraqi authorities, such as INOC, are empowered to "directly sign services contracts or administrative contracts with appropriate oil or services companies."[15] No restriction is placed by the provision on the need for the private contracting party to be Iraqi. In addressing the creation of a model exploration and production contract, the same article 8 speaks in paragraph (C) about the terms of any such model contract guaranteeing coordination between relevant government entities and "the international oil companies"[16] with whom such contracts will presumably be signed. And again, article 8 (D), in emphasizing the need for speedy and efficient development of undeveloped or partially developed fields, notes that "it is permissible to develop these Fields in collaboration with reputable oil companies";[17] no reference is made to these companies being of Iraqi origin. Article 9 (A) continues with that same thrust. In addressing the matter of the bestowal of rights to undertake petroleum operations, it provides such shall be in the form of an exploration and production contract, and such "contract shall be entered between the Ministry [of Oil] (or the Regional Authority) and an Iraqi or Foreign Person, natural or legal."[18] By the terms of this provision alone, it is clear that international oil companies are envisioned as playing a substantial role in future oil and gas development.

Leaving these general observations behind, and turning to the specifics and details of the relevant provisions of the February framework law, there are five main areas of interest to oil and gas industry representatives: the scope of the law's application; the federal entities or institutions charged with administering the law; the process for contracting with the government to engage in petroleum operations; the essential terms of all such petroleum contracts; and the basic conditions, obligations, or responsibilities to which contracting parties are to be

[14] See February 2007 draft, supra note 9 at Preamble, ninth para.
[15] See id. at art. 8 (A).
[16] See id. at art. 8 (C).
[17] See id. at art. 8 (D).
[18] See id. at art. 9 (A).

held. These five areas are contained in a document that is eight chapters, or 43 articles, in length. Chapter I focuses on what are termed fundamental provisions, which includes not only the scope of application of the law, one of the five areas to be examined, but definitions of essential terms, a statement of the law's purpose, and a declaration, consistent with article 111 of the Constitution, of ownership of the nation's oil and gas resources by all the people in all the regions and governorates of Iraq. This is followed in Chapter II by provisions on management of petroleum resources, which includes both the matters of the federal entities or institutions charged with administering the framework law, and the process for contracting with the government to engage in petroleum operations, but also the previously seen articles 8 and 9, on urging quick revitalization of existing oil and gas fields and exploration and development of known or unknown fields; article 10 on the mechanisms of negotiating and contracting; article 11 on the distribution of petroleum revenues; and article 12 on state participation in petroleum operations. Chapter III, dealing with exploration and field development operations, takes up in large measure the two remaining of the five areas examined – contract terms and basic contract conditions, obligations, or responsibilities – and also addresses, in articles 16 and 20, unitization and restrictions on production levels. Chapters IV on transportation, V on the matter of natural gas, and VI on regulation also contain provisions of relevance to the areas of contract terms and basic contract conditions. Notwithstanding this, however, they articulate some fundamental standards relative to pipelines, associated and nonassociated natural gas, including in article 25 rules aimed at minimizing the practice of gas flaring, the issuance of regulations on petroleum operations, and the right of designated authorities to conduct inspections of such operations. Chapter VII, on fiscal matters, includes provisions on taxation and royalties, both relevant to the topic of contract terms; Chapter VIII, on miscellaneous matters, concentrates on transparency, anticorruption, competitive bidding processes, dispute resolution, and entry into force. Chapter VIII also contains two provisions examined in Section III below on significant legal issues: article 40 dealing with the status of preexisting oil and gas contracts, and article 41 dealing with the effect on contracts of any subsequent changes in the borders of territorial areas.

Immediately prior to delving into the details of the February framework law's provisions on the five areas highlighted for examination, it might prove useful to sketch the parameters of four annexes that have come to be associated with that law.[19] Very briefly, Annex 1 contains thirty-six currently active and producing fields actually assigned field numbers, only two of which are new fields, all allocated exclusively to INOC. Annex 2 concerns discovered, undeveloped fields allocated to INOC, and contains twenty-seven that are assigned specific field numbers. Of these, only the Siba field, field number 345 and

[19] The four annexes are available at www.al-ghad.org/wordpress/wp-content/uploads/2007/04/annexes_with_krg_comment.pdf (accessed Aug. 1, 2008).

located in the governorate of Basra, is considered a new field, with the remaining fields being regarded as old. Annex 3 lists those discovered, undeveloped fields considered to be outside the control of INOC. The fields listed total twenty-eight in number, with eight falling into the category of new fields. It has been suggested by some that Annexes 1 and 2 cover roughly 90% of all Iraq's known reserves, leaving in Annex 3 the remainder to be dealt with by the subcentral governmental units.[20] This situation has elicited criticism by some, especially the KRG.[21] Annex 4 identifies so-called exploration blocks – areas of the country primed for exploration activity, with the objective being to boost the levels of proven reserves. The Annex contains sixty-nine blocks covering tens of thousands of square kilometers of surface area, much located in the western and eastern desert midsection of the country.

With all this in mind, the first of the five areas examined is that concerning the scope of the framework law's application. Most relevant in this context is article 2, but also, because it references the term "Petroleum Operations," article 4 (19), the provision that defines that term. Article 2 indicates that the various provisions of the oil and gas framework law apply to "Petroleum Operations in all the territory of the Republic of Iraq"[22] but not to "the refining of Petroleum, its industrial utilization as well as the storage, transport, and distribution of Petroleum Products."[23] In other words, as one might imagine, given the federal nature of the framework law, it is intended to have application throughout the entirety of Iraq, including in all of its regions and governorates. It does not apply to the refining of petroleum, however, or to the storage, transport, or distribution of products made from petroleum and, as will be seen in Section IV of the present chapter, with respect to refining this departs considerably from what the KRG oil and gas law provides. Given that the operative concept under article 2 of the federal framework law is "Petroleum Operations," its definition in article 4 (19) is critical. That provision indicates that the meaning of "Petroleum Operations" covers the ongoing activities of exploration, development, and production of petroleum, including natural gas, as well as its separation and treatment, storage, transport, and sale or delivery.[24] Exploration, development, and production include looking for petroleum by geological, geophysical, and other means,[25] carrying out activities under a plan or permission aimed at production and transportation of petroleum,[26] or extracting and disposing of petroleum.[27]

[20] See Statement from Minister of Natural Resources, KRG, supra note 9.
[21] See id.
[22] See February 2007 draft, supra note 9 at art. 2 (a).
[23] See id. at art. 2 (b).
[24] See id. at art. 4 (19).
[25] See id. at art. 4 (9).
[26] See id. at art. 4 (8).
[27] See id. at art. 4 (6).

In terms of the institutions or entities the framework law envisions as having responsibilities regarding oil and gas – the second of the five areas examined herein – article 5 is critical. As mentioned earlier, that article essentially rests on a notion of several governmental players having important roles in the oil and gas sector. INOC has already been referenced, but article 5 also vests the Council of Representatives (i.e., parliament), the Council of Ministers (i.e., cabinet), the Ministry of Oil, the regional governments, and a new body styled the Federal Oil and Gas Council (FOGC) with authority in that realm. The related articles 6, resuscitating INOC, and 7, reorganizing the Ministry of Oil, deserve at least the barest passing reference, though they are explored in detail in Chapter 6 of this book. Of the federal government entities provided by the framework law with authority regarding oil and gas, it would seem that INOC, the Oil Ministry, and FOGC hold the most significant day-to-day power: INOC is charged with carrying out, individually or in cooperation with contractors, actual exploration, development, production, transportation, storage, marketing, and sales of Iraqi oil and gas, especially in those areas over which Annexes 1 and 2 provide it with control, whereas the Oil Ministry is empowered to formulate federal policy, laws, and plans on development and sign exploration and production as well as service supply contracts. FOGC issues negotiating instructions on all development and production contracts, reviews and changes all exploration and production contracts, and establishes the terms of all model exploration and production contracts. As noted earlier,[28] this has the effect of severely limiting the role of regional authorities, confining it to things like the mere "licensing" of exploration and production activities in discovered yet undeveloped fields listed in Annex 3, and, because many of the powers of the various federal entities seem capable of overlapping and intersecting, confound the notion of a clear delineation and assignment of powers.

With greater specificity, article 5 (A) declares that it is the Council of Representatives that shall "enact all Federal legislation" and "approve all international . . . treaties" on oil and gas.[29] In addressing the powers of the Council of Ministers, article 5 (B) provides it shall be responsible for "recommending proposed legislation" on oil and gas development to the Council of Representatives for its enactment,[30] and for "formulat[ing] Federal Petroleum policy and supervis[ing] its implementation."[31] The Ministerial Council is also charged with ensuring that FOGC and the Ministry of Oil effectively consult and coordinate with regional governments and producing governorates.[32] The latter implements the constitutional obligation seen in Chapter 2 of this study,[33]

[28] See text accompanying supra notes 11–12.
[29] See February 2007 draft, supra note 9 at art. 5 (A).
[30] See id. at art. 5 (B), First.
[31] See id. at art. 5 (B), Second.
[32] See id. at art. 5 (B), Third.
[33] See Chapter 2, text accompanying 77–78.

and discussed again in Chapter 8,[34] requiring cooperation and collaboration between federal and subcentral units on some oil and gas matters. Article 5 (C) begins the authorities most central to the provision. It notes that FOGC, a body operating on a two-thirds decision-making basis and to be chaired by the Prime Minister, or a designee, and peopled by numerous other cabinet and regional and producing-governorate officials, as well as industry representatives and experts, is to help the Ministerial Council in "creating Petroleum policies," and to "put important legislation for Exploration and Production.[35] No explanation is provided as to what it means to say that FOCG is to "put" legislation on exploration and production. Given the fact the enactment and formulation powers are vested in the Council Representatives and the Council of Ministers, respectively, it seems reasonable to presume that to "put" legislation means to "implement" or to "bring it into effect." Article 5 (C) continues by declaring that FOGC is also responsible for "putting Federal Petroleum policies, Exploration plans, Development of Fields and main pipeline plans" and approving any major changes in such.[36] But its powers do not end there. FOGC is further empowered to "review[] and change[] . . . Exploration and Production contracts" concerning petroleum operations,[37] "set[] the special instructions for negotiations pertaining to granting rights or signing Development and Production contracts,"[38] and "approve the types of, and changes to, model Exploration and Production contracts."[39] It is entitled to rely on a so-called "Panel of Independent Advisors" in reviewing the Exploration and Production contracts and Development of Field plans.[40]

With respect to the Oil Ministry and INOC, articles 5 (D) and (E) are operative. Article 5 (D) provides that the Oil Ministry negotiates any oil and gas international treaties[41] that the Council of Representatives is to consider for approval.[42] The Oil Ministry is also vested with the authority, in consultation with regions and producing governorates, to draw up and propose "policies and plans on Exploration, Development and Production," submitting such to FOGC for review and decision.[43] Additionally, the Ministry is authorized to "issu[e] regulations and guidelines to implement Federal plans,"[44] "monitor[] Petroleum Operations to ensure adherence with the laws, regulations, and contracting terms,"[45] and "execute contracts related to Oil and Gas supply services

[34] See Chapter 8, Sec. V.
[35] See February 2007 draft, supra note 9 at art. 5 (C), First.
[36] See id. at art. 5 (C), Second.
[37] See id. at art. 5 (C), Third.
[38] See id. at art. 5 (C), Fifth.
[39] See id. at art. 5 (C), Fourth.
[40] See id. at art. 5 (C), Sixth.
[41] See id. at art. 5 (D), Sixth.
[42] See text accompanying supra note 29.
[43] See February 2007 draft, supra note 9 at art. 5 (D), First and Third.
[44] See id. at art. 5 (D), Second.
[45] See id. at art. 5 (D), Seventh.

other than those covered by Exploration and Development Contracts."[46] The existence of the Oil Ministry's contracting power presents some interesting issues, one of which will be taken up in the next section of this chapter.[47] As for article 5 (E)'s identification of the powers of INOC, which, as noted previously, has control over oil and gas fields listed in Annexes 1 and 2 accompanying the February 15, 2007, law,[48] they include "Exploration, Development, Transportation, Storage, Marketing and sales down to the Delivery Point,"[49] as well as the right to "participate in Exploration and Production operations inside Iraq" and "participate as a commercial partner in international projects related to the transportation, marketing and sale of Oil and Gas . . . and Exploration and Production contracts outside the Republic of Iraq[,] subject to approval by the Council of Ministers."[50] Now in view of the extensive assignment of powers to INOC, the Oil Ministry, FOGC, and the other federal institutions, is it any wonder that the 2007 law leaves the regions with but minimal authority in the oil and gas arena?

Apart from the scope of the law's application and the institutions or entities charged with administering it, a third area of interest concerns the contracting process associated with petroleum operations. Again, petroleum operations is defined as including oil and gas "Exploration, Development, [and] Production,"[51] with those essentially consisting of prospecting for such, and then undertaking activities aimed at developing a field and extracting its oil and gas.[52] Article 9 (A) indicates that the "rights for conducting Petroleum Operations shall be granted on the basis of an Exploration and Production contract." The notion of the exploration and production contract is central, because it represents the umbrella concept that includes the more specific instruments described in the February law as Service Contracts, Development and Production Contracts, and Risk Exploration Contracts. In the absence of an Exploration and Production contract, petroleum operations of any sort are not authorized. The effect of this would seem to be to require that not just industry representatives interested in exploiting Iraqi oil and gas, but even INOC, which controls all Annex 1 and 2 fields, secure an exploration and production contract prior to undertaking activities. Article 5 (E), Second, dealing with INOC's powers, is in accord with that reading, because it provides that INOC operations carrying

[46] See id. at art. 5 (D), Eighth.

[47] In particular, the issue has to do with the fact that article 5 (D), spelling out the Oil Ministry's contracting powers, says nothing about it having authority with respect to exploration, development, or production contracts. In fact, as just noted, article 5 (D), Eighth, contains language that might be read as suggesting it has no such power. Articles 9 and 10 of the February 2007 draft, however, contain, as will be seen later, language that seems in clear conflict.

[48] See text accompanying supra notes 19–20.

[49] See February 2007 draft, supra note 9 at art. 5 (E), Second.

[50] See id. at art. 5 (E), Third.

[51] See id. at art. 4 (19).

[52] See id. at art. 4 (6) and (8).

out oil and gas exploration, development, production, and so forth, shall be "in accordance with the rights and obligations under this law including the necessary contracts, permits and approvals applicable to all other holders of rights."[53]

Articles 9 and 10 purport to identify the essence of the relevant contracting process, with 9 providing for a contract licensing process that is competitive,[54] based on terms of a model contract[55] that take into consideration special factors related to the prospect field or individual area,[56] and honors the notions of national control,[57] Iraqi ownership of resources,[58] appropriate return on investment,[59] and incentives to encourage transfer of technology, training of Iraqi personnel, and environmental sensitivity.[60] That same article also indicates that the "Model Contracts [(that is to say, model Exploration and Production contracts)] may be based upon [a] Service Contract, Field Development and Production Contract, or Risk Exploration Contract,"[61] thereby leaving open the possibility of other forms as well. In that respect, it bears noting that language proposed and stricken from the January 2007 draft of article 9 provided that model contracts also could be based on a "Buy back Contract [or] Production Sharing Contract (PSC)."[62] The combination of the February law's refusal to define exploration and production contract, field development and production contract, or risk exploration contract, and the use in article 9 of the words "may be based upon" all suggest that the absence of any inclusion about the PSC does not indicate that this form of contract is excluded from the Oil Ministry's arsenal of negotiating tools. Regarding contracting parties, only those natural or juridical persons who have been "pre-qualified" on the basis of their technical competence and financial capability by the Oil Ministry or, when appropriate, the regional government, shall be considered for licensing under the February law, with the process seeking first to create a short list of eligible candidates.[63] Article 10 indicates that subsequently negotiated "Exploration and Production contracts" licensing petroleum operations proceed through two basic steps. First, after they have been "initial[ly] sign[ed],"[64] the signing governmental entity is to submit them within 30 days to FOGC for review to determine consistency with the model form of contract and FOGC exploration and production regulations.[65] FOGC can utilize its Panel of Independent Advisors in executing

[53] See id. at art. 5 (E), Second.
[54] See id. at art. 9 (B), First.
[55] See id. at art. 9 (B), Second.
[56] See id. at art. 9 (B), Third.
[57] See id. at art. 9 (B), Fourth, 1.
[58] See id. at art. 9 (B), Fourth, 2.
[59] See id. at art. 9 (B), Fourth, 4.
[60] See id. at art. 9 (B), Fourth, 5.
[61] See id. at art. 9 (B), Fifth.
[62] See January 2007 draft, supra note 7 at art. 9, Fifth.
[63] See id. at art. 9 (B), Sixth and Seventh.
[64] See id. at art. 10 (A).
[65] See id. at art. 10 (C) and (D), First.

this task.[66] Decisions by FOGC regarding reviewed contracts are to be based on a two-thirds rule[67] and made within 60 days of a contract's submission.[68] In the event FOGC has trouble with specific terms of a contract, the submitting and signing governmental entity shall be informed of the reasons supporting such, amendments made, and the contract resubmitted for re-review.[69]

The fourth of the referenced five areas of fundamental interest in regard to the February 15, 2007, law is that of the basic terms of a petroleum operations contract. Clearly, as just seen, it must be in conformity with both the model forms of contract adopted by the federal government and all relevant FOGC exploration and production regulations. Beyond that, however, articles 13 and 22 specify other essential terms that must be present. Article 13 (A) indicates that every exploration and production contract negotiated and signed, and then approved by FOGC on review, shall provide the contract holder with an "exclusive right" to undertake exploration and production in the area covered by the contract.[70] The period during which one can exercise that right to engage in exploration – that is, search for oil and gas – is normally 4 years, with the possibility of two additional 2-year extensions.[71] According to article 13 (E), "[i]n the event of a Discovery," that is, encountering crude or natural gas recoverable by conventional industry methods,[72] the contract holder's exclusive right "may be retained [for an additional 2 years for crude or 4 years for non-associated natural gas] . . . for . . . completing the operations initiated . . . to assess or determine the commercial value of [the] Discovery."[73] Following a discovery, and on the basis of a "Field Development Plan prepared and approved in accordance with this Law and the relevant [Exploration and Production] contract,"[74] the holder of an Exploration and Production exclusive right retains such to develop and produce petroleum from the contract area for "a period to be determined by [FOGC] varying from fifteen (15) to twenty (20) years . . . [with the possibility of a granted] extension not exceeding five (5) years."[75]

It should be recalled that, according to the terms of article 5 (C), FOGC is empowered to "put" several sorts of plans, including "Development of Fields and main pipeline plans."[76] Though not crystal clear, the implication appears to be that a 15- to 20-year development and production right is to be pursuant to the terms of the exploration and production contract, and consistent with

[66] See id. at art. 10 (D), First.
[67] See id. at art. 10 (D), Second.
[68] See id. at art. 10 (D), Third.
[69] See id. at art. 10 (E).
[70] See id. at art. 13 (A).
[71] See id. at art. 13 (B) and (C).
[72] See id. at art. 4 (1).
[73] See id. at art. 13 (E).
[74] See id. at art. 13 (F).
[75] See id. at art. 13 (F).
[76] See text accompanying supra note 36.

what FOGC has stipulated in its development of field plan, and the contractor in its own field development plan. Given that service contracts, by their very nature, are limited in what they call for, the most likely forms of article 9 exploration and production contract to be involved in this process would be what the February law refers to as the Field Development and Production contract, or the Risk Exploration contract. Additionally significant in this context is article 22. It guarantees to all those who are properly producing oil and gas under an exploration and production contract a right of access to main pipelines for transporting their petroleum. Specifically, article 22 (A) states: "The Exploration and Production Contract shall provide a non-exclusive right to access Main Pipelines on reasonable commercial terms."[77] It continues by noting that the contract "shall also confer the right to construct and operate Field Pipelines" in order to get oil and gas to main pipelines.[78]

The fifth, and final, area of interest to representatives of the industry curious about opportunities in Iraq concerns the basic conditions associated with a petroleum operations contract. More than a dozen provisions of the February 2007 law are relevant in connection with this matter, and they can be grouped into four categories: general provisions, liability provisions, operation provisions, and financial provisions. The contract conditions that are general appear in articles 14 and 15, 17–19, and 23–24. Article 14 requires a contractor to comply with all law and good oil-field practices; promptly report discoveries and then submit corresponding field development plans; compensate injured parties for the effects of petroleum operations; permit relevant Iraqi governmental entities to acquire oil or gas produced if national interests suggest such acquisitions; collect and keep in good condition usable data on contract operations and supply such to the Oil Ministry and affiliated companies; and create and submit a decommissioning plan at least 2 years prior to the termination of operations.[79] Holders of Exploration and Production contracts, including INOC, are required by article 15 to "cooperat[e] and associat[e]" with qualified private Iraqi entities to provide them with the knowledge and technology to conduct oil and gas field activities.[80] Article 17 requires the use of practices that avoid waste of resources and optimize petroleum recovery,[81] whereas 18 confirms that main pipelines are "the property of the Federal Government" and conditions access to extant field pipelines on "capacity [being] available" and the absence of "insurmountable technical problems."[82] Article 19 declares that "[a]ll data obtained pursuant to any Contract [not just exploration and production contracts] provided for under this Law is the property of the Iraqi Government," and the terms and

[77] See February 2007 draft, supra note 9 at art. 22 (A).
[78] See id.
[79] See id. at art. 14.
[80] See id. at art. 15.
[81] See id. at art. 17.
[82] See id. at art. 18.

conditions for exercising rights in respect to the data, whether primary or even interpreted or analyzed, "shall be established in data supply obligations in the relevant contract and by regulations."[83] In article 23, natural gas is recognized as a valuable resource not to be squandered, and holders of Exploration and Production rights are obligated to "diligently pursue all alternatives for optimal utilization of surplus volumes of produced gases,"[84] while article 24 both obligates contractors to keep the flaring of associated natural gas to a minimum and expresses the general rule that flaring is to be permitted only under limited circumstances.[85]

The liability provisions and operational provisions appear in articles 28 and 31–32, respectively. Regarding the former, it provides that holders of Petroleum Operation rights, whether under Exploration and Production contracts or otherwise, are liable for damage caused to crops, soils, structures or improvements, as well as for necessitated relocation. And similarly, if access to a contract area requires a right of way across lands owned by an Iraqi person, compensation shall be forthcoming.[86] Under the terms of articles 31–32, holders of petroleum operation rights are obligated to pursue measures to protect the environment, including through actions to dispose of polluted water and waste oil, and maintain the health and safety of personnel conducting petroleum operations.[87] Their contract rights are also conditioned upon providing an outline of a site decommissioning plan at the time of submitting their field development plan.[88] Further, it is also required that, upon completion of operations, holders of "Exploration and Production Contracts or Main Pipeline Contracts" transfer ownership in good working order of all works and facilities in the contract area.[89]

Articles 33–35 touch on the sensitive matter of financial concerns. All holders of "Petroleum Operation[]" rights are made "subject to" the payment of royalties, so-called property contribution and property transfer taxes, and municipal and local taxes, as well as income taxes. The methods by which taxes are to be collected, and both the rate of and possible exemption from taxation, are to be determined by the "appropriate monitoring authority."[90] Royalties are to be paid by all holders of "Exploration and Production" rights at the flat rate of 12.5% of gross production. When royalties are paid in cash, the total due is to be calculated according to the prevailing market price. Royalties, however, may

[83] See id. at art. 19.
[84] See id. at art. 23.
[85] See id. at art. 24.
[86] See id. at art. 28.
[87] See id. at art. 31.
[88] It should be noted that article 32 (C) speaks of the outline being included in "the Field Development Plan submitted by the Contractor to the Council of Ministers." However, the responsibilities assigned to the Council of Ministers by article 5 (B) say absolutely nothing about examining field development plans.
[89] See February 2007 draft, supra note 9 at art. 32.
[90] See id. at art. 33.

also be collected in kind at the option of the Oil Ministry.[91] In terms of financial recordkeeping, an essential in order to correctly calculate amounts owing by "Exploration and Production" rights holders, proper financial records "in both Arabic and English" are required to be kept, with statements of account being submitted quarterly and annually. After the payment of all taxes and fees, net profits are permitted to be transferred out of Iraq, if so desired.[92]

III. SIGNIFICANT LEGAL ISSUES

Already referenced as one of the problems with the February 2007 law is the potential for overlapping and conflicting authority between three of the federal entities assigned legal responsibility with respect to oil and gas activities – the Council of Ministers, FOGC, and the Oil Ministry. That problem will be taken up momentarily, but it should be noted that there are at least four others that require brief discussion. These include the impact of article 40 on preexisting oil and gas development contracts; the significance of article 41, governing the effect of changes that occur in the borders of regions or producing governorates, and in the status of Kirkuk; the question of whether INOC, which has extensive oil and gas fields assigned to its control, is required to make its revenues available for sharing with all Iraqis; and, finally, the matter of revenue and royalty calculation.

With respect to the potential for overlapping and conflicting authority between the Ministerial Council, FOGC, and the Oil Ministry, the convoluted and complex nature of the language of article 5 of the framework law contributes to a variety of concerns. As observed earlier, when it comes to the question of those seeking an Exploration and Production contract having to submit a Field Development Plan that outlines decommissioning procedures, the language of article 32 (C) speaks of the decommissioning outline being submitted to the Council of Ministers, but absolutely nothing in article 5 (B), detailing the authorities of the Council, says anything about field development plans, let alone outlines of decommissioning.[93] Then there is the matter of whether the Oil Ministry has authority regarding exploration, development, and production contracts.[94] Article 5 (D), spelling out the Ministry's powers and responsibilities, says nothing about such; in fact, article 5 (D), Eighth, plainly suggests that its powers extend no farther than to "Oil and Gas supply services" contracts "other than those covered by Exploration and Development Contracts."[95] At the same time, however, articles 9 and 10 of the law are in conflict, indicating

[91] See id. at art. 34.
[92] See id. at art. 35.
[93] See text accompanying, and note 88 supra.
[94] See text accompanying, and note 47 supra.
[95] See February 2007 draft, supra note 9 at art. 5 (D), Eighth.

that the Ministry is vested with authority over all such exploration and production contracts, speaking very explicitly of the Ministry or, where relevant, a regional government, being the appropriate entity to sign exploration and production contracts.[96] As concerns overlap, what is the difference between article 5 (C)'s indication of a power in FOGC to deal with "Federal Petroleum policies, Exploration plans, Development of Fields and main pipeline plans"[97] and article 5 (D)'s indication of a power in the Oil Ministry, in consultation with the regions and producing governorates, to draw up and propose "Federal policies and plans on Exploration, Development, and Production"?[98] Similarly, what is the difference between article 5 (B)'s statement that the Council of Ministers "shall be responsible for recommending proposed legislation"[99] and article 5 (D)'s indication that the Oil Ministry "is the competent authority for proposing Federal policy, laws and plans"[100] or "creating legislation"?[101]

On the matter of preexisting contracts to develop oil and gas resources, article 40 of the February 15, 2007, law contains two interesting provisions. One deals with preexisting contracts concerning the Kurdistan region, and the other with those concerning the rest of Iraqi territory. As to the latter, what if it were assumed that in 1998 the Iraqi government, with an interest in revitalizing specific crude oil wells in the south of the country, entered into a service supply contract with a European oil and gas service provider. That provider is interested in knowing the effect of the adoption of article 40 and the other provisions of the 2007 law on the earlier contract. Obviously, given that the language of article 40 (B) calls for review by the Oil Ministry, to ensure the old contracts are in "harmony" with the basic objectives of the February law, and by FOGC, to ensure such contracts produce "maximum economic return for the people of Iraq," it is critical to determine precisely the forms of contract to which the review provisions apply.[102] On that score, the language of article 40 provides that only "Exploration and Production contracts"[103] are subject to review and reconsideration, thus leaving aside applicability to service supply contracts. Article 4 does not offer a particular definition for "Exploration and Production contracts." It does, however, define "Exploration" as the search for oil and gas[104] and "Production" as the extraction or disposal of such,[105] thereby suggesting that "Exploration and Production contracts" would be contracts by which relevant Iraqi authorities grant a legal right to holders of such to

[96] See id. at arts. 9 and 10. See also text accompanying infra Chapter 6, notes 48–51.
[97] See supra note 36.
[98] See supra note 43.
[99] See supra note 30.
[100] See February 2007 draft, supra note 9 at art. 5 (D), First.
[101] See id at art. 5 (D), Second.
[102] See id. at art. 40 (B).
[103] See id.
[104] See id. at art. 4 (9).
[105] See id. at art. 4 (6).

undertake those precise activities, and not merely to supply an associated service. A modicum of additional support for this position derives from the fact that, again, article 5 (D), Eighth, refers to contracts for oil and gas "supply services" as distinct from "Exploration and Production Contracts."[106]

Even if the nature of the preexisting contract were such that article 40's review and reconsideration standards applied, the language of the provision would raise other interesting legal questions. For instance, is it conceivable that a reexamination of old contracts for areas outside of Kurdistan may not occur in a timely enough fashion to allow FOGC to effectively render such contracts nugatory? And beyond that, what is the exact effect of even timely decisions rendered by FOGC? On the first matter, article 40's analogue in the January 2007 draft, article 39, was completely silent.[107] The language of the February 2007 law's article 40 (B) provides that, following initial review and reconsideration by the Oil Ministry to determine consistency with the terms of the oil and gas framework law, the old contract is to be submitted to FOGC for examination of economic return "in a period not exceeding three (3) months from the time the Federal Oil and Gas Council issues model contracts and related regulations."[108] Clearly, that would appear to permit determinative reviews for only a short period of time after the effective date of the issuance by FOGC of its model contracts spoken of in articles 9 and 10, or the associated regulations. The implication is not only that review must be conducted within the prescribed period, but that review is not effective if conducted thereafter. On the second matter, the language of article 40 (B) simply refers to review by FOGC resulting in "a decision on the accuracy of the review and validity of the contracts."[109] As will be seen in Section V discussing legal issues presented by article 54 of the KRG's Oil and Gas Law of 2007, it is interesting to note that the latter indicates that review and reconsideration decisions of the relevant KRG body are considered "final." And even the language of article 40 (A) of the federal government's February 2007 framework law provides that such decisions taken for preexisting contracts in the Kurdistan region "shall be binding."[110] Plainly, there is a big difference between indicating that a review decision is final or binding and simply indicating that FOGC is to reach "a decision on the accuracy of the review and validity of the contracts."

In terms of article 40 (A) in particular, and preexisting contracts concerning the Kurdistan region, a couple of further points are worth noting. To begin with, as with article 40 (B), article 40 (A) has applicability only to "Exploration and Production contracts." Further, reviews are to determine consistency with the basic goals and objectives of the February 2007 law, and the level of economic

[106] See id. at art. 5 (D), Eighth.
[107] See January 2007 draft, supra note 7 at art. 39.
[108] See id. at art. 40 (B).
[109] See id. at art. 40 (B).
[110] See id. at art. 40 (A).

return. But rather than having the review for consistency undertaken by one entity, and that for economic return by another, both matters are examined by a single entity, with that entity's decision subject to being set aside by FOGC's Panel of Independent Advisors.[111] It is in this context that the language of article 40 (A) indicates that the Panel "will take responsibility to assess the contracts referred to in the Article, and their opinion shall be binding in relation to these contracts." There is also the additional point that review and reconsideration pursuant to article 40 (A) can differ from that under 40 (B), since in looking at the matter of a contract's consistency with the objectives of the February 2007 law, article 40 (A) provides that consideration can be taken of "the prevailing circumstances at the time at which [the] contract[] [was] agreed."[112] This sort of language appeared nowhere in the parallel article 39 of the earlier January 2007 draft[113] and provides some wiggle room not present with respect to old contracts affecting the rest of the territory of Iraq.

Regarding article 41 and the matter of Kirkuk, the ultimate status of that area and its surrounding oil and gas wealth is to be decided under constitutional referendum by the local Kurdish, Turkmen, Arab, and other population. Clearly, the Kurdish north of Iraq would like to see everything done to associate the area with the KRG. According to the language of article 41 of the February 2007 law, this may not be very meaningful in terms of subsequent control over the oil wealth. Normally, it might be thought that the legal regime applicable to an area's oil and gas wealth would be determined according to territorial jurisdiction. That is to say, if an area falls within the geographical ambit of a particular jurisdictional authority, then the resources situated in that area are subject to the legal regime established by that authority. Thus, it would seem that any referendum over Kirkuk that results in the area being brought within the reach of the KRG would subject the oil and gas wealth of the area to Kurdish control. Article 41, however, is to the contrary. It specifically provides that "[i]n the case of changes in borders of Regions or Producing Governorates . . . the new affected places shall be dealt with in accordance to the provisions of this Law [i.e., the February 2007 law] regarding to granting rights and Petroleum Operations."[114] One of the effects of such language is to declare that areas originally subject to the terms and provisions of the 2007 law remain so subject, even though subsequent events may bring the borders of such areas within some new region or producing governorate. The significance of this language on the question of Kirkuk's status cannot be minimized.

As for the matter of whether INOC, which controls and taps all those fields listed in Annexes 1 and 2, is required to have its oil and gas revenues subject to a sharing regime designed to distribute monies throughout the entirety of Iraq,

[111] See id. at art. 40 (A).
[112] See id. at art. 40 (A).
[113] See January 2007 draft, supra note 7 at art. 39.
[114] See id. at art. 41.

there certainly appears to be nothing in article 5 (C), defining that entity's powers and responsibilities, that dictates sharing. From the indications in this chapter's preceding Section,[115] the INOC is to participate in Exploration and Production operations inside of Iraq, including operations of development, transport, storage, marketing and sales, and can act as a commercial partner in international projects and projects outside Iraq. Article 6 indicates it is to manage and operate both the North and the South Oil Companies, and own, manage, and operate the main oil pipelines and export ports.[116] But again, nothing appears in that provision speaking to the matter of revenue sharing. In article 11, however, which takes up the topic of petroleum revenues, reference is made to the creation of an "Oil Revenue Fund" into which "all government revenues from Oil and Gas," and not just "royalties, signing bonuses and production bonuses," are to be deposited for ultimate distribution throughout Iraq.[117] There can be no question that INOC is an organ of the Iraqi government[118] and, as a consequence, the Oil and Gas revenues it earns are thus subject to deposit with the Oil Revenue Fund.

Revenue and royalty calculation is also potentially a significant issue under the terms of the February 2007 law. Royalties at the rate of 12.5% of gross production are called for, as seen. Property contribution and property transfer taxes, as well as municipal, local, and income taxes, are also called for. No reference is made in articles 33 and 34 on taxation and royalties to the fact other charges could be required of petroleum operators, and the suggestion is that the rate of royalties and taxation is a "one size fits all" approach, no consideration being given to an operator's costs or development risks, the nature of the field exploited, or the quality of the crude or gas extracted. Notwithstanding the apparent firm approach enunciated in articles 33 and 34, an approach that contrasts markedly with what will be seen in Section IV on the KRG's Oil and Gas Law of 2007, it is significant that the language of article 9 (B), Third, in addressing the granting of rights to conduct petroleum operations, very plainly states that both the form "and terms of the model contract shall take account of the specific characteristics and requirements of the individual area, Field or prospect being offered, including whether the resources are discovered or not, the risks and potential rewards associated with the investments under consideration, and the technological and operational challenges presented."[119] Though there may be some dispute, such language seems sufficiently accommodating to permit both the negotiated imposition of charges beyond taxes and royalties and variations in tax and royalty rates.

[115] See text accompanying supra notes 48–50.
[116] See February 2007 draft, supra note 9 at art. 6.
[117] See id. at art. 11 (B)-(D).
[118] See id. at art. 6 (A) ("(INOC) is a holding company fully owned by the Iraqi Government. . . . ").
[119] See id. at art. 9 (B), Third.

IV. THE KRG'S OIL AND GAS LAW NO. (22) OF 2007

In some respects, as an assertion of autonomy and self-governance, and in others, as an expression of frustration with the inability of the central government in Baghdad to nurture the kind of political compromise and ethnic and sectarian reconciliation necessary to ensure the adoption of the federal oil and gas framework law, the KRG (Kurdistan Regional Government) moved forward early on to draft an oil and gas law applicable to such resources within its own jurisdiction. The seminal instrument promulgated by the drafters in October of 2006[120] differs in various ways from that ultimately adopted by the regional parliament and enacted as law in mid-2007.[121] In terms of structure, the differences consist of the former containing sixteen basic chapters and three annexes; the annexes address revenue distinctions between so-called current fields and future fields, the matter of conditional federal participation in the Kurdish region's oil and gas activity, and conditional consent by the KRG to recognize federal institutions overseeing current and future fields. By way of structural distinction, the 2007 regional law removes the three annexes and eliminates or collapses some of the draft provisions while reorganizing others, resulting in a final product that is seventeen chapters in length. What should be focused on with respect to the 2007 KRG Oil and Gas Law are both an outline of the basic aspects of the Law itself and a description of the essential provisions relevant to representatives of the industry.

With respect to the former, the seventeen chapters of the 2007 Law include a long list of definitions of important terms, as well as chapters identifying the scope of the Law's application, noting who has title to KRG petroleum, referencing the competencies of the KRG's Ministry of Natural Resources, establishing the several public entities charged with responsibilities in the oil and gas realm, and calling for cooperative action between the regional and federal governments in the event that federal authorities fulfill specified tasks associated with the distribution of revenues and the restructuring of the oil and gas industry. The KRG's Law also identifies and describes the various oil and gas activity authorizations the Ministry is empowered to grant; lists the rights and responsibilities of authorized persons; states the exact parameters of government granted production-sharing contracts (PSCs); references the required local participation rules and unitization standards; and recounts the principles of dispute resolution, the government obligations relative to advertisements and publications, and regulatory measures, concluding with a series of noncompliance

[120] See Petroleum Act of the Kurdistan Region of Iraq, 2006 (22 Oct. 2006), available at www.krg.org/pdf/Kurdistan_Actg_COM_draft_22_October_2006.pdf (accessed Nov. 22, 2007).

[121] See Oil and Gas Law of the Kurdistan Region-Iraq, Law No. (22)-2007, available at www.krg.org/uploads/documents/Kurdistan%20Oil%20and%20Gas%20Law%20English_2007_09_06_h14m0s42.pdf (accessed July 15, 2008) (hereinafter KRG Oil and Gas Law).

(anticorruption) rules and certain final provisions. As an outline of the basic aspects of the Law, however, there are four particular chapters that merit attention, largely because they depart from the original 2006 draft proposal in a way that seems to reflect an emphasis on a greater role and position for the regional government vis-à-vis the federal authorities.

The first of these is Chapter Two of the Law and its spelling out of the scope of the KRG's 2007 enactment. Of importance here is article 2.[122] Aside from providing that the Law applies to petroleum operations, which is defined in the opening chapter on definitions as running the entire gamut from oil or gas prospecting and development to storage, transporting, refining, and related activities,[123] article 2 notes that it does not matter whether those operations are carried out by public or private entities, Iraqi or foreign owned.[124] Article 2, Second, then provides that, pursuant to specific provisions of the Iraqi Constitution, "no federal legislation, and no agreement, contract, memorandum of understanding or other federal instrument that relates to Petroleum Operations" shall have application in the absence of KRG approval.[125] Obviously, this strikes directly at measures such as the federal government's February 2007 framework law on oil and gas reviewed earlier. By way of contrast with article 2, Second, it should be recalled that the original 2006 draft proposal contained in its article 4, Section 3, language that, although of the same effect, was somewhat weaker in that it did not explicitly reference "federal" legislation or other "federal" instruments related to petroleum operations.[126]

The second chapter meriting attention is Chapter Three, and in particular its article 3 on title to KRG petroleum (i.e., oil and gas). In the original 2006 proposal, the question of title to KRG petroleum was addressed in article 5, which represented but one of six provisions in the proposal's opening chapter covering definitions and general provisions.[127] With the obvious intent of elevating the matter of title to KRG petroleum to a much higher level of significance, the 2007 Law spun off title into a separate chapter addressing basic government rights in oil and gas. Article 3 of this separate Chapter Three on title and government rights retains much of what appeared in article 5 of the 2006 draft proposal, including the intimation that KRG authority over its oil and gas derives from the terms of the Iraqi Constitution. However, there are two important ways in which the new article 3 differs from the proposed article 5. To begin with, the language of the new article 3, Second, is written in a way that emphasizes the constitutional right of the KRG to receive a share of the revenues from

[122] See KRG Oil and Gas Law, id. at art. 2.
[123] See id. at art. 1 (11), (18), and art. 2, First, para. (b).
[124] See id. at art. 2, First.
[125] See id. at art. 2, Second.
[126] See Petroleum Act of the Kurdistan Region of Iraq, supra note 120 at art. 4, Sec. 3.
[127] See id. at art. 5.

producing fields all across Iraq,[128] whereas the proposed language of article 5, Section 1, was more focused on the need of the KRG to provide to other Iraqis a share of the revenues resulting from oil and gas activities in the region.[129] Beyond that, the new article 3 of the 2007 Law adds two paragraphs not appearing in the proposed draft. One is article 3, Second, providing that the KRG is entitled to a share of the revenues from oil and gas production in future fields,[130] and the other is article 3, Third, obligating the regional government, in cooperation with the federal authorities, to jointly manage operations in producing fields.[131] As will be seen in Chapters 5, 8, and 9 of this book, the latter obligation is consistent with the terms of article 112 of the Iraqi Constitution.

A third chapter in the 2007 KRG Law meriting attention is Chapter Six. In three provisions, articles 15, 16, and 17, the chapter establishes the Kurdistan Oil Trust Organization (KOTO) and delimits its authority. KOTO is responsible for managing the revenues associated with oil and gas activity, and its management is subject to KRG parliamentary oversight.[132] The particular details of its revenue management authority, and its relation to federal involvement in oil and gas activity, are taken up in Chapter 9, Section VIII, of this book. For present purposes, though, Chapter Six of the 2007 Law is significant in that it again raises the stakes over the 2006 original proposal by according KOTO a status seemingly distinct from what it had under the earlier draft. More specifically, article 17 of Chapter III of the original 2006 proposal dealt with KOTO in one of six articles concerned with the establishment of various public entities to be involved in Kurdish oil and gas activity, including the Kurdish Exploration and Production Company (KEPCO), the Kurdish National Oil Company (KNOC), the Kurdish Oil Marketing Organization (KOMO), and the Kurdish Organization for Downstream Operations (KODO).[133] The KRG's 2007 Oil and Gas Law grants KOTO a position separate from the other public entities involved in oil and gas by reorganizing the original draft proposal in a way that distinguishes it with its own separate and discrete chapter in the final enactment.

Aside from the preceding three basic aspects of the KRG's Oil and Gas Law, a fourth that merits attention has to do with Chapter Twelve on oil and gas field unitization. In much of what has already been discussed, the Oil and Gas Law either attempts to stress the KRG's authority over the region's oil and gas resources, or to accord enhanced status to some entity involved in, or dimension of, Kurdish oil and gas activity. In the context of Chapter Twelve of the KRG's Law, however, language appears in article 49 that could undercut

[128] See KRG Oil and Gas Law, supra note 121 at art. 3, First.
[129] See Petroleum Act of the Kurdistan Region of Iraq, supra note 120 at art. 5, Sec. 1.
[130] See KRG Oil and Gas Law, supra note 121 at art. 3, Second.
[131] See id. at art. 3, Third.
[132] See id. at arts. 15–17.
[133] See Petroleum Act of the Kurdistan Region of Iraq, supra note 120 at arts. 12–17.

or weaken suggestions of KRG authority, at least when compared with what had been proposed in the original 2006 draft version. Article 49 of the 2007 Law provides that, although the KRG reserves the right of approval, in the event of the need for unitization of a field that stretches across international boundaries, unitization efforts shall be undertaken "in coordination with the Federal Government."[134] The language of the predecessor draft article 60, Section 1, very plainly indicated that in any such situation, "unitization of the Reservoir shall be the responsibility of the Minister [of Natural Resources]."[135] Section 4 of that same article then indicated that, "[i]f it becomes necessary, the Minister may assign to the Government of Iraq the right to represent the interests of the Kurdistan Region."[136] Would it not make sense, given the change reflected in the 2007 enactment, to read its article 49 as a backing away from the stronger position captured in article 60 of the 2006 proposal?

Prior to discussing the essential provisions of the KRG's Oil and Gas Law that are of greatest relevance to those in the industry, one should reemphasize the fact that the Law itself does not contain the three annexes that appeared in the 2006 proposal and addressed revenues from current and future fields, as well as conditions under which the federal authorities would be allowed to meddle in regional oil and gas matters and those under which the KRG would accede to the creation and authority of federal institutions governing current and future fields. Some of the fundamentals associated with these annexes are reflected in substantive provisions of the Law itself, such as the distinction between current and future fields captured in the roles of KNOC and KOTO, and the need for federal/regional cooperation on various matters in order for the KRG to show receptivity toward greater federal involvement in regional oil and gas activity and revenue sharing. Undoubtedly, a major consideration in the Law's elimination of the annexes had to do with providing the regional government increased latitude in its efforts to reach accommodation with Baghdad on the entire range of issues connected with oil and gas activity. As drafted in the 2006 proposal, the three annexes contained several pages of small-print detail that erected conditions that were sure to complicate discussions and negotiations with central government authorities. Could it be that removing the annexes was thought to open the door for a modus vivendi of sorts between the KRG and the federal government?

There are several portions of the KRG's Oil and Gas Law relevant to those in the industry. One concerns the nature of the oil and gas activities to which the provisions of the Law apply. Obviously, they apply to oil and gas resource development, but do they also apply to the pipeline, storage, refining, and petrochemical industries as well? The answer to that rests on articles 2 and 8 of the Law. Article 2, First, paragraph (a), provides that the terms of the Law

[134] See KRG Oil and Gas Law, supra note 121 at art. 49.
[135] See Petroleum Act of the Kurdistan Region of Iraq, supra note 120 at art. 60, Sec. 1.
[136] See id. at art. 60, Sec. 4.

apply to all petroleum operations which, as seen earlier,[137] are defined in article 1 (18) as including prospecting, production, storage, transportation, and refining of oil and gas, and the construction, installation, and operation of facilities, equipment, or devices associated with such. But even beyond that, article 2, First, paragraph (b), provides that the Law also applies to activities "related to Petroleum Operations."[138] This vests the Law with the ability to touch a wide range of matters not strictly within the terms of paragraph (a) alone. Adding to this expanded reach, article 8 makes clear that not only prospecting, exploration, and development of oil and gas are affected, but also so-called downstream activities. Article 8, First, declares that the terms of the Law empower the Ministry of Natural Resources to oversee and regulate all infrastructure and assets directly or indirectly used in petroleum operations or refining, storage, or transportation of oil and gas, including by pipeline.[139] Article 8, Second, declares that the Ministry also has the authority to oversee and regulate all downstream activities, including oil and gas refining, transportation, storage, and the production of petrochemicals.[140]

Though reference has already been made to KEPCO, KNOC, KOMO, KODO, and KOTO, the public entities established by the Law, their existence is another matter of relevance to those in the industry. In terms of KEPCO, article 10, Fourth, paragraphs (1–3), provide it with the authority to compete for prospecting, development, and access authorizations in future fields.[141] Future fields are all those that were not, prior to August 15, 2005, producing 5000 barrels per day or more over any 12-month period.[142] And prospecting, development, and access authorizations are the basic KRG-granted rights to engage in oil and gas development activities.[143] They also provide KEPCO with the authority to enter into joint ventures with other companies inside and outside of Iraq, and to create operating subsidiaries.[144] As for KNOC, article 11, Fourth, paragraphs (1–2), grants it essentially the same powers as KEPCO, but with respect to current fields[145] – those that were producing, as of August 15, 2005, 5000 barrels per day or more over any 12-month period.[146] It is also provided by paragraph (3) of article 11, Fourth, with the authority to compete on a case-by-case basis for authorizations with respect to future fields.[147] Clearly, in view of the four annexes attached to the federal government's February 2007

[137] See text accompanying supra note 123.
[138] See KRG Oil and Gas Law, supra note 121 at art. 2, First, para. (b).
[139] See id. at art. 8, First.
[140] See id. at art. 8, Second.
[141] See id. at art. 10, Fourth, para. (1).
[142] See id. at art. 1 (17).
[143] See id. at arts. 1 (22), 22, 24, and 25.
[144] See id. at art. 10, Fourth, paras (2–3).
[145] See id. at art. 11, Fourth, paras. (1–2).
[146] See id. at art. 1 (16).
[147] See id. at art. 11, Fourth, para. (3).

oil and gas framework law, the KRG's approach on the fields concerning which KNOC and KEPCO are to have instrumental roles proves problematic. Leaving this aside, though, pursuant to article 12, Fourth, KOMO is granted the authority to "market or regulate the marketing" of petroleum from production operations, and the further authority to, "with the agreement of a Contractor to a Production Sharing Contract, market the Contractor's share of Petroleum."[148] KODO is authorized under article 13, Fourth, paragraphs (1) and (3–4), to manage and make available state-owned petroleum operations infrastructure, including pipelines, and to license such infrastructure management to third parties, as well as participate with international oil companies in downstream petroleum operations.[149] In combination, articles 10–13 of the Law place public entities in potential competition with private industry representatives interested in exploring for and exploiting the KRG's oil and gas wealth, further subjecting the oil and gas actually removed to potential marketing regulation, and the transport of such over government-owned pipeline networks to the same kind of control.

Prospecting, development, and access authorizations are also relevant to the industry and should be looked at with greater particularity. All require approval of the so-called Regional Council, a body composed of the Prime Minister, the Deputy Prime Minister, and the Ministers of Natural Resources, Finance and Development, and Planning.[150] Article 6, Second, charges the Ministry of Natural Resources with the responsibility of negotiating and executing all authorizations,[151] and, though not stated explicitly, the Law certainly contemplates that oil and gas activities within its reach take place only after the receipt of proper authorizations.[152] With respect to prospecting authorizations, article 22 indicates that they concern geological, geophysical, geochemical, or geotechnical surveys of prescribed coordinates.[153] One granted such an authorization is required to make reports to the Ministry[154] and is not entitled to drill any wells, or to expect preference regarding a development contract.[155] Additionally, an entity granted a prospecting authorization is required to comply with any conditions associated with the authorization or face possible cancellation.[156] In accordance with the terms of article 23, once an authorization has been granted,

148 See id. at art. 12, Fourth.
149 See id. at art. 13, Fourth, paras. (1) and (3–4).
150 See id. at arts. 22, 24, and 25, as well as art. 4, listing the representatives of the Regional Council.
151 See id. at art. 6, Second.
152 That would appear to be the import of art. 2, First, paras. (1–2), indicating that the law applies to all petroleum operations and related activities, with, again, art. 1 (18) defining Petroleum Operations to encompass a vast range of activities, and arts. 22, 24, and 25 speaking of the Ministry's power to grant relevant authorizations. Also, see art. 36, Second, suggesting that unauthorized activity is illegal.
153 See KRG Oil and Gas Law, supra note 121 at art. 22, Second, para. (1).
154 See id. at art. 22, Second, para. (2).
155 See id. at art. 22, Second, para. (3).
156 See id. at art. 22, Third.

prospecting or otherwise, additional authorizations inconsistent therewith are not to be granted.[157]

Development authorizations, more formally referred to under article 24 of the Law as "Petroleum Contracts for exploration and development," can be granted by the Ministry of Natural Resources to any variety of entities, including those of foreign origin. More significantly, however, the form the petroleum contract is to take should be either that of the production-sharing contract, outlined later and examined at length in Chapter 4 of this study, or "other contracts which the Minister considers provides good and timely returns."[158] Conditions of financial capacity, experience, and good corporate citizenship are prerequisites to receiving a petroleum contract.[159] Once granted, the contract provides the authorized entity with essentially an exclusive right to conduct petroleum operations in the designated area. The contract itself may be limited to crude oil, natural gas, or other specific constituents of petroleum.[160] Article 24, Fifth, requires an entity working under a development authorization to notify the Ministry within 48 hours of encountering oil in the contract area,[161] and article 24, Sixth, restricts activities in the contract area to those approved by either the Ministry under programs of work, plans or budgets, or endorsed by the petroleum contract itself.[162] As for access authorizations, article 25 empowers the Ministry to issue them for the construction, installation, or operation of facilities, installations, or structures, and for carrying out other work.[163] Obviously, these could come in conjunction with a development authorization, or in order to facilitate the effectuation of such. Access authorizations come subject to negotiated conditions and can be cancelled for noncompliance.[164]

The precise terms and conditions of a petroleum contract (i.e., development authorization) is a matter of tremendous relevance to industry representatives. Though discussion of the terms and conditions set forth in the KRG's Oil and Gas Law presages the examination in Chapter 4 of this book of the provisions of the Model Production Sharing Contract, only a skeletal outline, with some reference to potential points of controversy, is undertaken herein. On that score, the Law's Chapter Ten articulates the basic required terms of the Contract, with Chapter Nine spelling out the basic conditions.

Concerning the former, Chapter Ten contains seven articles of relevance; articles 37, 40, and 41 proving of most significance. Article 37 recounts the fundamental contractual terms that must appear, article 40 the standards relative to the payment of taxes, and article 41 those controlling the whole issue

157 See id. at art. 23.
158 See id. at art. 24, Second.
159 See id. at art. 24, Third.
160 See id. at art. 24, Fourth.
161 See id. at art. 24, Fifth.
162 See id. at art. 24, Sixth.
163 See id. at art. 25, First.
164 See id. at art. 25, Second–Third.

of royalties. Prior to looking at each of these, however, it would be appropriate to keep in mind the essence of the four other articles contained in Chapter Ten and to offer some commentary on the question of whether article 37's fundamental contractual terms must appear in each and every form of petroleum contract aimed at exploring for and developing oil and gas resources, or only those in the form of a production-sharing contract. First, regarding the other four articles of Chapter Ten, article 38 pays heed to the fact much of Iraq's natural gas has simply been flared in the context of oil production. It both aims at limiting that practice and mandates that the terms of all petroleum contracts address associated and nonassociated natural gas with an eye toward optimizing revenues for the region and developing the gas industry.[165] Article 39, which will be referenced in the next section of this study's current chapter, provides that the Ministry of Natural Resources possesses not just the authority to enter into prospecting, development, and access authorizations, but also the authority to negotiate and conclude service contracts, field management contracts, supply and installation contracts, construction contracts, consulting contracts, "and any other types of contracts" necessary to pursue effective petroleum resource development.[166] Articles 42 and 43 hold forth on the matter of required sales of oil and gas to the KRG, and sovereign immunity. On sales, article 42 indicates that an entity with a petroleum contract can be required, upon written request from the Ministry, to sell oil and gas to the KRG in order to meet necessary domestic consumption demands, with the price being what the petroleum contract provides or, in the absence of such, the product's fair market value.[167] On sovereign immunity, article 43 notes that in a petroleum contract, the Ministry may waive such immunity with regard to legal proceedings or the enforcement of judgments.[168]

Second, regarding whether article 37's contractual terms must appear in every petroleum contract, or only those in the form of production-sharing contracts, it should be noted that the original 2006 draft proposed law seemed clear on the point of comprehensive applicability. Section 1 of article 46 of the draft, the initial predecessor to article 37 of the 2007 Law, provided the required contractual terms applied to "any Contractor," whether Iraqi or foreign.[169] The definitional provision of article 1 defined "Contractor" as anyone with a "Petroleum Contract,"[170] with the latter meaning any contract, license, permit, or authorization under article 30 of the draft law.[171] Article 30 of the draft, of course, dealt with development authorizations and described them as taking the form

[165] See id. at art. 38.
[166] See id. at art. 39.
[167] See id. at art. 42.
[168] See id. at art. 43.
[169] See Petroleum Act of the Kurdistan Region of Iraq, supra note 120 at art. 46, Sec. 1.
[170] See id. at art. 1 "Contractor."
[171] See id. at art. 1 "Petroleum Contract."

of either a Model Production Sharing Contract or an "other contract[] . . . the [Ministry] considers to provide good and timely returns."[172] Although it is conceivable that the terms of article 37 are also probably best applied to every form of petroleum contract, the language changes made by virtue of the 2007 Law leave room for doubt. Specifically, unlike in Section 1 of article 46 of the 2006 draft, the parallel provision of article 37 of the 2007 Law does not begin with an indication that the contractual terms enumerated in the article apply to all contractors or all petroleum contracts. All it does is open by stating that a "standard Production Sharing Contract shall include" the contractual terms recounted.[173] And turning to the definition of "Production Sharing Contract" does not necessarily clear up the confusion, for it references a "model Petroleum Contract,"[174] which unquestionably means the KRG's Model PSC. Nonetheless, the Law's definition of "Production Sharing Contract" is not simply the Model PSC, but a model "Petroleum Contract," which itself is defined as an article 24 development authorization,[175] including PSC's and "other contracts the [Ministry] considers provides good and timely returns."[176]

Leaving this aside, and returning to a basic description of the contractual terms contained in articles 37, 40, and 41 of the KRG's 2007 Law, article 37 focuses on length of contract, compensation, participation, and operational terms, and articles 40 and 41 deal with taxation and royalty payment issues. The heart of article 37 is its First paragraph. Extremely lengthy, article 37, First, provides that production-sharing contracts (and, as mentioned earlier, all petroleum contracts) shall limit post-prospecting initial exploration to a maximum term of 5 years, extendable on a yearly basis for an additional 2.[177] They shall also call, with some exceptions, for relinquishment to the KRG of the concerned geographic area, with 25% being returned after the 5-year exploration term, and additional 25% increments returned after each year of any extension.[178] The contracts shall also provide that, if petroleum is discovered, there shall be an exploration period of 20 years, with an automatic extension for an additional 5, and further possible extensions on the basis of negotiation.[179] As for royalty obligations of a contractor, article 37, First, paragraph 5, provides for a sliding rate, from a low of 7.5% for crude with an API gravity up to 14 degrees to a high of 12.5% for crude with a gravity over 30 degrees; natural gas royalties are set at 5%, with increases to be based on daily production levels.[180] The contracts shall also call for the contractor to recover its costs from oil and

[172] See id. at art. 30.
[173] See KRG Oil and Gas Law, supra note 121 at art. 37, First.
[174] See id. at art. 1 (29).
[175] See id. at art. 1 (27).
[176] See id. at art. 24, Second.
[177] See id. at art. 37, First, para. (1).
[178] See id. at art. 37, First, para. (2).
[179] See id. at art. 37, First, para. (4).
[180] See id. at art. 37, First, para. (5).

gas produced. Again, as with royalties, cost recovery for crude is on a sliding scale, ranging from 55% of production being available for cost recovery on crude with an API gravity of greater than 30 degrees, to 70% on crude with a gravity of 14 degrees or less; natural gas permits 70% of production to be available for cost recovery.[181] Article 37, First, paragraph 7, requires contracts to provide for production sharing on what remains after exactions for cost recovery and royalties, with the split of the production taking into consideration the total of all costs and revenues, as well as the need for reasonable contractor returns.[182] Further, contracts are to provide for annual surface rental payments during the exploration period, negotiated payments into an environmental fund, and provisions for securing health, safety, welfare, training, and goods and services.[183] By the terms of article 37, First, paragraph 9, contracts are also to provide in a fixed and defined way for participation by the KRG in direct working interests in exploration, development, and production.

The subsidiary aspects of article 37 are reflected in 37, Second through Fourth. Article 37, Second, permits the Ministry of Natural Resources to adjust royalty and cost recovery amounts whenever the surrounding circumstances indicate "an unusually high degree of commercial risk" or require "unusually high amount[s] of up-front capital."[184] Reductions of royalties in such situations may be set as low as 0%, with cost recovery amounts potentially rising to as much as 100%.[185] Article 37, Third, permits Contracts with "unusually low element[s] of commercial risk" to establish royalty rates at the highest authorized levels, and cost recovery amounts at the lowest authorized levels.[186] By the terms of article 37, Fourth, all Contracts must call for the use of good oil-field practices, especially covering matters of efficient production, environmental protection, and field safety.[187]

On the relevant matters of taxation and royalty payments, articles 40 and 41 are instructive. The former provides for the possibility that the negotiated terms of a petroleum contract can exempt a contractor from tax liability.[188] Further, article 40 provides that taxes imposed by the regional government will be the only taxes to which the contractor shall be subject.[189] The essence of article 40, however, appears in 40, First, which provides that not only contractors and persons who have received authorizations, but also all those associated with petroleum operations, shall be liable for regional government taxes, including surface and income taxes, customs duties, windfall profits taxes, and other

[181] See id. at art. 37, First, para. (6).
[182] See id. at art. 37, First, para. (7).
[183] See id. at art. 37, First, paras. (8, 10, and 11).
[184] See id. at art. 37, Second.
[185] See id.
[186] See id. at art. 37, Third.
[187] See id. at art. 37, Fourth.
[188] See id. at art. 40, Second.
[189] See id. at art. 40, Third.

taxes or levies "expressly included in its Petroleum Contract."[190] It should be noted that none of the language in article 40 prevents changes in the nature or rates of taxation from affecting existing petroleum contracts. Such language, though, did exist in the parallel article from the 2006 draft proposal – article 49, Section 3. It stated that: "A Petroleum Contract may contain a tax stabilization agreement."[191] In terms of article 41 on royalty payments, it provides that they are to be calculated directly on the amount of petroleum produced by the contractor, and not on what remains after initial deductions are made for cost recovery.[192] Royalties are to be paid quarterly or monthly, as provided in the Contract, in kind or in cash, as the Ministry requires.[193]

In addition to the contractual terms of set forth in the seven relevant articles – and especially articles 37, 40, and 41 – of Chapter Ten of the KRG's Oil and Gas Law, Chapter Nine of the Law spells out the basic conditions associated with a petroleum contract. Put succinctly, these include the obligations to prevent waste of the resources targeted and to use techniques that will allow extraction of as much of the relevant hydrocarbon resource as is possible,[194] as well as accommodate the granting of permission for prospecting, exploration, and development for nonhydrocarbon natural resources, provided that it "does not seriously hinder the performance of the [authorized] Petroleum Operations."[195] To the extent that such other activity winds up being incompatible, article 28, Second, of the Law requires the Regional Council to "decide which of the rights and obligations shall prevail . . . without prejudice to any compensation which may be due to the holders of the rights overridden."[196] Other Chapter Nine obligations include that of an authorized contractor to refrain from using public or private government immovable property within the authorized area without specific consent, or privately owned immovable property without the payment of compensation, and for such a contractor to permit owners of all such property to exercise their right of use, "except in so far as the use interferes with Petroleum Operations."[197] Damages to an owner's immovable property, "disturb[ances] [to] the rights of [an] owner" of such, or interference with "any other lawful activities" require the payment of fair and reasonable compensation,[198] with the Ministry deciding the amount "after having considered representations by interested parties."[199] Article 30 of the Law's Chapter Nine also requires that

[190] See id. at art. 40, First.
[191] See Petroleum Act of the Kurdistan Region of Iraq, supra note 120 at art. 49, Sec. 3.
[192] See KRG Oil and Gas Law, supra note 121 at art. 41, First.
[193] See id. at art. 41, Second.
[194] See id. at art. 27.
[195] See id. at art. 28, First.
[196] See id. at art. 28, Second.
[197] See id. at art. 29, First.
[198] See id. at art. 29, Second.
[199] See id. at art. 29, Third. Arbitration regarding amount is available "in accordance with any arbitration provisions," and resort may be had to "specialist courts in the Region" to object to a compensation decision. See id.

all authorizations provide for the Ministry's right to "approve, or be notified of" such things as joint operating agreements, lifting agreements, or other types of agreements "related to Petroleum Operations" that an authorized contractor may wish to enter into, as well as any changes in control of an authorized contractor, or any transfer of the authorization itself.[200] Additionally, other conditions of authorization include the KRG's "title to all data and information" regarding the area authorized, whether that data or information is raw, derived, analyzed, or in other form;[201] the Ministry's right to have its General Inspector audit an authorized contractor's "books and accounts";[202] the Ministry's right terminate an authorization "as set out in the Authorization";[203] and the requirement that an authorized contractor maintain insurance and "defend, indemnify, and hold harmless" the regional government for all claims connected with its petroleum operations.[204] Article 36 concludes the conditions established by the chapter with its decommissioning obligations of equipment removal and site cleanup.[205]

V. PROBLEMS ASSOCIATED WITH PREEXISTING OIL AND GAS CONTRACTS

Article 54 of the KRG's Oil and Gas Law of 2007 presents some extremely interesting questions regarding preexisting agreements dealing with Kurdish oil and gas. The basic thrust of the article is to subject some forms of these agreements to review that might result in changes, and other forms to nullification and invalidity. In at least one publicly acknowledged instance involving the Taq Taq field and the Kewa Chirmila prospect, both in the Kurdish north, mid-major international oil company Addax Petroleum and its partner Genel Enerji have experienced KRG's exercise of the review-and-change aspect of the law.[206]

The specific language of article 54 is divided into two provisions. Article 54, First, reads that "[a]ll agreements related to Production Sharing Contracts" (PSCs) and entered into before the effectiveness of the 2007 KRG Oil and Gas Law are to be reviewed by an entity (i.e., a Regional Council) within the KRG to achieve consistency with the standards therein established, taking into consideration conditions extant at the time of the agreement's original negotiation.[207] Further, article 54, First, also provides that the decisions of the KRG reviewing body are to be regarded as "final."[208] Article 54, Second, provides that

[200] See id. at art. 30.
[201] See id. at art. 32.
[202] See id. at art. 33
[203] See id. at art. 34.
[204] See id. at art. 35.
[205] See id. at art. 36.
[206] See Press Release (29 Feb. 2008), available at www.reuters.com/article/pressRelease/idUS146810+29-Feb-2008+RNS20080229 (accessed July 21, 2008).
[207] See KRG Oil and Gas Law, supra note 121 at art. 54, First.
[208] See id.

"[a]ll [preexisting] authorizations and memoranda of understanding [MOU] related to oil and gas" are to be considered null and void, unless the validity and effectiveness of such is affirmed by the same KRG entity that is charged with article 54, First, reviews.[209] Collectively, these two provisions of article 54 raise interesting legal issues that have begun and will certainly continue over the next several years to spawn contentious and controversial judicial and arbitral disputes.

One of the legal issues presented by the language of the two provisions concerns the meaning to be accorded the references to all agreements "related to" PSCs and all authorizations and MOUs "related to oil and gas," as well as the analogous language in the Law's definition of the term "[a]uthorization" as a petroleum contract, a prospecting authorization, or an agreement "with respect of such."[210] If the concepts of "related to" or "with respect of" were interpreted as meaning "connected to" or "associated with" PSCs, petroleum contracts, prospecting authorizations, or MOUs, then an extremely wide and conceivably endless range of agreements in the oil and gas context would fall within the ambit of article 54's review or nullification requirements. Conversely, if the relevant concepts were interpreted as meaning to bring within the reach of article 54 only agreements "in the form of" or "nature of" a PSC, petroleum contract, prospecting authorization, or MOU, then a much narrower and confined range of agreements would be affected.

An interesting hypothetical situation illustrating the impact of such an interpretive distinction might involve an oil and gas service provider who, in 2004, entered into an Eng.&PC (Engineering, Procurement, and Construction) agreement or TSA (Technical Service Agreement) with the KRG. The agreement entered into was designed to cause the particular service contracted for to benefit another company that had concluded a PSC with the KRG. Following the adoption of the KRG's 2007 Oil and Gas Law, the KRG decided not only to insist on a review and reworking of the terms of the PSC, but also to claim that the Eng.&PC or TSA, whichever was the case, either was subject to like review and reworking under article 54, First, or was a nullity under article 54, Second. Its claims are based on the fact that the former references "[a]ll agreements related to Production Sharing Contracts" and the latter, "[a]ll authorizations and memoranda of understanding related to oil and gas," with article 1(22) of the Law defining "Authorizations" as including an agreement "with respect of" a petroleum contract. As the KRG views the matter, the Eng.&PC or TSA is subject to review and reworking because it is "connected to" or "associated with" the PSC, or it is a nullity because its "connection to" or "association with" such makes it an agreement "with respect of" a petroleum contract.

While it is true that the Law's other twenty-five uses of the expressions "related to" and "with respect of" suggest a meaning of "connected to" or

[209] See id. at art. 54, Second.
[210] See id. at art. 1(22).

"associated with," a variety of substantial problems appear to confront the KRG's preferred interpretation when it comes to article 54. The first problem has to do with the context in which "related to" and "with respect of" are used in article 54. For openers, the way the entirety of the KRG's Oil and Gas Law is written suggests that when the article references PSCs, oil and gas petroleum contracts, prospecting authorizations, or MOUs, it means those things very specifically. And when it references agreements "related to" or "with respect of" such, it again means only agreements that are in the "nature of" or the "form of" a PSC, oil and gas petroleum contract, prospecting authorization, or MOU. Chapter 10 of the Law provides the Ministry of Natural Resources with authorities concerning PSCs, petroleum contracts, and prospecting authorizations. But it also provides it with authorities concerning so-called "Access Authorizations"[211] and, under article 39, a whole host of other forms of agreement used in the oil and gas sector.[212] Yet article 54 confines its review and nullification provisions to particular identified forms of agreement, mentioning Eng.&PCs or TSAs not at all.

Even beyond the interpretive significance flowing from the structure of, or other provisions appearing in the KRG Oil and Gas Law, another contextual consideration is the evolution of the legislation that resulted in article 54. As originally offered in draft form in October of 2006, the so-called Petroleum Act of the Kurdistan Region of Iraq[213] contained an article 79, the proposed predecessor to article 54, language that explicitly affirmed the continued validity of each and every oil and gas agreement earlier entered into by the KRG.[214] Section 1 of article 79 read: "Any agreement related to Petroleum Operations entered into by the Regional Government prior to the entry into force of this Act, and approved by the Minister, shall remain in force."[215] Section 2 of the same article then defined "agreement" to "include[] a contract, license, permit, memorandum of understanding, or other legal act or dealing of any sort."[216] With the rejection of the route proffered in proposed article 79, and the adoption in 2007 of the approach advanced in article 54, the KRG chose to move from a complete confirmation of the validity of all preceding agreements approved by the Minister of Natural Resources, not to one subjecting to review or nullification all such agreements, but rather to one reviewing or nullifying specifically identified forms of agreement. The drafters knew how to say that all agreements approved by the Minister remain valid; and they must be presumed to have known how to say that all would be reviewable or nullified. They chose

[211] See id. at art. 25.
[212] See id. at art. 39.
[213] See Petroleum Act of the Kurdistan Region of Iraq, 2006 (22 Oct. 2006), available at www.krg.org/pdf/Kurdistan_Actg_COM_draft_22_October_2006.pdf (accessed Nov. 22, 2007).
[214] For the text, see id. at art. 79.
[215] See id. at Section 1.
[216] See id. at Section 2.

another formulation; why should it not be honored and respected by those subject to or called upon to apply the Law?[217]

The second problem with according article 54's concepts of "related to" and "with respect of" the broad, expansive interpretation preferred by the KRG has to do with article 141 of the Iraqi Constitution.[218] Among other things, article 141 essentially confirms the continued validity of preexisting KRG contracts, unless these are altered by action of the regional government. Given that the terms of the Constitution were adopted in 2005, considerably prior to the KRG's proposed 2006 Petroleum Act, it is more than understandable that the proposed Act's article 79 would suggest the continued validity of Ministerially approved preexisting oil and gas agreements. The exact language of article 141 of the Constitution reads that legislation adopted in Kurdistan since 1992, and decisions of the KRG, including court decisions and "contracts, shall be considered valid unless they are amended or annulled pursuant to the laws of the region . . . by the competent entity in the region, provided that they do not contradict with the Constitution."[219]

Obviously, article 141 entitled the KRG to amend or annul its preexisting contracts. However, by virtue of the precise terms of article 141, any laws of the regional government that endeavor to amend or annul such contracts must do so in a way that does not contradict the Constitution. One extremely important constitutional limitation with which such amendments or nullifications might prove inconsistent would be the Constitution's article 23, which protects private property from confiscatory actions of governmental authorities. In pertinent part, article 23 provides that "[e]xpropriation [of private property] is not permissible except for the purposes of public benefit in return for just compensation."[220]

Some might be inclined to consider the protection accorded private property by article 23 available to Iraqis alone, and not foreign natural or juridical persons. That view seems misplaced, because the language of the provision contains no such limitation, and elsewhere in the Constitution's enunciation of rights and liberties, Iraqis are explicitly named as possessing such when the Constitution intends to limit them to Iraqis alone. For example, article 22, the immediately preceding provision, references a right to work being vested in all "Iraqis," and article 24, the provision immediately following article 23, references a freedom of

[217] The text of the proposed article 79, in referencing "approved by the Minister," can be read as referring either to those agreements approved by the Minister when entered into, or to those already entered into that the Minister approves after the passage of the KRG's oil and gas law. In either case, it is clear that the definition of "agreement" as contained in the proposed article 79, Second, is all-inclusive, encompassing every conceivable form of oil and gas agreement, whereas the language of article 54 of the KRG's 2007 Oil and Gas Law references only specific kinds of agreements.

[218] See Iraqi Constitution, available at www.export.gov/iraq/pdf/iraqi_constitution.pdf (accessed Nov. 22, 2007).

[219] See id. at art. 141.

[220] See id. at art. 23, Second.

movement between regions guaranteed to all manpower, goods, and capital that is "Iraqi."[221] Of more relevance than arguments about article 23's availability to Iraqis alone would be the suggestion that, if the article's no-expropriation standard were to serve as a limitation on the KRG's exercise of its article 141 power to amend or annul preexisting contracts, it would render that power without real consequence. The fundamental flaw of that argument, however, is that it fails to distinguish between expropriations or confiscations of property rights inherent in contractual agreements, on the one hand, and amendments or nullifications of contract that do not constitute expropriations or confiscations spoken to by article 23.

The distinction between these two turns on a variety of different factors. First, was the amendment to or nullification of contract one that served a legitimate public purpose? The language of article 23, Second, expressly provides that expropriations are not constitutionally permissible "except for the purposes of public benefit." Therefore, a reworking or nullification of an Eng.&PC or TSA as discussed earlier would have to reflect on whether it was serving some genuine public purpose, and not just an improvement in the KRG's financial positioning vis-à-vis the parties involved with it in the oil and gas development activity. Critical shortages of supply or changes in international policy positions could meet the constitutional requisite, but certainly not mere enhancement of one's initial commercial reward because of changed circumstances that supplement negotiating leverage earlier lacking. Second, was the impairment of property inherent in the contract affected by the action said to constitute an expropriation or confiscation offset by the provision of compensation? Again, the language of article 23, Second, specifically requires that to be permissible, an expropriation be accompanied by the payment of "just compensation." Thus, without compensation that is sufficient in amount, useful in form, or timely in payment, even a reworking or nullification of our hypothesized Eng.&PC or TSA for legitimate public purpose would seem constitutionally deficient. Article 23 protects against confiscatory actions of governmental authority, and article 141's provision of power to the KRG to amend or annul preexisting contracts remains clearly subject to that protection.

Apart from the exact language of article 54 of the KRG Oil and Gas Law, and its interpretation in the context of both other provisions of the same Law and articles 141 and 23 of the Iraqi Constitution, any complete consideration of modifications, alterations, or annulments of preexisting oil and gas agreements entered into by the KRG could not avoid reflecting on general international commercial law and its rules dealing with mandated deviations from or breaches of contractual commitments. Without attempting anything beyond a cursory reference to such, one real-life illustration strikingly similar to the

[221] See id. at arts. 22 and 24.

outlined hypothetical involves the Iran-U.S. Claims Tribunal decision in the 1989 case of Phillips Petroleum Co. v. Iran.[222] In that case of two decades ago, following its revolution in 1979, the Iranian government mandated through legislation departure from and noncompliance with a contractual commitment between Phillips Petroleum and the Iranian National Oil Company. Reviewing the breach of contract for consistency with international legal obligations, the Tribunal concluded that the action of the revolutionary Iranian government, by impairing contractual rights of Phillips, constituted a confiscatory measure in contravention of the dictates of international law. Given the almost precise parallels between this earlier decision and the example involving the attempt by the KRG under its Oil and Gas Law to escape earlier contractual commitments, there would seem more than adequate reason to expect a suspicious eye to be cast on reworking or nullification pursuant to article 54.

VI. CONCLUSION

The complexities of both the federal government's and the KRG's oil and gas measures seem more than apparent from the preceding review. If the February 15, 2007, framework law put forward for consideration by federal authorities is to be completely embraced by the various ethnic, religious, and sectarian factions within Iraq, it must resolve controversies over several consequential matters. Most prominent is that concerning the tussle between assertions of power by the federal government and those advanced by the subcentral units, and particularly the KRG. Clearly, the federal government would like to centralize much authority over oil and gas fields and activities, whereas those operating at the regional and governorate level would prefer more control left in the hands of local officials and institutions. Some of this controversy is captured in the distinctions between "present" and "future" oil and gas fields. Then there is the matter of the PSC. Many Iraqis are nervous about the kind of long-term oil and gas arrangement that is evidenced by any form of production-sharing commitment. Beginning as long ago as the 1960s, the nation moved toward autonomous control of its industry, and a certain degree of entrenched national pride is associated with that fact. The obvious financial value and economic importance of oil and gas only serve to embed that sense of pride more deeply. As seen, the KRG has few problems with the PSC, while the federal authorities in Baghdad struggle mightily with the concept of any form of long-term production-sharing contract, despite full recognition that revitalization and optimum oil and gas production may depend on being prepared to offer PSCs to those companies who are the major players in the international industry. When these two matters

[222] See [Ir.-U.S.] Phillips Petroleum Co. v. Iran (1989) 21 Iran-U.S.C.T.R. 79 [Iran-U.S. C.T.].

are conjoined with the suspicions surrounding the issue of the sharing of oil and gas revenues, and the overall convoluted and involved nature of the federal framework law, with its five federal institutions and seemingly contradictory and conflicting assignments of authority, the magnitude of the challenge of reaching closure on an acceptable federal oil and gas law seems more than apparent.

4 A PRIMER ON THE FEDERAL MODEL EXPLORATION AND PRODUCTION CONTRACTS AND THE KURDISTAN REGIONAL GOVERNMENT'S MODEL PRODUCTION-SHARING CONTRACT

I. INTRODUCTION

There may be a great deal of controversy and divisive posturing when it comes to the political acceptability in the Iraqi national parliament of the February 15, 2007, oil and gas framework law. And despite the criticism that the current actions of the Ministry of Oil in negotiating certain kinds of oil and gas development agreements on the basis of preexisting, Saddam-era laws evidences a disregard for some of the goals and objectives reflected in that February measure,[1] the Ministry continues to move forward to fulfill its aim of boosting Iraqi oil production as rapidly as is consistent with sound practice, technical feasibility, and productive capacity.[2] Against this backdrop, it is interesting to review the thinking of the federal government on model forms of exploration and production contracts, and the basic terms of production-sharing contracts (PSC) used by the KRG. Oil and gas field service providers and major international oil companies desirous of exploring development opportunities throughout Iraq, as well as those who study the contractual legal structure of resource-rich countries that host overseas extractive operations, would find such a review more than worthwhile. In that connection, it should be observed that, although the KRG has made its standard form of model PSC publicly available, indications are that at the time of this writing, the authorities in Baghdad continue to work on finalizing the precise structure and wording of their own model forms of exploration and production contracts. However, various officials associated with the Ministry of Oil have been allowed to offer insights into the general nature of what it envisions, thus permitting informed speculation about the

[1] See, for example, Tariq Shafiq, Iraq's Technical Support and Production Service Contracts: Pros and Cons, 51 Middle East Econ. Survey (No. 30) (28 July 2008), available at www.mees.com/postedarticles/oped/v51n30–5OD01 htm (accessed Aug. 11, 2008).

[2] See Iraq Opens 8 Oil Fields for International Bidding, USA Today (June 30, 2008), available at www.usatoday.com/news/world/2008–06–30-iraq-oil_N htm (accessed July 25, 2008).

products ultimately to be promulgated.[3] And further, private, knowledgeable media sources have released some documents represented as reflecting draft versions of central government model oil and gas contracts.

At the outset, however, several fundamentals revealed in the preceding chapter on the terms of both the February federal oil and gas framework law and the KRG's Oil and Gas Law of 2007 merit reiteration. With respect to the federal framework law first of all, it must be recalled that the law applies to all petroleum operations, but does not apply to refining activities. Further, the contractual form of oil and gas development agreement that is to be used for petroleum operations is the "Exploration and Production contract." From the language of article 9 of the February law, the exploration and production contract "may" take the form of a "Service Contract, Field Development and Production Contract, or Risk Exploration Contract."[4] Other forms of contract, such as the PSC, are not expressly referenced in the February law, but had been in earlier drafts. Nonetheless, given the fact the language of article 9 is permissive and not restrictive, and article 4 in listing definitions of key terms employed by the law fails to define the exact attributes of a "Development and Production Contract" or a "Risk Exploration Contract," it seems room is present to suggest that PSCs, or at least something in the form of such, remain a possibility. In this context it might also be noted that, as between the types of fields listed in the four annexes to the February 2007 oil and gas framework law, it could be argued that the Service Contract is the most likely to be used for those in Annexes 1 (i.e., discovered and producing fields) and 2 (discovered and nonproducing, but yet basically established or existing fields) controlled by INOC, with the Development and Production Contract most likely for the discovered but completely undeveloped new fields in Annex 3, and the Risk Exploration Contract for the Annex 4 unexplored blocks scattered across the balance of Iraqi territory. After all, INOC already has the benefit of known field location and either current production or knowledge about Annexes 1 and 2 fields. Annex 3 fields, on the other hand, are discovered but unexplored, therefore needing to be developed and brought into production, and those in Annex 4 are totally unexplored blocks posing the greatest financial and technical risks to contractors interested in the opportunity to secure authorization for petroleum operations.

With respect to the KRG's 2007 Oil and Gas Law, it should be recalled that it also applies to petroleum operations, though it defines these in a way that includes refining activities. The Law actively serves as a basis for the KRG to conclude development agreements with a wide range of international oil

[3] See, for example, N. K. al-Bayati, The New Structure of the Iraqi Oil Industry (Prepared by the Directorate General of Petroleum Contracts & Licensing of the Ministry of Oil, and delivered at Iraq Oil, Gas, Petrochemical & Electricity Summit, Sept. 2–4, 2007, Dubai, UAE), available at www.trade.gov/static/pdf_iraq_bayati2007Pres.pdf (accessed Aug. 11, 2008) (hereinafter The New Structure).

[4] See text accompanying supra Chapter 3, note 61.

companies, despite the vociferous objections of the central government. According to the terms of the KRG's Law, petroleum operations are supposed to take place only under a prospecting, development, or access authorization. The first is analogous to the framework law's notion of exploration, with the development authorization representing the same thing as the framework law's concepts of development and production. In fact, article 24 of the KRG's Law speaks of a development authorization as being represented by a "Petroleum Contract for exploration and development," which is to take the form of a PSC or "other contract which the Minister [of Natural Resources] considers provides good and timely returns."[5] The institutions charged with administering and participating in the KRG's Law have, in many respects, markedly different roles from the Iraqi Council of Representatives, Council of Ministers, FOGC, the Ministry of Oil, and INOC. However, it is interesting to recall that two of the KRG institutions, KNOC (Kurdish National Oil Company) and KEPCO (Kurdish Exploration and Production Company), have roles to play in the development of current and future fields, respectively; current fields being those producing a daily average of 5,000 barrels of oil per day for any 12-month period prior to August 15, 2005, and future being those not producing at that rate. Essentially, KNOC can compete for prospecting, development, and access authorizations in current fields, and KEPCO in future fields. Plainly, one objective of such an approach is to nurture and cultivate the growth of a local industry contingent, rather than placing reliance on outside help in perpetuity.

II. FEDERAL GOVERNMENT MODEL EXPLORATION AND PRODUCTION CONTRACTS

Article 9 of the February 15, 2007, oil and gas framework law speaks of model Exploration and Production contracts typically taking the form of Service Contracts, Field Development and Production Contracts, or Risk Exploration Contracts. And, as was seen in the preceding chapter, although it is true that a series of provisions in the February law spell out the terms and conditions that any exploration and production contract is to reflect, there is nothing in the law that actually describes a service contract, development and production contract, or risk exploration contract. Though there are indications that the Ministry of Oil, perhaps in conjunction with consultative advice from U.S. government officials or advisors, as well as industry representatives and personnel associated with international organizations, continues to work on developing text for model contract forms, as of late November 2008 none has appeared. Iraq's Ministry of Oil, however, has permitted some of its own officials to make public presentations regarding its thinking, and from these the skeletal structure or basic outline of

[5] See supra Chapter 3 at notes 150–164.

future model contracts has begun to emerge. Arguably, some added illumination is also cast by unofficial releases of what are represented as early draft versions of model contracts. International oil companies, and especially the majors, may be most interested in seeing Iraq move toward the PSC. The political climate is far from amenable to that, with the Ministry opting instead to move in the direction of the less objectionable service contract, in the early stages of what is sure to be a several-decade-long process of licensing activity in Iraqi oil and gas fields.

From information presented publicly by Iraqi government officials, three forms of model contracts have been intimated as under review in the Oil Ministry. The basic model, and that first turned to, would be an improved form of service contract. The second model would be a management and service contract, and the third, a joint venture agreement superimposed on an improved service contract.[6] Apparently, the Ministry understands the latter as capturing, politically, the present outer limits of its reach in the direction of anything that might approach the PSC. As described by the Ministry, the joint venture superimposed on an improved service contract would be the concrete manifestation of what the February 15, 2007, law describes as the development and production contract.[7] And there is reason to believe that until the political climate changes, it could also serve, with modifications, as the contract form of choice for what the February law describes as the risk exploration contract. This is because, to the extent the risk exploration contract is aligned with Annex 4 unexplored blocks, the petroleum operator would take on added risk, thereby demanding the potential for added remuneration. That could come in the form of a PSC. Its political unacceptability militates against its use, thus leaving as a possibility the more familiar, yet slightly modified, joint venture superimposed on an improved service contract.

Before proceeding farther, and certainly before setting forth the essence of what the Ministry of Oil sees as the basic terms of the joint venture superimposed on the improved service contract, it may be useful to briefly describe the fundamentals of some of the contract forms referenced. With the demise of the traditional concession agreement in the 1960s and 1970s, and in some cases, such as Iraq, the complete nationalization of the holdings under the concessions, the production sharing agreement or the PSC came to be the favored replacement. Unlike the concession, which is of very long duration, contains provisions assigning the concession holder operational authority and coming close to relinquishing formal sovereignty over the area of interest, and provides mere royalty payments to the host country while granting the international oil company all hydrocarbons produced, the PSC is of substantially shorter duration, clearly

[6] For reference to these three, see The New Structure, supra note 3 at Sec. "FIVE: Criteria and Model Contracts."

[7] See id., describing the joint venture agreement on top of a service contract as "for operating Development & Production."

retains sovereignty in the host country, identifies specific operational conditions that must be met, and often calls for gradual participation by the host country in the operations of the contract holder. In terms of payment to both the contract holder and the host country, the PSC usually permits the holder to recoup its expenses (often under some limit) through what is termed "cost oil," and then dictates the sharing of the production that remains between the host and the holder on the basis of a preassigned percentage split. The holder is also typically obligated to the host country for a royalty as well as taxes and various other charges.

The service contract is designed to secure certain specific efforts or labors that the party putting out the contract is incapable, unable, or not interested in performing. In the oil and gas context, those labors could span the entire spectrum of activities from prospecting, to data analysis, to production, to marketing. As will be seen much later in Chapter 8, the service contract can take many more particular forms, such as the Technical Service Contract (TSC) or Technical Service Agreement (TSA), and even the Engineering, Procurement, and Construction (Eng.&PC) contract, to name a few. The essence of each, however, is the provision of some particular service or set of services. In some instances the form of the agreement is that of a risk service contract, linking compensation or its form (i.e., cash payments versus payments in kind) to the service provided. In others, no element of risk is involved.

No particular definition exists for the February 15, 2007, law's so-called field development and production contract, or its risk exploration contract. It stands to reason, though, that although these terms may have been selected by the drafters to avoid the lightning-rod effect of referencing PSCs, they have meanings that derive from the basic words that label them. To put it another way, the term "field development and production contract" would have to mean a contract that entitles the holder to undertake all those activities necessary to move a discovered but undeveloped oil or gas field toward development and then finally production by actually lifting oil or gas. Likewise with respect to a risk exploration contract, because the very notion that an element of risk is involved in the exploration activities connotes the absence of existing knowledge as to whether oil and gas may even be present in the area explored. Focusing on the financial aspect, and by comparison to the development and production contract, it would be natural to assume that the risk exploration contract, simply in order to induce parties to enter into it, would carry a financial or profit premium for the contract holder not present in regard to the development and production contract. Putting aside the exact specifics, as a general matter, why should the financial terms prove more lucrative under a development and production contract, where discovered oil and gas fields exist, than under a risk exploration contract, where it is not even known if fields are present?

Next we attempt to read the tea leaves and divine what the federal government in Baghdad could have in store for the overall structure of the development

and production contract, the risk exploration contract, or what the Ministry of Oil describes as the improved service contract, the management and service contract, or the joint venture superimposed on an improved service contract. But first it should be noted that, apart from the terms of relevant financial provisions of the development and production contract and the risk exploration contract, it would make sense to think of the two as being distinguished on other important bases: operational control, and perhaps even eventual participation by the host state. As to the former, it would not seem unusual for a contractor to demand, and the host country to permit, greater autonomy in operation decisions as the degree of risk increases. This would essentially mean the risk exploration contract, in addition to being more financially lucrative, is also likely to be characterized by much more extensive contractor independence than the development and production contract in regard to operational decisions. In view of the general sense in Iraq and elsewhere, for that matter, that the host country should jealously protect its position of supremacy over natural resource activities of any sort occurring in its territory, the chances are more than remote that the autonomy accorded the contractor under either form of contract will greatly weaken that supremacy. Decisions as to when and how to drill, what techniques should be employed, whether this service provider or some other should be enlisted, the rate and total amount of oil or gas to be extracted, and many other related matters will surely be left to the contractor, though most probably under basic legislative standards established by the host country and designed to establish what is deemed wise for the protection and optimum utilization of the resource itself. As an even stronger demonstration of retained authority and despite the fact that a development and production contract or risk exploration contract carries increased risk for the contractor, it is unlikely that the host country will exempt the contractor from fundamental environment, safety, or labor laws, or free it from circumstances that in some instances can lead to termination of contract rights.

As to the matter of eventual host-country participation, it would not seem unreasonable to expect that with comparatively risky endeavors such as the development and production contract and the risk exploration contract, the level and nature of eventual host-country participation would be affected. Understandably, one might think of a development and production contract in an explored but undeveloped field, resulting in a host country being entitled to exercise different and more extensive participation rights than would be the case in connection with an even riskier risk exploration contract focused on unexplored blocks scattered throughout a country such as Iraq. It will be recalled that the terms of the KRG's Oil and Gas Law of 2007 speak of Kurdish participation in the PSCs it grants, at a level negotiated – the nature of the participation is to be in a direct working interest.[8] Given this, might it not make sense to expect a

[8] See text accompanying supra Chapter 3, notes 183–184.

downward variation in the level of negotiated participation in the riskiest forms of petroleum operations contracts? And would the same not seem to hold with respect to the very nature of the participation interest as well?

Now it is appropriate to discuss what might be expected from the Ministry of Oil by way of the three forms of model contracts – the improved service contract, the management and service contract, and the joint venture superimposed on an improved service contract, as well as what might be expected, beyond what has already been mentioned, about the development and production contract and the risk exploration contract. On this score, it must be reiterated that the intimations from the Ministry suggest a degree of parallelism between the February 2007 framework law's allusion to development and production contracts, and the joint venture superimposed on an improved service contract model form of petroleum operations agreement. The joint venture superimposed has been described by one Ministry official as a contract designed "for operating Development & Production."[9] As a consequence, in attempting to describe what might be expected in model contract forms, focus is really to be limited to the improved service contract, the joint venture superimposed, and the risk exploration contract. Because the same Ministry official who suggested the parallelism between the development and production contract and the joint venture superimposed also offered insights into the Ministry's thinking about the essential provisions of the latter, discussion begins there, and then moves on to the improved service contract and the risk exploration contract.

As suggested by the Oil Ministry, the joint venture superimposed on an improved service contract would be typified by a duration between 15 and 20 years, with an "option for additional lifting at market prices."[10] This implies that the contract could extend beyond 20 years, but any oil or gas to which the contract holder is entitled as a result of its production efforts would have to be paid for at the going market rate. Also indicated as typical of the joint venture superimposed would be the fact that payment to the contract holder for services rendered would be "in cash with option [of] payment in Kind both for Cost Recovery and Remuneration."[11] Since one could structure a service contract to provide cash or in-kind remuneration for services alone, the fact that Ministry indications suggest optional cash or in-kind payments are to be both for "Cost Recovery and Remuneration" suggests that the joint venture superimposed will reflect elements of a PSC. Cost recovery, in addition to a separate line-item for remuneration as such, is standard fare in production-sharing contracts. This is not to say that payments made to holders of pure service contracts fail to reflect cost expended in providing the service requested; they do, but can be structured in a way that presents a one-item charge to the party providing the contract – the

[9] See supra note 7.
[10] See The New Structure, supra note 3 at "FIVE: Criteria and Model Contract: Contracting Policy."
[11] See id.

charge representing an aggregation of projected costs as well as remunerative profit for the service provided.

In addition to a 15- to 20-year duration, with possible extensions of lifting rights, and payments made to the contract holder in cash or in kind for both the recovery of costs and remuneration for services rendered, indications are that the model joint venture superimposed is to involve "[g]overnment participation up to 50% which is to be carried by the Contractor."[12] Again, this is another aspect standard in PSCs. The notion of government participation basically captures the host country's desire to be involved in the petroleum operations of contractors looking for and producing hydrocarbons in areas under their territorial jurisdiction. And since the model joint venture superimposed proffered by the Iraqi Oil Ministry is, by name, to be a joint venture, participation is expected. Participation is expressly recognized as a right of the government under article 12 (D) of the February 2007 framework law.[13]

Whenever participation is raised, the suggestion would be that the percentage level of participation would capture not only the role the government is to play in the operation itself, but also the portion of the operating expense to be picked up by the government. However, most host-country governments are not in that happy state of financial liquidity that would allow them to sign a contract envisioning participation, send the contractor to commence work without knowing whether the contractor's efforts at discovering and producing oil or gas will be fruitful, and regularly write checks against the nation's treasury to pay the contractor for the government's share of the prospecting, exploration, development, and production costs. This is where the notion of "carrying the participation interest" comes in, and usually exploration, development, and production contracts that call for host-country participation will also provide that until actual discovery, or a certain stage of subsequent development, or maybe even eventual production itself, the participation interest (and most importantly the government's share of the costs reflected in such) will be carried by the contract holder. At the point the relevant triggering event – discovery, development, production – is reached, the government will "back in" with its participation interest. Indeed, the standard expectation is that the government's payment of costs obligated by participation will be made out of hydrocarbons successfully produced. Although all of the details associated with the 50% Iraqi participation in the joint venture superimposed have yet to be ironed out, it seems clear that what is contemplated envisions contract holders carrying the government until some specific point in the discovery, development, and production process.

[12] See id.

[13] See Republic of Iraq Draft Iraq Oil and Gas Law No. __ of 2007 (15 Feb. 2007), available at www.iraqrevenuewatch.org/documents/oil_law_english_20070306.pdf (accessed Feb. 12, 2008) (hereinafter February 2007 law).

The intimations from the Ministry also speak of the joint venture company operating "[f]rom the beginning until the Handover."[14] This seems to be consistent with what is anticipated under the terms of the February 2007 framework law, in that article 13 (D) of that law provides for "relinquishment of [Exploration and Production] Contract Areas in adherent [sic] to the Petroleum regulations"[15] issued by the Oil Ministry, and 13 (F) references a 20- to 25-year limit on contract rights to develop and produce petroleum, which necessarily means a handover in the case of fields continuing to produce. In any event, the model the Ministry has planned is one that will eventuate in the discontinuance of an issued set of contract rights and their transference to a relevant Iraqi entity, presumably the state owned oil and gas company – INOC in most of Iraq, or KNOC in the Kurdish region.

Clearly, a host of various other model contract matters from minimum work obligations, to guarantees, to accounting and audits, to subcontracting and personnel training and technological assistance, have yet to be addressed by the Ministry of Oil. The only other observation offered by the Ministry on the joint venture superimposed on an improved service contract is that of remuneration for the contract holder. It has already been noted that the comments of Ministry officials suggest that the joint venture superimposed contemplates payments to the contract holder for both the costs incurred and the services rendered. In terms of the rate or amount to be associated with the latter, all that has been intimated by the Ministry is that the remuneration for services rendered is to "relate[] to investment."[16] Though not explicitly stated, this certainly seems to mean that, because the level of contractor investment will necessarily fluctuate depending upon the producing or nonproducing, explored or unexplored nature of the contract area, as well as on things like the known or anticipated existence of geological complications, distance from sources of needed supplies, equipment, or manpower, the rate of remuneration could vary accordingly. This seems perfectly consistent with what the February 2007 framework anticipates for all exploration and production contracts, as article 9 (B), Third, notes the "terms of [any] model contract shall take account of the specific characteristics and requirements of the individual area, Field or prospect being offered, including whether the resources are discovered or not, the risks and potential rewards associated with the investments . . . , and the technological and operational challenges presented."[17] No one would question the fact of remuneration being one of the most essential of the "terms" of a "model contract."

[14] See The New Structure, supra note 3 at "FIVE: Criteria and Model Contracts: Contracting Policy."
[15] See February 2007 law, supra note 13 at art. 13.
[16] See The New Structure, supra note 3 at "FIVE: Criteria and Model Contracts: Contracting Policy."
[17] See February 2007 law, supra note 13 at art. 9 (B), Third.

Moving away from the model joint venture superimposed on an improved service contract, and commenting on the improved service contract itself, and then the risk exploration contract, the Ministry of Oil has offered few insights. Perhaps the silence on the risk exploration contract can be explained by the fact the Ministry is aiming to boost production as rapidly as possible, with the focus on discovered, producing and nonproducing fields, and not on the vast unexplored blocks most likely to be addressed through the use of the February 2007 framework's risk exploration contract. Of course, this does not explain the reticence of the Ministry to offer instructive guidance on the terms and conditions of the improved service contract. With regard to the Annex 1 and 2 fields under INOC's control – discovered fields that are currently producing or are known to hold reserves of oil and gas and, thus, the fields to which Iraq will first turn in its quest raise production levels – the service contract is the prime prospect for utilization. Indeed, as will be seen in Chapter 8, the technical service contract (TSC), technical service agreement (TSA), and even the engineering, procurement, and construction contract (Eng.&PC), all forms of service contracts, recently have been regularly employed by the central government in securing outside assistance in the resuscitation and revitalization of, and increased productivity from, known oil and gas fields.[18] Although there has been little public disclosure of the specific provisions of the agreements placed in use by Iraq, at least one knowledgeable former INOC official has complained that some of the TSCs signed by the Oil Ministry have been on a no-bid basis, totally contrary to the notion of competition among potential contractors, all of whom have gone through a rigorous prequalification process.[19] Clearly, the terms of the February 2007 framework envision all forms of exploration and production contracts, including service contracts, field development and production contracts, and risk exploration contracts, being granted on the basis of a competitive bidding process[20] in which all bidding parties have been prequalified.[21] To the extent that claims of TSCs inconsistent with these are accurate, they are no doubt at odds with the substantive terms of the federal framework oil and gas law.

While there is nothing self-defining in the notion of an improved service contract that would indicate every one of its aspects and nuances, the label ascribed to that form of model contract suggests a traditional service contract supplemented and altered by provisions designed to address current conditions and international developments. Prior to sketching some of the key attributes that have typified oil and gas service contracts over the years, it seems appropriate to observe that one of the alterations or supplementations that might contribute to recharacterizing a service contract as an "improved service contract" could

[18] See Chapter 8, Sec. I.
[19] See Tariq Shafiq, supra note 1.
[20] See Chapter 3, especially text accompanying note 54.
[21] See id., especially text accompanying note 63.

involve a remuneration system paying for so-called technical services in actual oil or gas, perhaps through the service provider's invoice of charge showing a credit for oil or gas received. This will be suggested in Chapter 7 as posing certain questions under relevant UN resolutions concerning the protection of Iraqi oil and gas, and revenues from its sale, from claims by creditors. In that context, the issue will concern the service provider's status under the resolutions as a "purchaser."[22] At present, however, the only interest is with this form of payment arrangement constituting, perhaps, part of a larger group of changes in a traditional service contract sufficient to result in it being characterized as an improved service contract. There seems to be nothing in the language of the February 2007 framework law that would forbid payment arrangements of this sort on service contracts. Indeed, as already indicated, the language of article 9 provides the Ministry of Oil with wide latitude in structuring many of the terms of any form of exploration and production contract.

Accepting this innovation in payment as representative of one supplementation or alteration that might be found in an improved service contract that seems consistent with the negotiating authority of the Ministry itself, what other basic terms characterize a traditional service contract, and how might an Oil Ministry model service contract improve on those?

Essentially, service contracts are typified by a service provider agreeing with the host country to provide a particular service either for a guaranteed fee, which is not that common, or at their own cost, until oil or gas happen to be discovered and produced. Thus, in the usual case, most are accurately described as "risk service contracts," given that the absence of oil or gas could result in the complete absence of compensation for the service performed. Unlike the PSC, where the contract holder recovers its costs by receiving so-called "cost oil," in the risk service contract the host government retains control of all oil or gas, and compensation for the service provider is usually in the form of cash payments made from the proceeds of sales of oil or gas that has been lifted. The provider may also receive additional fees paid out of further oil or gas sales, with those fees being subject to taxation. In view of this structure, it is easy to see why a TSC that permits payments to be made through the actual delivery of oil or gas, and credited on the payment invoice delivered to the host country by the service provider, could be regarded as an improved service contract. Interestingly, however, such a supplementation or alteration serves to blur the distinction between the TSC and the PSC – except that the latter involves the payment of royalties, host-country participation, the division of "profit oil" following cost recovery, and a more extensive range of exploration, development, and production activities. Other changes in the standard service contract that might result in it being regarded as improved could involve a requirement for training or technology transfer, the use of specific indigenous

[22] See Chapter 7, text accompanying notes 95–96.

labor or material sources, and perhaps even host-country involvement in aspects of decision making.

The risk exploration contract, as suggested, is most likely reserved for Annex 4 unexplored blocks – those vast stretches of unexamined land situated principally in the western midsection of Iraq. Conceivably, it could also be employed in Annex 3 discovered, but nonproducing fields; however, if Iraq could choose between utilizing a development and production agreement in the form of a joint venture superimposed on an improved service contract, or a risk exploration contract in an explored field with known, yet nonproducing reserves, the former might be preferred. The latter – the risk exploration contract – although not ascribed a meaning by either the substance of article 9 of the February framework law, or article 4 that sets forth the definitions of important terms, suggests the assumption by the contract holder of risks beyond those present in the other forms of exploration and production contract, thus necessitating the payment by the host country of remuneration in excess of what those other contracts provide. Assuming this to be accurate, the use of the risk exploration contract would be limited to those situations where the least is known about the existence of oil or gas. This would certainly not be the case with Annex 3 fields, but would be with respect to the blocks listed in Annex 4.

The other thing suggested by the preceding helps illuminate what the Ministry of Oil's thinking might be with respect to the structure of a model risk exploration contract. More particularly, if such a contract is to involve activities in the face of greater risk of coming up empty-handed in the search for oil and gas producible in lucrative quantities, then it would make sense for a model risk exploration contract to offer an equivalently greater level of compensation for the activities provided. That is, if a typical development and production contract, such as the Iraqi suggested joint venture superimposed on an improved service contract, called for the contract holder to be able to recover its costs through in-kind payments, but placed a cap on the maximum percentage of total production subject to cost recovery, the added risks associated with the use of a risk exploration contract might take account of that by raising the level of the cap. Along the same lines, if a joint venture superimposed were to normally permit a 15- to 20-year contract duration, with the option of extensions, during which purchases by the contractor of further lifting of oil and gas could occur at market prices, the additional risk accompanying a risk exploration contract not only might result in lengthening the overall duration, or splitting it between a 15- to 20-year production period and a separate front-end exploration and development period, but also might allow purchases of what is lifted to occur during any extensions at less than the prevailing market price.

One of the other affiliated matters might concern the question of host government participation in contract holder activities pursuant to a risk exploration contract. The Oil Ministry in Iraq has intimated that the joint venture superimposed on an improved service contract will likely contain a 50% participation

provision.[23] In view of the uncertainties and perils of a risk exploration contract, it seems reasonable to expect a couple of possibilities when it comes to participation. One possibility might be a simple reduction in the level of participation. Rather than 50%, as in the joint venture superimposed situation, participation could be reduced to 25%, or something less. The other possibility has to do with the opposite side of the participation coin. In other words, if participation is considered from the perspective of the degree of input the host country is entitled to provide and decision-making authority it is empowered to exercise, there is also a corresponding, yet concomitant accompanying cost – a 50% participation rate requires the participant, at some point in the exploration, development, and production sequence, to be obligated for a equivalent portion of subsequent costs. With this in mind, it is possible to structure a risk exploration contract so that the added risk associated therewith is offset by requiring a participant to take on its cost obligation at a point much earlier than in a mere joint venture superimposed form of contract. Again, because the participant's portion of the costs is typically paid from eventual production, the expectation would not be an earlier commencement of regular check writing against the national treasury by the host-country participant, but rather the potential on the part of the contract holder of a claim for a larger share of any production that ultimately eventuates.

As observed near the beginning of this chapter, there has been at least one release of documents by a private source that represents this as reflecting Iraqi government thinking about the precise form of model oil and gas contracts. From what has been made available by that knowledgeable source, official thinking prior to the time of the public presentations by ranking members of the Iraqi Oil Ministry that formed the basis for the analysis in the preceding several pages was that model contracts might take one of four specific forms: the development and production contract (DPC); the exploration and development contract (EDC); the exploration and production contract (EPC); and the field development contract (FDC).[24] Given the unofficial nature of the release of these model forms of contract, and their timing in relation to the more recent statements of Oil Ministry officials, there is a certain reluctance to examine each in any great detail. Nonetheless, it is important that those interested in the development of Iraqi oil and gas law be apprised of their existence and have the benefit of at least a preliminary and general analysis of some their basic terms and provisions.[25]

[23] See text accompanying supra notes 13–15.

[24] These four forms of model contracts are represented as in third-draft form and dated May 7, 2007. See www.iraqog.com/oillaw/dpc_draft3.pdf (the DPC); www.iraqog.com/oillaw/edc_draft3.pdf (the EDC); www.iraqog.com/oillaw/epc_draft3.pdf (the EPC); and www.iraqog.com/oillaw/fdc_draft3.pdf (the FDC). Again, it should be recalled, see supra note 3, that the official presentations forming the basis of the analysis in the preceding several pages dates from early September 2007, several months after the date carried by each of the draft forms of model contracts.

[25] The author has received some indication that, at least as early as the time that work on the February 15, 2007, oil and gas framework law was being completed, drafts of various model

To begin with, by their very nature, each of these contracts might be thought as tailored to specific needs. For example, to call something a DPC (development and production contract) suggests that exploration and discovery have already occurred, and the contract looks only toward field development and oil and gas production. Similarly, the EDC (exploration and development contract) seems to leave aside the task of actual oil and gas production; the EPC (exploration and production contract) would leave field development to another; and the FDC (field development contract) would leave both exploration and production to someone else. Clearly, however, it is unsettling to imagine a contractor agreeing to undertake exploration, leave aside development, and then return for execution of its production obligation, yet this seems to be the effect of any common understanding of an EPC. What is thus suggested is that, despite how the four forms of contract ascribed to official Iraqi government sources might be expected to function, the reality is that they function otherwise. As will be noted, the draft EPC attributed to Iraq does contemplate preproduction development activities. With this in mind, a couple of important observations should be made regarding these model contracts.

First, as to the matter of exploration activities, both the EPC and the EDC expectedly speak of and obligate the international oil and gas company serving as the contractor to undertake exploratory efforts. This is clear from the language of article 2.1(A)(i) of the latter,[26] and article 2.1(A) of the former,[27] with both explicitly referencing the scope of the contracts as encompassing operations to explore for petroleum. With regard to the DPC and FDC, however, neither contract indicates that its scope extends to activities involving exploration for oil and gas. The express language of article 2.1(a) of the DPC obliges the contractor to undertake only to "study, appraise, develop, and produce"[28] the relevant oil and gas reservoirs of the identified fields. In like manner, article 2.2(a) of the FDC alludes to the same obligation, with no mention of exploration.[29]

Second, as indicated earlier in connection with the fact that an EPC might be expected to have no development obligation attached to it, there are peculiarities inherent in some of the four model forms of contract. The just-mentioned article 2.1(A) of the EPC provides that its contractor obligations extend not only to the quite explicable duty to explore for oil and gas, but also to the duties to "appraise, develop, and produce" such.[30] As suggested earlier, it may seem

oil and gas contracts were circulated to those involved in the drafting process. Though the precise texts have not been seen, as best as can be determined, those models included an Exploration & Development Contract (EDC), Field Development Contract (FDC), Development & Production Contract (DPC), and Risk Exploration, Development & Production Contract.

26 See EDC, supra note 24 at art. 2.1(A) (i).

27 See EPC, supra note 24 at art. 2.1(A).

28 See DPC, supra note 24 at art. 2.1(a).

29 See FDC, supra note 24 at art. 2.2(a).

30 See EPC, supra note 24 at art. 2.1(A).

incongruous to denominate a document as an exploration and production contract, expecting someone other than the contractor to perform the intermediate task of development, but this model EPC leaves expectations aside and imposes duties on the contractor beyond what the contract's general appellation or title might suggest. If one looks closely, there are other instances in which the titles of some of these model forms of contract fail to accurately capture the full import of their obligations.

Third, and related to what was just suggested, a DPC is to be distinguished from an FDC not because the former covers specific and limited exploitation sites, and the latter much broader and general geographic areas, but because of their starkly different expectations regarding the government of Iraq's relationship to the contractor, and the handling of the hydrocarbon reservoirs being exploited. To begin with, article 2.2(a) of the model FDC states that in the contract, the contractor is acting "for and on the behalf of [the] Authority," with the Authority being the government of Iraq.[31] From the analogous provision of the model DPC, no such reference appears to the contractor acting on anyone's behalf other than its own.[32] Beyond this, however, it seems clear from the terms and provisions of the model FDC that what is envisioned is a contractor providing study, appraisal, development, and production activities for the government of Iraq in order to get fields up and producing, with an eventual handover of the production operations to a local Iraqi operating company.[33] The contract, lasting no more than 12 years (or until all costs and required remuneration have been received, if before then),[34] could be extended.[35] In any event, even after operations are transferred to a local company, pursuant to the terms of article 2.4 of the FDC, the contractor remains under a legal duty to provide assistance to that company for an additional 15 years[36] in accordance with a prenegotiated TSA (technical service agreement).[37] By way of contrast, according to the model DPC it is a much longer term arrangement, lasting 23 years, with the possibility of one 5-year extension.[38] Operations undertaken by the contractor are undertaken on its own behalf, but subject to the rules and regulations of Iraq.[39] As soon as the contractor is able to recover all of its costs, operations are to be transferred to a joint operating committee,[40] in which the contractor will have a minority stake.[41] Compensation for the contractor under the DPC

[31] See FDC, supra note 24 at art. 2.2(a).
[32] See DPC, supra note 24 at art. 2.
[33] See FDC, supra note 24 at arts. 2.2(d) and 8.8–8.16.
[34] See id. at art. 3.2.
[35] See id. at art. 3.3.
[36] See id. at art. 2.4.
[37] See id. at Addendum Four "Heads of Technical Service Agreement" at para. 3.
[38] See DPC, supra note 24 at art. 3.2–3.3.
[39] See id. at art. 9.3–9.11.
[40] See id. at art. 9.12–9.13.
[41] See id. at Addendum Three "Heads of Agreement for the Joint Operating Company" at para. 1.2.

shall include both cost recovery and profit oil allocations based on an R Factor formula.[42] Profit oil is a notion completely inapplicable to the FDC. Essentially, then, the DPC looks more like a form of production-sharing arrangement, and the FDC a form of service contract.

Another, or fourth, observation about the model forms of contract ascribed to the Iraqi government has to do with the distinction between the EDC and the EPC. As indicated earlier, because the EPC obliges the contractor to undertake development activity, that certainly cannot be cited as the source of the distinction. Rather, the real distinction resides in the very thing that makes the DPC and FDC different from each other: the former is more closely aligned with a form of production-sharing arrangement, and the latter is a form of service contract. The EDC, like the FDC, contemplates the contractor undertaking its exploration, appraisal, development, and production activities on the behalf of the government of Iraq.[43] Further, it contemplates that the results of the contractor's activities shall be handed over to a local operating company at a specific point in time.[44] And, as is true with respect to the FDC, the terms of the model EDC provide for a prenegotiated 15-year TSA to govern the provision of assistance by the original contractor to the local operating company once the handover has occurred.[45] On each of these counts, the model EPC differs. The EPC's article 2.1(A) provides nothing to suggest that the contractor is operating on the behalf of anyone other than itself. Its article 9 contemplates not a complete handover of operations to a local company, but a passage of authority to a joint operating committee, in which the original contractor will hold a minority stake.[46] In a few words, the EPC is a version of the DPC most probably contemplated as useful in regard to unexplored areas where hydrocarbons are suspected to exist.

Though the foregoing stresses commonalities and similarities between the EDC and FDC, as well as the EPC and DPC, there are a couple of important points of divergence between the basics of the EDC and FDC on the one hand, and the EPC and DPC on the other. As noted, the FDC has a term of 12 years, with the possibility of extension. The EDC, on the other hand, has a base term of 16 years for oil[47] and 17 years for natural gas,[48] but in neither case to ever exceed 20 years.[49] The increased length of contract for the EDC seems largely attributable to the uncertainties taken on when operating in areas where little is known about the existence of commercially viable deposits of

[42] Explaining the essence of the R Factor formula, see text accompanying infra note 144.
[43] See EDC, supra note 24 at art. 2.1(A) (i).
[44] See id. at arts. 2.1(A), 9.2, 9.8, 9.15–9.17.
[45] See id. at Addendum Four, "Heads of Technical Service Agreement," at para. 3.
[46] See EPC, supra note 24 at art. 9 and Addendum Three "Heads of Agreement for the Joint Operating Committee" at para. 1.2.
[47] See EDC, supra note 24 at art. 3.1(A).
[48] See id. at art. 3.1(B).
[49] See id. at art. 3.2.

oil and gas. Also, the EDC is specifically described as a "risk" contract[50] – that is, one in which costs may not be recoverable, in the absence of discovering, developing, and producing oil or gas. The EPC carries the same description.[51] In contradistinction, the FDC is not specifically styled a "risk" contract.[52] And neither is the DPC.[53] This seems to reflect that contractors under either form of development contract are acting on the behalf of the government of Iraq and are likely to be operating in areas where it is known or much more likely that oil and gas deposits exist.

With these general comments about the four model forms of contract ascribed to the central government kept firmly in mind, it must be reiterated that, at present, it is not at all clear what the exact details of these model contracts will look like. From official Ministry of Oil indications, observations about existing contract practices, and reasonable conjecture, it is at least possible to speculate regarding potential contract structure. As will be seen shortly, such speculation is not needed when it comes to the KRG. Some time ago it publicly disseminated a model PSC, containing much detail on virtually every conceivable matter of relevance. The central government in Baghdad has chosen a significantly slower and more tortuous course, in part because of dissatisfaction and continuing rancor concerning the terms of its basic oil and gas framework law, and in part due to an abundance of caution about moving too fast in directions that might be characterized by critics as taking Iraq back to contract regimes strikingly similar to those when its industry was dominated and controlled by outsiders. There certainly appears to be a commitment from Ministry of Oil officials to complete the task of creating and promulgating model forms of contract. At this juncture, however, it seems safe to say that this is unlikely to occur with any great celerity.

III. THE KRG'S MODEL FORM OF PSC: THE PRINCIPAL PROVISIONS SUBGROUP

In an effort to flesh out the details of the KRG's 2007 Oil and Gas Law, the regional government published in September 2007 a model PSC,[54] the latest iteration of which was promulgated in mid-July 2008.[55] That current version of the model PSC runs 115 pages in length and is composed of 47 substantive articles, covering 89 pages, and two annexes – the first being available for

[50] See id. at art. 2.1.
[51] See EPC, supra note 24 at art. 2.1.
[52] See FDC, supra note 24 at art. 2.1.
[53] See DPC, supra note 24 at art. 2.1.
[54] See KRG Model PSC (Sept. 6, 2007), available at www.krg.org/uploads/documents/KRG%20Model%20PSC_2007_09_06_h14m3s46.pdf (accessed Mar. 15, 2008).
[55] See Production Sharing Contract [] Block Kurdistan Region (July 17, 2008), available at www.krg.org/grafik/uploads/KRG_Model_PSC_20071112_2008_07_17_h15m59s45.pdf (accessed Aug. 11, 2008) (hereinafter KRG's Model PSC).

reproduction of a map showing the coordinates and contract area corner points; and the second, consisting of 23 pages, articulating various rules for appropriate accounting procedures. Though no authoritativeness can be attributed to any particular categorization of the model PSC's provisions, they are susceptible to being broken into two broad groupings: major provisions and subsidiary provisions. The major provisions fall either into the subgroup of principal provisions or into that of adjectival provisions. The former constitute the basic operative provisions of the PSC, and the latter those that facilitate the functioning of the former. What has here been characterized as the subsidiary provisions are all those other provisions that flesh out the balance of the PSC. In what follows, only the major provisions are accorded any degree of attention; the subsidiary provisions such as article 7 on relinquishments, article 9 on guarantees, article 15 on accounting and audits, article 22 on subcontracting, article 31 on taxation, article 33 on pipelines, and article 38 on decommissioning receive no special analysis and examination.

Again, the major provisions of the KRG's model PSC can be regarded as either principal or adjectival. The present section focuses on the principal provisions alone, with the adjectival provisions being addressed in Section IV to follow. For purposes of analysis and discussion, however, it bears noting that each of these two subgroups (principal as well as adjectival) can be broken into four distinct categories. The four categories in the principal provision grouping are made up of fourteen articles, and the four categories in the adjectival grouping consist of eight. When it comes to the principal provision subgroup, its four categories can be characterized as (1) substance and nature of the production-sharing contract; (2) the host government's right of participation; (3) the work duties imposed on the contract holder; and (4) the financial obligations associated with the contract. Each of these four categories will be examined in turn.

Substance and Nature of the PSC

The first of the categories, that involving the substance and nature of the PSC, implicates not just article 2's scope of contract provision, but also article 6 on the length or duration of the contract, article 14 on the matter of natural gas, and article 16 on the contract holder's rights and obligations. Beginning with article 2, it provides that during the term of the PSC, the Contractor is vested with the "exclusive right and authority to conduct all Petroleum Operations" in the contract area.[56] This entitles the Contractor to freely "access and operate" within the contract area, make "use [of] access roads," "sand, water, electricity and any other natural resources" inside or outside the contract area, "import any goods, material, equipment and/or services required,"

[56] See KRG's Model PSC, id. at art. 2.1.

and "use land or property" belonging to the KRG, or get the government to assist in acquiring permission from necessary private property holders.[57] The Contractor is not entitled to exploit for nonwork purposes natural resources other than petroleum,[58] shall be responsible to the KRG for the "conduct of its Petroleum Operations,"[59] and shall conduct such at the Contractor's "sole cost, risk and peril on behalf of the [KRG]."[60] Article 2.6 provides that the "Contractor shall only be entitled to recover Petroleum Costs incurred . . . in the event of a Commercial Discovery" and in accordance with article 25,[61] with article 2.7 noting that the so-called Profit Crude Oil and/or Profit Natural Gas that remains after the recovery of Petroleum Costs "shall be shared between the Parties" in accordance with article 26.[62] Despite the fact that the KRG's Oil and Gas Law of 2007 applies to Petroleum Operations and defines that in such a way as to include pipelines and refineries,[63] because its model PSC focuses on the exploration, development, and production stages of oil and gas activity, its definition of the Petroleum Operations activities governed by the terms of the PSC is confined to operations involving "Exploration," "Gas Marketing," "Development," "Production," "Decommissioning," "as well as any other activities or operations directly or indirectly related or connected with . . . said operations."[64]

Two other things should be noted in conjunction with article 2. First, the KRG's Oil and Gas Law, as referenced earlier, contemplates the use of the PSC, but also "other contracts which the Minister [(of Natural Resources)] considers to provide good and timely returns," in fact mentioning in article 39, service, field management, installation, construction, and consulting contracts.[65] For obvious reasons, such other contracts are not addressed by the provisions of the model PSC. Second, the scope of the Kurdistan government's PSC is also illuminated by article 16's listing of contractor rights and obligations. These consist of the obligations to appoint a permanent representative for and open an office in Kurdistan;[66] act consistently with the terms of the contract;[67] provide the government with periodic data, including on its exploration, development, and production operations;[68] submit to work site inspection notified in advance;[69] permit government use of facilities so as to ensure the performance

[57] See id. at art. 2.8.
[58] See id. at art. 2.5.
[59] See id. at art. 2.4.
[60] See id. at art. 2.3.
[61] See id. at art. 2.6.
[62] See id. at art. 2.7.
[63] See Chapter 3, notes 123 and 137–140.
[64] See KRG's Model PSC, supra note 55 at art. 1 "Petroleum Operations."
[65] See supra Chapter 3, text accompanying notes 172 and 166.
[66] See KRG's Model PSC, supra note 55 at art. 16.1.
[67] See id. at art. 16.2.
[68] See id. at art. 16.3.
[69] See id. at art. 16.5.

of government contracts and related KRG Oil and Gas Law tasks;[70] take on responsibility for any loss or damage caused by the fault of the contractor or its agents;[71] provide compliance with health, safety, and environmental duties;[72] and sell to the KRG at international market price "any amounts of [oil or gas] that the Government shall deem necessary to meet . . . internal consumption requirements."[73] This last obligation, however, is inapplicable to nonassociated natural gas produced by the contractor.[74] The contractor has corresponding rights to use "any Affiliate," as well as its "Subcontractors, and . . . employees, consultants, and agents";[75] "freely use" any petroleum produced in the contract area "for . . . Petroleum Operations";[76] to take its share of petroleum "in kind" and sell or otherwise dispose of such;[77] and, to expect that reductions in the maximum efficient rate of production from a reservoir that affect the contractor's production rate, whether imposed by the KRG, the federal government, or some international regulatory body, are allocated on a pro rata basis among all operators then producing in Kurdistan, and that an extension of its development and production period will be granted so as to permit such imposed reductions to be made up.[78]

Article 6 sets forth the term or duration of the PSC. This is accomplished by taking the approach of the KRG's Oil and Gas Law of breaking activity into either exploration or development, with the former having a duration under the PSC of no more than 7 years,[79] consisting of an initial 3-year first subperiod, with a 2-year second subperiod, and two possible additional 1-year extensions.[80] As will be seen in the discussion of contractor work duties, specific minimum work obligations correspond with each subperiod or extension, and for a contractor's right to proceed to or request a follow-on subperiod or extension depends upon fulfillment of such obligations with respect to the previous period.[81] During the exploration period, contractors must pay a surface exploration rental of (U.S.)$10 per square kilometer, with such payments being a recoverable cost.[82] Contractors have the right, upon 30 days notice, to withdraw from exploration at any time, assuming they have completed all work obligations related to the

[70] See id. at art. 16.7.
[71] See id. at art. 16.8.
[72] See id. at art. 16.11.
[73] See id. at art. 16.15.
[74] See id. at art. 16.15, third para.
[75] See id. at art. 16.2, second para.
[76] See id. at art. 16.4.
[77] See id. at art. 16.14
[78] See id. at art. 16.12.
[79] Though see id. at art. 6.9 (the exceptional case of natural gas with an exploration period not limited by the 7-year rule).
[80] See id. at art. 6.1, 6.2, 6.5–6.6.
[81] See id. at art. 6.2.
[82] See id. at art. 6.3.

current subperiod or made appropriate payments to the government.[83] Further, if by the end of the exploration period no Commercial Discovery has been made – that is to say, petroleum "recoverable at the surface with a measurable flow utilising technique[]" has not been found in sufficient quantities to render the discovery "potentially commercial"[84] – the PSC terminates.[85] The development period under the PSC, during which time the contractor possesses an exclusive right of production, is to last for essentially 20 years, with an automatic additional 5 years, the initial period commencing when the contractor declares a Discovery a Commercial Discovery.[86] In the event that the contract area is still commercially productive thereafter, the contractor is "entitled to an extension" of the contract for another 5 years.[87] Upon proper notice, the contractor is also entitled to terminate production operations at any time.[88]

When it comes to the exploitation of natural gas, which the KRG seeks to encourage, article 14 of the model PSC acknowledges that complications that do not present themselves in connection with crude oil production may be encountered by contractors and, as a result, it provides for more generous cost recovery and profit sharing, but basically in the context of contract provisions that are "materially similar" to those of a crude oil PSC.[89] It must be observed, however, that the KRG's 2007 Oil and Gas Law places a cap on cost recovery from gas production not exceeding 60%, after deduction for royalties.[90] Article 14 permits contractors engaged in crude oil activities to "freely use" natural gas to enhance recovery efforts.[91] Excess associated natural gas that is not used or sold by the contractor is to be made available "free of charge" to the KRG upon request, and if the gas is subsequently marketed by the government, the contractor "may elect to participate," at its own cost, in providing future supplies for marketing.[92] As for flaring of natural gas, article 14.12 prohibits it except in two instances: first, flaring for up to 12 months if "necessary for testing or other operational reasons," including that associated gas is not needed for reinjection and the KRG is not interested in taking it for marketing; and, second, if the government grants the contractor authorization to flare.[93] In the event the

[83] See id. at art. 6.7.
[84] This represents a distillation of the definitions of the terms "Discovery" and "Commercial Discovery." See id. at art. 1 "Discovery" and "Commercial Discovery."
[85] See id. at 6.8.
[86] See id. at arts. 6.10 and 6.11.
[87] See id. at art. 6.12.
[88] See id. at art. 6.13.
[89] See id. at art. 14.1.
[90] See KRG's Oil and Gas Law, supra Chapter 3, note 121 at art. 37, First (6).
[91] See id. at art. 14.2.
[92] See id. at art. 14.3. The idea of associated gas that is not used or sold by the contractor being made available to the KRG free of charge seems consistent with the broad language of the KRG's Oil and Gas Law, art. 38, which speaks of the contract being able to provide terms for the "optimal utilisation of surplus volumes" of natural gas.
[93] See id. at art. 14.12.

contractor determines that nonassociated natural gas "may become a Commercial Discovery" and that such may be "subject to Gas Marketing Operations," defined as activities to locate commercial markets, determine viable technical means to extract the gas, or evaluate the quantity, quality, location, and associated costs connected with producing or supplying it, then at the end of the Gas Marketing Operations, the contractor is to submit to a so-called management committee, including representatives from the government and the contractor, a statement as to whether the discovery is a Commercial Discovery.[94] Prior to commencing Gas Marketing Operations, however, a contractor's Gas Marketing Work Program and Budget are to be submitted to and scrutinized by the management committee, with input from the KRG.[95] Also, expenses incurred in Gas Marketing Operations are deemed recoverable petroleum costs.[96]

The Host Government's Right of Participation

Switching away from the first category of the principal provision subgroup – the substance and nature of the production-sharing contract – and moving to the second category – the host government's right of optional participation – article 4 of the model PSC is completely controlling. Participation is envisioned as taking one of two possible forms: government-held interest in the petroleum operations of a PSC contractor, or KRG-nominated third-party participation interest. The former is the focus of article 4.1–4.7 and essentially contemplates a "Public Company" being engaged in the participation; the latter is addressed in article 4.8–4.12 and involves a KRG designated third party. Interestingly, the terms of the model PSC simply define "Public Company" as one incorporated under Kurdish law,[97] which might lead to the conclusion that privately held companies are meant. However, the KRG's Oil and Gas Law itself references KEPCO, KNOC, KOMO, and KODO as all being "public companies,"[98] and the Law's article 37, First (9), plainly indicates that it is participation by the "Regional Government" that is contemplated.[99] By way of contrast, no

[94] See id. at arts. 14.5 and 14.6.
[95] See id. at art. 14.8.
[96] See id. at art. 14.7.
[97] See id. at art. 2, "Public Company."
[98] See KRG's Oil and Gas Law, supra Chapter 3, note 121 at art. 10, First; art. 11, First; art. 12, First; and art. 13, First.
[99] See id. at art. 37, First (9). See also KRG's Model PSC, supra note 55 at art. 4.9, fourth para., indicating that, at least for art. 4.9, "Public Company" shall be a wholly owned entity of the KRG. Interestingly, given that art. 37, First (9), of the KRG's Oil and Gas Law provides that PSCs shall call for "Regional Government participation for a direct working interest" (emphasis added), there may be some question as to whether the idea of nominated third-party participation is contemplated. It should be noted that, although the chief way government participation could be effected would be through participation by a public company like KEPCO, KNOC, and so forth, it is not wholly unreasonable to conceive of it as being effected through a nominated third party. The key seems to be more the matter of a "direct working interest," as opposed to a mere indirect portfolio interest, and not whether that interest was held by a public versus a private entity.

definition appears in the model PSC as to the meaning of the concept "third party." Presumably, it could be any private entity organized under Kurdish law, as well as any entity organized under the laws of a foreign country. With respect to participation through government interest, in no case is it to be exercised at less than 5%; however, an upper limit is not specified.[100] In order to avoid the claim of waiver of the right of government participation, it must be exercised no later than 180 days after a PSC contractor declares an oil or gas find to be a Commercial Discovery.[101] By virtue of the language of article 4.3 (c), all costs incurred by a contractor prior to the participation by the government must be borne by the contractor alone, not the subsequently participating government. Similarly, failures by the government participant to comply with contractual and other obligations can neither be ascribed to the contractor nor serve as a basis for KRG termination of the PSC.[102] Government-nominated third-party participation is basically to occur under the same participation interest level rules as government participation.[103] The timing for exercising such, however, is different and is not pegged to the idea of a Commercial Discovery. Essentially, government-nominated third-party participation must occur within 12 months of the date the relevant PSC becomes effective.[104] Article 4.11 clearly provides that if timely nomination of a third-party participant is not forthcoming, exercise of the right is waived.[105] A Joint Operating Agreement (JOA), which details the rights, duties, and relationship between contractors and participants, is contemplated with respect to both government and third-party participation. Among the matters that such JOA must address, article 14.14 specifies the voting levels of the collaborators' operating committee, and the fact that possible transfers of relevant contractor or participant interests hold up to certain standards, including financial capability of a proposed transferee.[106]

Work Duties Imposed on the Contract Holder

The work duties imposed on a contract holder represent the third category under the broader heading of the principal provisions subgroup. In a sense, these duties may be seen as related to the previously described contractor obligations set forth in article 16,[107] but they are quite distinct in that they deal exclusively with the level of contractor work expected to be performed during the exploration, discovery, development, and production phases of oil and gas activity. Before proceeding to discuss the work duties category, one should not lose sight of

[100] See KRG's Model PSC, supra note 55 at art. 4.1.
[101] See id. at art. 4.2.
[102] See id. at art. 4.5.
[103] See id. at art. 4.8.
[104] See id. at art. 4.9.
[105] See id. at art. 4.11.
[106] See id. at art. 14.14.
[107] See text accompanying supra notes 66–78.

the other broad subgroup that complements the principal provisions subgroup. That is the adjectival provisions subgroup, which is made up of provisions that help facilitate or implement the objectives of the principal provisions subgroup and is the subgroup examined in Section IV. However, returning to the task at hand – the work duties imposed on contract holders – articles 10–13 of the KRG's model PSC are key and instrumental. From their very titles – article 10, "Minimum Exploration Work Obligations"; article 11, "Exploration Work Programs and Budgets"; article 12, "Discovery and Development"; and article 13, "Development and Production Work Programs and Budgets" – the essential objective of these provisions seems clear.

With greater specificity, article 10 enumerates the minimum work obligations to be performed by a contractor during the two subperiods of oil and gas exploration, which, it will be recalled,[108] are basically designed to run for a 3-year juncture, and a 2-year juncture, with possible 1-year extensions. During the first exploration subperiod, the contractor must carry out certain geological and geophysical studies, perform a search for existing data on the contract area, conduct field work, acquire and analyze two-dimensional seismic data, and drill one exploratory well, at agreed-to and specified cost levels.[109] In the second exploration subperiod, further seismic data is to be acquired and analyzed, and a second exploratory well is to be drilled, unless not warranted by the results of earlier activities.[110] All these minimum exploratory work obligations have to be met even if they may result in the contractor's financial outlay exceeding levels to which it had earlier committed itself.[111] Obligations in the second exploration subperiod, however, may be escaped if the contractor has properly notified the KRG that its activities will not proceed beyond the first subperiod.[112]

Now the exploration phase financial obligations of a contractor are to be spelled out in an annual Exploration Work Program and Budget submitted to and approved by the same management committee that has authority concerning a contractor's Gas Marketing Work Program and Budget,[113] and empowered to receive contractor declarations of Commercial Discovery regarding nonassociated natural gas.[114] As in the case of the Gas Marketing Work Program and Budget, the KRG is entitled to scrutinize and request revisions in a contractor's Exploration Work Program and Budget.[115] Nothing indicates, however, whether the revisions requested must be implemented by the management committee. In terms of contractor expenditures, article 11.5 and 11.6 indicate

[108] See text accompanying supra notes 79–80.
[109] See KRG's Model PSC, supra note 55 at art. 10.2.
[110] See id. at art. 10.3.
[111] See id. at art. 10.4(b).
[112] See id. at art. 10.4(a).
[113] See text accompanying supra note 95.
[114] See text accompanying supra note 94.
[115] See KRG's Model PSC, supra note 55 at art. 11.4.

that expenditures not detailed in the budget can be recoverable as a Petroleum Cost when made to respond to emergencies involving protection of life, property, or the environment, but those made for nonemergency reasons are neither authorized nor recoverable unless they exceed budgeted totals by no more than 10% and are reported to the management committee "as soon as is reasonably practicable."[116]

Any exploration phase well that results in a Discovery of oil or gas is to be notified to the KRG and, in the form of a so-called Discovery Report, to the management committee.[117] If it is thought that the Discovery has commercial potential, and the contractor would like to appraise the situation, it "may drill any additional Exploration Well or any Appraisal Well" and has 90 days after the notification of the Discovery to submit to the management committee an Appraisal Work Program and Budget identifying certain appraisal work specifics.[118] Essentially the same 10% and report rule concerning expenditures in excess of the budgeted exploration work program applies to appraisal work.[119] Within 90 days of the completion of the Appraisal Work Program, a so-called Appraisal Report is to be submitted to the management committee,[120] and this is to be accompanied by a contractor-written statement of whether the original Discovery is or is not a Commercial Discovery, and if not, whether it is still to be regarded as a significant Discovery that could become commercial with additional work.[121] In the event of a Commercial Discovery, the contractor has 180 days from the statement of such to the management committee to submit its "proposed Development Plan," and that Plan is to detail a long list of things ranging from the drilling and completion of development wells and water or gas injection wells, to the laying of gathering as well as transport pipelines, to the construction of storage facilities, preliminary decommissioning and site restoration plans, and financing schemes for meeting contractor work obligations.[122] The proposed Development Plan is subject to input from the KRG, but it seems clear that the management committee, with its representatives from the government, has the final word on suggested revisions.[123] Article 12.9 explicitly provides that "[t]he Development Plan shall be considered approved by the Government if the Government, through its representatives on the Management Committee, indicates its approval in writing."[124]

Article 13 addresses both Development Work Programs and Budgets, and Production Work Programs and Budgets. The Development Work Program

[116] See id. at arts. 11.5 and 11.6.
[117] See id. at art. 12.1.
[118] See id. at art. 12.2 and 12.3, first para.
[119] See id. at art. 12.3, second para.
[120] See id. at art. 12.4–12.5.
[121] See id. at art. 12.6.
[122] See id. at art. 12.8.
[123] See id. at art. 12.10.
[124] See id. at art. 12.9.

and Budget follows upon the management committee's approval of the article 12 proposed Development Plan and is to be submitted for management committee and KRG input and scrutiny within 90 days of the Development Plan being approved.[125] Again, certain details need to be specified in the Development Work Program and Budget,[126] and the 10% and report rule applicable to excess expenditures under the exploration work program and the appraisal work program applies here as well.[127] Additionally, on an annual basis and no later than October 1 of each year "preceding the estimated commencement of production" of oil or gas, a contract holder must submit to the management committee, and for scrutiny and input by the KRG, a Production Work Program and Budget.[128] The basics of the Production Work Program and Budget track those of the other work programs and budgets.[129] One obvious difference, though, is found in article 13.10. It fixes on the contract holder an obligation to pay an annual (US)$100 per square kilometer Production Rental for the land area covered by the PSC once commercial production commences, allowing recovery of any such payments as a Petroleum Cost.[130]

Financial Obligations Associated with the Contract

The financial obligations associated with a contract represent the fourth, and final, category under the broader heading of the principal provisions subgroup of the terms of the KRG's model PSC. The relevant articles from that document are 24, 25, 26, 27, and 29, as well as Annex B. They address contractor payment of royalties, recovery of petroleum operation costs, the sharing of profits between the contractor and the government from what remains after satisfaction of the preceding two items, standards regarding the valuing of oil and gas produced, and financial procedures relevant to the foregoing. The condensed version on the matter of royalties is that it entitles the government to receive, typically in cash, but conceivably in kind at the KRG's option (with the contractor committing to assist the government in making subsequent sales of in-kind deliveries), 10% of what is termed by article 24 Export Petroleum, or distinguishing between oil and gas, what is termed Export Crude Oil and Export Non-Associated Natural Gas.[131] Essentially, Export Petroleum, or its more particular Export Crude Oil and Export Non-Associated Natural Gas, is what remains from the total amount actually produced by a contractor, after deductions have been made for

[125] See id. at art. 13.2.
[126] See id.
[127] See id. at art. 13.4 and 13.5.
[128] See id. at art. 13.6.
[129] See id. at arts. 13.6–13.9.
[130] See id. at art. 13.10. On the fact the KRG's Oil and Gas Law permits the collection of an annual surface rental, see KRG Oil and Gas Law, supra Chapter 3, note 121 at art. 37, First (8).
[131] See id. at art. 24.4.

all oil or gas used in Petroleum Operations, reinjected into a petroleum field, lost, flared, or incapable of being used or sold (e.g., because of its chemical composition or other natural characteristics).[132] The 10% royalty with respect to Export Crude Oil is to be without regard to the gravity of the oil.[133] Under some royalty formulations reviewed in Chapter 3, rates are adjusted in accordance with crude oil gravity.[134] All in-cash royalty payments are to be made quarterly, within 30 days of the end of each quarter,[135] and the contractor "shall be entitled to export freely the volume of Export Petroleum [(i.e., oil or gas)] corresponding to the Royalty determined [to be owing] . . . for the purpose of paying the Royalty in cash."[136] In calculating in-cash amounts due and owing, the international market price at the delivery point of the exported crude oil is to be used, whereas royalties on relevant natural gas are to be calculated on the "actual price obtained" at the delivery point.[137]

Export Crude Oil and Export Non-Associated Natural Gas (i.e., Export Petroleum) remaining subsequent to deductions for the payment of royalties, and all associated natural gas produced by the contractor, is subject to the recovery of petroleum costs incurred by the contractor in undertaking its operations. It is from what remains after first making deductions for royalties, and then for petroleum cost recovery, that profits are ultimately to be shared between the contractor and the KRG. With regard to cost recovery, article 25 terms the crude oil and nonassociated natural gas remaining after royalty deductions as Available Crude Oil and Available Non-Associated Natural Gas, with all associated natural gas termed Available Associated Natural Gas. Collectively, article 25 terms these three Available Petroleum.[138] Items of cost incurred by the contractor for which a cost recovery claim can be made are to be lodged against Available Crude Oil and Available Non-Associated Natural Gas (not Available Associated Natural Gas), up to a percentage amount to be negotiated in each PSC,[139] with the order of recovery being first for production costs, then exploration costs, followed by gas marketing costs, then development costs, and finally decommissioning costs.[140] To the extent costs exceed Available Crude Oil or

[132] See id. at art. 24.2.
[133] See id. at art. 24.4(a).
[134] See art. 46, Sec. 2 (e) of the Kurds original 2006 proposed Petroleum Act of the Kurdistan Region of Iraq, supra Chapter 3, note 120.
[135] See id. at art. 24.7(c).
[136] See id. at art. 24.7(d).
[137] See id. at art. 24.7(a) and (b).
[138] See id. at art. 25.1.
[139] See id. at art. 25.3 and 25.4. However, it will be recalled from what was indicated earlier, that cost recovery for natural gas activities is capped at a maximum of 60% of production, after deductions for royalties. The same provision of the KRG's Oil and Gas Law capping gas cost recovery also caps crude oil cost recovery at 45% of production, after deductions for royalties. See KRG's Oil and Gas Law, supra Chapter 3, note 121 at art. 37, First (6).
[140] See KRG Model PSC, supra note 55 at art. 25.5.

Available Non-Associated Natural Gas in any particular calendar year, unrecovered amounts may be carried forward to subsequent years.[141] Furthermore, contractors are "entitled to receive, take in kind and to export freely all Available Petroleum to which . . . entitled for recovery of . . . Petroleum Costs . . . and to retain Abroad any proceeds from the sale of such Available Petroleum."[142] To the extent a contractor has operations in two or more PSC locations, it is not entitled to use Available Petroleum from one site to satisfy petroleum costs claims from another.[143] As to the matters of accounting records, production and pricing statements and records, the classification, definition and allocation of costs and expenses, the identification of those costs recoverable with minimal government approval, those costs deemed not recoverable under any circumstance, and other hyperdetails associated with cost recovery and the like, the twenty-three pages of specificity set forth in Annex B of the KRG's model PSC provide useful guidance.

Regarding the Profit Petroleum (i.e., profit crude oil or profit (nonassociated) natural gas) that remains after deductions have been taken for royalties and then for petroleum cost recovery, article 26 sets forth the somewhat familiar "R Factor" formula for determining the amount of Profit Petroleum to which a contractor is entitled. In oversimplified terms, the "R Factor" formula is based on the rate of return on investment, or the ratio between cumulative revenues taken in by and cumulative costs incurred by a contractor on a particular petroleum operation.[144] This approach is clearly consistent with the language of the KRG's Oil and Gas Law, article 37, First (7).[145] The precise percentage share that operates on the "R Factor" to produce the exact amount of Profit Petroleum taken by the contractor remains for negotiation on a case-by-case basis with respect to both profit crude oil and profit nonassociated natural gas.[146] As with cost recovery oil or natural gas, profit crude or nonassociated natural gas is freely exportable by the contractor and revenues from the sale of such may be kept offshore.[147] It must be recalled that the KRG, through a Public Company (such as KEPCO, KNOC, KOMO, or KODO), or through a nominated third-party entity, is entitled to participate in an original contract holder's PSC petroleum operations. This means that the Profit Petroleum rules of article 26 also apply to determine its share of the profits. Along this line, article 26.10 indicates that any government share of Profit Petroleum determined through use of the "R Factor" formula "shall be deemed to include a portion representing the corporate income tax imposed upon and due by each Contractor Entity."[148] The idea

[141] See id. at art. 25.6.
[142] See id. at art. 25.9.
[143] See id. at art. 25.10.
[144] See id. at art. 26.3 and 26.4.
[145] See KRG's Oil and Gas Law, supra Chapter 3, note 121 at art. 37, First (7).
[146] See KRG Model PSC, supra note 55 at art. 26.5.
[147] See id. at art. 26.9, second para.
[148] See id. at art. 26.10.

is that the government's share of the Petroleum Profits is to be supplemented by the amount of tax liability owed by any other participant contractor entity, with the government then holding and remitting those taxes for payment.[149] The nongovernment, original participating contractor is required to make regular detailed reports to the government regarding all relevant aspects going into the division of Profit Petroleum;[150] however, the costs it incurs in lifting the KRG's share "shall not be considered Petroleum Costs and shall be charged to the Government according to terms to be mutually agreed between the Contractor and the Government."[151]

Since so much of the concepts of royalty, cost recovery, and profit petroleum hinge on the monetary values ascribed to crude oil or natural gas that has been produced, and on actual metering of quantities lifted or delivered, article 27 articulates several useful standards. In terms of monetary values, it states that natural gas values shall be the prices actually obtained at the delivery point.[152] For oil, however, it is to be the international market price, calculated on the average price in U.S. dollars per barrel received at the delivery point during the particular calendar quarter from the execution of arm's-length sales.[153] Such sales do not include transactions between contractors, or with their affiliates or the KRG, or involving exchanges or noncommercial practices.[154] Essentially, such sales involve parties with "no direct or indirect relationship or common interest whatsoever."[155] The average price is initially calculated by the contractor making such sales, but the contractor is required to supply the KRG with evidence regarding the sales, and this can be disputed by the KRG, with subsequent reference then being made to an expert for resolution under the dispute settlement terms of the PSC.[156] Relevant oil and gas is to be metered at the delivery point through the use of equipment installed and maintained by the contractor, but subject to KRG inspection.[157] Defects in equipment are to be addressed with haste,[158] and any questions regarding the equipment shall likewise be submitted to an expert for resolution.[159]

Payments owing by a PSC contractor to the government are to be made in U.S. dollars and offset against payments due by the KRG to the contractor.[160]

[149] See id.
[150] See id. at art. 26.12 and 26.13.
[151] See id. at art. 26.14.
[152] See id. at art. 27.3.
[153] See id. at art. 27.1 and 27.2. If there are no such sales, then art. 27.2, third and fourth paras., provide that a predetermined basket of comparable crude oil sales from other contract areas shall be used to calculate the international market price.
[154] See id. at art. 2 "Arm's-length Sales."
[155] See id.
[156] See id. at art. 27.2, second para.
[157] See id. at art. 27.6.
[158] See id. at art. 27.6 (speaking of repairs within 15 days).
[159] See id. at art. 27.7.
[160] See id. at art. 29.1.

Similarly, payments owed to the contractor by the government are to be offset by what the KRG is owed by the contractor and, when made, are to be in U.S. dollars.[161] Interest at the London Inter Bank Offer Rate, plus 2%, is due in both instances when 30 days late.[162] In view of Iraqi interest in an oil and gas revenue-sharing plan, as discussed in Chapter 5, it is also provided by article 29 of the KRG's model PSC that payments owed to the government in the form of royalties, proceeds from oil and gas sales undertaken by a contractor on the behalf of the government, or production bonuses can be directed to be paid into a revenue-sharing fund.[163] It also bears noting that contractors, as well as their affiliates, subcontractors, and personnel, are guaranteed the right to freely convert currency associated with petroleum operations and transfer it abroad.[164]

IV. THE KRG'S MODEL FORM OF PSC: THE ADJECTIVAL PROVISIONS SUBGROUP

As observed at the beginning of Section III, the major (as distinguished from subsidiary) provisions of the KRG's model PSC can be divided into a principal provisions subgroup and an adjectival provisions subgroup. The preceding Section broke the principal provisions into four categories – scope of contract, host-country participation, contractor work duties, and financial obligations. The adjectival provisions subgroup, too, can be split into four categories of provisions: (1) those dealing with the making of decisions; (2) those addressing the handling of lands and assets; (3) the matter of contract "stabilization"; and (4) important miscellany.

The Making of Decisions

Beginning with the first of the four categories, the making of decisions, the central provision would appear to be article 8, concerning the management committee, previously referenced as being deeply involved in both the issue of contractor declaration that a discovery is of sufficient magnitude to warrant characterization as a Commercial Discovery, and that of approval of Exploration, Appraisal, Development, and Production Work Programs and Budgets. According to the terms of the article, the management committee is composed of four members, two each designated by the KRG and the contractor, with one of the government's designees serving as chair, and the vice-chair a designee of the contractor. The committee is to provide "orderly direction of all matters

[161] See id. at art. 29.3.
[162] See supra notes 130 and 131.
[163] See KRG's Model PSC, supra note 55 at art. 29.2.
[164] See id. at arts. 29.6, 29.7, 29.10, 29.12.

pertaining to the Petroleum Operations and the Work Programs"[165] and to review, deliberate, decide, and give advice, suggestions and recommendations concerning Work Programs and Budgets, contractor activity reports, production levels, accounting of Petroleum Costs, procurement procedures, and Development Plans and Budgets, as well as "any matter having a material adverse effect on Petroleum Operations," or "any other subject matter of a material nature" that the parties are willing to take up.[166] The parties are to attempt to reach unanimous decisions, but if that is not possible, the chair "shall have the tie-breaking vote."[167] Two exceptions exist with respect to that general rule, however. The first is that tie votes on proposals submitted by the contractor during the Exploration Period are "deemed adopted" by the management committee.[168] The second is that unanimity is always required (and no tie-breaking vote cast by the chair is possible) when it comes to certain specific kinds of matters, including approvals of, or material revisions to, Exploration Work Programs and Budgets prepared after the first Commercial Discovery and related to it; approvals of, or material revisions to, Development Plans, production schedules, lifting schedules, and Development and Production Work Programs and Budgets; procedural rules of the management committee; insurance issues; approval of, or material revisions to, procurement procedures or proposed pipeline projects; approval of the establishment of a Decommissioning Reserve Fund, or the creation of, or material revision to, any Decommissioning Plan; establishment of the Terms of Reference for the submission of party disagreements to experts for ultimate determination; approval of petroleum costs in excess of 10% of any budgeted amount; and any matter having a material adverse effect on Petroleum Operations.[169] The management committee is entitled to request the creation of technical or other subcommittees to assist it,[170] and all cost incurred by the PSC contractor for management or subcommittee meetings are to be treated as recoverable Petroleum Costs.[171]

Handling of Land and Assets

Articles 17–21 of the model PSC make up the second category of adjectival provisions – the category concerning land and assets. Article 17 declares that the KRG is obligated to make available any public lands required for petroleum operations and allow the contractor to build and maintain necessary facilities thereon, above or below ground.[172] In the event that required lands are not

[165] See id. at art. 8.1.
[166] See id. at art. 8.2.
[167] See id. at art. 8.3, second and third paras.
[168] See id. at art. 8.4.
[169] See id. at art. 8.5.
[170] See id. at art. 8.10
[171] See id. at art. 8.11.
[172] See id. at art. 17.1.

owned by the KRG, the contractor is first required to endeavor to reach a use agreement with the owner.[173] If these efforts prove unsuccessful, the contractor notifies the government, which shall, if the contractor's use is to be of short duration, determine the fair and reasonable level of compensation to be paid by the contractor to the owner (presumably for a government-compelled right of use),[174] or if the use or its effect is to be long lasting, commence expropriation action.[175] Regarding the latter, such action is to result in title being vested in the KRG, with the contractor simply being "entitled [to] free use of the land or property" for the petroleum operations.[176] Expenditures incurred or compensation paid by the contractor for land or property use "shall be considered a Petroleum Cost[] and shall be recoverable."[177] Articles 17.3 and 17.5 provide the contractor with extensive rights to use the whole panoply of existing KRG infrastructure in the context of petroleum operations, and 17.6 allows it to make use of soil, timber, sand, stones and other items of property, though it should be noted that the KRG's 2007 Oil and Gas Law provides that the terms of any particular PSC (or other contract) can limit a contractor's rights of use.[178] The government has the right, during emergencies, to request use of contractor facilities and infrastructure.[179] It also retains the right in the area covered by the contractor's PSC to build, operate, and maintain roads, railways, airports, security installations, pipelines, telecommunication facilities, and other sorts of infrastructure, so long as this does not increase contractor petroleum operation costs or materially affect such activities.[180] In the event that this is the result of the government's activities, it is a recoverable petroleum cost for the contractor.

Government assistance in regard to access to property not owned by the KRG is but one area where such assistance is required. The government is also to provide assistance in connection with securing a whole host of permits, from those required for use and installation of means of transportation and communication, to those related to imports and exports, and activities impacting the environment. It is also to provide assistance with respect to entry and exit visas and work and residence permits for foreign personnel and family members of contractors, their affiliates and subcontractors, as well as assistance in gaining access to existing information held by others about the contract area. The government is further required to provide necessary security for petroleum operations.[181] Any expenses incurred by the government in connection with

[173] See id. at art. 17.2.
[174] See id. at art. 17.2(a).
[175] See id. at art. 17.2(b).
[176] See id.
[177] See id. at art. 17.2, second para.
[178] See KRG Oil and Gas Law, supra Chapter 3, note 121 at art. 29, First (3).
[179] See KRG's Model PSC, supra note 55 at art. 17.4.
[180] See id. at art. 17.7.
[181] See id. at art. 18.1.

the foregoing are to be charged to the contractor and treated as a recoverable petroleum cost.[182]

The equipment and material assets employed in petroleum operations are to be supplied by the PSC contractor.[183] Article 19, though, notes that the contractor's article 8 management committee is to receive, "[a]s soon as possible after the Effective Date" of the relevant PSC, a copy of the contractor's procedures concerning the procurement of such equipment and material assets. The committee can request modifications thereof to ensure coincidence with prudent practice in the industry.[184] Article 19.4, recognizing the interest of KRG and Iraqi companies in supplying needed equipment and material when such is available, does require that procurement procedures give "priority" to local suppliers when relevant equipment or materials meet competitor items on price, quality, quantity, and other commercial and technical terms.[185] The model PSC also contains an identical associated priority requirement with respect to PSC contractors needing to take on subcontractors.[186] This tracks a parallel requirement, applicable to all oil and gas contractors, and not just PSC holders, that is contained in article 44 of the KRG's Oil and Gas Law.[187] It also bears noting that that same article of the basic Law permits (and does not require) the Ministry of Natural Resources, in deciding between competitor entities seeking a PSC or other petroleum operations authorization, to give preference to those who "partner[] with local companies."[188]

Title to all assets is addressed by article 20 of the KRG's model PSC. The rules established by that provision are grounded in the notion that the PSC envisions the contract holder bearing the risk that exploration efforts may not yield results, but that thereafter when discoveries of oil or gas are developed, the expenditures associated with petroleum operations become recoverable petroleum costs. Thus, article 20.1 notes that petroleum operation assets acquired by the contractor during the Exploration Period "shall remain the property of the Contractor . . . [its] Affiliates or their Subcontractors."[189] In contradistinction, petroleum operation assets acquired by the contractor during the Development Period "shall become the property of the Government upon completion of the recovery of the costs of all such assets by the Contractor, or the end of the Contract, whichever is earlier."[190] Given that the contractor does not own and has not acquired the petroleum assets used by affiliates or subcontractors or employees, nor has it any claim to assets it merely leases rather than

[182] See id. at art. 18.2.
[183] See id. at art. 19.1.
[184] See id. at art. 19.3.
[185] See id. at art. 19.4.
[186] See id. at art. 22.2.
[187] See KRG Oil and Gas Law, supra Chapter 3, note 121 at art. 44.
[188] See id.
[189] See KRG Model PSC, supra note 55 at art. 20.1.
[190] See id. at art. 20.2.

purchases, all such assets remain those of the owner, notwithstanding the fact they may be in the possession of, used by, or at the command of the contractor during any period of the petroleum operations process, including the Development Period.[191] Article 21 provides that even though a contractor who has acquired assets through purchase during the Development Period of petroleum operations may have recovered all costs associated with the acquisition and thus faces title transference of such assets to the KRG, that same contractor remains vested with an "exclusive right to use, free of any charge" all such assets for petroleum operations anywhere in Kurdistan.[192]

The Matter of Contract Stabilization

Clearly, it is critical to be familiar with those terms and provisions of the KRG's model PSC that address the topic of land and assets relevant to contractor's petroleum operations. But leaving that second category of adjectival provisions aside, and moving to the matter of contract "stabilization" – the third such category – article 43 of the model PSC is quite illuminating. Essentially, it concerns itself with the fact that, once a contract has been negotiated and signed, the contractor expects that its terms and provisions will be lived up to, not departed from as a consequence of subsequent changes in the laws and regulations of the host country. After all, in running the calculus as to precisely what terms and provisions in a contract make most economic sense, subsequent unilateral legislative or executive action of a governmental partner that compels departure from standards hammered out in negotiations and settled upon in written provisions completely frustrates the expectations that served to incubate the initial interest in the very act of contracting. Parties contracting with governmental partners have sought to address this problem through the use of "stabilization" clauses or provisions designed to limit the government's latitude in changing foundational rules subsequent to the conclusion of the contracting process. Though the provisions of the KRG's 2007 Oil and Gas Law contain no such "stabilization" language, its 2006 proposed Petroleum Act did have a limited provision applicable to matters of taxation alone.[193] With the inclusion in the KRG's model PSC of the language of article 43, however, absolutely no doubt exists as to the requirement of stabilization in the production-sharing context.

The apposite language of the article begins by noting the general principle that the contractor's obligations under the contract shall not be altered or changed by the government.[194] As might be expected, however, changes or

[191] See id. at art. 20.3.
[192] See id. at art. 21.1.
[193] See Petroleum Act of the Kurdistan Region of Iraq, 2006, supra Chapter 3, note 120 at art. 49, Sec. 3.
[194] See KRG Model PSC, supra note 55 at art. 43.2.

alterations that serve to further benefit a contractor are not viewed as objectionable, and the contractor is permitted to gain the full advantage associated with changes or alterations of that nature.[195] As for changes or alterations that produce adverse consequences, article 43 provides that the government guarantees the contractor the maintenance of the "stability of the legal, fiscal and economic conditions" of the contract, and that those conditions emerge either from the terms of the contract itself or from the laws and regulations extant on the date of the contract's signature.[196] With greater specificity, article 43.3 provides an obligation, which clearly falls in large part on the KRG and its representatives, to adjust the situation (by changes in the contract terms or otherwise) to restore the contractor, or other relevant affected parties, to the same economic position that would have existed had there not been a change in the legal, fiscal and/or economic framework after the effective date of the contract resulting in a "detrimental[] affect[] [on] the Contractor, the Contractor Entities or any other Person entitled to benefits" under the contract.[197] The process for such restoration of the status quo ante begins when a contractor believes its economic position, or that of another relevant party, to be detrimentally affected[198] by legal, fiscal and/or economic framework changes that have been adopted by the KRG or the federal government in Baghdad.[199] The contractor would request in writing a meeting of all the PSC contracting parties to consider the existence of the alleged detrimental effect and possible responses to it. If, within 90 days, the parties have not reached agreement on the contractor's claim or possible responses, the contractor may refer the matter to arbitration in accordance with the dispute settlement provisions of the PSC.[200] Results of any such resort to arbitration are final[201] and may involve the arbitral body directing that amendments be made to the contract itself.[202]

Important Miscellaneous Adjectival Provisions

The fourth, and final, category of adjectival provisions is represented by that small handful of miscellaneous provisions critically important to those in the international oil and gas industry. With respect to such, matters such as the just-referenced dispute settlement provisions of the KRG's model PSC, as well as its provisions on force majeure, personnel training, and contract termination, are all relevant. Dispute settlement is addressed in article 42, force

[195] See id. at art. 43.5.
[196] See id. at art. 43.3.
[197] See id.
[198] See id. at art. 43.4.
[199] See id. at art. 43.3 (referencing any "change in the legal, fiscal and/or economic framework under the Kurdistan Region Law or other Law applicable in or to the Kurdistan Region").
[200] See id. at art. 43.4.
[201] See id. at art. 42.1, third para.(c) (v).
[202] See id. at art. 42.1(c), third para. (c) (vi).

majeure in article 40, personnel training in article 23, and contract termination in article 45.

The dispute settlement aspects of article 42 address far more than the applicability of arbitration to controversies precipitated by post-contracting changes in host government laws, and the finality of decisions associated with such arbitration. In larger context, article 42 looks toward the resolution of "disputes," defined as "any dispute, controversy or claim (of any and every kind or type)," including interpretive disputes, that arise out of, relate to, or are connected with the PSC or "operations carried out under" the PSC.[203] When any such dispute arises, the parties are to initially attempt to negotiate their own resolution.[204] If such efforts prove unsuccessful, then a party so disposed may submit to the others a Notice of Dispute, which is to include a statement of the dispute's nature and any requested relief.[205] The service of such a Notice triggers a formalized process leading to negotiations between so-called senior representatives of the parties, which includes the KRG's Minister of Natural Resources.[206] Lack of an acceptable resolution within 60 days of negotiations can result in any party then seeking settlement through mediation, in accordance with the mediation rules and procedures of the London Court of International Arbitration (LCIA).[207] Unsuccessful mediation can result in a request for "final resolution" through arbitration pursuant to LCIA arbitral rules. The relevant arbitral body is made up of three persons, one each appointed by the KRG and the contracting party (or parties), and the third, or chair, selected in most instances by the other two arbitrators.[208] During the arbitral proceedings, the parties are to continue performance of their contractual obligations and take no action impairing these.[209] Further, any decision of the arbitrators is said to be "not subject to any appeal, including . . . on issues of law."[210]

Article 43 also envisions the use of so-called expert determinations with regard to "any disagreement" over matters of accounting, the establishment of the international market price for crude oil that a contractor has produced, or the metering of oil or gas at a delivery point, as well as "any disagreement that Parties agree to refer" to an expert.[211] The Terms of Reference for referring disagreements for expert determination are to be formulated and settled upon by the contractor's management committee.[212] It must be recalled, however, that those Terms of Reference are one of the several items on which unanimity

[203] See id. at art. 42.1.
[204] See id. at art. 42.1, second para.
[205] See id. at art. 42.1, third para.
[206] See id. at art. 42.1, third para. (a).
[207] See id. at art. 42.1, third para. (b).
[208] See id. at art. 42.1, third para. (c) (i–iii).
[209] See id. at art. 42.1, third para. (c) (iv).
[210] See id. at art. 42.1, third para. (c) (v).
[211] See id. at art. 42.2 (cross referencing such matters under arts. 15.9, 27.2, and 27.5).
[212] See id. at art. 42.2.

is required by the four members of the management committee.[213] Interestingly, with respect to the Terms of Reference, there appears some confusion in the language of article 42.2, in that its opening language speaks of these terms being prepared by the management committee "as soon as possible after the Effective Date" of the PSC, whereas that in 42.2(a) seems to indicate that the terms are to be prepared later on, whenever a particular disagreement arises.[214] The advantages and disadvantages associated with either of these two approaches seem apparent. What is troubling is that from the two seemingly conflicting sets of language, it is not entirely clear when the Terms of Reference are to be drawn up. From some of the follow-on language in article 42.2(b), however, it is probably best assumed that it is to happen at the later point in time.[215] Putting that to the side, though, any expert asked to make the requisite determination is, in the first instance, to be settled upon by the "mutual agreement" of the parties or, if this is not possible, by appointment of the President of the Energy Institute in London.[216] The parties have the right to make submissions to the expert, both initially and in explanation of submissions provided by the other.[217] The decision of the expert is to be made rather promptly, and it "shall be final and shall not be subject to any appeal, except in the case of manifest error, fraud, or malpractice."[218]

With respect to article 40's force majeure provision, which permits a contractor to escape culpability for contract-related lapses or failures of obligation caused by external and unanticipated forces or events,[219] it should be noted that nothing appears in the KRG's Oil and Gas Law that speaks directly to this. The best that exists is reference in the Law to the fact that matters such as contract duration, royalties, and cost recovery shall be addressed in standard PSCs, but the particular listing is prefaced by the statement that these are simply some of the matters that the contractual provisions of such shall "includ[e]."[220] No indication appears that provisions on other matters are forbidden to be included in the standard PSC.

Regarding the exact language of article 40 of the model PSC, it goes through a nonexhaustive and merely illustrative litany of events or phenomena from war and terrorism, strikes and blowouts, to epidemics and natural disasters, and KRG or other governmental acts or orders, that "prevents or impedes execution of all or part of [a contractor's] obligations" and therefore qualify as force

[213] See id. (cross referencing art. 8.2) and text accompanying supra note 137.
[214] See id. at art. 42.2 and 42.2(a).
[215] See id. at art. 42.2(b) (declaring that when a disagreement is to be sent to an expert, "[t]he Management Committee shall promptly provide the expert with the agreed Terms of Reference relating to the disagreement.").
[216] See id. at art. 42.2(a).
[217] See id. at art. 42.2(b).
[218] See id. at art. 42.2(c).
[219] See id. at art. 40.1.
[220] See KRG's Oil and Gas Law, supra Chapter 3, note 121 at art. 37, First.

majeure.[221] But under the terms of article 40, force majeure is also represented by events or phenomena considered "unforeseeable, insurmountable and irresistible," as well as "due to circumstances beyond [the] control" of, and "not due to any error or omission" of the contractor.[222] Apart from the fact that much disagreement is likely to exist in specific factual contexts over whether certain events or phenomena leading to nonperformance of contractual obligations truly were unforeseeable, insurmountable, and irresistible, the precise wording of article 40 raises the interesting interpretive question of whether the litany of things it lists (e.g., war, terrorism, strikes, blowouts) automatically qualify as force majeure, or qualify only in the event they were not foreseen, unable to be surmounted, or proved completely inexorable. Article 40.2 plainly states that force majeure "means any event that is unforeseeable, insurmountable and irresistible, not due to any error or omission by the Contractor but due to circumstances beyond its control."[223] It then directly leads into its long listing by stating that "[s]uch event shall include the following. . . ."[224] The implication is that war, terrorism, strikes, blowouts, and so forth are always to be regarded as unforeseeable, insurmountable, and irresistible. As a factual matter, however, that is categorically untrue and quite possibly could give rise to questions about whether wars, terrorism, strikes, blowouts, and such that were foreseen, or could have been averted or avoided, qualify as force majeure. Perhaps useful in this respect is the language in article 40.3, which indicates that the "intention of the Parties is that Force Majeure shall receive the interpretation that complies most with prudent international petroleum industry practice."[225]

Concerning article 23's obligation to train personnel, unlike with respect to force majeure, supporting language does appear in the KRG's 2007 Oil and Gas Law.[226] Just scratching the surface of article 23, however, since it runs for two and one-half pages in the model PSC, it calls for several things. To begin with, it calls for contractors and their subcontractors to provide preference in their hiring to Kurds and other Iraqis, on the assumption that they have the necessary expertise, and it envisions what might be described as employee sharing ("secondment"), with monies being advanced by the contractor to the KRG for such and for recruitment itself.[227] Next, on training in particular, the contractor is to provide such to its petroleum operations personnel from Kurdistan and elsewhere in Iraq so as to help them gradually acquire the knowledge and qualification of the contractor's foreign workers. The training is to be with

[221] See KRG's Model PSC, supra note 55 at art. 40.2. It should also be noted that the event or phenomena of relevance can qualify as force majeure if, rather than directly affecting the contractor, it indirectly causes such an effect by acting on a contractor's affiliated company. See id. at art. 40.3.
[222] See id.
[223] See id.
[224] See id.
[225] See id. at art. 40.3.
[226] See KRG's Oil and Gas Law, supra Chapter 3, note 121 at art. 45.
[227] See KRG's Model PSC, supra note 55 at art. 23.1–23.4.

respect to both management matters and petroleum technology, with training on the latter taking into account what "applicable Law and agreements with third parties," as well as "confidentiality agreements," happen to authorize.[228] So important is the commitment to training of Kurdish and Iraqi personnel that article 23.6 provides that within 90 days of the effective date of a PSC, and thereafter on an annual basis, the contractor must submit to the management committee a proposed training plan.[229] Article 23.7 actually calls for specific identifications of annual dollar amounts to be committed by the contractor to training during both the Exploration Period and the Development Period.[230] Such costs are considered recoverable petroleum costs. Costs spent on training personnel of the KRG, however, can be recovered only to the extent that they come within the management committee approved training plan.[231]

On the matter of transfer of technology, an aspect of training, the language of article 45 of the KRG's Oil and Gas Law is somewhat less satisfactory than that of article 23.11 of the model PSC. Article 45, Second, of the Oil and Gas Law does little more than reference a commitment to "maximize knowledge transfer" and establish "any necessary facilities for technical work, including the interpretation of data."[232] This seems to envision vast discretion on the part of the contractor as to how the obligation is fulfilled. On the other hand, article 23.11 of the PSC is comparatively specific. It notes that prior to the end of the first year of the PSC, the contractor is to provide the government "in kind technological and logistical assistance," including "geological computing hardware and software and such other equipment as the Minister of Natural Resources may require," but only up to a negotiated dollar amount.[233] Indubitably, the transfer of in-kind technology and necessary logistical assistance falls within the Law's concept of "maximiz[ing] knowledge transfer." In the event that such language is intended to leave greater latitude in the contractor as to its satisfaction, the requirement in the model PSC that "in kind technolog[y] and logistical assistance" be provided could be suggested as evidence of an excess of government zeal on that front.

The last of the miscellaneous adjectival provisions bearing mention is article 45 on termination of the PSC. Government termination of a PSC with a contractor is permitted for one of six identified reasons: failure to meet financial obligations of the contract; failure to carry out the specific drilling and seismic

[228] See id. at art. 23.5.

[229] See id. at art. 23.6.

[230] See id. at art. 23.7.

[231] See id. at art. 23.8. It should also be noted that art. 23.9 calls for the contractor to make, from the first production from the contract area, annual negotiated contributions during the Exploration Period, and during the Development Period, for the benefit of a KRG environmental fund. Such contributions are also recoverable petroleum costs.

[232] See KRG's Oil and Gas Law, supra Chapter 3, note 121 at art. 45, Second.

[233] See KRG's Model PSC, supra note 55 at art. 23.11. Also observe that, when it comes to logistical assistance, the language of the last sentence of art. 23.11 notes that "the form of such assistance shall be mutually agreed by the Parties." whereas with respect to technology, it seems to be "as the Minister of Natural Resource may require."

obligations accompanying first two subperiods of the exploration phase of the contract; interruption of production without cause or justification for more that 90 days straight; intentional extraction of minerals not covered by the PSC; contractor bankruptcy; or willful refusal to abide by an article 42 dispute settlement negotiation, mediation, arbitration or expert decision.[234] Termination, however, must follow a procedural course that requires an initial notice of intent to terminate, with reasons specified and a request for remediation of the default or payment of acceptable compensation. If such notice goes unrequited for 3 months, then a subsequent notice of termination by the government ends the contract, unless the contractor files a notice of dispute and submits such to article 42 dispute settlement.[235] As for termination by the contractor, article 45.3 provides that, prior to the Development Period, the contractor has the right to terminate by "surrendering the entire Contract Area." During the Development Period, however, contractor termination is a possibility "at any time by surrendering all Production Areas, provided . . . then current obligations have been satisfied in accordance with [the] Contract."[236] Essentially, that prevents a contractor from failing to meet its specified contractual commitments, and then attempting to insulate itself from a claim for breach by simply declaring the contract terminated.

V. CONCLUSION

As just seen, an intricate and immensely detailed model PSC has been put forward for public review and international oil industry analysis and digestion by the authorities representing the Kurdish north of Iraq. While it contains its share of controversial provisions, ambiguities, and conflicts, it reflects much that is familiar to industry experts. As seen from the review of the KRG's 2007 Oil and Gas Law itself, the Ministry of Natural Resources for the Region has the authority to utilize other forms of petroleum agreements in place of, or to supplement the common employment of, the production-sharing contract. A substantial amount of contractual activity has already occurred between the KRG and representatives of the international oil and gas community, and there can be little question that more will be forthcoming.

When it comes to the promulgations by the federal government in Baghdad, though, the situation is significantly more complicated and unsatisfactory. The precise terms of a federal oil and gas framework law have been publicly disseminated and widely commented on by knowledgeable entities both inside and outside of Iraq. That legislation clearly contemplates the Oil Ministry's ability to use service contracts, development and production contracts, and risk

[234] See id. at art. 45.1.
[235] See id. at art. 45.5.
[236] See id. at art. 45.4.

exploration contracts to induce cooperative assistance in the revitalization of the Iraqi oil and gas industry. From the outset, there had been indications that the Ministry would follow the lead of the Kurds and issue model petroleum contracts. The Ministry's adherence to those preliminary indications has been, to say the least, less than admirable. The difficulties associated with settling upon the precise language to appear in such contracts is fully understood. At the same time, it must be similarly appreciated that representatives of the oil and gas industry, and especially those mega-players able to contribute the most to the reinvigoration of Iraqi oil and gas sector, feel a great sense of insecurity because they do not know in advance of negotiations the specific contours of agreements they may be interested in making. It would be highly useful to all involved were the Ministry of Oil to replicate the efforts of the KRG and provide to the public the precise terms of its model petroleum contracts. To date, however, the best that is available are those drafts released by one private media source and represented thereby as being negotiating versions of central government model contracts. Whether official versions of model contracts will be released to the public by Baghdad any time soon remains to be seen. As of this writing, however, the best that has been offered by the central government are general descriptions of the broadest and most far-reaching parameters of such agreements.

5 THE FEDERAL OIL AND GAS REVENUE-SHARING LAW: ITS MANY PROBLEMS

I. INTRODUCTION

It almost goes without saying that nations which find themselves blessed by the fates with substantial deposits of extremely desired and, thus, highly valuable natural resources often encounter great difficulty in managing their exploitation and handling the financial benefits that flow from tapping that bounty. Even among nations that are seeming exceptions to that general proposition, the past makes clear that only great abuse and struggle have helped them evolve to wiser ways. To a certain extent, nature almost does a country a favor in withholding her largesse and compelling its people to scratch a living from the bare bones of their own ingenuity and determination. Virtually everyone cognizant of the ways of the world is familiar with how many natural resource rich nations seem to translate raw mineral wealth into exploitation incompetence, sheer ruling-class or ruling-family greed, or political despotism and entailed perpetual power. The likes of Nigeria, Sudan, Myanmar, and untold others spring readily to mind. All remind us that, if a chance exists to get in at the ground level and shape the character and contours of a natural resource revenue-sharing law, several major areas absolutely must be addressed.

The areas that definitely require attention in any seminal effort to shape a natural resource revenue-sharing law include those involving clarity with respect to both the collection triggers and to the distribution formula itself. After all, the last thing that one desires is confusion and dispute regarding the sorts of activities or events that entitle the appropriate authorities to demand or expect revenue payments, or argument and suspicion with respect to the manner by which revenue distributions are to be calculated. Beyond these, however, it is also essential that the revenue-sharing law provide a revenue allocation that is regarded as fair and equitable by the respective population groups; a transparent, reliable, and neutral oversight mechanism for the management of the relevant revenues; and clear rules concerning the holding or investment options available to the body charged with managing the revenues. When there is concern about

the potential for creditors attempting to satisfy claims against natural resource revenues that cover a substantial portion of the particular debtor nation's operating expenses – as is the case in Iraq – provision may also be made for some immunity from direct legal action. To put it briefly, a wide range of important topics must be addressed in a revenue-sharing law that endeavors to touch on the basics of a comprehensive approach. Though what follows will describe some of these relevant features as they appear in the Iraqi revenue-sharing law, the focus will be on the collection triggers and the distribution formula, with an eye toward examining the legal complications associated with both.

Prior to taking up these two matters, however, one should recall the situation that exists in connection with Iraqi oil and gas revenues. By the last month of 2007, and again into mid-November 2008, Iraqi oil production ran in the vicinity of 2.3 to 2.4 million barrels per day (mbpd).[1] Exports from that production ended 2007 at around 2.1 mbpd.[2] Both numbers reflect a gradually improving situation, as production ended 2005 at roughly 2.1 mbpd, with 2006 only marginally higher than that.[3] In terms of crude oil exports, 2005 had ended at around 1.5 mbpd, and 2006 at 1.6 mbpd.[4] Interestingly, however, during the months intervening between the end of 2005 and 2006, both production and export levels trended higher – the former reaching about 2.3 mbpd in early fall 2006, and the latter peaking at about 2.0 mbpd during midsummer 2006.[5] Projections for Iraqi crude oil in 2008 had suggested an increase in production and exports.[6] As for Iraqi natural gas, exports really do not exist and remain controversial because the nation's reserves are viewed by many as potential feedstocks needed to supply the population's domestic electricity requirements. By some estimates, at least 60% of the gas produced in association with oil production is currently flared, and a substantial portion of the remainder is reinjected to assist with crude oil recovery.[7] Revenues, therefore, are essentially confined to what flows from crude oil exports. However, consideration has been given to reactivating gas exports to Kuwait and constructing a gas pipeline to Turkey. With respect to revenues, 2006 saw crude oil exports generating in the range of (U.S.)$31.3 billion for the year.[8] Revenues from that same source were thought to come in at around (U.S.)$41 billion for the 2007

[1] See U.S. Department of State, Iraq Transition Office, Essential Indicators Report at 4 (Oil Production) (Feb. 21, 2008). See also U.S. Department of State, Bureau of Near Eastern Affairs, Iraq Weekly Status Report at 16, available at www.state.gov/documents/organization/112246.pdf (accessed Nov. 25, 2008).

[2] See id., Essential Indicators Report (Oil Exports).

[3] See supra note 1.

[4] See supra note 2.

[5] See supra notes 1 and 2.

[6] See U.S. Department of State, Bureau of Near Eastern Affairs, Iraq Weekly Status Report at 16 (Jan. 30, 2008) (suggesting production increase to 2.6–2.7 mbpd).

[7] See Energy Information Administration, Official Energy Statistics from the U.S. Government, available at www.eia.doe.gov/emeu/cabs/Iraq/NaturalGas html (accessed Mar. 5, 2008).

[8] See supra note 6 at 16.

fiscal year.[9] As of mid-November 2008, reports indicated Iraq had already taken in (U.S.)$58.6 billion in revenues, year-to-date, from crude oil exports, and had started the year with an anticipated expense budget of roughly (U.S.)$48 billion.[10] By any measure, then, Baghdad was in a prime position to close out 2008 with a budget surplus.

When UN Security Council resolution 1483 was adopted in 2003, and the transfer of authority over Iraqi revenues from oil and gas activity was passed by the UN oil-for-food program to the newly established and Iraqi-controlled Development Fund for Iraq (DFI),[11] a process was commenced that eventually resulted in as much as (U.S.)$9.978 billion being moved from UN escrow accounts into accounts at the Central Bank of Iraq managed by DFI.[12] From the February 29, 2008, report of the International Advisory and Monitoring Board (IAMB) established by that same Security Council resolution to oversee the activities of DFI, the period between DFI's inception to the end of June 2007 saw proceeds from oil and gas sales and releases of frozen assets totaling (U.S.)$98.9 billion, with disbursements for running the Iraqi government during that time coming in at (U.S.)$89.9 billion.[13] The IAMB report was based on a thorough accounting conducted by Ernst & Young,[14] and also took into consideration that resolution 1483 mandated that 5% of all oil and gas revenues be set aside for claims to be paid by the UN Compensation Commission.[15]

There can be no doubt that since 2003, additional financial resources have been made available to Iraq by the United States and some other nations. As well as can be determined, however, many of these resources went directly to funding specific reconstruction projects associated with infrastructure and other needs of the Iraqi people. Reports indicate that up to November 2007, U.S. assistance to Iraq for reconstruction and related nonmilitary or security purposes amounted to approximately (U.S.)$26.1 billion – this being based on estimates of total assistance in the area of (U.S.)$42.8 billion, and then deducting assistance in the form of monies for the Iraqi Security Forces, the Iraqi Army, the Commanders Emergency Response Program, nonproliferation,

[9] See id.

[10] On the budget, see supra note 6 at 14; on year-to-date revenues of (U.S.)$58.6 billion, see Iraq Weekly Status Report, supra note 1 at 13.

[11] See UN Security Council Res. 1483, paras. 12–21 (May 22, 2003), available at http://daccessdds.un.org/doc/UNDOC/GEN/N03/368/53/PDF/N0336853.pdf?OpenElement (accessed Mar. 6, 2008).

[12] See UN Office of the Iraq Programme, Oil-for-Food (Mar. 6, 2008), available at www.un.org/Depts/oip/ (accessed Mar. 6, 2008) (noting transfers occurring between 28 May 2003 and the end of 2005).

[13] See International Advisory and Monitoring Board (IAMB) Third Interim Report Covering the Year 2007 (29 Feb. 2008), available at www.iamb.info/pdf/iamb_02292008.pdf (accessed Mar. 7, 2008).

[14] See Development Fund for Iraq: Interim Results as of June 30, 2007 at 4–5 (Jan. 14, 2008), available at www.iamb.info/auditrep/ey011408.pdf (accessed Mar. 7, 2008).

[15] See UN Security Council Res. 1483 at para. 21.

anti-terror, and de-mining efforts, and international military education and training programs.[16] Moreover, contributions associated with pledges from the October 2003 Madrid donors conference have amounted to approximately (U.S.)$18.4 billion.[17] In sum, Iraqi revenues from oil and gas exports – whether associated with UN-supervised sales, sales during the period of Iraqi occupation by the Coalition Provisional Authority (CPA), or sales made following the restoration of independence in late June of 2004 – and reconstruction assistance provided by the United States and other nations constitute the bulk of revenues that have been available to that nation. Given rapid increases in world oil prices in early 2008, it was reported to the U.S. Senate on March 11, 2008, that an Iraqi budget surplus would allow Iraqis to begin paying some of the costs of reconstruction.[18]

II. CONTEXT OF IRAQI REVENUE-SHARING LAW

As with any revenue-sharing law, and especially those designed to govern the collection, maintenance, and distribution of revenues by developing nations, there are a variety of policy issues with important legal dimensions that require addressing.[19] For example, the terms of the relevant law clearly must deal with the issue of the events or status of activities that will be considered sufficient to trigger a revenue-collection obligation. This can be anything from engaging in a form of income-generating activity within the nation –activity that might cover a vast range of conduct – to having a particular status, like that of a national of the state or a business headquarters or principal place of operations within the state's territory. Further, there is also the question of how collected revenues are to be held. That is to say, they could be held in a local or an offshore account, the account could contain monies segregated from all others, the account could be situated with a private institution or one of a public nature, and the trustee of the account might be one with specific credentials or experience.

Apart from these important considerations, others also exist. Specifically, these include how deposits of relevant funds are to be effectuated, the precise limits of the investments that can be made with collected funds, the circumstances under which withdrawals from designated accounts can be undertaken, and the nature of the official or officials empowered to make or authorize such

[16] See Curt Tarnoff, CRS Report for Congress: Iraq: Reconstruction Assistance at 4, Tbl 1, "U.S. Assistance to Iraq" (Order Code RL31833) (Nov. 15, 2007), available at http://ftp.fas.org/sgp/crs/mideast/RL31833.pdf (accessed Mar. 7, 2008).

[17] See id. at 10.

[18] See PBS NewsHour (Mar. 11, 2008), available at www.pbs.org/hewshour/news_summaries/2008/03/Summary_11 html (accessed Mar. 13, 2008).

[19] For a good primer on some of these considerations, see Joseph C. Bell and Teresa Maurea Faria, Critical issues for a revenue management law, in Escaping the Resource Curse (eds. M. Humphreys, J. Sachs, & J. Stiglitz, 2007) at Chapter 11.

withdrawals. Other considerations regard the oversight and management of collected funds. These can span the spectrum from making of policy concerning the funds and supervision of day-to-day portfolio activities, to the nature of oversight bodies charged with scrutinizing how funds have been handled by those entrusted with them. The latter can obviously include the eligibility of those who aspire to membership on oversight bodies, the mechanics of selection to such bodies, and the audit authority necessary to conduct full oversight. Transparency can also be a significant issue, for without the ability of others, whether domestic or international government officials or members of the general populace, to determine that practices regarding collected funds have been beyond reproach, confidence in fund administration will be absent and suspicion rampant. Similarly, the matters of the applicability of domestic fiduciary, bribery, and ethics principles, as well as the potential applicability of the right of litigation against transgressors, can surface during an attempt to construct a comprehensive revenue-sharing regime.

On the payout end, just as many and varied considerations exist. Included would be questions concerning how calculations are to be made of specific amounts to be distributed; whether such calculations are to be affected by particular and enumerated factors; the populations or regions within a country that are eligible to receive distributions; and whether distributions are to give consideration to unfortunate and often reprehensible historic factors such as earlier mistreatment by central government authorities or general ethnic, religious, or social discrimination. There are also considerations about whether funds are to be disbursed directly to individual members of the populace or to subcentral governmental entities charged with jurisdiction over certain population groups. And, additionally, it may be crucial in certain circumstances to provide not only for insulation of collected or disbursed revenues from suit by third-party claimants or debtors, but also for linkage between the disbursement obligation and the continuation of the revenue-collection authority. With particular reference to the latter, negotiation between various indigenous political constituencies may suggest that subcentral governmental entities are reluctant to empower the central government to exercise collection authority in the absence of a corresponding commitment to meet specific distribution metrics. In such a case, successful completion of negotiations may hinge upon linking continuation of any collection authority with appropriate and faithful execution of the central government's distribution responsibilities.

The Iraqi revenue-sharing law deals with many, though not all, of these matters. And in any event, the focus here will be much more limited. Nonetheless, before taking up the central aspects of that law, it is important to recall its relationship to both the relevant provisions of the Iraqi Constitution and the Iraqi framework law on oil and gas. In terms of the Iraqi Constitution, there are two especially relevant provisions. The first, article 111, provides that the oil and gas resources of the nation are owned by "all the people of Iraq in all

regions and governorates."[20] This provision represents an unequivocal declaration that no single ethnic or religious group, no single region or area of the country is entitled to assert exclusive ownership or rights to benefit from Iraq's natural resources patrimony. The second constitutional provision is article 112. It provides the central government with collaborative power, shared conjunctively with subcentral units, over the management of oil and gas extracted from so-called "present fields."[21] Consistent with article 111's emphasis on all Iraqis owning the nation's oil and gas resources, article 112 conditions the central government's retention of the collaborative management power on the central government allocating collected revenues in a fair and equitable manner. Relevant here is whether allocations reflect population distributions, recompense for previous devastation and injustice inflicted by the regime of Saddam Hussein, and an effort to stimulate balanced development throughout the entirety of the country.[22]

As for relevant provisions of the Iraqi framework law on oil and gas, several come to mind in connection with oil and gas revenue sharing. For openers, both the Preamble and article 1 reiterate the Constitution's declaration that Iraq's oil and gas resources are owned by all the people of Iraq.[23] Then article 11A provides implementation of that notion and the idea of fair distribution of revenues and stresses the need for a comprehensive and thorough revenue-sharing law.[24] Articles 11C and 11D follow this by first indicating that oil revenues include "all government revenues from Oil and Gas,"[25] and second, indicating that two separate accounts – the Oil Revenue Fund and the Future Fund – are to be created to hold deposits of all oil revenues.[26] Clearly, the framework law on oil and gas drive home the Constitution's themes of ownership by all and fair distribution of revenues. These twin themes are advanced by the framework law calling for the creation of an overarching revenue-sharing law, denominating as oil revenues all those revenues produced by any oil and gas activity, and indicating the importance of establishing two revenue funds for receiving oil revenue distributions – one aimed at demands associated with future needs and developments, and the other aimed at contemporary needs.

Keeping in mind both the provisions of the Iraqi Constitution and those of the framework law on oil and gas that touch on the matter of revenue sharing, any analysis of the operative provisions of the Iraqi revenue-sharing law and the various complications presented thereby must begin by acknowledging that the

[20] See Iraqi Constitution, art. 111, available at www.export.gov/iraq/pdf/iraqi_constitution.pdf (accessed Oct. 11, 2007).
[21] See id. at art. 112.
[22] See id.
[23] See Draft Iraq Oil and Gas Law (Feb. 15, 2007), available at http://priceofoil.org/wp-content/uploads/2007/03/Iraqoillaw021507.pdf (accessed Dec. 15, 2007).
[24] See id. at art. 11A.
[25] See id. at art. 11C.
[26] See id. at art. 11D.

law attempts to give effect to the notion of a fair and equitable distribution and does so by accepting that there should be two funds from which disbursements are to be made. The framework law on oil and gas referred to these two funds as the Oil Revenue Fund and the Future Fund. The Iraqi revenue-sharing law, in a nod toward the notion that collected and subsequently disbursed revenues may come from a variety of sources and not just oil and gas activity, revises the name of the Oil Revenue Fund to the Financial Resources Fund. It is from this fund that basic governmental expenses for day-to-day functioning and projects are to be allocated. The revenue-sharing law leaves intact the Future Fund, as conceptualized by the framework law. Essentially, this fund remains one designed for accumulating but a small portion of collected revenues, and disbursements from this fund are to be dedicated to addressing unique and particular problems associated with unfolding Iraqi developments and needs.

III. OVERVIEW OF THE REVENUE-SHARING LAW

Most of the provisions of the Iraqi revenue-sharing law are dedicated to addressing the operation of the Financial Resources Fund (hereinafter Fund or FRF). In this connection, the basic aims of the law's provisions are several. They include ensuring, obviously, the collection of revenues;[27] the continuous and dependable flow of expenditure financing to concerned government organs at the federal, regional, and governorate level;[28] the fair and equitable distribution of revenues between regions and governorates not organized into regions;[29] the most efficient and productive use of revenues allocated to government organs;[30] and appropriate transparency regarding all distributed revenues.[31] With respect to the Future Fund, the law makes clear that monies held in that particular account are to be accumulated on the basis of "surplus[age]," as spelled out in article 7 of the law. What seems apparent is that revenues constituting the Future Fund are to be derived from what remains after the essential needs associated with current governmental fiscal demands are fully satisfied.

Of the various proposals that led to the development of the revenue-sharing law, it is interesting to note that that put forward by the Kurdistan Regional Government (hereinafter KRG) on February 1, 2007, was constructed in a form slightly different from that of the Iraqi revenue-sharing law.[32] As concerns the basic aims or objectives of the KRG proposal, there was acceptance

[27] See Draft Law of Financial Resources (June 20, 2007) art. 1, First, available at http://web.krg.org/pdf/English_Draft_Revenue_Sharing_law.pdf (accessed Dec. 20, 2007).
[28] See id. at art. 1, Second.
[29] See id. at art. 1, Fourth.
[30] See id. at art. 1, Fifth.
[31] See id. at art. 1, Sixth.
[32] See Iraq Revenue Sharing Law, First Draft prepared by the KRG (Feb. 1, 2007) (hereinafter KRG First Draft) available from the author.

of the need for sharing revenues collected, as well as of the notion that a principal goal of sharing was the use of revenues for the provision of government services to the Iraqi population.[33] Rather than attempting to accomplish these twin aims through the establishment of just two revenue funds, however, the KRG proposal had no fewer than seven, including not only a General Iraq Revenue Sharing Account and a Future Generation Fund Account, both precursors of what eventually evolved into the Iraqi revenue-sharing law, but also separate accounts for the federal government, regions – and especially the Kurdish region – and governorates, and a so-called Damaged Areas Account.[34] The Kurdish proposal would have had all revenues, including that from oil and gas activity, deposited into the General Iraq Revenue Sharing Account,[35] with periodic transfers made by a Supreme Revenue Movement Committee to the other accounts.[36] And instead of depending on the concept of "surplus[age]" to provide allocations for the Future Generation Account, the KRG approach would have assigned five percent of expected revenue collections to the Future Generation Account.[37] Much of the original KRG proposal reappeared in its March 10, 2007, draft as well.[38]

Consultants' drafts of March 5 and 7, 2007,[39] diverged from the original KRG proposal in suggesting both that the revenue-sharing law apply only to revenues generated by oil and gas activity,[40] and that such revenues be managed by a constitutionally contemplated trustee, termed the Oil Revenue Supervisory Board.[41] In common with the KRG proposal, the consultants' drafts emphasized the basic goals and aims of revenue sharing and the use of revenues for the provision of services for the populace.[42] Under the consultants' drafts, all revenues were to be accumulated in a so-called Oil Revenue Fund,[43] from which regular budgetary distributions would be made for federal, regional, and governorate demands,[44] for deposits into what the drafts termed the Future Generations Fund,[45] and for allocations to so-called damaged areas within Iraq.[46] Clearly,

[33] See id. at art. 1: Preamble.
[34] See id. at art. 5, Sec. 1.
[35] See id. at art. 5, Sec. 3.
[36] See e.g., id. at arts. 8, 9, and 11.
[37] See id. at art. 8, Sec. 1.
[38] See Iraq Intergovernmental Revenue Sharing Law, Second Draft, prepared by the KRG (Mar. 10, 2007) (hereinafter KRG Second Draft), available from the author.
[39] See Republic of Iraq Draft Revenue Sharing Law (March 5, 2007) (hereinafter Consultants' First Draft), available from the author, and Republic of Iraq Draft Revenue Management Law, March 7, 2007 (hereinafter Consultants' Second Draft), available from the author.
[40] See Consultants' First and Second Drafts, id. at art. 2 and art. 7, Sec. 1.
[41] See id. at art. 6 (and especially footnotes 2 and 3 of Consultant First Draft and footnotes 3 and 4 of the Second Draft).
[42] See id. at Preamble.
[43] See id. at arts. 5 and 7.
[44] See id. at art. 8.
[45] See id. at art. 8, Sec. 4.
[46] See id. at art. 8, Sec. 5.

the Iraqi revenue-sharing law in its current form incorporates elements of each of these separate proposals.

Regarding the sources of the revenues to be collected, article 2 of the Iraqi revenue-sharing law indicates applicability to revenues from both external sources, such as foreign grants, aid, or loans, and from internal sources, such as domestic income, sales, and property taxes.[47] Paragraph A of that same article has the effect of bringing "[a]mounts received and obtained from sales of oil and gas payable to the State all over the country, [as well as] royalty, production bonuses, and direct and indirect taxes of any individual resources resulting from oil and gas contracts from national and foreign countries" within the revenue-sharing law's so-called Financial Resources Fund.[48] Article 3 of the revenue-sharing law then clearly provides that deposits of such amounts from oil and gas activity shall be considered deposits into an account denominated the "external financial resources" account.[49] As might be imagined, that external financial resources account shall also hold deposits from all foreign grants, aid, and loans. The Iraqi revenue-sharing law's FRF or Fund is represented by the resources accumulated in the external financial resources account, in combination with those in the internal resources account, and is to be held at the Central Bank of Iraq. Under the terms of the law, any revenues in the Fund are subject to transfer only by directive of either the Iraqi Prime Minister or the Minister of Finance, not by any other individual, commission, committee, or group.[50]

With respect to the distribution of the revenues collected in the Fund, irrespective of whether held in the external or the internal financial resources account within the Central Bank of Iraq, article 4 of the revenue-sharing law indicates that they are to go for expenses of the federal government,[51] the operational budgets of federal ministries,[52] particular projects agreed to between federal authorities and regional governments or governorates,[53] and expenditures for the development of governorates not organized into regions.[54] Article 4 also states that distributions from the Fund are to be made as well to flesh out the financial resources pool of the Future Fund, the fund specifically designated to address future needs, issues, and problems of the Iraqi people.[55] Distinct from drafts floated earlier by the KRG,[56] however, the Iraqi revenue-sharing law refrains from either specifying what percentage of collected revenues is to be allocated to the Future Fund or suggesting that allocations are to be

[47] See Draft Law of Financial Resources, supra note 27 at art. 2.
[48] See id.
[49] See id. at art. 3.
[50] See id. at art. 3, Third.
[51] See id. at art. 4, First, A.
[52] See id. at art. 4, First, D.
[53] See id. at art. 4, First, A.
[54] See id. at art. 4, First, E.
[55] See id. at art. 4, First, C.
[56] See text accompanying supra notes 32–39.

made only whenever surpluses remain after distributions for all other purposes. Instead, the revenue-sharing law provides in article 7 that allocations to the Future Fund are to be at a rate to be determined by subsequent negotiation.[57] Perhaps most interestingly, beyond article 4's provision for distributions to fund federal expenditures and operational budgets, projects agreed to with regions or governorates, the development of governorates not organized into regions, and the Future Fund itself, it also provides that the financial resources of the Fund are to be utilized for "funding the [revenue] quota of the region of Kurdistan which amounts to (17%) of the remaining revenues after subtracting expenditures" associated with distributions to the Future Fund, federal expenditures, and projects agreed to between federal authorities and regional governments or governorates.[58] The revenue-sharing law envisions adjustments in the allocation level based on changes in census data concerning Kurdistan.[59] It should also be noted that, of the various draft proposals dealing with the matter of revenue sharing, only those proffered by the KRG explicitly referenced, as has already been observed, Kurdistan as warranting designated special treatment.[60] Plainly, the KRG's negotiating efforts translated into substantive language in the national revenue-sharing law.

Of principal interest in connection with the Iraqi revenue-sharing law are the matters of revenue collection and revenue distribution. Before taking up the various issues raised by the law with regard to those two matters, any broad overview would have to at least reference three other operational items of some importance. The first concerns the fact that the Kurdistan region's 17% allocation under the revenue-sharing law is to be held in the Central Bank of Iraq's Erbil branch. Presumably, this means that any revenues that ultimately wind up being disbursed to the Kurds are to be initially accumulated in Central Bank accounts under the control of the federal government and then subsequently transferred to accounts in the Erbil branch earmarked for receiving disbursements in satisfaction of the required 17% allocation. According to the revenue-sharing law, monies held in such Erbil branch accounts can be moved on instruction of "the Prime Minister, and the Minister of Finance of the Kurdistan Region."[61] The second operational item involves independent monitoring of the financial resources regulated by the revenue-sharing law. On that front, article 6 of the law indicates that a Commission of Monitoring Federal Financial Resources is to be established and to be vested with the ability to scrutinize transactions, activities,

[57] See Draft Law of Financial Resources, supra note 27 at art. 7.
[58] See Draft Law of Financial Resources, supra note 27 at art. 4, First, C.
[59] See id.
[60] See text accompanying supra note 34. Both the Feb. 1, 2007, KRG draft and the Mar. 10, 2007, draft spoke of the revenue sharing scheme as including several earmarked accounts, including one for Kurdistan. It must be noted, however, that the consultants' drafts, see supra note 39, without explicitly referencing Kurdistan, contained language regarding "regions" and "damaged areas" that would have encompassed Kurdistan.
[61] See id. at art. 3, Sixth.

and undertakings connected with financial resources considered either external or internal.[62] The adequacy of such oversight, while extremely important, is an issue beyond the concern of this chapter however. Nonetheless, its significance makes it worth being called to the attention of readers. The third, and final, operational item has to do with the Future Fund. Specifically, as alluded to earlier,[63] the rate at which this fund is to filled is subject to negotiation and to be reflective of "surplus resources" remaining after government operational, project, and development expenditures have been met. Additionally, however, the same article 7 of the revenue-sharing law that speaks to these matters also indicates that the way the Future Fund is to be administered and regulated is subject to agreement among the Federal government, the regions, and the governorates not organized into regions.[64] Certainly this represents a deliberate and conscious effort to leave aside what could have been a nettlesome and controversial issue capable of grinding to a halt all efforts to successfully conclude an acceptable Iraqi revenue-sharing law.

IV. DIFFICULTIES ASSOCIATED WITH THE COLLECTION OF REVENUES

Many difficulties exist in connection with the way the Iraqi revenue-sharing law handles the collection side of oil and gas revenues. However, only four will be the focus of attention in this chapter. Those four consist of the following. First, do the terms and provisions of the law that deal with revenue collection apply to monies or financial resources generated by oil and gas activities of subcentral governmental entities – specifically, regional governments or governments of governorates not organized into regions? Second, do the revenue-sharing law's provisions trigger the basic collection obligation only when oil and gas activity takes some particular legal form, say a development agreement, a sales contract of actual product, or a royalty? Third, are the revenues subject to the collection side of the law limited to revenues flowing from activities involving exploration for, or exploitation or sales of, oil and gas alone, and not other associated or distinct natural resources, despite the fact they may be produced as by-products of oil and gas activity? And fourth, do the provisions of the revenue-sharing law dictate collection when an entity with which an Iraqi governmental authority may be working has restricted and confined all its business so that its activities are neither conducted internationally around the globe nor throughout the nation of Iraq or across its regions or governorates, but are limited to execution solely in the region or governorate where the subject oil and gas activity is performed? Each of these issues will be examined in turn.

[62] See id. at art. 6.
[63] See text accompanying supra note 57.
[64] See Draft Law of Financial Resources, supra note 27 at art. 7.

Regarding the first difficulty posed by the Iraqi revenue-sharing law, that of whether the oil and gas activities of subcentral governmental entities implicate the revenue-collection aspects of the law, several reasons exist to believe that the collection aspects apply to the oil and gas activities of every level of government throughout Iraq. To begin with, a principal aim of the revenue-sharing law is the establishment, as article 1, First, provides, of a Financial Resources Fund (FRF) "for collecting total federal financial resources."[65] Article 2, paragraph A, of the law then declares that the "[f]inancial resources" to be collected for FRF encompass many revenues, including those "payable to the State" from oil and gas activity "all over the country."[66] Not only does the language's reference to the fact that collected revenues are to come from oil and gas activity all over the country, and made payable to the *state* – not just the central level of the state – suggest that the collection aspects of the law are applicable to oil and gas activities of subcentral governmental units, but the way in which the revenue law uses the term "State" in article 2, paragraph A, contrasts to its references elsewhere to federal, regional, or governorate levels of government. Along that line, the deployment by the drafters of the term "State" in article 2, paragraph A, is only one of five specific instances in which the term is appears.[67] As any examination of the law will reveal, the drafters explicitly mention and distinguish between federal, regional, and governorate levels of government when intended. Thus, it seems perfectly reasonable to conclude that, in those instances when the law uses the more general and encompassing expression of "State," as it does in connection with article 2, paragraph A's, oil and gas revenue collection obligation, the intention is catch the revenues generated by oil and gas activity at every level of government throughout Iraq.

There are a couple of other reasons for conceiving of the foregoing interpretation as correct. One has to do with the language of the Iraqi Constitution discussed earlier: specifically, the language of article 111 of that foundational document. As will be recalled, article 111 provides in unequivocal terms that the oil and gas resources of Iraq belong to all of the Iraqi people in all the various regions and governorates across the entire nation. And because all Iraqis own all of the nation's oil and gas resources, and those resources are to serve as a basic item for producing revenues to be shared throughout the country, it makes sense to think of oil and gas activity anywhere in Iraq, by any level of government, as subject to the revenue-sharing law's collection obligation. Even beyond this, however, there is an additional reason for arriving at the same conclusion: this understanding of the revenue-sharing law seems completely in accord with an essential feature of Iraq's so-called oil and gas framework law. Article 5C of the framework law requires that all contracts concerning oil and gas anywhere in Iraq be submitted to the Federal Oil and Gas Council (FOGC)

[65] See id. at art. 1, First.
[66] See id. at art. 2, para. A.
[67] For the others see, art. 3, Third; art. 4, First, paras. C and D; art. 5, First.

for approval.[68] Certainly, it would stretch credulity to believe that FOGC would approve contracts entered into by subcentral governmental units, if these contracts do not provide that the parties with whom those units have contracted, or the very units themselves, agree to subject revenues produced to the terms and provisions of the revenue-sharing law. Without this, a large portion of oil and gas revenues generated within Iraq would remain unavailable for distribution to the Iraqi people.

Apart from the text of the revenue-sharing law itself, and the associated provisions of the Iraqi Constitution and oil and gas framework law, the negotiating history of the revenue-sharing law supports the interpretation that the revenue-collection obligation applies to oil and gas revenues taken in at every level of government. Indeed, all of the various drafts of the revenue-sharing law make this quite clear. The KRG's February 1, 2007, draft provided in the third paragraph of article 1: Preamble, that "Revenue" shall be shared, and then in article 2, paragraph three, that "Revenue" means not only federal government income from oil and gas, but also, as subparagraph (b) notes, "all moneys received by a Region or Governorate" that comes from oil and gas activity, including that from region or governorate actually selling oil and gas itself at an international market price.[69] The KRG's March 10, 2007, draft contained, in article 2's definition of "Revenue," identical language.[70] Similarly, the consultants' draft of March 5 referenced, in article 2, that "all revenues derived from petroleum operation in the territory of the Republic of Iraq" were the focus of the draft.[71] In article 7's language regarding the requirement to make deposits into the oil revenue fund, the draft indicated, in section 5(b) of the article, that the requirement applied to all "moneys payable to a region or governorate that would be Petroleum Revenue if payable to the Federal Government."[72] The same two articles in the consultants' March 7 draft again make clear revenues for distribution throughout Iraq are to be collected from regional and governorate levels, not just the federal government level.[73] Admittedly, the language of the revenue-sharing law itself does not, as seen, so clearly provide for revenues from regions and governorates. As best as can be determined, the shift to the notion of using the comprehensive term "State," rather than the more specific reference to regions and governorates, in connection to oil and gas revenue collection appeared with the introduction of the draft revenue-sharing law submitted by the Iraqi Government.[74] In that draft, article (2), Second, dictates

[68] See Draft Iraq Oil and Gas Law, art. 5C (Feb. 15, 2007), available at http://priceofoil.org/wp-content/uploads/2007/03/Iraqoillaw021507.pdf (accessed Dec. 15, 2007).
[69] See Iraq Revenue Sharing Law, supra note 32, at arts. 1, third para., and art. 2, third para.
[70] See Iraq Intergovernmental Revenue Sharing Law, supra note 38, at art. 2, "Revenue," para. (b).
[71] See Consultants' First Draft, supra note 39, at art. 2.
[72] See id. at art. 7, Sec. 5(b).
[73] See Consultants' Second Draft, supra note 39 at arts. 2 and 7, Sec. 5(b).
[74] See A Draft Law of Oil Revenues, available from author.

that oil and gas revenues are to be distributed throughout Iraq, and then article (3), First, defined such revenues as "consist[ing] of the amounts arising from and obtained from sales of oil and gas of the *State*."[75]

Moving to the second difficulty associated with revenue-sharing law, that involving whether the nature of the oil and gas activity must take a certain legal form in order to fall within the ambit of the law's provisions, several observations are warranted. For starters, the language of article 111 of the Iraqi Constitution, in declaring the country's oil and gas resources to belong to all the Iraqi people, certainly suggests that, if those owned resources are to generate revenues for ultimate distribution across the county, it would be inappropriate to frustrate that objective by employing forms of legal dealing circumventing the idea that the Iraqi people are to get the benefit of the nation's natural patrimony. More substantively, however, the very language of article 2, paragraph A, of the revenue-sharing law supports the notion that any form of dealing with respect to oil and gas triggers the revenue-sharing law. The particular terminology of that provision plainly includes "sales," as well as "royalty, production bonuses, and direct and indirect taxes."[76] Consequently, revenues flowing from oil and gas sales in any manner, and those flowing from oil and gas royalties, production bonuses, and taxes of any sort, fall within the scope of the revenue-sharing law's collection obligation. Beyond this, article 2, paragraph A, also references "any additional resources resulting from oil and gas contracts from national and foreign companies."[77] The implication of such language is that it serves as a "catch-all" designed to pick up all other forms of legal dealing that generate oil and gas revenues. What leaves little doubt about this is that article 2, paragraph A's, reference to sales, royalties, production bonuses, taxes, and any additional resources resulting from oil and gas contracts appears in the context of offering a definition of "[f]inancial resources." Thus, there is no way it would seem reasonable to construe the reference to "any additional resources resulting from oil and gas contracts" as simply meaning that the revenue-sharing law applies to monies from a limited range of oil and gas activities, as well as from activities involving other resources exploited in association with oil and gas.

Here, too, the negotiating history of the revenue-sharing law proves instructive. The KRG's February 1, 2007, first draft indicated in article 2 that revenues subject to the law covered "all moneys received by the Federal Government," including "petroleum revenue," as well as "all moneys received by a Region or Governorate which is petroleum revenue."[78] Since the language of the article then proceeded to illustrate the various forms that petroleum revenues might take, such as taxes on petroleum operations, royalties, profit petroleum, signing and production bonuses, and the like, the reasonableness of interpreting

[75] See id. at arts. (2), Second, and (3), First.
[76] See Draft Law of Financial Resources, supra note 27 at art. 2A.
[77] See id.
[78] See Iraq Revenue Sharing Law, supra note 32, at art. 2.

the basic expression "petroleum revenue" as requiring only that the revenue produced come from petroleum activities, irrespective of the legal form those activities take, seems quite apparent. As long as the monies of concern proceed from undertakings involving petroleum, it does not matter whether they are generated by transactions or arrangements whose legal form fails to come squarely within any of the explicitly enumerated examples of revenue-generating petroleum dealings. The KRG's second draft from March 10, 2007, contained, again in article 2, the same kind of reference to the broad and encompassing notion of "petroleum revenue" as being of operative significance under the revenue law.[79]

When scrutinizing the language of the first and second consultant drafts, a somewhat interesting departure from the thrust of all-inclusiveness exists. Undeniably, language appears in both that would support a reading subjecting virtually every form of petroleum transaction or arrangement to the revenue-collection obligation. Nonetheless, both qualify such language with much more precise language that has the effect of excluding particular sorts of petroleum activities or dealings from the essential provisions of the draft revenue-sharing proposals. Now with greater specificity, both the first draft of March 5, and the second of March 7, contain in article 2 straightforward language stating that the terms of proposals apply to "all revenues derived from petroleum operations."[80] To indicate that revenues merely have to be "derived from petroleum operations" in order to come within the ambit of the revenue-sharing proposal seems capable of ensnaring a vast range of petroleum dealings, thereby paralleling in large measure the KRG's proposals. The language of article 7, Section 1, of both consultant draft proposals notes that the oil revenue fund is to take in deposits of "Petroleum Revenue,"[81] though article 7, Section 5, then whittles away at what initially appears to be inclusiveness regarding the source of those revenues.

Without a laborious discussion about the technical distinctions in article 7, Section 5, between the two consultant drafts, it seems sufficient to note that they both deliberately leave various petroleum dealings or arrangements beyond the reach of their revenue-sharing approach. For instance, although the consultants' first as well as second drafts indicate that all revenues from "Oil Operations" are subject to revenue sharing,[82] a footnote accompanying article 7, Section 5, of the first draft provides that this does not include revenues generated as a result of refining activity.[83] Other language in that section, or footnotes accompanying it, leave aside rents from production that pass through the system as subsidies, or the mere value of oil distributed in-kind to (as distinct from revenues from

[79] See Iraq Intergovernmental Revenue Sharing Law, supra note 38, at art. 2, "Federal Revenue" and "Regional Revenue."
[80] See Consultants' First Draft and Second Draft, supra note 39, at art. 2.
[81] See id. at art. 7, Sec. 1.
[82] See id. at art. 7, Sec. 5 (opening language).
[83] See Consultants' First Draft, supra note 39, at art. 7, Sec. 5, fn. 6.

in-kind distributions sold by) federal, regional, or governorate units.[84] The second consultant draft tracks exactly this same approach on those particular matters.[85] However, it also makes a point of noting that revenues subject to the sharing law include not just those deriving from sales by governmental units of in-kind distributions of petroleum, but also those generated by sales of oil and gas that the State happens to own.[86] This obviously suggests that the first draft could have been read to exclude from the revenue-sharing proposal all revenues flowing from in-kind sales of State-owned oil and gas. Further, when taken in conjunction with the explicit exclusions in article 7, Section 5, and its accompanying footnotes, it also evidences an intent to close certain kinds of loopholes that previously freed particular oil and gas activities or arrangements from the revenue-collection obligations. Since the explicit exclusions in the two drafts (e.g., refining, production rents passing as subsidies, and the mere holding of in-kind distributions) concern activities or conduct that do not involve the commercial or market transacting of oil and gas or rights relative to such, whereas State sales of State-owned oil and gas do, an intent seems evidenced by the second draft's revision addressing the latter to capture a wider range of dealings involving oil and gas. In that sense, the revision proves consistent with the broad and inclusive interpretation suggested earlier with respect to article 2, paragraph A, of the Iraqi revenue-sharing law itself. That is not in the least surprising, considering that the breadth of the KRG's two draft proposals on revenue sharing left little question that a less inclusive approach would likely face substantial opposition.

Let us leave aside this second difficulty with the Iraqi revenue-sharing law, and move on to the third – that regarding the matter of the revenue-collection obligation's applicability to the exploitation of oil and gas by-products. Several important points merit attention here. One might be the fact that the language of article 2, paragraph A, of the revenue-sharing law provides, as has been seen, that the financial resources to supply FRF are to come from sales of oil and gas, royalties, production bonuses, taxes, and any additional resources "resulting from oil and gas contracts."[87] As noted earlier, the breadth of this language certainly permits the reading that the provision includes the widest range of revenue generating transactions or activities to be pulled within the reach of the law's collection obligation. The particular legal form of the dealing in oil and gas is irrelevant. The language also, however, seems to indicate that it is not just transactions involving oil and gas that generate revenues subject to the collection obligation. The concept of financial resources "resulting from" oil and gas activity seems more than sufficiently broad to encompass revenues from commercial exploitation of any of the by-products of oil and gas activity.

[84] See id. at fn. 7.
[85] See Consultants' Second Draft, supra note 39 at art. 7, Sec. 5, and footnotes.
[86] See id. at art. 7, Sec. 5(a) (i).
[87] See supra note 77.

Such a reading of the words "resulting from" is entirely consistent with the petroleum law adopted by the KRG.[88] Article 24, section 4(b), provides that a petroleum exploration and development contract may include crude oil, natural gas, "or other constituents of Petroleum."[89] Therefore, the reasonableness of construing the relevant language of article 2, paragraph A, of the Iraqi revenue-sharing law to apply the revenue-collection obligation to monies flowing from commercial dealings in by-products of oil and gas development seems irrefutable. Moreover, the very language of article 2, paragraph B(2), of the revenue-sharing law leaves no question that FRF revenues are also to come from so-called "internal sources,"[90] as well as the external sources focused on in the preceding pages. By definition, article 2, paragraph B(2), defines these as including "all [financial] resources obtained federally or in favor of the Federal Government by Regions and Governorates not organized in a region."[91] Essentially, this would even include government-received revenues resulting from the negotiation of contracts for the exploitation of non-oil and gas resources. And surely, if all such non-oil and gas contract revenues are to be considered subject to the revenue-sharing law's collection obligation, then why should this not include revenues generated by the exploitation of by-products associated with oil and gas production?

With regard to the negotiating history, the KRG's February and March drafts have the same effect, though by virtue of slightly different routes. The effect is clearly to include within the revenue-sharing proposal all revenues from by-product exploitation consequent to oil and gas contracts entered into by the federal government, but not so clearly to include such when connected with oil and gas contracts by the regions or governorates. The February draft arrives at this point in two steps. Article 5, Section 3, indicates that all "Revenue" is to be paid into the General Iraq Revenue Sharing Account, one of the many accounts the draft proposed to establish.[92] The definitional provision, article 2, then defines "Revenue" to mean, as already referenced, "all moneys received by the Federal Government," including those from various oil and gas activities or arrangements,[93] and "all moneys received by a Region or Governorate which is petroleum revenue," including that generated by then specified examples of oil and gas dealings.[94] The KRG's March draft gets to the same place by virtue

[88] See Oil and Gas Law of the Kurdistan Region-Iraq, Law No. (22) 2007, available at www.krg.org/uploads/documents/Krudistan%20Oil%20and%20Law%20English_2007_09_06_h14m0s42.pdf (accessed Dec. 20, 2007). Publication of the original draft version of the KRG's law can be found at Petroleum Act of the Kurdistan Region of Iraq, 2006, Annex A, available at www.kry.org/pdf/Kurdistan_Act_COM.Draft_20_October_2006.pdf (accessed Jan. 15, 2008).

[89] See id. at art. 24, Sec. 4(b).

[90] See Draft Law of Financial Resources, supra note 27, at art. 2, para. B(2).

[91] See id.

[92] See Iraq Revenue Sharing Law, supra note 32, at art. 5, Sec. 3.

[93] See id. at art. 2: Definitions, "Revenue", para. (a).

[94] See id. at art. 2: Definitions, "Revenue", para. (b).

of having article 5, Section 4, indicate that the General Iraq Revenue Sharing Account is to collect "Federal and Regional Revenues," and then have the definitional provision of article 2 bifurcate the more general term "Revenue" used in the first draft and attach the respective parts to definitions of both "Federal Revenues" and "Regional Revenues."

Plainly, under either draft, the definition of the term revenue associated with federal activities is comprehensive and requires no linkage to oil and gas activities. The fact that linkage is required for regional or governorate contracts, however, does not necessarily preclude the argument that even revenues from by-product exploitation would be subject to the revenue-sharing proposal, as it could be maintained that by-product revenue should always be viewed as "moneys received by a Region or Governorate which is petroleum revenue." Restated, because the by-product revenue is tied to the fact of petroleum exploitation, it should be seen as "moneys received [from] petroleum revenue" operations. The persuasiveness of this line of reasoning, though, seems seriously compromised by the fact the drafters of the KRG proposals went out of their way to require linkage in the context of regional and governorate contracts, but not those contracts entered into by federal authorities. Perhaps this is consistent with the general suspicion that the Kurds have always tilted in the direction of greater autonomy on all matters.

Looking at the two drafts put forward by the consultants provides an interesting contrast. As with the Kurdish drafts, it also takes us back to language seen earlier, the language of article 7, Section 5, of both the first and second consultant drafts. But the place to begin is with article 2 of both drafts. There it is indicated that the revenue-sharing law is intended to apply "to all revenues derived from petroleum operations."[95] Taking the language of that provision alone, there seems much to support the view that both drafts were capable of encompassing revenues from the exploitation of oil and gas by-products. After all, could not such revenues easily be seen as "derived from petroleum operations"? As will be recalled, article 7, Section 1, of both drafts then addresses the matter of accumulating money in the Oil Revenue Fund, which in the final Iraqi revenue-sharing law ultimately evolved into FRF. On that score the drafts provide the revenues for the fund are to come from "[a]ll monies owed to the Federal Government, a region, or a governorate and constituting Petroleum Revenue."[96] Section 5 of that same article defined "Petroleum Revenue," as noted earlier,[97] to mean certain very specific and particular things. Previously, concentration was on the question of whether Section 5's coverage extended to revenues generated by dealings in oil and gas that took some peculiar or unique legal form. The suggested answer was that the negotiating history associated with the consultants' drafts supported the notion the collection obligation of

[95] See Consultants' First and Second Drafts, supra note 39 at art. 2.
[96] See id. at art. 7, Sec. 1.
[97] See text accompanying supra notes 81–86.

the Iraqi revenue-sharing law should be interpreted as applying to all dealings involving commercial or market transactions, and the breadth of the law itself proves at the least consistent with that notion. The issue now confronted is markedly different, focused on the wholly distinct question of whether the consultants' drafts define "Petroleum Revenue" in a way that subjects revenues from dealings in oil and gas by-products to the strictures of revenue sharing.

With respect to this question, a couple of comments are warranted. First, both consultants' drafts leave aside the distinction offered by the KRG between federal revenues and regional revenues. In doing so, the consultants' drafts indicate that revenues taken in by nonfederal governmental authorities are not exempt from the revenue-sharing proposals. Recall that the KRG's drafts offered definitions of the concept of revenue that required linkage to "petroleum revenue" operations, if revenues taken in by regional or governorate level governments were to be subject to the revenue-sharing proposals.[98] Such linkage was not required when it came to revenues taken in at the federal level. Article 7, Section 5, of both consultants' drafts depart from this approach and attach exactly the same definition to the operative term "Petroleum Revenue," whether in the context of the federal government or in that of the subcentral units.[99] Second, the consultants' drafts indicate that the key to revenues being subject to revenue-sharing concerns whether the revenues are "with respect to Oil Operations."[100] What makes it impossible to merely construe this language so as to include revenues from by-product exploitation is the fact that both drafts attached a footnote to the language providing that "Oil Operations" was to have the same definition it has under the framework law on oil and gas. Curiously, the final version of that framework law does not use or define that concept, opting instead to use and define "Petroleum Operations."[101] As that concept is defined to include "all or any of the activities related to Exploration, Development, Production, separation and treatment, storage, transfer," and so forth, of crude oil or natural gas, and because transacting with respect to by-products would be such a normal and regular activity, revenues from by-products should be considered within the reach of the consultants' drafts.

It also bears noting that the second consultant draft carries a date of March 7, 2007, with the second KRG draft carrying a March 10 date. This is significant for a variety of reasons. To begin with, because the KRG's March 10 draft leaves aside endeavors to exclude by-product revenues when received by subcentral governmental units, it could be seen as a reaction to the two

[98] See text accompanying supra notes 92–95.

[99] See Consultants' First and Second Drafts, supra note 39 at art. 7, Sec. 5. More particularly, the drafts provide a lengthy definition of "Petroleum Revenue" in regard to federal authorities, and then, in art. 7, Sec. 5(b) attach the same definition when revenues are collected by regions and governorates.

[100] See Consultants' First and Second Drafts, supra note 39 at art. 7, Sec. 5(a).

[101] See Draft Iraq Oil and Gas Law (15 Feb. 2007) at art. 4, para. 21, available at http://priceofoil.org/wp-content/uploads/2007/03/Iraqoillaw021507.pdf (accessed Dec. 15, 2007).

consultants' drafts refusing to incorporate such an idea. Given that the final language contained in article 2, paragraph A, of the Iraqi revenue-sharing law refrains from adopting the approach on this matter proffered by the KRG and contains language susceptible to a broad interpretation, it makes sense to construe that final language as applying the revenue-sharing collection obligations to monies generated by transactions involving oil and gas by-products. Also worth noting in this connection is that the draft revenue law submitted by the Iraqi Government itself called, in article (3), First, for its application to "amounts arising from and obtained from" the development and sale of oil and gas.[102] Surely, revenues from by-products can be seen as "arising from" the development and sale of oil and gas.

The fourth, and last, difficulty associated with the collection side of the Iraqi revenue-sharing law has to do with the oil and gas entities to which the law applies. As indicated in all the preceding, the revenue-sharing law focuses on collecting "Financial Resources"[103] into FRF for ultimate distribution throughout Iraq. With respect to monies from oil and gas activity being viewed as one source of such "Financial Resources," article 2, paragraph A, of the law references these amounts being received and obtained from "national and foreign companies" for oil and gas sales, royalties, production bonuses, taxes, and additional matters resulting from oil and gas contracts.[104] The language of "national and foreign companies" has a plain meaning, and might well suggest to some that companies located and operating within less than the entire nation of Iraq would not trigger the revenue-sharing law's collection obligation. For example, government revenues earned from oil and gas activity of a company located and operating only in Kurdistan, or some governorate not organized into a region, might be said to avoid the law's collection obligation; the same would apply to revenues generated by oil and gas dealings with companies that operate in several regions or governorates in Iraq, but not across the whole country. Unless oil and gas revenues can be shown to come from companies that are located or operate outside of Iraq, or at least throughout the entirety of Iraq proper, the requisite "foreign" or "national" status to subject the revenues to the law's collection obligation is missing.

One possible response to any such suggestion could be that article 2, paragraph A's, use of the words "national and foreign companies" comes after the article's language making "any *additional* resources [i.e., revenues] resulting from oil and gas contracts"[105] – that is to say, resources over and above those oil and gas sales, or royalties, production bonuses, and taxes connected with oil and gas activities – subject to the revenue-sharing law's collection obligation. As a consequence, it could be argued that such "additional resources" fall

[102] See A Draft Law of Oil Revenues, supra note 74, at art. (3), First.
[103] See Draft Law of Financial Resources, supra note 27 at art. 2.
[104] See id. at art. 2, para. A.
[105] See id.

within the reach of the law only to the extent generated by oil and gas dealings with national or foreign companies. Financial resources flowing from, on the other hand, oil and gas sales, royalties, production bonuses, and taxes would be subject to the law whether they result from relations with national or foreign companies or not. Although admittedly this construction is somewhat plausible, it seems just as conceivable the full language of article 2, paragraph A, has a third possible interpretation. Specifically, it seems not unreasonable to read the language as meaning that revenue amounts received from sales of oil and gas anywhere in Iraq – regardless of the national or foreign nature of the companies generating them – and revenues coming from oil and gas royalties, production bonuses, taxes, and additional matters resulting from oil and gas contracts are also included, as long as any of the latter are with national or foreign companies. The language of the provision says as much: financial resources consist of "[a]mounts received and obtained from sales of oil and gas payable to the State all over the country," and "royalty, production bonuses, and direct and indirect taxes or any additional resources resulting from oil and gas contracts from national and foreign companies."[106]

Though these various interpretations may have a certain appeal, it seems that a couple of reasons exist for reading the relevant language of article 2, paragraph A, as applying the revenue-sharing law's collection obligations to oil and gas monies flowing to the government as a result of dealings with any company, whether local, regional, national, or international. Instrumental in this respect is the fact that, whereas the concept of a "foreign" company refers to an enterprise organized and based outside of Iraq, a company that is "national" can simply mean an enterprise that is organized and based within Iraq. To be considered "national," there is no need for an enterprise to operate everywhere across Iraqi territory, or even in more than a single region or governorate in Iraq. "[N]ational" is a term positioned in contradistinction to "foreign," with the consequence that it implies no more than a company created under or operating somewhere within the jurisdictional confines of the Iraqi nation. This would include a company conceived, owned, organized, and operated by Iraqis, and also, perhaps, a company organized and operating within Iraq, even though not conceived or owned by Iraqis alone. That any such company failed to conduct operations throughout all of Iraq would seem irrelevant, as would the fact that such a company may involve itself in overseas operations. The revenue-sharing law's combination of "foreign" and "national" appears aimed at capturing within its collection obligation revenues from the most comprehensive spectrum of companies involved in oil and gas activities.

At least partial support for this reading can be derived from article 2, paragraph A's, language subjecting monies from oil and gas sales "payable to the State all over the country" to the law's collection obligation. Clearly, this language

[106] See id.

does not contemplate that the revenues have to come from dealings with companies that are "foreign," or "national" in the sense of being Iraqi companies that operate everywhere within Iraq. Rather, the thrust is that all revenues from oil and gas sales anywhere in Iraq, no matter who they involve, are subject to the obligations of the revenue-sharing law. A quick look at the negotiating history yields corroboration, because neither of the draft proposals submitted by the KRG, nor the two consultants' drafts contained language linking the oil and gas revenue-collection obligations to monies coming from government dealings with either national or foreign companies. The definitional language of article 2 of the KRG's February 1 and its March 10 proposals just described the various contractual sources of relevant revenue, without regard to character of the business enterprises from which that revenue flows.[107] In terms of the consultants' drafts, article 7, Section 5, though in some ways distinct from the KRG's language, also referenced contractual sources of revenue, while leaving aside verbiage regarding whether the companies from which it proceeded were to be considered foreign or national.[108] Only the Iraqi government's draft proposal contained such a trigger for the revenue-collection obligation. Article (3), First, of the proposal stated that the oil revenues subject to the collection obligation were those coming from "sales of Oil and Gas of the State, the royalty and production rewards for oil contracts with national and foreign companies." Given this background, and the previously described interpretive conclusions connected with the reference to "national and foreign" companies, it would certainly appear that the revenue-sharing law's ultimate inclusion of such language should not be seen as shifting the focus from the nature of the oil and gas activity generating the revenue and toward the nationality of the enterprise providing it.

V. DIFFICULTIES ASSOCIATED WITH DISTRIBUTION OF OIL AND GAS REVENUES

A variety of difficulties or complications also exist in connection with the distribution or allocation side of the Iraqi revenue-sharing law. Essentially, all these difficulties involve matters of calculation – determination of how much is to be paid to recipients of revenues taken in. The difficulties or complications reviewed in the preceding Section all revolved around whether certain types of oil and gas dealings, entered into with or by certain kinds of entities and concerning certain specific resources, trigger the law's collection obligation.

By way of transitioning between the subjects of collection and distribution, and at the same time maintaining focus on this section's concern with matters of calculation, the first difficulty taken up has to do with what the Iraqi

[107] See Iraqi Revenue Sharing Law, supra note 32 at art. 2: Definitions ("Revenue"); Iraq Intergovernmental Revenue Sharing Law, supra note 38 at art. 2: Definitions ("Revenue").

[108] See Consultants' First and Second Drafts, supra note 39 at art. 7, Sec. 5.

revenue-sharing law says regarding calculating the amount of money owed when its collection obligation comes into play. Article 1, First, of the revenue-sharing law provides for the creation of FRF or Fund to accumulate federal financial resources.[109] Article 2 follows this with nothing more than an indication that the financial resources collected are to consist of "[a]mounts received and obtained" from oil and gas activity, and from "[a]mounts received" from various other internal and external sources.[110] With the exception of revenues from sales of oil and gas, which all seem subject to collection under the law, absolutely nothing in article 2 suggests how to calculate or determine the specific amounts regarding royalties, bonuses, taxes or other monies that are due and owing. And although one might expect the oil and gas framework law to offer some formula or method for filling this gap, it, too, seems wanting. Articles 11 and 34 of that legislation prove most relevant. However, article 11 does nothing more than indicate that oil and gas activity generates monies through the mechanisms of sales revenues, royalties, bonuses, and taxes,[111] whereas article 34 does sketch out a particular formula, but only for the calculation of royalties to be paid by oil and gas developers, providing for nothing with respect to bonuses, taxes, or other potential sources of revenue.[112] Interestingly, if one contrasts the framework law with the KRG's 2007 Oil and Gas Law, it is clear that the latter is very specific and detailed regarding the calculation of amounts to be paid by those subject to its provisions. One provision very plainly notes the amounts of taxation to be paid,[113] a second the royalties that are owing,[114] another the revenues (or product) that can be anticipated by the KRG,[115] and yet another spells out the collection obligation[116] and speaks to eventual remittal to the federal government and distribution to central and subcentral levels.[117]

Examining the Iraqi revenue-sharing law's negotiating history of this first difficulty, it seems the KRG's February 1 and March 10 proposals are much like the revenue-sharing law itself. To a certain extent, the revenue-sharing law appears predicated on the notion that, when it comes to monies from matters other than the straight sale of oil and gas, either the oil and gas framework legislation or some other statutory or regulatory regime will identify specific formulae for calculating amounts that are due. As noted, the framework law provides such with regard to royalties, but is completely silent when it comes to bonuses, taxes, and other sources of revenue. Both of the KRG's draft proposals

[109] See Draft Law of Financial Resources, supra note 27 at art. 1, First.
[110] See id. at art. 2.
[111] See Draft Iraq Oil and Gas Law, supra note 74 at art. 11.
[112] See id. at art. 34.
[113] See Oil and Gas Law of the Kurdistan Region-Iraq, supra note 88 at art. 40.
[114] See id. at art. 41.
[115] See id. at art. 37.
[116] See id. at art. 15.
[117] See id. at arts. 18–20.

strike a similar course. All revenues from actual sales of oil and gas are subject to the revenue-sharing law's collection obligation, and because royalty amounts are set out in article 34 of the oil and gas framework law, the real difficulty concerning calculation arises in conjunction with bonuses, taxes, and other revenue sources from oil and gas activities. None of this is explicitly stated in the actual terms of the KRG's proposals, but derives from any reasonable reading of the language utilized.[118]

Something very similar can also be said with respect to the consultants' draft proposals. What makes them distinct from those of the KRG, however, is the fact that the consultants' drafts are much more explicit, especially the second consultant draft of March 7, 2007, when it comes to indicating in clear language that all revenues from the actual sale of oil and gas are subject to accumulation in the revenue-sharing account. Article 7, section 1, of the second consultant draft declared that "[a]ll monies owed to the Federal Government, a region, or a governorate and constituting Petroleum Revenue" is to be deposited in the Oil Revenue Fund.[119] Although the term "Petroleum Revenue" was not defined in section 5 of the same article in a way that pinned down exactly how much was owed by way of bonuses, taxes, and other matters, it did state in paragraph (a) of the section that it included all monies payable with respect to "receipts from oil and gas sales belonging to the State."[120] And as if to make clear that all the monies generated by the actual sales of oil and gas were subject to the revenue-sharing collection obligation, Section 2 of article 7 also provided that the very "sales agreements of the State [Oil] Marketing Organization or any similar organization shall provide for the direct electronic deposit of the revenues from such sales into the Oil Revenue Fund."[121] Though the accompanying footnote indicated direct deposit in order to minimize possible financial abuse,[122] the very idea that oil and gas sales revenues were to be paid by purchasers directly into an account leaves no confusion regarding the calculation as to how much should be paid. Once one moves away from revenues generated by the actual sale of oil and gas, however, neither of the consultants' drafts offer clarification on the matter of calculating payments on bonuses, taxes, and other revenue producers. In short, the ambiguity that derives from the language of Iraqi

[118] This emerges from the fact both the February 1 proposal, see Iraq Revenue Sharing Law, supra note 32, and the March 10 proposal, see Iraq Intergovernmental Revenue Sharing Law, supra note 38, indicate in art. 5, Sec. 3, that all "Revenues" are to be paid into the General Iraq Revenue Sharing Account, and in art. 2: Definitions, define "Revenue" as meaning "all moneys received" by the central or subcentral government in connection with petroleum activities. This obviously would include oil and gas sales revenues and, because the framework law spells out royalty amounts, those as well. Just as with the Iraqi revenue-sharing law itself, the amount of "moneys received" from bonuses, taxes, and other things, however, is not detailed with formulae for making calculations.

[119] See Consultants' Second Draft, supra note 39 at art. 7, Sec. 1.

[120] See id. at Sec. 5(a).

[121] See id. at art. 2.

[122] See id. at footnote 5.

revenue-sharing law itself is not removed by reflecting on the negotiating history that preceded it.

The second, third, and fourth difficulties regarding calculation are all directly and wholly associated with the distribution side of the revenue-sharing law. In large measure, they deal with the language of paragraph C of article 4, First. Prior to setting forth that language, one must recall, as noted earlier, that the way the revenue-sharing law works is that all collected revenues are deemed "Financial Resources" and are to go into the Financial Resources Fund (FRF or Fund), with distributions to all ministries, agencies, and levels of government being made from that fund. FRF is to be held by Central Bank of Iraq in earmarked external and internal financial resources accounts. The entirety of article 4, First, indicates that collected financial resources are to be distributed for federal government expenditures and projects,[123] supporting the Future Fund,[124] meeting the statutorily required quota amount for the Kurdistan region,[125] providing for the operational and investment expenditures of federal ministries,[126] and covering expenditures aimed at the development of governorates not organized into regions.[127] It is in this context that paragraph C of article 4, First, provides that an important use of FRF is to be for "[f]unding the quota of the region of Kurdistan which amounts to (17%) of the remaining revenues after subtracting expenditures [for federal expenditures and projects, and supporting the Future Fund]."[128] This is where the second difficulty on the distribution side surfaces. More precisely, that difficulty concerns the calculation of subtracted expenditures in order to get to Kurdistan's 17% allocation, and in particular the subtraction for federal expenditures and projects. Again, the KRG is entitled to 17% of the collected revenues that remain after certain deductions are made, and one of those deductions is for federal expenditures and projects. The exact language of the relevant cross-reference in paragraph C of article 4, First, to paragraph A means that the amount of the allocation is to based, in part, on a deduction for federal government "sovereign expenditures . . . and strategic projects of benefit to all . . . [and] agreed with the governments of the Regions and Governorates."[129] But what exactly constitutes a "sovereign expenditure[]" or "strategic project[] of benefit to all"? This is the nub of the second difficulty.

Winnowing the text of the Iraqi revenue-sharing law brings to light no real basis for an authoritative definition of a "sovereign expenditure[]" or "strategic project[] of benefit to all." As a consequence, the distribution calculation formula set forth in paragraph C of article 4, First, leaves much to be desired,

[123] See id. at art. 4, First, para. A.
[124] See id. at para. B.
[125] See id. at para. C.
[126] See id. at para. D.
[127] See id. at para. E.
[128] See id. at para. C
[129] See id. at para. A.

both in terms of ambiguity and, as noted later in connection with the discussion of the language's third difficulty or complication,[130] in terms of the inclusiveness of the expenditures that could be declared covered. What constitutes a "sovereign expenditure[]" or "strategic project[]" is far from self-defining and, therefore, opens itself up to much interpretive dispute. Although there may be little question about expenditures for roads, bridges, and other infrastructure constituting expenditures made on "strategic projects," what does the relevant language mean when it provides that the projects have to be "of benefit to all"? Is there some requirement that it must be used by or be available for use by every member of the public? And even in situations where a project might be said to benefit all, such as one designed to provide emergency economic relief in response to a nationwide natural disaster, how does one gauge the significance of the language's requirement that the project be "strategic," rather than short-term, in character?

Similarly troublesome is the additional reference to "expenditures" having to be "sovereign" in nature in order to qualify for deduction from collected revenues. Applied literally, this could preclude some expenditures connected with federal government contracts from being considered "sovereign expenditures" if they do not result in the delivery of some tangible end product. After all, it might be suggested that the only expenditures within the ambit of that language are those associated with the construction or delivery of some observable and touchable thing, such as a dam, building, or piece of equipment, not those associated with the mere payment of government employee salaries or the provision of social services to the larger community – in other words, a distinction exists between a "sovereign expenditure" and an "expenditure by a sovereign." Although the language of paragraph D of article 4, First, seems to make clear that it is not permissible to count the public budget day-to-day operational and investment expenditures of federal ministries in computing the amount of "sovereign expenditures," once one moves beyond the federal ministries and considers the operational and program expenditures of other federal agencies, committees, commissions, organizations, companies, and entities – some of whom, such as the Iraq National Oil Company (INOC) and the State Oil Marketing Organization (SOMO), may have direct and regular involvement with the oil and gas sector of the economy – it seems that the door is left open by the revenue-sharing law to considering many things as "sovereign expenditures."

The various draft proposals that collectively make up the negotiating history of the revenue-sharing law contain interesting provisions on the matter of deductions from amounts to be distributed to the Kurdistan region. Take the KRG's own February 1 draft, for instance. As previously mentioned, it indicated that basically all government-received "Revenues" were to go into a so-called

[130] See text accompanying infra note 148.

General Iraq Revenue Sharing Account[131] and defined "Revenues" to mean proceeds from oil and gas activity.[132] It then went on to provide that revenues paid by the federal government into the account were to be what remained after deductions were made to meet UN Security Council resolution compensation obligations connected with the First Gulf War.[133] Furthermore, 5% of "expected annual Revenue" collected in the account was designated as guaranteed for the Future Generation Fund, the KRG's analogue of the Iraqi revenue-sharing law's Future Fund.[134] Then, the KRG's first proposal indicated that the federal government also was to receive an allocation for its governmental expenses, but not to exceed the rate of 20% of "expected annual Revenue."[135] Collectively, this might dedicate as much as 30% or more of revenues for fixed purposes. Article 11 of the KRG's February 1 proposal next provided for so-called "Regional and Governorate Accounts," and it is here that the Kurdistan region's allocation was addressed.[136] Section 1 of article 11 called for a "First Regional Transfer," a transfer to be made from the revenues that remained, providing that it would be for governmental expenses of the regions, but without specifying a particular percentage allocation.[137] Section 2 of the same article then followed by noting that after the First Regional Transfer of funds and the transfer to the federal government, the balance in the General Iraq Revenue Sharing Account was to be regarded as the "Regional and Governorate Balance."[138] From this amount, Section 2(a) of the proposal then provided for a specific, but then undetermined, percentage allocation to the Kurds,[139] the balance to be available for other distributions, including to governorates and damaged areas of the country. While this approach may appear a bit more satisfactory than that contained in the Iraqi revenue sharing law itself, it is not without its own problems.

Intervening between this opening proposal by the KRG and its second, or March 10, 2007, proposal – one that departs not at all on this score – the first consultant draft of March 5 suggested another approach, albeit not one singling out the Kurdistan region for a special allocation. The consultants' first draft provided for the federal government to annually develop an estimate of anticipated petroleum revenues,[140] requiring as well that federal, regional, and governorate authorities put together budgets consistent with the estimate.[141] The federal budget was obligated to include deductions from the estimated petroleum

131 See Iraq Revenue Sharing Law, supra note 32 at art. 5, Sec. 3.
132 See id. at art. 2: Definitions.
133 See id. at art. 6.
134 See id. at art. 8.
135 See id. at art. 9.
136 See id. at art. 11.
137 See id. at art. 11, Sec. 1.
138 See id. at art. 11, Sec. 2.
139 See id. at art. 11, Sec. 2(a).
140 See Consultants' First Draft, supra note 39 at art. 8, Sec. 2, first sentence.
141 See id., second sentence.

revenues for a so-called "contingency amount," leaving the remaining revenues as "Distributable Revenue."[142] The federal budget was also required to include allocations for "an [unspecified] amount" for a Future Generation Fund,[143] and "an [unspecified] amount" for unidentified "damaged areas."[144] Presumably, given the horrific atrocities inflicted upon the Kurds, compensatory allocations from petroleum revenues would be forthcoming. From the language of the second sentence of article 5 of the consultants' first draft, the allocation was to be "in accordance with the ratio of population" to the country's total population.[145] To this extent, at least, the draft seems to track the Iraqi revenue-sharing law. Regional and governorate budgets were required not to exceed the amount yielded by the percentage of the country's population located in that region or governorate, times the so-called "Net Distributable Revenue," plus any allocations for being damaged areas.[146] Clearly, the concept of net distributable revenue was of central importance under the draft, and it was defined as "Distributable Revenue," minus certain specified items, including compulsory payments required under UN Security Council resolutions, payments needed to service the Iraqi national debt, payments essential to defense, and the capital and operating budgets of INOC or SOMO.[147]

The consultants' second draft proposal of March 7proved virtually identical on the matter allocations and deductions. Essentially, while the relevant language of the Iraqi revenue-sharing law itself may raise several difficulties or complications associated with determining the level of deductions from the ultimate allocation to be made to the Kurdistan region, the two far more detailed and intricate consultants' drafts of the revenue-sharing law contain difficulties and complications of their own. In a general sense, the drafts and the final revenue-sharing law all contemplate deductions from collected revenues, thereby affecting the actual amount of monies to be allocated to the KRG. Nonetheless, just as the meanings of "sovereign expenditures" and "strategic projects" prove troublesome under the Iraqi revenue-sharing law, perhaps even subjecting revenues to be distributed to serious depletion, so too the concept of "Net Distributable Revenue" presents problems of its own. For instance, because "Net Distributable Revenue" reflects "Distributable Revenue" reduced by deductions or things like capital and operating budgets of INOC and SOMO, should that be taken as authorizing deductions for an unlimited range of expenditures listed as within either institution's capital and operating budget? In the end, it seems that the much simplified language utilized in the ultimate version of the revenue-sharing law reflects both a desire to avoid the potential for confusion and abuse incident

142 See id, at art. 8, Sec. 3, first sentence.
143 See id. at art. 8, Sec. 4.
144 See id. at art. 8, Sec. 5.
145 See id., second sentence.
146 See id. at art. 8, Sec. 6.
147 See id. at art. 8, Sec. 7.

in more complex approaches, yet without producing a neat and tidy final package, and a resignation to the fact that perfection often has to take a back seat to the eventual closure of a negotiating process.

As mentioned earlier,[148] the third calculation difficulty on the distribution side is also connected with the language of paragraph C of article 4, First, of the Iraqi revenue-sharing law – the language guaranteeing the Kurdish region a 17% allocation. Specifically, the difficulty is that, even if one were to ignore or trivialize the interpretive problems associated with paragraph C's cross-reference to the concepts of "sovereign expenditures" and "strategic projects beneficial to all," there would remain the possibility that, since no cap or upper limit is established on the portion of collected revenues that can be subjected to deduction for such, serious erosion could occur with respect to the amount of revenues ultimately available for distribution. All that the language of paragraph C states is that the Kurdistan region's 17% allocation is to come from "revenues [remaining] after subtracting expenditures [for strategic projects and sovereign expenditures]."[149] Although that language clearly leaves aside deductions of expenditures related to public operational and investment budgets of federal ministries,[150] as well as expenses associated with development activities in governorates not organized into regions,[151] the absence of any limit on the percentage of collected revenue that can be depleted by sovereign expenditures or strategic projects poses a real problem for the Kurds and those other "subsidiary" designees identified as entitled to allocations under article 4, First.

When reflecting on the negotiating history leading to the finalization of the Iraqi revenue-sharing law, it appears that much the same environment that affected the drafters' inability to craft a more satisfactory approach to the matter of what kinds of expenditure qualified as deductions to be made from total revenues prior to the Kurds receiving their designated amount also operated to obstruct the development of specific numeric or percentage caps on how much of the revenue pool could be depleted prior to allocating the Kurdistan region's 17% share. As noted in the preceding discussion about the second calculation difficulty on the distribution side, both the KRG's draft proposals of February 1 and March 10, 2007, as well as the two consultants' drafts of March 5 and 7, contained a variety of specific percentage caps, or at least opportunities for negotiators to settle upon and then insert such caps. Before we refresh our recollection on that point, however, one inference seems beyond dispute: because the language of paragraph C of article 4, First, of the Iraqi revenue-sharing law contains an explicit grant to – and only to – the Kurdistan region of a guaranteed percentage share of collected revenues, whereas earlier draft proposals of the KRG and the consultants did not so designate the Kurds

[148] See text accompanying supra note 130.
[149] See Draft Law of Financial Resources, supra note 27 at art. 4, First, para. C.
[150] See id. at art. 4, First, para. D.
[151] See id. at para. E.

by name for special treatment, then KRG's negotiators must have been successful at prevailing on their "opposite numbers" in the negotiating process to include express designation of Kurdistan in return for the KRG relenting on its insistence about incorporating the kinds of numeric or percentage limits on predistribution deductions from total revenues that were reflected in its own and other proposals. In other words, the Kurds seem to have been prepared to accept a final legal regime that explicitly referenced only them as being entitled to a guaranteed percentage share of collected revenues, at the cost of giving up on the greater certainty inherent in identifying precise amounts or caps related to predistribution deductions. The risk, however, is that they wind up with a specified allocation amount, but the absolute level of funding incident to that amount is subject to depletion because the pool of revenues from which the allocation is to be made is reduced by subtractions for a variety of governmental expenditures.

The fourth, and final, calculation difficulty associated with the distribution of monies collected under the Iraqi revenue-sharing law has to do with the Future Fund. It will be recalled that the language of paragraph C of article 4, First, states that the revenue pool from which the Kurds are to obtain their 17% allocation will be reduced not only by federal government "sovereign expenditures" and "strategic projects of benefit to all," but also by transfers to be made into the Future Fund.[152] The problem is that the language of paragraph B of article 4, First, which references the Future Fund speaks of the funding being "in accordance with Article (7)."[153] Article 7, however, provides nothing more than that funding is to be at "a certain rate of the surplus resources," and that rate is to be determined by subsequent agreement between the federal government and the subcentral governmental units.[154] Again, as with the other calculation difficulties, this leaves absolutely no certainty regarding the level of funding that can be expected by the Kurds under the 17% allocation guarantee.

Noted earlier in connection with the discussion about the second difficulty – that involving the ambiguous nature of the concepts "sovereign expenditures" and "strategic projects of benefit to all" – at least one of the proposals in the negotiating background of the Iraqi revenue-sharing law dealt with the matter of the Future Fund in a much more precise and certain fashion.[155] That proposal is the KRG's February 1, 2007, draft and its article 8, Section 1.[156] Very explicitly it indicated that distributions to what it called the Future Generation Fund were to be made at the rate of 5% of expected annual revenue collection. The KRG's later March 10 draft proposal repeated the same approach.[157] Neither of the

[152] See id. at art. 4, First, para. C (cross referencing para. B).
[153] See id.
[154] See id. at art. 7.
[155] See supra note 134 discussing the Iraq Revenue Sharing Law, supra note 32, at art. 8.
[156] See id.
[157] See Iraq Intergovernmental Revenue Sharing Law, supra note 38, at art. 8, Sec. 1.

consultants' drafts were so specific. Much like the language of article 7 of the Iraqi revenue-sharing law itself, the best they offered was to leave unspecified the percentage of collected revenues subject to transfer to the Future Fund.[158] With respect to the same matter, the draft proposal of the Iraqi government suggested in its article 5 merely that the body charged with supervising collected revenues "shall have the right to submit a proposal to the Government and the Council of Representatives . . . to retain a specific amount annually or a percentage of the annual oil revenues to be deposited in an account called "Future Fund."[159] Plainly, what the revenue-sharing law's negotiators opted for was the open and uncommitted approach proffered by the Iraqi government and the consultants. While that may have been the best the Kurds could obtain, in view of other concessions they were fortunate enough to exact, it still left them with a marked degree of uncertainty concerning the level of funding guaranteed by the 17% allocation.

VI. CONCLUSION

Despite the fact that the Iraqi revenue-sharing law leaves several important matters – such as specification of what percentage of collected revenues shall go for the Future Fund – uncompleted, there can be no doubt that it represents a legitimate and honest attempt to structure a financial resources regime that is sound, fair, and transparent. As has been indicated, however, the regime suffers from a variety of difficulties associated with imprecision in the language settled upon by the drafters. To be sure, some, or perhaps most, of this imprecision can be explained as the result of compromises needed to conclude the negotiating process and produce a final product. Nonetheless, each imprecision presents the possibility for rancor, disagreement, and dissatisfaction going forward. It may be that some of this can be addressed by the development of a clearer regulatory and administrative regime, or by subsequent legislative adoptions specifically targeted at rectifying drafting deficiencies and ambiguities. In any event, as observed in the opening pages of this chapter, clarity is vital to the development of any successful legal regime. What now exists in the language of the Iraqi revenue-sharing law is a measure that lacks sufficient clarity on a number of important points. Only time will tell whether that proves deleterious to the effectiveness of the revenue-sharing law's overall objective.

In the context of concluding, it should be noted that the Constitutional Review Committee (CRC), established following the adoption of the Iraqi Constitution in 2005, reported in late May 2007 on a variety of suggested amendments that could, if adopted, have an impact on the matter of revenue

[158] See Consultants' First and Second Drafts, supra note 39 at arts. 8, Sec. 7(v), respectively.
[159] See A Draft Law of Oil Revenues, supra note 74 at art. (5).

sharing, including on the language of the Iraqi revenue-sharing law.[160] Of most relevance would be the suggested amendments to articles 111 and 112. The amendments, which were referenced earlier in Chapter 2,[161] would generally make clear that the federal government is to collect all oil and gas revenues for distribution to the subcentral governmental units, and that the retention by the federal government of a constitutional role with respect to oil and gas activities is not somehow contingent upon satisfaction with how revenues are distributed.

Article 111, First, of the suggested amendments simply provides that ownership of oil and gas is vested in all of the Iraqi people; the reference to the notion of "in all regions and governorates,"[162] contained in the Constitution's article 111, is deleted.[163] This is followed in the suggested amendments to article 111 by five separate paragraphs. Most important is article 111, Second, which proposes to read: "The federal government shall collect the oil revenues and distribute them equally to all Iraqis in accordance with the state budget law in [a] transparent and fair way to be consistent with population distribution in governorates."[164] The effect is to make the central government, and not the subcentral units, the collector of all oil and gas revenues. Practically speaking, this would mean either that the federal government would control from start to finish all the various revenue-generating aspects of oil and gas activity, or that the subcentral units would be required to remit all oil and gas revenues to the federal government itself. The Third through Fifth paragraphs of the amended article 111 spell out the factors to be considered in subsequently distributing revenues and stress the automatic, formalized, and transparent nature of such distributions,[165] with article 111, Sixth, requiring the adoption of measures of implementation.[166]

Article 112, First, of the suggested amendments replicates much of what now appears in the Constitution's current version of the article. The amended language, however, would eliminate the current version's distinction between "present" and "future" fields and, most significantly for revenue sharing, the idea that the constitutional role of the federal government in relation to managing oil and gas operations is conditioned or predicated upon satisfaction regarding its distributions of revenues. All the suggested version of article 112, First, provides is that "[t]he federal government, with the producing governorates and regional governments, shall undertake the management of oil and gas operations."[167]

160 See Constitutional Review Committee Report (23 May 2007), available at www.forumfed.org/pubs/IraqConstitutionalReviewENG.pdf (accessed July 18, 2008).
161 See Chapter 2, at notes 126–129.
162 See Iraqi Constitution, supra note 20 at art. 111.
163 See Constitutional Review Committee Report, supra note 160 at art. 111, First.
164 See id. at art. 111, Second.
165 See id. at art. 111, Third-Fifth.
166 See id. at art. 111, Sixth.
167 See id. at art. 112, First.

The import of this language is such that the federal government's role in relation to oil and gas would be enhanced, but given the clear distribution obligations appearing in the suggested amendments to article 111, it would be impossible to conclude that article 112, First's, amendments provide enhancement that now exempts the federal government from having to distribute collected revenues.

6 MEASURES TO RECONSTITUTE THE IRAQ NATIONAL OIL COMPANY (INOC) AND REORGANIZE THE MINISTRY OF OIL

I. INTRODUCTION

No matter the nature of the oil and gas legal regime governing relations between the representatives of the international industry and the host Iraqi governmental authorities, there will always be concerns about the specific, individual governmental entities charged with overseeing or actively participating in petroleum operations. Thinking from the ground up, so to speak, there are at least three structural approaches to the nature and responsibilities of those entities. First, whether power and authority is concentrated in a single entity or shared by several, the idea might be to have only the host country's entity or entities undertake petroleum operations. Clearly, however, as has been shown, this is not the option selected by Iraq for its oil and gas sector. Second, although private, nongovernmental entities, whether domestic or foreign, may be allowed to participate in petroleum operations – as in fact is the case with respect to Iraq – they may have to do so in conjunction or competition with particular governmental entities. And third, despite the possibility of having an oil and gas legal regime that allows for specific, individual governmental entities to participate in the oil and gas sector, the same participant entity, or some other, may be charged with legal authority to formulate oil and gas development policy, particular rules and regulations with which all participants are expected to comply; supervise the conduct of petroleum operators to ensure observance of relevant rules and regulations; negotiate and structure contracts with nongovernmental participants; and engage in sundry other tasks related to or associated with oil and gas activities.

In what follows, it will be obvious that, at the federal as well as the regional levels, Iraq has chosen to create a structure for its oil and gas sector that incorporates elements of both the second and third approaches. More precisely, from the information currently extant on the matter, the central government in Baghdad and the Kurdistan Regional Government (KRG) in Erbil accept the model of having certain specific, individual governmental entities actually participate in

petroleum operations in Iraq, while some other entity or entities formulate policy, provide input with regard to rules and regulations affecting oil and gas activity, undertake the negotiation and creation of contractual obligations, and oversee compliance with relevant legal standards, whether regulatory, contractual, or otherwise. Herein an attempt will be made not only to examine the intricacies of the organizational form chosen on these matters by both the central government and the KRG, but also to review what the terms of the controlling legal documents have to say on this score. Interestingly, even though the Iraqi Constitution establishes the foundation for subsequent legislative enactments, it provides little by way of focus on either INOC or the Ministry of Oil in particular. The most detailed statements on these two entities begin with the federal government's February 15, 2007, oil and gas framework law, and the KRG's 2007 Oil and Gas Law. After a review of what these two legislative measures have to say regarding participation in and oversight or regulation of petroleum operations, an effort will be made to examine what the central government has offered with respect to measures to reconstitute INOC and reorganize the Oil Ministry itself. As a preview, however, it warrants noting that, unlike with respect to the basic oil and gas framework law and the revenue-sharing law, Baghdad has been extremely close-mouthed regarding the precise content of the INOC and Oil Ministry restructuring legislation. It can only be speculated as to why this has been the case, but the reports that have surfaced about the measures suggest that, as of mid-autumn 2008, they have progressed little beyond the first stages of the legislative approval process.

II. THE RELEVANT TERMS OF THE IRAQI CONSTITUTION

At the outset, it should be noted that not a single provision of the Iraqi Constitution expressly addresses either INOC or the Ministry of Oil. Indeed, save for one exception, the Constitution does not even identify the Ministries that are to exist within the Iraqi government.[1] Despite this problem, there are a couple of very general and broad provisions that could provide some insight into the constitutional structure, powers, and authorities of INOC and the Oil Ministry. These are articles 25 and 26 of the Iraqi Constitution, as well as article 112, First, and article 112, Second. The two latter provisions were referenced in Chapter 2 in connection with subcentral governmental authorities' role in oil and gas activities,[2] but are taken up here for the generalities they might offer regarding central governmental institutions involved in or overseeing oil and

[1] For an English translation of the Iraqi Constitution, see www.export.gov/iraq/pdf/iraqi_constitution.pdf (accessed Nov. 15, 2007) (hereinafter Iraqi Constitution). See also translation at www.krg.org/articles/detail.asp?1ngnr=12&smap=04030000&rnr=107&anr=12329 (accessed Sept. 20, 2008). Article 9, First, para. C, does reference the Ministry of Defense, however.

[2] See text accompanying supra Chapter 2, notes 76–79.

gas activities. Articles 25 and 26, on the other hand, are discussed only in the present chapter, but were included in the Constitution, basically, for fleshing out the economic rights and liberties guaranteed by that document, not to suggest anything in particular with regard to either INOC or the Oil Ministry.

Taking each provision in chronological order, article 25 declares that Iraq is constitutionally obligated to "guarantee the reform in the Iraqi economy in accordance with modern economic principles [that] . . . insure[s] the full investment of its resources . . . and the encouragement and development of the private sector."[3] Plainly, this offers absolutely nothing about the governmental institutions to be involved in petroleum operations in Iraq. However, given its constitutionally imposed requirement of a modern economic vision that promotes full investment and stimulates private-sector development, it would not seem wholly without merit to suggest that article 25 indirectly affects both the structure of and the role to be played by any Ministry or entity involved with exploiting Iraqi oil and gas resources. Without reading specifics into article 25's general suggestions, it would be reasonable to conclude that promoting full investment and stimulating private-sector development would demand market openness with respect to interested parties accessing oil and gas resource exploitation opportunities. This translates into not only an institutional structure that is amenable to investment, but a sense that regulatory and oversight responsibilities, though taken seriously, are allocated and administered in a way that does not unnecessarily obstruct or frustrate interest in oil and gas investment.

Article 26 of the Iraqi Constitution picks up on this theme by stating explicitly that one of the constitutional obligations of the central government is to "guarantee the encouragement of investment in various sectors, [though such is to] . . . be regulated by law."[4] If article 25 articulates a general principle of encouraging full investment and private-sector development, article 26 leaves no doubt that this applies to all the economy's "various sectors," presumably even including oil and gas. Clearly, however, it also provides that such encouragement does not mean a conscious absence of regulation, monitoring, or oversight. As the explicit terms of article 26 provide, any guarantee of investment encouragement "shall be regulated by law." The tension created between regulation and encouragement of investment suggests that, in terms of structure and substance, INOC and the Oil Ministry, the entities charged with responsibility in connection with petroleum operations, are tasked with walking a tightrope. The nature of the relationships between INOC and the Ministry and how they carry out their jurisdictional responsibilities are not to be such that they hinder or complicate investment, yet the oversight executed by both in connection with monitoring or participating in petroleum operations must ensure compliance with appropriate regulatory directives.

[3] Iraqi Constitution, supra note 1 at art. 25.
[4] See id. at art. 26.

Articles 112, First, and 112, Second, offer only slightly more detail. Article 112, First, provides that the federal government, in cooperation with the governments of the regions and governorates, shall manage oil and gas extracted from present fields. Although there may be questions regarding the distinction between present and future fields, and the extent of federal as opposed to subcentral authority with respect to oil and gas that has been extracted from present fields, one thing is perfectly clear from the language of the provision. Specifically, the federal government is provided with distinct constitutional power concerning the management of oil and gas extracted from present fields. That management power, though not expressly assigned to some particular, identified entity representative of the federal government, is nonetheless a power that must be shared with the regions and governorates. It cannot be exercised solely and exclusively by the appropriate federal entity, in this case the Ministry of Oil. It has also been seen that the language of article 112, First, establishes a proviso that conditions the retention of this power on the federal government meeting its constitutionally established revenue-sharing obligations.[5] Presently, however, what is most important is the article's unequivocal establishment of authority on the part of the federal government, presumably through an entity of its creation, to manage oil and gas extracted from those oil and gas fields considered "present." When taken in conjunction with articles 25 and 26, the effect would be to require the central government in Baghdad to put together a legislative plan (including an institutional structure and regulatory regime) that promotes investment in all the nation's various economic sectors, encourages private business activity, makes sure that all such endeavors are subject to appropriate legal regulation, and, with particular regard to the oil and gas sector, ensures that the legislative plan incorporates central government management of oil and gas extracted from present fields. Obviously, in light of the extensive responsibilities of federal authorities in a wide range of diverse matters, the creation of special federal entities to deal with these constitutional directives is inescapable.

Article 112, Second, simply adds to these particular constitutional charges. Again, as with article 112, First, that is done with explicit reference to the oil and gas sector. As before, the language of article 112, Second, speaks of the federal government acting in cooperation with the regions and governorates, but this time to formulate strategic policies for the developing the nation's oil and gas wealth in a way that achieves the greatest benefit for the Iraqi people. Further, the accomplishment of that goal is to be in conjunction with use of "the most advanced techniques of the market principles" and "encouraging investment" in the sector.[6] Although still remaining completely reticent about mentioning by name any central government entity for executing the particular task of formulating strategic policy for oil and gas development, article 112,

[5] See text accompanying supra Chapter 2, notes 87–88.
[6] See Iraqi Constitution, supra note 1 at art. 112, Second.

Second, quite palpably adds to the constitutional charges directed at federal governmental authorities. Not only must the federal authorities meet the more generic economic development directives of articles 25 and 26, as well as article 112, First's, directive of management of extracted oil and gas, it must also – albeit in consultation with subcentral units – put together comprehensive, long-term policies for developing Iraq's oil and gas resources. Though not spelled out in so many words, it is more than understandable that this would lead the federal government to conclude that the reconstitution of INOC and reorganization for the Oil Ministry were imperatives that could not be averted.

It is certainly one thing to conclude that INOC and the Oil Ministry had to be either revived or rearranged, if the directives of articles 25, 26, and 112, First and Second, of the Iraqi Constitution were to be met. After all, surely it was not expected by the drafters of the Constitution that either the Council of Representatives (the Iraqi parliament) or the chief executives (President, Prime Minister, or Council of Ministers) would *directly* execute the mandates of the relevant constitutional articles. But why was it viewed as necessary that action be taken with respect to both INOC and the Oil Ministry, and why a vesting in INOC of authority with respect to actual participation in petroleum operations regarding certain oil and gas fields, when no reference to participation of any sort appears in these, or any other, constitutional provision? The answer to this can only be guessed at and surely has to do with an attempt to gather to the central government as much power as is constitutionally reasonable. Though the language of article 112, First, speaks of managing oil and gas extracted from present fields, some may construe this as indicating that the management power extends to the actual process of extraction, therefore encompassing the right to participate in petroleum operations in present fields. Yet the precise language of that particular provision seems clear in being limited to managing oil and gas that has been extracted, thus not including management of the actual extraction, let alone participation therein.

Aside from this, however, once it was concluded at the federal level that it was essential to reconstitute INOC and assign to it the task of participating in the exploitation of present fields,[7] it was also then necessary to decide upon the assignment of the constitutional authorities referenced in articles 25, 26, and 112, Second. Instituting reforms so as to apply modern economic principles to ensure full investment and encourage private development and adequately regulated investment in the entire range of economic sectors, as directed in articles 25 and 26, all the while granting federal authorities (in cooperation with the subcentral units) the power to formulate strategic policies for the development Iraq's oil and gas wealth, as directed in article 112, Second, required additional assignment of tasks. As seen in Chapter 3 of this study, the federal government's

[7] On this assignment, see text accompanying supra Chapter 3 at notes 9–10, 19–20, 27–28, and 47–53.

February 15, 2007, oil and gas framework law not only envisions the Ministry of Oil playing an important role on these other fronts, but also calls upon both the Council of Ministers and FOGC (the Federal Oil and Gas Council) to perform significant functions.[8] In terms of the present focus, however, it may be recalled that the framework law speaks of the Oil Ministry being the competent authority for "proposing Federal policy, laws and plans" regarding oil and gas.[9] Consistent with the language of the Iraqi Constitution, policies and plans are to be drawn up "in consultation with" regional authorities and producing governorates.[10] Just as with respect to the language of article 112, Second, of the Constitution, so the framework law does not limit the Ministry's policy formulating authority to oil and gas fields of some particular type. Whether a field is considered present or future, strategic development policy authority over that field is vested in the Oil Ministry.

III. THE FEDERAL OIL AND GAS FRAMEWORK APPROACH: ARTICLES 6 AND 7, AS WELL AS 5D AND 5E

As just alluded to, the February 15, 2007, framework law on oil and gas builds on what the general and broad directives of the relevant provisions of Iraqi Constitution provide. The framework law contains three sets of provisions addressing the roles of INOC and the Ministry of Oil. The first set is reflected in articles 6 and 7 and speaks directly to the matter of reconstituting INOC and reorganizing the Oil Ministry. The second set is captured in articles 5D and E and basically deals with where INOC and the Oil Ministry fit in to the larger picture of responsibilities to be executed and duties to be performed in the oil and gas sector by various Iraqi governmental bodies. The third set is represented by a large number of other articles scattered throughout the framework law and simply constitutes recognition that, when it comes to specific issues related to the management of petroleum resources, exploration and field development operations, natural gas activities, transportation, pipelines, or regulatory matters, it might be entirely appropriate to assign INOC or the Ministry of Oil some specific and particular role. In this section, attention will limited to the first two sets of provisions just referenced – specifically, those that speak directly to the matter of INOC and the Ministry through the language of articles 6 and 7 of the framework law, and those that do so through articles 5D and 5E by situating the two institutions in the larger picture of assignment of responsibilities regarding the oil and gas sector. In terms of the approach of the federal oil and gas law

[8] See text accompanying supra Chapter 3 at notes 27–40.

[9] See art. 5D, First, Republic of Iraq Draft Iraq Oil and Gas Law No. of 2007 (Feb. 15, 2007), available at www.iraqrevenuewatch.org/documents/oil_law_english_20070306.pdf (accessed Feb. 12, 2008) (hereinafter February 2007 draft).

[10] See February 2007 draft, id. at art. 5D, Fourth.

framework legislation, Section IV of the chapter, rather than the current section, will take up the matter of the large number of other articles scattered throughout the framework law that provide authorities to either INOC or the Oil Ministry.

Articles 6 and 7

Articles 6 and 7 leave no doubt about the matters of reconstituting INOC and reorganizing the Ministry of Oil. With respect to INOC, article 6 does several important things. To begin with, it creates INOC as a "holding company" that is fully owned by the Iraqi government, but financially and administratively "independent" and operated purely on a "commercial basis."[11] This has the effect of establishing INOC as an autonomous business venture, albeit one wholly owned by the nation's government, and envisioning INOC operating on a market-oriented basis, rather than a nonmarket, command-and-control sort of model. That appears to be the essential thrust of article 6's reference to INOC functioning on a "commercial" basis and its parallel reference to INOC being financially and administratively "independent" of the government itself.

Beyond that, article 6 specifically identifies the operational realm of INOC, in terms of the oil and gas fields in which it is to function. INOC is vested with "[m]anag[ment] and operat[ional]" authority over those existing producing fields listed in Annex 1 of the Dubai Annexes.[12] It is also vested with authority in regard to discovered and yet nonproducing fields listed in Annex 2.[13] However, that authority over Annex 2 fields differs from the management and operational authority over the Annex 1 fields, in that it extends only to authority to "[p]articipa[te] in the Development and Production" of the Annex 2 fields.[14] Clearly, the notion of participation, as opposed to management and operations, seems to look toward a qualitatively different form of authority exercised by INOC over Annex 2 by comparison with Annex 1 fields. Further, because the participation to be exercised by INOC is to be with respect to "Development and Production" of the Annex 2 fields,[15] whereas the Annex 1 fields are subject to INOC authority over management and operations of those existing producing fields, it would appear that Iraq's 2007 framework law conceives of INOC's authority as somewhat circumscribed in regard to the various matters concerning Annex 2 fields that might merit its attention. When it comes to INOC's involvement in fields listed in Annexes 3 and 4, article 6 of the framework law provides it with authority to "[c]arry[] out for Exploration and Production operations in new areas outside its respective areas in adherent [sic] to this law

[11] See id. at art. 6A.
[12] See id. at art. 6B, First.
[13] See id. at art. 6B, Second.
[14] See id.
[15] See id.

through applying for Exploration and Production rights in new areas on a competitive basis."[16] In view of the fact that other provisions of the February 15, 2007, oil and gas framework law reserve the Annex 4 fields exclusively to the control of the subcentral governmental units, as seen earlier in this study, the effect of this language is essentially to say that, in the Annex 3 discovered but undeveloped fields, INOC has no special authority; it must compete with all others for permits to explore and produce oil and gas.

Article 6 also touches on another area important to petroleum operations, specifically, that of main pipelines and ports of export from Iraq. Pursuant to its terms, INOC is to "own, manage, and operate" both the main pipeline network and ports of export.[17] This is transitional, however, and is to last only until a full reorganization of the Ministry of Oil is completed. Clearly, the language of article 6 suggests the expectation that the transition will be completed within 2 years of the adoption of the oil and gas framework law.[18] In any event, once completed, it is provided that the federal oil and gas council is to decide upon the entity to then be responsible for "operating," not owning and managing, the main pipelines and ports of export. FOGC's decision is to be based on an Oil Ministry proposal, coordination with INOC, and approval of the Council of Ministers.[19] Article 6 also provides INOC with an additional authority: INOC is to be the entity that "enters into contracts with existing and future shippers of Oil and Gas."[20] Presumably, in view of its parallel authority over Iraq's main pipelines, it makes sense to assign to INOC the task of making contracts with shippers to use those pipelines. It is unclear why it was felt essential to include this authority, for it would seem that inherent in the ownership of and the power to manage and operate pipelines would be the right to make contracts with shippers for their actual use. In any event, article 6's separation of contract making from ownership, management, and operation authority presents an interesting question, in the event FOGC eventually assigns operational authority to some entity other than INOC. In particular, should INOC continue to be the entity seen as possessing the contract-making power, because of its retention of ownership and management authority? Or should the new entity charged with operating the pipelines be seen as having the contracting power, given that the latter constitutes an integral aspect of operational authority?

The final matter that bears brief mention in conjunction with article 6's terms regarding INOC dovetails with the frequent references in the Iraqi Constitution to cooperation and consultation between the central government and its subcentral units at both the regional and governorate levels. As an illustration, it will be recalled that article 112 of the Constitution very plainly indicates, in each of

[16] See id. at art. 6B, Third.
[17] See id. at art. 6B, Fourth.
[18] See id.
[19] See id.
[20] See id.

the article's two paragraphs, that the federal government's authorities to manage oil and gas extracted from present fields and formulate strategic policy for the development of the nation's oil and gas resources are authorities to be exercised in coordination with the regions and governorates. Along this line, article 6, Fifth, of the February 15, 2007, oil and gas framework law provides that INOC is to establish wholly owned "subsidiary companies," presumably in the various regions and governorates throughout Iraq, not just to undertake petroleum operations around the country, but to "ensure and develop the coordination and collaboration with the Regions and Producing Governorates" envisioned by the dictates of the Constitution.[21] Each of the subsidiary companies is to be represented on the board of INOC, have its operational costs covered, and be able to earn a reasonable profit to develop and expand its own operational activities.[22]

As mentioned earlier, in addition to what article 6 of the framework law on oil and gas provides by way of general detail concerning the reconstitution of INOC, article 7 of that same law provides in connection with the reorganization of the Ministry of Oil. Prior to exploring that general detail, however, it must not be overlooked that the language of article 7 makes absolutely clear that the Ministry, "pursuant to a law," is to initiate institutional and methodological innovations to accommodate its new responsibilities and duties, including those recounted in article 7 and other provisions of the framework law.[23] The thrust of such a directive is the enactment of a follow-on legislative measure, like that contemplated in the long-discussed and -expected measure reorganizing the Ministry of Oil – one of the four basic legislative measures making up the total oil and gas law legislative package.

Now specifically concerning the responsibilities and duties generally detailed in article 7 of the framework law itself, the article continues by directing the Ministry to create a "new department" charged with the task of specializing in the "planning, developing, and following up [on] the process of [contractors] obtaining [from the Ministry] rights" relative to petroleum operations.[24] Given that the new department is to plan, develop, and follow up on contracts of this sort, article 7 emphasizes the need for the Ministry to make sure that departmental employees are skilled in the vagaries of the petroleum operations "bidding process," the techniques important to the conduct of "professional negotiations with oil companies," and the ultimate conclusion of such negotiations through the "sign[ing] [of] contracts of Exploration and Production rights."[25] Departmental teams responsible for particular negotiations are permitted by article 7

[21] See id. at art. 6B, Fifth.
[22] See id.
[23] See id. at art. 7A.
[24] See id.
[25] See id.

to contain advisers with distinguished international reputations and experience, but they must in every case have representation from relevant producing governorates.[26] Interestingly, even though the language of the two paragraphs of article 112 of the Iraqi Constitution speaks, as previously observed, to the federal government having power over management of oil and gas extracted from present fields and the formulation of strategic policy relative to the development of Iraq's oil and gas resources, no such limitations appear in the language of article 7 when it comes to the scope of the activities of the Oil Ministry. The authority of the new department regarding bidding, negotiations, and contract signing includes nothing that would confine those activities in a way consistent with the terms of the Constitution.

Setting this potential source of controversy aside, however, the language of article 7 does proceed to hold forth on some matters other than the creation of and duties assigned to the aforementioned new department within the Ministry. More specifically, it once again emphasizes the imperative of adopting a "law of reorganization of the Ministry of Oil,"[27] and then indicates that such a law must include devices and mechanisms that will ensure a wall of separation between, on the one hand, the Ministry, related companies (such as INOC and its subsidiaries), and regulators and monitors, and, on the other hand, the oil and gas companies doing business in Iraq and subject to oversight and regulatory control. The precise language of article 7B speaks of such devices and mechanisms being structured in a way as to "guarantee[] a full separation between, on the one hand, the Production and oil services companies, and, on the other hand, the regulatory, monitoring, and supervisory departments in the Ministry."[28] Although this language alone might seem to suggest concern only with separation between the oil companies and the Ministry and its entities, it is prefaced by other language plainly declaring that the restructuring is to ensure that the relationship "between the Ministry and other related companies and regulating entities" and the oil companies guarantees full separation from the referenced regulatory, monitoring, and supervisory departments of the Ministry.[29] The idea would certainly seem to be that, even though INOC is separate from and not a department of the Oil Ministry, there must be adequate independence from and relational space between INOC and the oil companies so that the regulatory, monitoring, and supervisory duties of the Ministry are not compromised. In this same vein, the concluding sentence of article 7B also references the requirement for another separation – that between "producing units and the services departments" of the Ministry.[30] The nature and character of that separation is to be one that "guarantees increasing productivity and maximizing

[26] See id.
[27] See id. at art. 7B.
[28] See id.
[29] See id.
[30] See id.

profits."[31] After all, in the event that producing units and services departments lacked adequate separation, the latter could serve as a huge drag on oil and gas production. In full recognition of the fact that excessive separation leading to hostility and turf battles could also produce the same result, the last sentence of article 7B speaks of separation in conjunction with "integration" between producing units and services departments.[32] The idea is that the two are to operate in such a way that they complement each other so as to increase productivity and maximize profits.

Moving away from articles 6 and 7, and in the direction of articles 5D and 5E, it bears recalling at the outset that the basic thrust of article 5 is to go through the list of relevant Iraqi governmental entities and set forth for each their particular competences in connection with oil and gas activity. In a very general way, this has been touched on in Chapter 3.[33] And, it will be remembered that one of the extremely important governmental players in that respect is FOGC, an entity to be newly established by the framework law and provided with extensive and significant powers concerning petroleum operations in Iraq.[34] In articles 5D and 5E, various competences are also assigned to the Oil Ministry and INOC, respectively.

Articles 5D and 5E

In addressing the Oil Ministry, article 5D speaks to four specific competences. The first two have to do with the Ministry's role in developing federal policy, plans, laws, regulations, and guidelines, and its role in oversight ensuring the implementation of such. As to developing policy, plans, laws, regulations, and guidelines, article 5D, First and Second, provides that the Ministry is "the competent authority" for "proposing" policy, laws, and plans[35] and the body that "issu[es]" regulations and guidelines pertaining to petroleum operations.[36] The regulations and guidelines issued by the Ministry are to be cast in terms that "implement Federal plans" previously promulgated. Article 5D, Second, goes beyond this and also indicates that the Oil Ministry is to be vested with the competence not to enact or pass, but to "create" legislation.[37] Of course, this coincides with the indication in article 5D, First, that the Ministry is the competent authority for "proposing" a variety of things, including "laws."

Article 5D, Fourth, picks up on the authorities in 5D, First and Second, in a curious way. Specifically, it provides that, on the basis of policies, regulations,

[31] See id.
[32] See id.
[33] See text accompanying supra Chapter 3, notes 11–12 and 27–50.
[34] See id. at notes 31–40.
[35] See February 2007 draft, supra note 9 at art. 5D, First.
[36] See id. at art. 5D, Second.
[37] See id.

guidelines and requirements under article 5D, First and Second, the Ministry shall, in consultation with the regions and producing governorates, annually or as needed, "draw up Federal policies and plans on Exploration, Development and Production."[38] What is curious is that you would normally think regulations, guidelines, and requirements would come after, and not precede, the issuance of policies and plans. Yet article 5D, Fourth, arranges the order the other way around – regulations, guidelines, and requirements are to serve as "the basis" for the "draw[ing] up [of] Federal policies and plans on Exploration, Development and Production."[39] Article 5D, Fourth's, reference to regulations, guidelines, and requirements serving as the basis for drawing up policies and plans contains a clear clue to explaining this curiosity; it is not only to be regulations, guidelines, and requirements, but "policies" that are to serve as the basis. Thus, the only way that policies could serve as the basis for "policies and plans" relative to Exploration, Development and Production, would be if the latter policies and plans were more specific or targeted than the former policies. Consequently, the proper interpretation of the opening language of article 5D, Fourth, would have to be that general, overall oil and gas economic policies, regulations, guidelines, and requirements are to constitute the basis for the formulation of specific "Federal policies and plans on Exploration, Development and Production" in particular.

A couple of other things must be noted about article 5D, Fourth, before proceeding to discuss the Oil Ministry's role in oversight ensuring implementation of federal policies, plans, laws, regulations, guidelines, and other requirements. First, the language of that provision makes clear that the policies and plans drawn up annually or as needed by the Ministry and dealing with Exploration, Development, and Production of oil and gas are simply to be regarded as "suggestions . . . to be submitted to the Federal Oil and Gas Council . . . [for] review[] and deci[sion] [thereon]."[40] In other words, although the Ministry is empowered to annually perform the important role of formulating policies and plans relative to oil and gas exploration, development, and production, it is FOGC that is assigned the determinative role of settling upon the ultimate character of exploration, development, and production policies and plans. Second, article 5D, Fourth, also indicates that, in view of the fact that exploration, development, and production policies and plans concerning oil and gas are to be drawn up in consultation with the regions and producing governorates, they must weave into their content a geographical distribution and timing that includes petroleum operation projects of regional governments and nonregional governorates in all the various sorts of fields falling within each of the four Dubai Annexes categories.[41] Stated another way, the Ministry's policies and plans for

[38] See id. at art. 5D, Fourth.
[39] See id.
[40] See id.
[41] See id.

exploration, development, and production must include not just the developed, commercially and noncommercially producing fields of Annexes 1 and 2, but the discovered, yet undeveloped, as well as the wholly unexplored fields of Annexes 3 and 4.

Now as to the Ministry's role in oversight ensuring implementation of federal policies, plans, laws, and so on, article 5D, Third and Seventh, are most relevant. The former states that the Oil Ministry is to undertake the actions necessary to ensure coordinated and uniform implementation of "monitoring and supervisory actions" throughout all of Iraq. Consultation and cooperation with the regions and producing governorates are important elements in accomplishing this goal.[42] The latter obviously plays well in light of the cooperative and coordinative spirit spoken of in provisions such as article 112 of the Iraqi Constitution, in its aim of creating a good working relationship between the central government and its subcentral governmental units when it comes to the important oil and gas sector. Article 5D, Third's, statement is supplemented by that in article 5D, Seventh, which tasks the Ministry of Oil with the responsibility for "monitoring Petroleum Operations to ensure adherence with the laws, regulations, and contracting terms."[43] Just as international oil companies have a variety of divisions and departments, each assigned specific and narrow duties and responsibilities, so, too, the Ministry is directed, in coordination with the regions and producing governorates, to "create specialized entities" to carry out the monitoring tasks.[44] Particular tasks spoken of in the language of the provision include the traditional "administrative and technical monitoring duties" connected with compliance with laws, regulations, and contract terms; the "verification of costs and expenditures" by petroleum operators, in order to ensure a proper allocation of profits; and other forms of "inspection, technical audits, and other appropriate actions" of compliance oversight.[45]

Apart from the first two competences found in article 5D, and in particular paragraphs just reviewed – First, Second, and Fourth, as well as Third and Seventh – the second two competences of the Oil Ministry listed in article 5D have to do with the empowerment of the Ministry to represent Iraq in matters with regional governments and international partners, and its empowerment to enter into contracts. Concerning representation of Iraq, paragraphs Fifth and Sixth of article 5D are relevant. The former simply states the basic proposition that the Ministry is the competent authority to represent Iraq in both regional and international forums.[46] Though cast in terms that seem all-encompassing, the intent must be limited to representation about matters dealing with oil and gas because, after all, the assignment of such competence appears in legislation

[42] See id. at art. 5D, Third.
[43] See id. at art. 5D, Seventh.
[44] See id.
[45] See id.
[46] See id. at art. 5D, Fifth.

focused on that matter alone. Article 5D, Sixth, follows up on the matter of representation by noting that the Ministry is also empowered to "negotiate with other countries and organizations" with an eye toward the conclusion of "multilateral and bilateral treaties related to Oil and Gas. . . ."[47] Plainly, if the treaties to be negotiated are to be limited to oil and gas, then it would seem, despite the more inclusive sort of language in article 5D, Fifth, regarding the Ministry's general empowerment to represent Iraq in regional and international forums, that empowerment, too, is limited as suggested. Before proceeding to the Ministry's authority to enter in to contracts, it should also be noted that article 5D, Sixth's, empowerment regarding treaty-making is subject to the approval process delineated in the Iraqi Constitution, which essentially requires a ratification process involving both the parliament (Council of Representatives) and the President.[48]

The contracting authority of the Ministry of Oil is provided for in article 5D, Eighth. That provision declares that the Ministry has the right to "execute contracts related to Oil and Gas supply services," but then immediately attaches the language "other than those covered by Exploration and Development Contracts. . . ."[49] Though initially this added language might seem to suggest that the Ministry's contracting power is a power confined to contracts related to oil and gas supply services, believing this would be a profound mistake. It will be recalled from Chapter 3 of this study that the Ministry is also vested with the authority to enter into the basic Exploration and Production Contracts for exploiting the nation's oil and gas wealth.[50] Yes, it is true that the language of article 5D, Eighth, in referencing empowerment to contract for services, confuses the matter. Nonetheless, the combination of article 5D, Eighth, and article 7 on the Ministry's reorganization should not be taken as exhausting the list of powers assigned by the framework law to the Oil Ministry. Equally important is what is provided in article 9 on the granting of rights to engage in petroleum operations: it explicitly provides that the Ministry is authorized to negotiate exploration and production contracts (i.e., all contracts for the oil and gas development, whether in the form of a service contract, field development and production contract, or risk exploration contract). Article 5D, Eighth's, reference to a Ministry power to enter into contracts related to oil and gas supply services other than those covered by exploration and production contracts does not mean the Ministry lacks the authority to enter into the latter, only that in addition to the power to enter into the latter, it possesses the further power to contract on all other matters related to oil and gas supply services.

With respect to article 5E of the February 15, 2007, oil and gas framework law, it focuses on the competences of INOC. As seen from the discussion

[47] See id. at art. 5D, Sixth.
[48] See Iraqi Constitution, supra Chapter 2, note 28 at arts. 61 and 73.
[49] See February 2007 draft, supra note 9 at art. 5D, Eighth.
[50] See text accompanying supra Chapter 3 at notes 17–24, 27–28, and 41–47.

of article 6, INOC has management and operational authority with respect to Annex 1 fields, is entitled to participate in development and production in Annex 2 fields, and can apply on a competitive basis for exploration and production rights in so-called "new areas," presumably meaning Annex 3 fields, given that Annex 4 areas are envisioned as being under regional control.[51] Building on this, article 5E, Second, states that the scope of INOC's operations shall include oil and gas "Exploration, Development, [and] Production," and then continues by listing "Transportation, Storage, Marketing and sales down to the Delivery Point."[52] The latter listing also seems reasonable in view of the fact that article 6 provides, as seen earlier, that the reconstituted INOC is to include not just management, operational, participative, and application rights with respect to petroleum operations, but at least transitional ownership, management, and operational rights over main oil and gas pipelines and ports of export, as well as authority to enter into contracts with oil and gas shippers. Pipelines and ports of export necessitate both the transportation and storage of hydrocarbons, and contracts with shippers certainly suggest marketing and general sales efforts. Clearly, the competence provided by article 5E, Second, for INOC to make necessary contracts and seek requisite permits and approvals ties in to the other powers and authorities enumerated in that particular paragraph of article 5E. The same can be said about the fact that article 5E, First, the immediately preceding paragraph, declares another competence of INOC to be its right, "in accordance with Article 6 of [the framework law]," to "participate in Exploration and Production operations."[53] The fact this competence is accompanied by INOC's obligation to "sell its share of Crude Oil to the Oil Marketing Company"[54] further drives home the tight nexus between articles 5E, First and Second, and article 6 itself.

A couple of other not insubstantial competences are also assigned to INOC by virtue of article 5E. First, article 5E, Third, entitles INOC to "participate as a commercial partner in international projects related to transportation, marketing and sale of Oil and Gas,"[55] a not unsurprising competence given article 5E, Second's, reference to INOC's power in connection with transportation, storage, marketing, and sales. Beyond this, however, article 5E, Third, references INOC being authorized to participate in exploration and production contracts "outside the Republic of Iraq."[56] All such contracts, in view of the fact that INOC, though an independent commercial endeavor, is the alter ego of the Iraqi government,

[51] See text accompanying supra notes 11–17.
[52] See February 2007 draft, supra note 9 at art. 5E, Second.
[53] See id. at art. 5E, First. The sales by INOC to the Oil Marketing Company are to be at a price that allows INOC to recover its costs and earn a "reasonable profit that . . . facilitate[s] the company's development in Exploration and Production." See id.
[54] See id.
[55] See id. at art. 5E, Third.
[56] See id.

require "approval by the Council of Ministers."[57] Second, article 5E, Fourth, consistent with earlier observations regarding article 6, directs that INOC is to form subsidiaries around Iraq, based on field locations and management tasks. When spoken of in article 6, the formation of subsidiaries seemed tilted in the direction of furthering cooperation between the central government and the regions and producing governorates. The directive regarding the formation of subsidiaries in article 5E, Fourth, appears to emphasize forming subsidiaries throughout Iraq for the reasons of promoting "better efficiency."[58] Third, INOC is empowered by the terms of article 5E, Fifth, to "establish in association with others affiliated companies or acquire shares in existing companies" in Iraq.[59] The idea is that, if INOC can be assisted in the accomplishment of its oil and gas objectives by affiliating with others or acquiring shares of existing businesses, it should be authorized to do so. Paragraph Fifth of article 5E also vests INOC with the same authority outside of Iraq, but again conditions this upon approval of the Council of Ministers.[60] And fourth, article 5E, Sixth, provides INOC with the right to "acquire tangible and intangible assets" if such assists it in "achieving its objectives."[61]

IV. FEDERAL OIL AND GAS FRAMEWORK APPROACH: SCATTERED ARTICLES

Having examined the significance of articles 6 and 7, as well as 5D and 5E of the February 15, 2007, oil and gas framework law, and their specifics with respect to INOC's reconstitution and the Oil Ministry's reorganization, various other scattered provisions of the framework law – provisions not directly and explicitly labeled as addressing INOC and the Ministry – merit at least a few pages of review. It should be noted in that context, however, that the provisions to be reviewed are not those establishing conditions upon or requirements applicable to INOC or the Oil Ministry. Examples would include provisions such as article 15, which requires INOC to give preference in its purchases to local Iraqi products, maximize the training offered to Iraqi nationals, and seek business and operational associations that promote the rapid growth of the Iraqi hydrocarbons industry; article 17, which mandates that INOC utilize oil and gas extraction practices that optimize production; and article 19, which directs the Ministry to share petroleum data – geophysical or otherwise – with INOC. Rather, the provisions reviewed are those that speak to the rights, powers, or authorities provided to INOC or the Oil Ministry beyond those set forth in articles 6 and 7,

[57] See id.
[58] See id. at art. 5E, Fourth.
[59] See id. at art. 5E, Fifth.
[60] See id.
[61] See id. at art. 5E, Sixth.

as well as 5D and 5E. Though perhaps counted differently by others, nine additional provisions of the framework law would seem to fall into that category, and each will be examined in the material that follows.

The first additional provision of the framework law would be article 8. In a general sense, it deals with the matter of field development and oil and gas exploration. Recognizing both that INOC has not been functional since the mid to late 1980s and is provided with authority over developed, producing oil and gas fields referenced in Annex 1 of the Dubai Annexes, it states clearly that INOC is the operator of all such fields and is authorized to "directly sign services contracts or administrative contracts" with companies to accelerate both restoration of, and increases in, production from those fields.[62] This provides a certain specificity that builds on article 6's more general indication that INOC's rights include "managing and operating" the existing producing fields listed in Annex 1.[63] Any question about whether those rights encompass authority to contract for the performance of particular services is answered by the terms of article 8. Also appearing in that same provision is a charge to the Oil Ministry to "propose" to FOGC how best to develop the discovered but yet undeveloped fields[64] – presumably those in Annex 3 – and an authorization for the Ministry to prepare "model Exploration and Production contracts,"[65] meaning those more particularly referred to by the framework law as service contracts, field development and production contracts, or risk exploration contracts.[66] The only authority close to the latter in what has been reviewed is that in article 5D and article 7 empowering the Ministry generally to enter into contracts. With respect to the Oil Ministry's power to prepare model exploration and production contracts, of course, the effectiveness for use of such model forms of any of the three contract types depends upon ultimate approval by FOGC, and article 8 makes that clear as well.[67] As for article 8's charge to the Ministry to "propose" to FOGC how best to develop Annex 3 fields, it should also be noted that the article charges the Ministry to provide to FOGC "a comprehensive proposal for Oil and Gas Exploration" throughout all of Iraq.[68] Both the proposal for exploration throughout Iraq, and the proposal for development of Annex 3 fields are to be crafted in coordination with the regions and producing governorates, not by the Ministry acting on its own.[69]

[62] See id. at art. 8A.
[63] See text accompanying supra note 12.
[64] See February 2007 draft, supra note 9 at art. 8B.
[65] See id. at art. 8C.
[66] See text accompanying supra Chapter 3, notes 52–53 (for the proposition that service, field development and production, and risk exploration contracts all fall within the broader description of exploration and development contracts).
[67] See February 2007 draft, supra note 9 at art. 8C.
[68] See id. at art. 8F.
[69] See id. at arts. 8B and 8F.

Article 9, on the matter of granting of rights to conduct petroleum operations, and article 10, on negotiating and contracting oil and gas development agreements, add further to the authorities of the Ministry of Oil and INOC. Article 9, in speaking exclusively of the Ministry, provides, in line with what has been offered about articles 5D, 7, and 8, that all Exploration and Production contracts are to be between "the Ministry (or Regional Authority) [in those cases where the Regions are vested with authority over the fields concerned] and an Iraqi or Foreign Person, natural or legal."[70] Moreover, it is the Ministry (or the Regional Authority when appropriate) that is empowered to "pre-qualif[y] companies" for consideration for any licensing round leading to a contract.[71] Article 10 provides that, in recognition of the respective responsibilities and jurisdictions of the Ministry, INOC, and the Regional Authority, they are entitled to sign Exploration and Production contracts with selected contractors; however, these are to be considered "initial signing[s],"[72] in light of the requirement for submission to FOGC for its review.[73] The Ministry, INOC, or Regional Authority has the right to expect FOGC to submit the results of its review within 60 days of the receipt of the contract, and the contract remains valid "in case no objection is made" by FOGC in a timely manner.[74] Objections permit the relevant entity to make agreed-upon alterations.[75]

Articles 21, 24, and 26 all reiterate or add to the powers of INOC or the Oil Ministry in connection to pipelines and natural gas. As seen in the discussion regarding article 6, INOC is said to "own, manage and operate" the main oil and gas pipelines, at least during a 2-year transitional period following the adoption of the framework law on oil and gas.[76] Article 21 reiterates INOC's ownership of the main pipelines.[77] It goes on, however, to contain language that could potentially lead to controversy between INOC and the Oil Ministry by providing that the "construction and operation" of main pipelines, or modifications thereof, are subject to approval of the Ministry.[78] Now, although nothing in article 21 regarding INOC suggests authority over pipeline operations, as distinct from ownership, as seen from article 6 of the framework law, it explicitly assigns such operational authority to INOC, thus placing the language of article 21, regarding the Ministry having the power to approve "operation[s]" of pipelines, in direct conflict with article 6.[79] The Ministry is also provided by

[70] See id. at art. 9A.
[71] See id. at art. 9B, Sixth.
[72] See id. at art. 10A.
[73] See id. at art. 10C.
[74] See id. at art. 10D, Third.
[75] See id. at art. 10E.
[76] See text accompanying supra notes 17–18.
[77] See February 2007 draft, supra note 9 at art. 21A.
[78] See id. at art. 21B.
[79] Note that there is no such conflict when it comes to the matter of pipeline "construction" or "modification."

article 21 with authority to coordinate "tasks related to the transport of Crude Oil through new Pipelines outside the Iraqi territories."[80] In view of the Ministry's role pursuant to article 5E in dealing with other nations when it comes to oil and gas matters,[81] it is perfectly rational to have it deal with pipeline issues involving transport outside of Iraq.

Article 24 provides that, among others, INOC is entitled "to use, free of charge," associated natural gas "necessary for Petroleum Operations."[82] Obviously, these operations are to take place in fields assigned by the Dubai Annexes to INOC. Such use of associated natural gas, however, must be in accord with a field development plan that optimizes utilization,[83] and associated gas not used is to be available to the Oil Ministry free of any charge, except for INOC's cost of production.[84] This is clearly consistent with article 5E's grant of authority to INOC over oil and gas "Exploration, Development, Production," etc., in certain fields.[85]

In terms of nonassociated gas, article 26 provides that the "Development and Production" of such is "subject to approval of the Ministry of a Field Development Plan supported by signed agreement(s) for the sale of Natural Gas from the Discovery and approved by the Council of Ministers."[86] Here, again, the Oil Ministry is provided with a power some may consider inconsistent with INOC's authorities. After all, INOC has distinct authority in certain specific Dubai Annex fields, thereby suggesting a possible conflict with article 26's grant to the Ministry of power to approve field development plans involving nonassociated natural gas development. The reality, however, is that no conflict exists.

First, the breadth of article 26's grant to the Ministry involving approval of field development plans extends to all nonassociated natural gas production, not just that engaged in by INOC. Had the language of article 26 on this score not been present, questions may have arisen regarding whether contractors other than INOC seeking to tap nonassociated gas could have done so without an approved field development plan. And second, the mere fact that INOC may be the one desirous of exploiting nonassociated natural gas within a Dubai Annex field over which it has authority does not relieve it of all the technical contract and paperwork obligations that attach to other contractors. As article 5E, Second, makes plain, "[t]he tasks and scope of operation of INOC shall include carrying out Oil and Gas Exploration, Development, [and] Production . . . in accordance with the . . . obligations under [the February 15, 2007, framework] law including

[80] See February 2007 draft, supra note 9 at art. 21E.
[81] See id. at art. 5E, Fifth and Sixth.
[82] See id. at art. 24A.
[83] See id. at art. 24B.
[84] See id. at art. 24C.
[85] See text accompanying supra note 52.
[86] See February 2007 draft, supra note 9 at art. 26.

the necessary contracts, permits and approvals applicable to all other holders or rights."[87] Along the same lines, article 9A indicates that the Ministry represents Iraq in the entering into of exploration and production contracts, whether service, field development and production, or risk exploration in form,[88] and then article 13 provides that exclusivity of development and production attach under an associated field development plan to "INOC and other holders of an Exploration and Production right."[89]

Further powers or authorities are provided to the Oil Ministry, in particular, by articles 27, 30, and 40 of the oil and gas framework law. Article 30, however, could be viewed as also providing possible authority to INOC, because it speaks of rights or powers being assigned to the "Designated Authority,"[90] rather than to INOC or the Ministry of Oil as such, with the quoted reference defined by the definitional provision of article 2 as meaning the Ministry of Oil, INOC, or, in appropriate instances involving Annex 3 fields, the regional governmental authorities.[91] Article 27 explicitly declares that the Oil Ministry, in coordination and collaboration with INOC, the regions, and the producing governorates, is vested with the authority to "approve regulations for Petroleum Operations."[92] Though neither article 5D nor article 7 speak explicitly and directly to approving or even issuing regulations regarding petroleum operations specifically, they both reference the Ministry's regulatory authority in implementing federal oil and gas policies and plans, thereby implying the existence of that authority. With the language of article 27, no room for doubt exists on that matter. It must be noted, though, that whatever petroleum operations regulations the Ministry approves, the terms of that same article make it clear that such be submitted to FOGC for the ultimate and final approval.[93]

Aside from the fact that article 30 and its content speak to the Ministry, and also to INOC, its substance declares an inspection right regarding petroleum operation sites, as well as assets, records, and data.[94] In other words, petroleum operators are not entitled to insulate their operations from oversight and scrutiny through regular inspection. The right of inspection, however, is something to which not only "holders of Exploration and Production right[s] relating to Petroleum Operations" are to be subjected, but also to which "Iraq National Oil Company (INOC)" is subjected.[95] The idea is surely not to define the "Designated Authority" vested with the inspection right to include INOC and then permit it to inspect itself. The most reasonable manner in which to

[87] See id. at art. 5E, Second.
[88] See id. at art. 9A.
[89] See id. at. art. 13.
[90] See id. at art. 30.
[91] See id. at art. 2, "Designated Authority."
[92] See id. at art. 27.
[93] See id.
[94] See id. at art. 30.
[95] See id.

understand the inspection right of article 30 is that petroleum operations carried out by INOC as the holder of an Exploration and Production right are to be subject to site and information inspection performed by the Oil Ministry (or its designee), but when a holder of such a right is an entity other than INOC, it would be possible to assign the right of inspection to INOC. In the typical case in which INOC exercises its management and operational authorities in an Annex 1 field, with some particular contract holder pursuing exploration and production activities under formal contract issued by the Ministry of Oil, INOC could be designated to conduct inspections of the contractor. In the event, though, that INOC was the holder of an Exploration and Production right in an Annex 3 field, for instance, the entity designated with authority to inspect INOC would have to be the Ministry. The latter situation of the Ministry conducting the inspection points up the consistency between article 30 of the framework law and the terms of article 5D, which references the Ministry "monitoring" petroleum operations.[96] On the other hand, because nothing appears in INOC's foundational provisions of article 5E or article 6 of the framework law about monitoring or inspections, the fact that article 30 permits INOC to assert an inspection right is a clear supplementation of powers otherwise possessed.

Finally, article 40 of the February 15, 2007, oil and gas framework law provides that the Ministry of Oil is vested with both the power and responsibility to review all Exploration and Production contracts that were entered into prior to the effective date of the framework law itself.[97] This is an authority completely unreferenced in the foundational provisions for the Ministry – articles 5D and 7. The scope of the article 40 review power is limited to "Exploration and Production contracts,"[98] which, as alluded to, means those oil and gas contracts that can be considered service contracts, field development and production contracts, or risk exploration contracts. Although, as seen, none of these three specific forms of contract is defined or precisely described by the terms of the framework law, it seems relatively clear that they all deal with the activities of exploring for, developing, or actually producing oil and/or gas. The framework law applies to the much broader notion of "Petroleum Operations,"[99] and such operations are defined as including not just activities involving exploring, developing, and producing oil and gas, but also "separation and treatment, storage, transportation and sale or delivery" of oil or gas, as well as "Natural Gas treatment operations and the closure of all concluded activities."[100] Consequently, there is every reason to believe that many contracts entered into prior to the effective date of the framework law would fall well outside the review authority of the Oil Ministry under article 40.

[96] See id. at art. 5D, Third and Seventh.
[97] See id. at art. 40.
[98] See id. at art. 40.
[99] See id. at art. 2.
[100] See id. at art. 2 (19).

The purpose of the Ministry's review of the relevant contracts is to ensure their consistency with the basic objectives of the framework law. Indeed, it could be suggested that the late-summer 2008 review by the Ministry of the earlier 1997 production-sharing contract (PSC) between the Saddam Hussein regime and China to exploit oil resources of the al-Ahdab field south of Baghdad, with the consequent scrapping of the earlier agreement and the substitution of a service contract, reflects use by the Oil Ministry of the general approach sanctioned by article 40.[101] The Ministry is not entitled to act unilaterally, however. Article 40 provides that, even after review by the Oil Ministry, all reviewed contracts are to be submitted to FOGC for its own consideration, primarily looking to ensure that the terms of the contracts guarantee "maximum economic return" for the people of Iraq.[102] While it will undoubtedly prove quite onerous, article 40 also makes clear that contracts to be reviewed are to be submitted to FOGC "in a period not exceeding three (3) months from the time the Federal Oil and Gas Council issues model contract and related regulations."[103] In a sense this could provide a needed time cushion, as simply delaying the promulgation of model contracts and associated regulations would prevent the triggering of this 3-month deadline.

V. RELEVANT INSIGHTS ON THE RESTRUCTURING OF INOC AND THE MINISTRY OF OIL FROM THE KRG'S 2007 OIL AND GAS LAW

Just as the federal government's February 15, 2007, framework law on oil and gas contains a variety of instructive provisions useful in regard to securing a glimpse of the nature of a reconstituted INOC and reorganized Ministry of Oil, so also do the KRG's 2007 Oil and Gas Law[104] and its October 2006 draft Petroleum Act of the Kurdistan Region[105] prove somewhat illuminative. Because support of the KRG will be essential in getting either the INOC reconstitution or the Oil Ministry reorganization laws through the Iraqi parliament, reference to what the KRG's Oil and Gas Law and its draft predecessor set forth can prove extremely valuable in speculating about the form ultimately to be taken by either measure.

The most instructive language of the KRG's 2006 draft Petroleum Act appeared in articles 22 and 24, as well as in the draft Petroleum Act's annex B. Article 22 spoke of the regional government being required to cooperate with

[101] See Campbell Robertson, Iraq poised to revive oil contract with China, International Herald Tribune (Aug. 20, 2008), available at www.iht.com/articles/2008/20/africa/20oil.php (accessed Oct. 3, 2008); Iraq, China ink three-billion-dollar oil deal, Iraq Updates (Aug. 29, 2008), available at www.iraqupdates.com/p_articles.php/article/35810 (accessed Oct. 3, 2008).

[102] See February 2007 draft, supra note 9 at art. 40.

[103] See id.

[104] See 2007 KRG Oil and Gas Law, supra Chapter 3, note 121.

[105] See Petroleum Act of the Kurdistan Region, Iraq (Oct. 22, 2006) (hereinafter 2006 draft Petroleum Act), supra Chapter 3, note 120.

federal authorities "to restructure the petroleum industry of Iraq pursuant to Annex B . . . and subject to Article 24 of this Act."[106] Article 24 picked up on the notion that the cooperation between the KRG and the federal government in the oil and gas realm was conditioned upon a variety to matters, including the KRG being provided with its share of federal revenues and, as article 24, Section 1(b), stated, "the modern restructuring of the petroleum industry of Iraq in accordance with Annex B."[107] The combined effect of these two articles, then, was to mandate the regional government cooperate in restructuring the oil and gas industry and condition cooperation in regard to the general matter of oil and gas on a restructuring occurring in accordance with the terms of annex B.

Annex B of the 2006 draft Petroleum Act dealt explicitly with the restructuring of the oil and gas industry in Iraq. After referencing the Iraqi constitutional provisions on oil and gas – articles 111, 112, and 115 – it then authorized federal government participation in oil and gas activities in the Kurdistan Region, provided certain specific conditions and agreements were concluded. Among the conditions and agreements enumerated were revenue sharing; the access to and exchange of data and information; and the conclusion of an agreement between the KRG and the Government of Iraq "on the regulatory role of the Iraq Ministry of Oil,"[108] the establishment of two federal institutions, "one for Current Fields, and another for the exploration and development of Future Fields,"[109] and the establishment of a third federal institution "for all petroleum activities other than exploration and production, with a view to restructuring and modernizing those activities with the involvement of the private sector."[110]

It is undeniable that the relevant terms of the 2006 draft Petroleum Act envision a restructuring of the industry. It is equally as undeniable, however, that neither of the provisions quoted nor any other even remotely reference INOC, and only twice do they reference the federal Oil Ministry. Under such circumstances, it makes it next to impossible to conclude that the 2006 draft Petroleum Act proves immensely helpful in providing insight into the kind of reconstitution of INOC or reorganization of the Ministry of Oil that would prove acceptable to the KRG. Moreover, although language does appear in annex B about the Oil Ministry having a regulatory role and new federal institutions being created to manage and oversee current fields, exploration and development of future fields, and petroleum activities other than exploration and production, this and all other language in either that annex or the substantive articles of the 2006 draft Act itself is woefully deficient in spelling out the assignment of specific duties and powers to the Oil Ministry or INOC, and starkly different

[106] See id. at art. 22.
[107] See id. at art. 24.
[108] See id. at Annex B, para. (f).
[109] See id. at Annex B, para. (g).
[110] See id. at Annex B, para. (h).

from the already examined terms of the federal government's February 15, 2007, oil and gas law in that respect. It is hard to conclude anything other than that the terms of the KRG's 2006 draft Petroleum Act are only marginally useful in getting a sharper focus on what might be seen as an acceptable restructuring of the INOC and the Ministry of Oil.

Switching to the KRG's 2007 Oil and Gas Law itself, it should be noted that the annexes appearing in the 2006 draft predecessor have been entirely eliminated. However, this should not be taken as meaning that the 2007 Law offers nothing with regard to the acceptable structure of INOC and the Ministry of Oil at the federal government level. There are at least two sets of provisions in the 2007 Law that seem instructive on that matter. Before examining those, it bears noting that the elimination of the 2006 draft's annexes leaves but a single reference in the totality of the 2007 KRG Oil and Gas Law to either INOC or the Ministry of Oil. Nonetheless, the two sets of provisions that do appear offer, in either a direct or a roundabout way, indications of what the Kurds would view as acceptable. The first set on this score is represented by article 19, Second, of the 2007 Law and its directive concerning the structure and relationship of INOC. The second set emerges inferentially from the combined effect of articles 10, 11, and 14 of the Law, articles establishing within the KRG both the Kurdish Exploration and Production Company (KEPCO) and the Kurdish National Oil Company (KNOC) – the functional equivalents at the regional level of the central government's INOC – and characterizing the nature of their relationship with the KRG's Ministry of Natural Resources.

Concerning the article 19, Second, it should be noted that this is one of only two provisions in the entirety of the KRG 2007 Law that explicitly mentions INOC; the other being the follow-on provision, article 19, Third. Unlike that provision, however, which references INOC not to clarify the Kurdish position on its future structure, but rather to insist upon KRG participation at the management level of INOC, article 19, Second, speaks directly to the matter of INOC's structure and is therefore helpful in providing insight regarding its reconstitution. The precise language of article 19, Second, provides that "the petroleum industry in Iraq must be restructured in all of Iraq, with a fair role for an Iraq National Oil Company, to encourage private investment into Iraq consistent with the requirements of Article 112(2) of the Federal Constitution, to generate maximum revenue."[111] Although the thrust of the language is toward emphasizing the need to restructure the industry throughout all of Iraq, it also touches on the themes of federal cooperation with subcentral governmental units in formulating strategic policy for the development of the nation's oil and gas resources, as required by Article 112(2) of the Iraqi Constitution, and keeping an eye on maximizing oil and gas revenues and encouraging private investment in the industry. For present purposes, though, most important are

[111] See 2007 KRG Oil and Gas Law, supra note 104 at art. 19, Second.

the ideas of industry restructuring and the maintenance of "a fair role for an Iraq National Oil Company." Nothing in the language of article 19, Second, suggests the standards for determining whether the role ultimately assigned by the federal government to INOC truly can be considered "fair." Nonetheless, it is plain from the language of the KRG Law that INOC is at least contemplated as having a role to play. In other words, it would be insufficient to restructure the petroleum industry in Iraq and provide for no role for INOC, or provide it with meaningless tasks or tasks so controlled by others as to render it an entirely subservient creature.

The second set of relevant provisions in the 2007 KRG Oil and Gas Law is comprised of articles 10, 11, and 14. As will be recalled from Chapter 3 of this study, these three articles establish KEPCO (the Kurdish Exploration and Production Company), KNOC (the Kurdish National Oil Company), and the relationship between these entities, as well as the Kurdish Organization for Downstream Operations (KODO) and the Kurdistan Oil Trust Organization (KOTO), and the KRG's Ministry of Natural Resources. True, that does not speak directly to the structure and relationship between INOC and the central government's Ministry of Oil. Nonetheless, the inferences drawn from the interaction between articles 10, 11, and 14 all suggest, at least indirectly, what might be palatable to the KRG when it comes to the structure and relationship between the central government's (INOC and Ministry of Oil) analogues to the Kurds' KEPCO, KNOC, and the Ministry of Natural Resources. Stated another way, KEPCO, KNOC, and the Ministry of Natural Resources are the functional equivalents at the regional level of the central government's INOC and Ministry of Oil. As a result, the thinking reflected in articles 10, 11, and 14 of the KRG's 2007 Oil and Gas Law regarding the organization, character, and interrelationship between KEPCO, KNOC, and the Ministry of Natural Resources proves telling about what could be acceptable to the Kurds in connection with the central government's INOC and the Ministry of Oil.

Beginning specifically with article 10, that provision establishes KEPCO as an entity with "independent finance and management."[112] It stands on its own and is beholden to no other. Further, its board of directors is appointed and put in place by the collaborative action of the KRG's Council of Ministers and the Parliament, with the members being described as fully "independent of the Ministry [of Natural Resources]."[113] The powers and authorities of KEPCO are said to include competing with others in securing authorizations relative to oil and gas activities in future fields; establishing joint ventures to engage in petroleum operations within the region, Iraq, or abroad; and creating subsidiaries to undertake efforts in future fields.[114] Article 11 picks up these same

[112] See id. at art. 10, First.
[113] See id. at art. 10, Second.
[114] See id. at art. 10, Fourth.

themes in connection with KNOC. It first provides that KNOC is to be an entity with "independent finance and management,"[115] with its board of directors appointed by action of both the Council of Ministers and the Parliament, but remaining completely and wholly "independent of the Ministry."[116] It further states that the powers and authorities of KNOC are to include competing for petroleum operations authorizations in current fields, establishing joint ventures to engage in activities in such fields, and on a case-by-case basis, competing for authorizations in future fields.[117] Although the distinction between KNOC and KEPCO in relation to current versus future fields is significant, key in regard to both entities is the absolute independence from the KRG's Ministry of Natural Resources.

The independence of KEPCO and KNOC could be thrown into question by some of the language appearing in article 14 of the KRG's 2007 Oil and Gas Law. In particular, the opening paragraph of article 14 quite clearly states that the Ministry of Natural Resources is charged with "regulating the operations" of not only KEPCO and KNOC, but also KODO and KOTO.[118] Such regulatory authority over KEPCO and KNOC certainly suggests a loss of independence. Neither KEPCO nor KNOC is in a position to simply do as it chooses. Their operational activities have to submit to the regulatory authority of the Ministry. KEPCO and KNOC may be vested by articles 10 and 11 with independence, but this is limited to "financ[ial] and management" independence, as well as independence of the directors of their boards from the meddling of "the Ministry." It does not include independence from the regulatory measures over petroleum operations the KRG's Oil and Gas Law empowers the Ministry of Natural Resources to adopt. As will be recalled, article 6 of that Law establishes the Ministry as the lead agency with respect to petroleum operations in Kurdistan. Further, it vests the Ministry with vast powers in connection with any activity designed to explore, develop, or produce oil or natural gas.[119]

As compelling as such suggestions may appear in regard to the actual nature of the independence of KEPCO and KNOC from the Ministry of Natural Resources, it must be stressed that the same article of the Law subjecting KEPCO and KNOC to the regulatory authority of the Ministry also contains language in paragraph Second declaring that the board of directors of KEPCO and KNOC, as well as KODO and KOTO, "shall establish its own organization structure, assign authorities, and determine the manner in which its functions are discharged."[120] Far from constituting another illustration of drafting schizophrenia – wherein at one location the terms of the KRG's Oil and Gas

[115] See id. at art. 11, First.
[116] See id. at art. 11, Second.
[117] See id. at art. 11, Fourth.
[118] See id. at art. 14, First.
[119] See id. at art. 6.
[120] See id. at art. 14, Second.

Law speak of KEPCO and KNOC independence, and then in another assign authority to the Ministry that seems to negate it – the quoted language really serves to elucidate the true nature of the relationship between KEPCO and KNOC independence and Ministry of Natural Resources regulatory authority. Yes, it is beyond dispute that the opening paragraph of article 14 explicitly states that the Ministry is charged with "regulating the operations" of KEPCO and KNOC, despite the fact that articles 10 and 11 provide both latter entities financial, management, and board independence. Few would ever maintain, however, that simply because entities otherwise independent are subjected to the legal and regulatory authority of another, they are independent in name only, for it is a common feature of most legal systems to ensure that even otherwise independent entities are not above the law. By virtue of the language of paragraph Second of article 14 – the language providing the boards of KEPCO and KNOC, as well as KODO and KOTO, independence regarding organizational structure, assignment of authorities, and discharge of functions – the point is made that, although all may be subject to the legal and regulatory constraints properly established by the Ministry, they remain wholly independent entities in every other respect. From this, then, it would appear that any relation acceptable to the KRG between the central government's INOC and Ministry of Oil would probably have to be one ensuring fiscal, management, operational, and decisional independence.

VI. BASIC CONDITIONS AND CURRENT THINKING ASSOCIATED WITH RECONSTITUTING INOC AND REORGANIZING THE MINISTRY OF OIL

It is one thing to review the provisions of the Iraqi Constitution, the February 15, 2007, oil and gas framework law, and the KRG's 2007 Oil and Gas Law in order to get a sense of the kind of structure and organization envisioned by foundational legislative measures and likely to be reflected in INOC reconstitution and Oil Ministry reorganization laws of the central government in Baghdad. However, prior to examining what is actually known about the central government's approach to reconstituting INOC and reorganizing the Ministry of Oil, it makes sense to keep in mind the historical background of those two entities and to think in broad conceptual terms about the most appropriate form of such reconstitution and reorganization.

Regarding the historical background of INOC and the Oil Ministry, even before the commencement of nationalization of the Iraq Petroleum Company (IPC)'s interests in Iraq in December of 1961, it was obvious that if the Iraqi government of General Abdul Karim Qassim, who had overthrown the Hashemite monarchy of King Faisal 3 years earlier in 1958, was to effectively operate oil fields, a separate, skilled, and resourceful governmental entity would be required. As early as July of 1962, Qassim delivered a radio address in which he spoke of

creating an entity known as INOC to serve as just such an entity.[121] Two months later, in September, he issued a statement of plan for INOC, indicating it would have the "right to exploit oil in all areas outside those . . . for the Iraqi Petroleum Company" as identified in the 1961 nationalization decree.[122] By 1964 INOC had been formally created and was operational.[123] In the context of the 1967 Six Day War between Israel and its neighbors, two things occurred. First, Iraq adopted Law No. 97 of August 19, 1967, further consolidating INOC's power against IPC in certain oil fields.[124] Second, both the French and the former Soviet Union agreed to provide INOC with necessary technical assistance to enhance its oil and gas field production activities.[125] Of the remaining concessionary interests of IPC and its subsidiaries, additional nationalizations in mid-1972 and 1975 completed the process of placing all oil and gas fields in Iraq under the auspices of INOC.[126]

In 1976 the Ministry of Oil was established by the Iraqi government.[127] Its principal functions were to be petroleum sector planning and direction of infrastructure development for the sector. Between 1976 and 1987, both the Ministry and INOC continued operating in their distinctive spheres – the former in sector planning and infrastructure development, and the latter in managing the day-to-day operations and functioning of the nation's oil fields. Beginning in February 1987, the Ministry of Oil, under the leadership of Issam Abdul Rahim al-Chalabi, underwent a reorganization that created several state-controlled entities within the Ministry: the State Organization of Gas (SOG), the State Organization of Oil Refining (SOOR), the State Company for Oil Projects (SCOP), and the State Organization for Distribution of Oil Products (SODOP). In May 1987, just 3 months later, INOC and all its activities were merged into the Oil Ministry, and SOG, SOOR, and SODOP were disbanded with their functions being taken over by distinct departments within the Ministry. Informed individuals have suggested that some of the key features of the May 1987 rearrangement involved: (1) establishing the North and South Oil Companies (NOC and SOC), along with reaffirming the role of SCOP; (2) creating the Oil Exploration Company (OEC) to engage in drilling activity; (3) establishing both the Oil Distribution Company and the Gas Processing Company; and, (4) founding SOMO (the State Oil Marketing Organization). Whereas

[121] See Iraq to establish a new oil company, New York Times (July 15, 1962), cited in Amy Myers Jaffe, Iraq's Oil Sector: Past, Present and Future at 30, note 30 (Mar. 2007) (hereinafter Rice University Iraqi Oil Study).

[122] See Iraqi national oil setup is projected by Baghdad, New York Times (Sept. 30, 1962), cited in Rice University Iraqi Oil Study, id. at note 31.

[123] See Baghdad to Limit INOC Power, APS Diplomat Operations in Oil Diplomacy (May 26, 2008), available at http://goliath.ecnext.com/coms2/gi_0199–7909725/Baghdad-To-Limit-INOC-Power.html (accessed Oct. 10, 2008).

[124] See Rice University Iraqi Oil Study, supra note 121 at 32.

[125] See id. at 32–33.

[126] See id. at 34–37.

[127] See id. at 37.

previously INOC had operated independently of the Ministry, with its own managerial, production, and legal staffs, all oil and gas policy and development activity was now centralized within the Oil Ministry. The Ministry reported to the Council of Ministers, who reported directly to Saddam Hussein, who had risen to power as chief of state 8 years earlier in 1979.[128]

With this historical background of centralization under the Oil Ministry in mind, what observations might be offered regarding the reconstitution of INOC and reorganization of the Oil Ministry, thinking in broad conceptual terms? For openers, it might be suggested that the basic structure of INOC and the Ministry depart radically from Saddam's model and incorporate a wall of separation between the two. The idea would be to have the Ministry serve as a policy-formulating, regulation-enforcing, contract-making, and revenue-collecting body, with INOC being the state-owned oil and gas exploration, development, and production company. Aside from whether INOC should have exclusive authority in certain oil and gas fields, or should be placed in a position of having to compete for contracts in such fields with private international oil and gas companies, the idea would be a structure that assigns planning and legal measures to the Oil Ministry, and day-to-day field operations to INOC itself. The principal reason that a wall of separation would prove an attractive structural feature has to do with securing efficiencies. When planning/legal functions and day-to-day field operations are blended or merged, there is the omnipresent risk that policy makers and regulatory overseers might settle upon both end goals and regulatory adherence that play down to reduced accomplishments of field operators who prefer not to be challenged or pushed. Keeping distance between the respective units would be one way to increase the likelihood that those charged with formulating policy and enforcing regulations would hold field operators to standards of performance replicating the highest levels in the industry and producing the greatest efficiencies attainable. One can just imagine the disappointing and unsatisfactory nature of state-run oil and gas operations – not necessarily from the perspective of mere total rates of production, but rather from the perspective of optimizing long-term, environmentally, and economically sound production – were the same governmental officials making the operational decisions in the field also setting the policy and applying the regulations pursuant to which field operations had to be conducted.

Another problem that makes any structure which blurs the distinct functions of INOC and the Ministry unattractive has to do with the potentially competitive relationship between INOC and private international oil and gas companies. A legal framework that would encourage competition between INOC and private investors in certain oil and gas fields would necessarily function best if the

[128] See Donald Ian Hertzmark and Amy Myers Jaffe, Iraq National Oil Company (INOC) Case Study, Newsletter, Energy Economics Education Foundation p. 5 at 7 (Fourth Quarter 2005), available at http://www-personal.umich.edu/~twod/oil-ns/articles/iraq/05fall_iaee_newsletter_iraq_oil_jaffe.pdf (accessed Oct. 10, 2008) (hereinafter INOC Case Study).

Oil Ministry, the body empowered to award petroleum operations contracts, was sufficiently separate from INOC to minimize or eliminate risks to absolute objectivity. In an oil and gas legal system where the Oil Ministry is to decide who shall receive an award of a petroleum operations contract, with private contractors having to compete for such contracts against INOC in certain fields, the potential for favoritism, at the cost of neutral evaluation of all relevant contractual and other factors, increases markedly if INOC serves as little more than the alter ego of the Ministry. By structuring the relationship between INOC and the Ministry so that in the contracting process the latter regards the former as but the equivalent of another international oil and gas company interested in exploiting Iraq's hydrocarbon wealth, not only are the best interests of all private competitors and the sense of fairness served, but the process also acts to promote the legitimate desire of the Iraqi people to maximize the return on and most efficient production of the nation's resources. It would be a shame to have actual or perceived favoritism cloud the functioning of a system designed to attract outside investment and technical expertise to assist Iraq in developing its oil and gas wealth.

A third reason for a wall of separation between INOC and the Ministry of Oil might have to do with avoiding potential corruption. As seen in Chapter 3, the Ministry of Oil is charged with a variety of responsibilities and duties, including the formulation of policy and regulations governing petroleum operations and the oversight and enforcement of these to ensure compliance on the part of petroleum operators. Considering that INOC is itself empowered to contract to engage in petroleum operations, the Ministry thus has as one of its charges ensuring INOC's compliance with all relevant rules and regulations. Clearly, the very fact that INOC is an Iraqi government-owned entity, and the Ministry of Oil serves as a component of the Iraqi government, raises the difficulty of ensuring that Ministry oversight can and will be efficacious. Just imagine a situation in which INOC was but a division, department, or appendage of the Oil Ministry. The mere organizational propinquity between the two would facilitate the potential for corruption. As organizational independents, the February 15, 2007, oil and gas framework law of the central government seems to reduce the likelihood that, in the context of overseeing Ministry policies and regulations, INOC would employ corrupt practices. Were INOC nothing other than an associated division of the Oil Ministry, the potential for this would seem heightened.

Structuring the relationship between INOC and the Oil Ministry so as to establish distinct and separate spheres of operation may make sense from the perspective of minimizing the potential for corruption, avoiding favoritism that disadvantages private competitors, and producing efficiencies in the production of oil and gas. The February 15, 2007, oil and gas framework law of the central government facilitates such goals and objectives by assigning policy and regulatory authority, contract making, and administrative oversight to the Ministry,

and exploration, development, and production authority in certain fields to INOC. From the way in which the KRG's 2007 Oil and Gas Law allocates powers between its Ministry of Natural Resources and the separately functioning and independent KEPCO and KNOC, it appears that the Kurds share the central government's vision. However, is it possible to imagine other devices and mechanisms beyond those reflected in the basic oil and gas legislation of these two governmental entities that might further the aim of operational autonomy and independence between INOC and the Ministry?

One additional feature that might help facilitate autonomy and independence would be the complete separation of INOC board of directors personnel from individuals staffing the Oil Ministry. It is true that nothing in any of the measures previously examined speaks of Ministry personnel serving on INOC's board. Indeed, the implication flowing from the central government's February 15, 2007, framework law declaring that INOC shall have its own independent organizational structure is to avoid having Ministry personnel serve on INOC's board. Nonetheless, article 6 of that framework law indicates that the members of the board can be from the federal government, which could include the Ministry itself. If the framework law's implication of autonomy and independence through separation of organizational structure were explicitly stated, then operational individuality could be better secured.

A second additional helpful feature might be removal of certain INOC actions and decisions from the condition of approval by the Council of Ministers. The Oil Ministry serves on the Council and, involving all issues related to oil and gas, is likely to be shown great deference by fellow Ministers. Examples in the framework law include the fact that INOC is empowered by article 5E to participate in oil and gas exploration and production contracts outside of Iraq and to associate with others in establishing affiliated companies or acquiring shares in existing companies outside Iraq. In both instances, however, the effectiveness of such actions and decisions by INOC is made subject to approval by the Council of Ministers – quite possibly read "The Ministry." Even though the Oil Minister also is to serve on FOGC, in view of the specific expertise of that body (by comparison with the Council of Ministers) and its general charge and authorities in the matter of oil and gas, it seems that FOGC approval might better meet the goal of ensuring INOC autonomy and independence.

A third additional feature might be clear and explicit specification of jurisdictional authority on the part of the Iraqi courts to resolve disputes or controversies between INOC and the Ministry regarding matters such as INOC adherence to policies, plans, and regulations of the Ministry or differences between the two over cost and accounting matters that have implications for the profitability of INOC. The terms of articles 5D and 7 of the central government's framework law empower the Ministry with respect to such matters, and it is conceivable that INOC and the Ministry will have divergent perspectives on whether specific operating practices comply with policies, plans, or regulations administered by

the Ministry, or result in financial consequences with particular implications. Would there not be a certain attractiveness to having a provision of law clearly stating that in such situations, all controversies between INOC and the Ministry are to be resolved by a neutral and independent body of the judiciary? This would avert the potential for controversy generating paralysis and an inter-entity standoff. It would also assure INOC and the Ministry, as well as the larger Iraqi public, of fairness and objectivity in the administration of relevant oil and gas laws.

With these general conceptual thoughts about reconstituting INOC and reorganizing the Oil Ministry in mind, it bears noting that, in the wake of Gulf War II and the removal of Saddam Hussein from power, the nature of Iraq's future oil and gas administrative structure began to be reconsidered. In midsummer 2004, the interim government of Prime Minister Ayad Allawi established the Supreme Oil and Gas Council (SOGC).[129] Though empowered to contract with foreign oil and gas companies to rehabilitate and develop Iraq's oil and gas production, given the transitional nature of the Iraqi government, it apparently confined its activities to the tasks of domestic oil and gas pricing, crude oil marketing policies, and establishing the terms of employment for Ministry of Oil officials and employees.[130] August 2004, however, witnessed the SOGC recommending the reestablishment of INOC as an entity distinct from the Ministry of Oil.[131] From reports regarding that recommendation, SOGC envisioned the reestablished INOC as an entity that would involve itself in oil and gas exploration, development, and production activities and oversee the efforts of NOC (the North Oil Company), SOC (the South Oil Company), and OEC (the Oil Exploration Company), as well as the Iraq Drilling Company (IDC). Interestingly, however, INOC was not thought to stand wholly apart from the Oil Ministry, because the membership of INOC's board of directors was envisioned as comprising the Minister of Oil as board chair, INOC's chief executive officer, and others recommended by the Minister of Oil.[132]

Perhaps because of the political difficulties associated with getting the February 15, 2007, oil and gas framework law, and its companion federal revenue-sharing law, through the Iraqi parliament after the public release of these measures and the many consequent analyses and commentaries regarding them, the central government has moved into a "lock-down," absolute-silence mode with respect to information about both the law reconstituting INOC and the law reorganizing the Oil Ministry. However, from official U.S. Department of Defense (DoD) sources as recent as March 2008, confirmation exists that draft

[129] See Iraq Establishes Supreme Oil and Gas Council, 47 Middle East Economic Survey No. 29 (July 19, 2004).
[130] See INOC Case Study, supra note 128 at 8–9.
[131] See Iraq to Establish National Oil Company, 47 Middle East Economic Survey No. 35 (Aug. 30, 2004).
[132] See INOC case study, supra note 128 at 8–9.

versions of both measures have been reported out of the Council of Ministers to the Shura Council, an intermediate stopping point on the way to the Council of Representatives (i.e., parliament) for a formal vote.[133] Nonofficial media sources reported the following month, though, that although a draft of the law reconstituting INOC had been voted out of the Council of Ministers, the draft concerning the reorganization of the Ministry of Oil had not made quite the same degree of progress.[134] A September 2008 DoD follow-up on the March report noted that negotiations on both measures (as well as the framework law and revenue-sharing law) were continuing,[135] and in early October 2008, the U.S. Department of State weekly status report on Iraq referred to neither the INOC nor the Oil Ministry measures,[136] leaving the clear implication of serious negotiating roadblocks.[137] As of early November 2008, the content of neither the INOC nor the Oil Ministry measures had been divulged, and indications going back to the spring of that year suggested that the central government's legislative strategy was to present both these, and the framework and revenue-sharing laws, to the parliament as a single package, rather than separate measures.[138] Personal communications with individuals extremely knowledgeable about internal Iraqi negotiations over the various oil and gas measures suggested that few beyond a limited number of individuals close to the negotiations had any firm idea of the exact content of the INOC reconstitution and Oil Ministry reorganization laws.

In terms of specificity regarding the laws reconstituting INOC and reorganizing the Ministry of Oil, the little that can be offered as of the time of this writing in late November comes from high-ranking officials within Prime Minister Nouri al-Maliki's government. For starters, there are indications that the draft INOC reconstitution measure will provide it with authority to operate present oil and gas fields, but not with authority over exploration and early-stage

[133] See Measuring Stability and Security in Iraq, Report to Congress from the Dep't of Defense at 3 (March 2008), available at www.defenselink.mil/pubs/pdfs/Master%20%20Mar08%20-%20final%20signed.pdf (accessed Oct. 16, 2008).

[134] See Ben Lando (UPI), Analysis: Iraq moves on oil, graft laws (Apr. 3, 2008), available at www.upi.com/Energy_Resources/2008/04/03/Analysis_Iraq_moves_on_oil_graft_laws/UPI-41981207250973/ (accessed Oct. 17, 2008).

[135] See Measuring Stability and Security in Iraq, Report to Congress from the Department of Defense, at 3 (September 2008), available at www.defenselink.mil/news/d20080930iraq.pdf (accessed Oct. 16, 2008).

[136] See Iraq Weekly Status Report, Bureau of Near Eastern Affairs, at 6, U.S. Department of State (Oct. 8, 2008), available at www.state.gov/documents/organization/110988.pdf (accessed Oct. 16, 2008).

[137] See Resource nationalism rises in Iraq, Iraq Updates (Oct. 16, 2008), available at www.iraqupdates.com/p_articles.php/article/30859 (accessed Oct. 17, 2008) (action on package of laws stalled).

[138] See Big Oct. Conference, APS Diplomat Operations in Oil Diplomacy (Apr. 28, 2008), available at www.entrepreneur.com/tradejournals'article/178496555 html (accessed Oct. 17, 2008) (indicating the single package idea). See also Epilogue, text accompanying infra note 2 (single package for the four measures).

production activity.[139] Apparently, several members of the Council of Ministers have insisted upon such a distinction in the allocation of authority.[140] Additionally, from an earlier public presentation made by the Prime Minister's chief theoretician on oil and gas matters, Thamir al-Ghadban, it is suspected that it had been favored to reconfigure INOC in a way that would embody several key features: first, it would be a holding company of the federal government; second, it would have administrative and financial independence from other state entities; third, it would have the power to manage present fields through the use of subsidiaries; and fourth, its board of directors would be made up of appropriate federal and provincial representatives. As originally set out, the reconfiguration envisioned SOMO (State Oil Marketing Organization) as remaining, at least for a period of time, under the oversight of the Oil Ministry, rather than INOC. And, contrary to the more recent suggestions just mentioned, suggestions of opposition within the Council of Ministers, al-Ghadban had expressed the possibility of considering INOC authority regarding oil and gas exploration activity.[141] Again, because of the complete absence of transparency concerning the reported draft measure reconstituting INOC, it is impossible to know whether any or all of al-Ghadban's suggestions are reflected in what is now under active consideration by Iraqi legislative negotiators.

With respect to the reorganization of the Ministry of Oil, the al-Ghadban presentation[142] offered that the Ministry's responsibilities be trifurcated: those associated most intimately with the Minister would engage in policy and legislative formulation, licensing, economic and finance activity, and research, development and security; those under an oil directorate reporting to the Minister would engage in the creation of regulations, as well as supervision and monitoring; and those connected with various operating companies also reporting to the Minister would be responsible for operational and production activities. To ensure a certain degree of consistency between the vision for the reconstituted INOC, which would *manage* current oil and gas fields through the use of subsidiaries, the operating companies under the Oil Ministry would have to be limited in their activities either to the performance of the day-to-day, on-the-ground production efforts, or to exploration and early-stage production, as has been referenced more recently by others. In any event, the organizational authority of the Ministry envisioned both SOMO and the Inspector General reporting directly to the Minister's office, and not through any intermediary. It also established three Deputy Minister positions, each charged with oversight of a discrete

[139] See Baghdad to Limit INOC Power, APS Diplomat Operations in Oil Diplomacy (May 26, 2008), available at http://goliath.ecnext.com/coms2/summary_0199–7909725_ITM (accessed Nov. 2, 2008) (report referencing statements by Barham Saleh, one of Iraq's two Deputy Prime Ministers).

[140] See id.

[141] For the various components of INOC's reconstitution as put forward by Thamir al-Ghadban, see Managing Iraq's Petroleum, Revenue Watch: Workshop (April 8–9, 2006), App. 3, pp. 38–9, available at www.revenuewatch.org/reports/061906.pdf (accessed Nov. 2, 2008).

[142] See id. at App. 3, pp. 31–5.

area of responsibility, and a set of Directorates for security, planning, reservoirs, economics, technical matters, accounting and audits, administrative and legal questions, and national industrialization. The Deputy Minister positions would cover crude-oil upstream matters, refining and natural gas, and distribution and transportation of oil and gas. The Deputy Minister for Upstream would oversee OEC, NOC, SOC, and IDC, as well as SCOP and research. The Deputy Minister for Refining and Gas would have responsibility over a comparable range of state entities involved in the refining of crude oil and natural gas activities. And the Deputy Minister for Distribution and Transportation would handle matters related to pipelines, gas bottling, oil and gas distribution generally, oversight of oil tankers, and various institutes involved in distribution and transportation.

Again, it is not known whether the proposals actively under consideration actually involve any of these features. Another possible approach could be to create a couple of additional Deputy Minister positions or to reshuffle the assignments in a different way from that envisioned under the al-Ghadban plan. Specifically, if the Oil Ministry is to be empowered to oversee exploration and early-stage production activity, with INOC exercising authority over the management of current fields, then perhaps the portfolio of the Deputy Minister for Upstream activities should include authority over natural gas as well as crude oil. After all, it seems unsettling that natural gas should be paired with refining under a distinct Deputy Minister. If the thinking was to avoid overloading the Upstream Deputy Minister, then perhaps it might be advisable to spin the Upstream and Refining and Gas Deputy positions into three distinct Deputy positions: Upstream Crude Oil, Natural Gas, and Refining. Further, there is the additional matter of the Deputy Minister position for Distribution and Transportation. Arguably, distribution and transportation are sufficiently closely associated with actual marketing to either fold SOMO, for the time it remains in the Oil Ministry, into the portfolio of the Distribution and Transportation Deputy, or place SOMO on an equivalent Deputy Minister level. It seems awkward to keep SOMO in a position where it might be perceived as more closely connected to the Minister of Oil than is the Deputy Minister for Distribution and Transportation, or where its decisions, or those regarding distribution and transportation, might have consequences for the other.

As for the reconstitution of INOC, if the proposal before Iraqi legislative negotiators in late 2008 includes features described in the earlier al-Ghadban plan, it is arguable that a couple of those could be problematic. First, if the idea of INOC having management authority over current oil and gas fields is married to the notion of the Oil Ministry (and not INOC) having exploration and early-stage production authority, this would seem inconsistent with the terms of articles 5E and 6 of the February 15, 2007, oil and gas framework law.[143] There may be a certain wisdom in assigning exploration, development, and production

[143] See text accompanying supra notes 13–15 and 51–54 (providing INOC with the authority to participate in exploration, development, and production activities outside of currently producing fields).

authority to the Oil Ministry, leaving INOC with the more limited power to *manage* production from currently developed fields, but that is clearly not an allocation of power consistent with what the framework law provides. Though the *lex specialis* of the INOC reconstitution law could be seen as trumping the *lex generalis* of the oil and gas framework law, the dissonance between the relevant provisions of the two measures invites disputes, confrontation, and perhaps litigation.

A second problematic feature of the earlier al-Ghadban proposal concerns SOMO. The marketing organization was temporarily to be placed under the Oil Ministry, presumably to later shift to INOC supervision and control. Although this is apart from the argument that INOC should be assigned authority regarding exploration, development, and production in order to create agreement between what the oil and gas framework law contemplates and any INOC reconstitution measure provides, there seems little reason to think of SOMO as being associated with INOC. In fact, not only does article 5E, First, of the framework law contemplate INOC being obligated to sell its production of crude oil to the SOMO,[144] but it seems incongruous to provide an entity such as INOC, assigned the task of managing currently producing fields (and perhaps also the task of participating in exploration, development, and production), a marketing responsibility as well. Indeed, given that the al-Ghadban plan contemplates an Oil Ministry with three Deputy Directors – Upstream, Refining and Natural Gas, and Distribution and Transportation – it might make more sense to permanently position SOMO within the Ministry, rather than moving it over to INOC. On this score, however, it must be observed that, just as with the matter INOC management versus exploration, development, and production authority, if there is to be consistency between what the language of article 5E, Second, of the February 15, 2007, framework law provides and that of any INOC reconstitution measure, then from the very outset SOMO might be placed under INOC. As previously observed, the very language of that framework law provision vests INOC with marketing authority, at least down to the point of delivery.[145]

The third feature of the al-Ghadban plan that could be troublesome has to do with the configuration of the INOC board of directors. Previously it had been noted that the Oil Ministry has been in a position to supervise and influence INOC decisions and activities.[146] Complete separation between the two might be preferable. Though not entirely clear, the earlier al-Ghadban plan could be read as envisioning a reconstitution of INOC that would involve the Iraqi cabinet (Council of Ministers) and an additional Ministry of Oil representative in INOC's board. This would certainly contravene any idea of a wall of separation between the Ministry and INOC, and thereby compromise the notion of INOC being an autonomous and independent entity. Nothing in the language

[144] See February 2007 draft, supra note 9 at art. 5E, First.
[145] See text accompanying supra note 52.
[146] See text accompanying supra notes 128–132.

of the February 15, 2007, oil and gas framework law necessitates Oil Ministry representation on INOC's board. The most that the relevant language provides is that the board include members "from the Federal Government, the Regions, and the Producing Governorates."[147] The mandate of that language certainly can be satisfied while maintaining space and separation between INOC and the Ministry of Oil. All that need by done by INOC is to staff its board with some representatives from federal government entities other than the Oil Ministry.

VII. CONCLUSION

Certainly the unavailability of an official (or even unofficial) version of the INOC reconstitution and Ministry of Oil reorganization measures results in a somewhat compromised analysis. Nonetheless, what can be gleaned about the possible structure and broad outline of those measures from the sketchy comments and skeletal public presentations of oil and gas savants within the administration of Prime Minister Nouri al-Maliki is not without value. When that structure and outline are conjoined with the fundamentals of INOC and Oil Ministry restructuring set forth in the terms of the February 15, 2007, oil and gas framework law, as informed by the provisions of the KRG's Oil and Gas Law (No. 22) of 2007 that replicate at the regional level standards of industry restructuring, a decent glimpse is provided of what to expect if pending measures are eventually enacted. It is lamentable that the Iraqi central government has not seen fit to make public what it contemplates regarding INOC and the Oil Ministry. There are certainly occasions when keeping one's cards close to the chest is appropriate and wise. Unfortunately, even those with extensive experience with democracy slip into fits of secrecy and resistance to transparency, in many instances only to regret it later as public suspicions mount and calls are made for governmental actions to be closely scrutinized. Perhaps it is to be expected that Iraqi politicians, unschooled in the workings of the democratic system, would drift toward a closed legislative process, after the extensive discussions and analyses generated by the releases of the framework law and the revenue-sharing law. However, while the absence of transparency may keep the wheels of the legislative process turning, it moves proposed laws forward without the benefit of important observations and suggestions that can be critical to an end product that represents the most efficient and pragmatic of the various versions then available.

[147] See February 2007 draft, supra note 9 at art. 6B, Sixth.

Part Three CURRENT ISSUES AND POTENTIAL FUTURE PROBLEMS

It is one thing to be conversant with the constitutional principles and legislative initiatives affecting oil and gas activity in Iraq, and something different to appreciate the legal problems that plague or can be seen on the horizon by diplomats and advisors charged with assisting the development of that sector of the Iraqi economy. In this final part of the study, an attempt will be made to examine the more pressing current legal issues and potential future legal problems. The issues and problems examined revolve around either the fact that certain existing legal principles establish a specific juridical regime that, by the terms of the creating legal instruments, expires at a particular point in time, thus subjecting Iraqi oil and gas to exposure by certain foreign claimants, or the fact that evolving political and legislative events can not only present questions regarding oil and gas development activity and the revenues flowing from it, but also prompt speculation about the nature of Iraq's future oil and gas regime, in the event that the various legislative measures already examined prove aborted or stillborn.

With respect to existing legal principles that establish a specific juridical regime scheduled to expire, Chapter 7 takes up this matter by looking at the United Nations Security Council resolutions that have, since 2003, provided legal protection for Iraq's oil and gas resources and revenues from its sale. Though the chief focus of Chapter 7 is the insulation of Iraqi oil and gas from legal claims voiced by foreign creditors, also reviewed are the provisions of the relevant Security Council resolutions concerning the establishment of a neutral, trustworthy, and transparent entity to ensure that revenues from the sale of Iraqi hydrocarbons are managed properly and benefit the Iraqi people. As of this writing, the protections erected by the controlling Security Council resolutions are scheduled to expire at the very end of December 2009, unless once again extended or made part of some other legislative or treaty measure involving Iraq and creditor nations.

Chapters 8 and 9 take on the issues and problems that arise from the impact of evolving political and legislative events both on the law governing the matter of oil and gas development activity and on the distribution of revenues produced by such activity. Chapter 8 concentrates on the nature of the central government's legal authority to enter into oil and gas development agreements if its oil and gas framework law fails to earn the respect required to establish it as a permanent fixture of the Iraqi legal coda. Chapter 9 attempts to accomplish something similar with regard to the 2007 federal revenue-sharing law. It focuses on what rules, if any, mandate and govern revenue sharing in the event that the approach in the 2007 law never gains traction.

The final chapter – Chapter 10 – starts from the premise that the enmities complicating the creation of a set of new and comprehensive measures applicable to Iraqi oil and gas could go much further and frustrate the desire for Iraq as a unified and coherent member of the world community. One must therefore anticipate the nature of the oil and gas legal regime or regimes that could arise, in the event that the nation's transition to autonomous, single-state status comes asunder. Endeavoring to exercise a degree of prescience, this concluding chapter of the study offers modest prognostications on the character of Iraqi oil and gas law if the very face of Iraq were to change.

7 THE MATTER OF CREDITOR CLAIMS: AN EXAMINATION OF UNITED NATIONS SECURITY COUNCIL RESOLUTIONS 1790 (18 DEC. 2007) AND 1859 (22 DEC. 2008), AND THEIR PREDECESSORS

I. INTRODUCTION

As the Introduction to Chapter 5 observes, the Iraqi government may expect at least as much as (U.S.)$58.6 billion in revenue from oil and gas sales during 2008. It had budgeted for expenditures of (U.S.)$48 billion. If one were to make the reasonable assumption that production continues to increase at least incrementally during calendar year 2009, and that oil prices on the international market once again climb to the $75 to $90 per barrel level (at this writing in late autumn 2008 they hover near (U.S.)$50+ per barrel, having collapsed with the worldwide recession from the $150 range), revenue for that particular year should come in close to $70 billion to $80 billion. Of course, this is a gross revenue figure and reflects neither expenses or costs paid to partnering foreign or national oil and gas companies and contractors, nor management, administrative, operational or associated fees owing to relevant Iraqi governmental entities such as the Iraq National Oil Company (INOC), the Oil Ministry, or the State Oil Marketing Organization (SOMO) and its analogues. Furthermore, the Iraqi government's calendar year 2008 $48 billion budget should reasonably be expected to increase for the 2009 calendar year, especially given the country's well-known needs for very basic social services and infrastructure. To the extent that oil and gas sales revenues exceed budgeted expenditures and other internationally or domestically required payments, though, monies would then be available for the satisfaction of pre–Gulf War II Iraqi debts.

By some estimates at the time of the March 2003 invasion, those debts to both foreign governmental and nongovernmental entities total somewhere in the neighborhood of (U.S.)$400 billion.[1] Although early on in the invasion it was

[1] See Gardiner and Miles, Forgive the Iraqi debt, The Heritage Foundation, Executive Memorandum #871 (Apr. 30, 2003), available at www.heritage.org/Research/Tradeand ForeignAid/em871.cfm (accessed Feb. 27, 2003) (citing CSIS study figure of $383 billion). For a much lower figure in the $100–$200 billion range, see Barry E. Carter, Phillip R. Trimble, and Allen S. Weiner, International Law, at 465 (5th ed., 2007).

thought by some such as U.S. Deputy Secretary of Defense Paul Wolfowitz, one of the principal architects of Gulf War II, that Iraqi oil and gas production would cover the cost of the military effort associated with toppling Saddam Hussein and rebuilding the country,[2] it has since become clear that such suggestions seriously overestimated the speed at which the Iraqi oil and gas industry could be returned to its peak production days. To ameliorate the financial strain on Iraq generated by the prewar debt level, and to account for the slow pace of restoring oil and gas production, in mid-November 2004 the so-called Paris Club agreement, involving nineteen major capital-supplying countries, such as the United States, the UK, France, and Germany, committed signatories to reducing the amount of Iraqi debt actually owed. On the basis that debt owed to the signatories approximated (U.S.)$38.9 billion, they agreed to a collective reduction by 80% to a level of $7.8 billion.[3] Suggestions are that the United States desired as much as a 95% reduction, but its European allies balked at anything more than a 50% reduction. The 80% settled upon represented, therefore, a sensible and negotiated intermediate position.[4] As is apparent, because the Paris Club agreement affected only identified debt of signatory governments and had absolutely no impact on non-Paris Club member states, nor prewar debt owed to private or nonstate entities, it addressed less than one-tenth of the total estimated prewar debt.

Although under notions of sovereign immunity the domestic law in various nations and at various times may have differed concerning the extent to which a nation-state, such as Iraq, subjects itself to liability in the event it causes legal harm to a contractual partner, it now seems generally accepted that the controlling legal principles do not envision blanket insulation from lawsuit and claims of financial compensation. Indeed, in the context of commercial dealings, sovereigns are just as subject to having causes of action maintained against them as are non-state actors.[5] Apart from the technical dimension of legal rights and responsibilities, however, there are at least two other factors that serve to minimize the regularity with which nation-states insist on advancing immunity arguments. The first has to do with the practical realities of contractual relations. Potential creditors who might be compelled to maintain legal action to recover on damage or breach claims would grow increasingly reluctant to

[2] See Transcript, Hearing of the Defense Subcommittee of the House Appropriations Committee (Mar. 27, 2003).

[3] See generally, Metzger, A Mission Accomplished, The National Law Journal (Apr. 10, 2006), available at www law.com/jsp/nlj/PubArticleNLJ.jsp?id=1144672790115 (accessed Feb. 26, 2006).

[4] See generally, Mitchell, Debt Relief Agreement for Iraq, Jubilee Research (Nov. 29, 2004), available at www.jubileeresearch.org/news/iraq301104 htm (accessed Feb. 26, 2006).

[5] See, for example, Societe Anonyme des Chemins de Fer Liegeois Luxembourgeois v. the Netherlands, . . . (Belgium Sup. Ct. 1903); Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (U.S. Sup. Ct. 1983); United States v. The Public Service Alliance of Canada, 32 Int'l Legal Mat. 1 (Can. Sup. Ct. 1993).

take on contractual obligations with states, if those states ardently advocate theories designed to shield them from suit or liability. The end result would be to undermine that requisite contractual and business confidence essential to the initiation of day-to-day commercial operations. Second, it is not at all uncommon for international commercial agreements between states and private nongovernmental entities to require disputes regarding compliance with the terms of the agreements to be submitted to some non-litigious form of alternative dispute resolution. As a consequence, the effect of immunity doctrines seems undercut by state consent to settlement and rectification of any precipitating allegation of breach, contractual default, or the infliction of harm.

It is against this backdrop that following the conclusion of the invasion phase of Gulf War II, the United Nations Security Council felt it essential to weigh in on the matter of protection for Iraqi oil and gas and its revenues. With full knowledge that any serious diminution of assets earned as a result of oil and gas activity – even if the diminution arose from the claims of creditors – would deprive the nascent democracy established in the short years after the removal of Saddam Hussein of necessary financial resources and jeopardize the likelihood of its success, the Security Council provided a couple of important sources of protection. As will be recalled from the discussion in Chapter 1 and its observations regarding the status of Iraqi oil and gas at the time of the commencement of the coalition invasion, both revenues held in UN-controlled escrow accounts and the petroleum and petroleum products capable of being sold to generate these revenues were entitled to a significant degree of protection from legal claimants.[6] However, with Saddam gone and the UN prepared to witness a shift in its approach in the direction of providing Iraqis with greater control over dealings with its oil and gas resources and the revenues they produced, the Security Council protections conceived in the interwar years began to take a new form. The precise character and effect of that form constitutes the basis of what follows. It bears noting, however, that because those protections are scheduled to terminate at the end of 2009, consideration must also be accorded to what may materialize in their place.

II. PRIMER ON THE PREDECESSORS OF RESOLUTIONS 1790 AND 1859

Security Council resolution 1483, adopted May 22, 2003, roughly 2 months after the commencement of the Gulf War II invasion, and just weeks following the completion of that thrust by the United States and its coalition allies, is the first of the important predecessors of Security Council resolutions 1790 and 1859.[7] Elsewhere resolution 1483 has been described as shifting the paradigm

[6] See text accompanying Chapter 1, Sec. V, particularly notes 113–128.

[7] See SC Res. 1483, available at www.iraqwatch.org/un/unscresolutions/un-scres1483–052203.pdf (accessed Dec. 5, 2006).

evidenced in earlier resolutions. Clearly, because the earlier resolutions were adopted while Saddam Hussein was in power and therefore had physical control over Iraqi oil and gas resources, the resolutions could prescribe nothing more than UN restriction over efforts by Iraq to commercially dispose of its oil and gas, and controls over revenues that purchasers were prepared to pay the Iraqis for such purchases. With the removal of Saddam and the newfound independence of the Iraqi people, the Security Council was disposed to eliminate the earlier restrictions and controls evidenced in both the trade embargo against Iraq and the revenue measures of the oil-for-food program. Along this line, paragraph 10 of 1483 declared at an end the trade embargo established right after Iraq's invasion of Kuwait in summer 1990.[8] The effect of this declaration was to remove all formal legal obstacles to member states importing Iraqi petroleum and petroleum products. As if to emphasize that the lifting of the embargo was not designed to jeopardize Iraqi control over its own natural resources, however, the second paragraph of resolution 1483's preamble provides that the Security Council "[r]eaffirms the sovereignty and territorial integrity of Iraq,"[9] following this in the preamble's fourth paragraph with the statement the Council also "[s]tress[es] the right of the Iraqi people freely to determine their own political future and *control their own natural resources*."[10] The latter is significant to the extent that one may have been inclined to interpret language in any of the earlier resolutions as undermining or eroding Iraq's claim to its own natural patrimony.

With respect to the matter of claims that Iraq's creditors might have been interested in making against its oil and gas resources, or revenues produced by sales or other commercial dealings regarding those resources, paragraph 22 of Security Council resolution 1483 proved extremely important. The language of that provision stated, in part, that "until December 31, 2007, unless the [Security] Council decides otherwise, petroleum, petroleum products, and natural gas originating in Iraq shall be immune, until title passes to the initial purchaser from [any and all] legal proceedings. . . . "[11] In other words, although the embargo impacting Iraqi oil and gas had been ended and the oil-for-food program's demands on revenues generated by UN-supervised sales were evolving, this did not mean that Iraqi creditors would instantly be able to proceed legally, as if the removal of Saddam Hussein left a fully functioning nation flush with a highly valued natural resource soon to produce untold levels of cash for governmental coffers. Appreciating that the road ahead would be difficult, yet perhaps not even anticipating the true complexity of the future and the nature of the ethnic and sectarian obstacles confronting Iraqis, the Council sought to protect the country's principal resource from creditor claims that could ensure failure of efforts to transition toward democracy. But paragraph 22 goes beyond just

[8] See id. at para. 10.
[9] See id. at Preamble, second para.
[10] See id. at Preamble, fourth para.
[11] See id. at para. 22.

insulating petroleum, petroleum products, and natural gas from legal proceedings. As had been the case with respect to the escrow account that funded the UN's oil-for-food program, the language of the paragraph also provided that "proceeds and obligations arising from sales [of petroleum, petroleum products, or natural gas] . . . shall enjoy privileges and immunities equivalent to those enjoyed by the United Nations."[12] To hold funds generated by oil and gas sales, the so-called Development Fund for Iraq (DFI) was established,[13] and it was extended identical privileges and immunities from legal action. Further, member states were obligated by the resolution to adopt in their domestic law measures that guaranteed observance of the mandated insulation from legal action.[14]

As noted, the resolution envisioned an evolution with respect to the oil-for-food program. That program had essentially consisted both of an observation and monitoring body, designed to oversee any authorized transactions in Iraqi oil and gas made under the general embargo on such, and of mechanisms for holding revenues produced by authorized transactions and their use for humanitarian needs of the Iraqi people. Paragraph 18 of resolution 1483 stated that the resolution "terminates effective on [its adoption] . . . the functions related to the observation and monitoring activities . . . under the [oil-for-food program] . . . including the monitoring of the export of petroleum and petroleum products from Iraq."[15] This was consistent with the notion of the removal of the embargo. Given that the humanitarian needs of the Iraqi people remained, however, the oil-for-food program was not to be immediately and completely dismantled. Instead, paragraph 16 of resolution 1483 requested the Secretary General "in coordination with the [Coalition Provisional Authority or CPA], continue to exercise its responsibilities under [a reinvigorated oil-for-food program],[16] for a period of six months following the adoption of this resolution, and terminate within this time period . . . the ongoing operation of the [program] . . . transferring responsibility for . . . any remaining activity . . . to the [CPA], including by taking . . . measures" related to quickly getting humanitarian goods into needy civilian hands, facilitating "a comprehensive strategy . . . in coordination with the [CPA] and the Iraqi interim administration" of a handover of "all operational responsibility [for the program]," and "consolidat[ing] into a single fund the accounts established pursuant to the [oil-for-food program]."[17] The clear intent was to transition the oil-for-food program to the CPA and then move quickly toward phasing it out, with passage of its humanitarian objectives to Iraqi governing authorities.

[12] See id.
[13] See id. at para. 12.
[14] See id. at para. 22.
[15] See id. at para. 18.
[16] See id. at para. 19.
[17] See id. at para. 16.

Tying into the legal protection provided by resolution 1483 for Iraqi oil, gas, and revenues from such, and also the just-discussed idea of transitioning responsibility for meeting the humanitarian objectives of the oil-for-food program to the CPA and then local Iraqi authorities, resolution 1483 provided a couple of important things. To begin with, paragraph 17 provided that funds held in previously established UN accounts related to the oil-for-food program were to be deposited as quickly as possible with the Central Bank of Iraq in favor of DFI.[18] And then paragraph 20 of the resolution called for revenues from all future sales of Iraqi oil and gas to be deposited into the same DFI account. The exact words of that provision stated that proceeds from "all export sales of petroleum, petroleum products and natural gas from Iraq [after] the date of the adoption of this resolution shall . . . be deposited into the Development Fund for Iraq until such time as an internationally recognized, representative government of Iraq is properly constituted."[19] Again, it will be recalled that in late May 2003 when resolution 1483 was adopted, the invasion phase of the military campaign against Iraq had just been completed, there was no existing indigenous government in Iraq, and the CPA was acknowledged by the United Nations to hold the reigns of political power. Not until summer 2004 would the CPA formally pass power to an Iraqi government. The effect of paragraphs 17 and 20 was to provide needed funding for Iraq's humanitarian needs and, when linked to the insulation from legal claims provided in paragraph 22, protection of both the revenues held by DFI and the Iraqi oil and gas capable of generating such from causes of action before adjudicative bodies.

It bears noting that the monies held by DFI were not only insulated from legal claims, but under clear administrative and supervisory regulation. Access to the monies had to be executed in a "transparent manner," for humanitarian needs, disarmament objectives, reconstruction purposes, administrative costs, or "other purposes benefiting the people of Iraq."[20] Furthermore, disbursements from the Central Bank of Iraq holding the DFI account had to be "at the direction of the CPA, and in consultation with the interim Iraqi administration."[21] And finally, DFI was subject to independent audit approved by the [DFI's] International Advisory and Monitoring Board (IAMB), composed of representatives from the UN, the IMF, and the World Bank, among others.[22] Essentially, then, by the terms of Security Council resolution 1483, not only were Iraqi petroleum, petroleum products, natural gas, and the revenues resulting from their sale immune from legal action, but the management, expenditure, and supervision of all oil and gas revenues were to be closely controlled.

[18] See id. at para. 17.
[19] See id. at para. 20.
[20] See id. at para. 14.
[21] See id. at para. 13.
[22] See id. at para. 12.

With the much anticipated birth of Iraqi political independence in summer 2004, the ascendancy of a structured Iraqi government and the CPA's handover of power warranted the adoption of a successor to resolution 1483. That promulgation by the Security Council took the form of resolution 1546, actually adopted June 8, 2004, less than 4 weeks prior to the official transfer of governmental authority.[23] Resolution 1546 reflected three themes, two of which replicate themes apparent in the earlier resolution 1483, and another that takes into account the then-increasing control by Iraq over its own governmental affairs.

The reaffirmation by the Security Council of Iraq's ability to decide how and whether to use its own natural resources is one of the two themes replicated from resolution 1483 and its preamble.[24] Not only did resolution 1546's preamble reaffirm the nation's sovereign integrity and complete control over its natural resources,[25] but paragraph 2 of the resolution's substantive provisions went on to welcome the CPA's transitioning of authority to Iraq, thereby allowing the nation to "reassert its full sovereignty,"[26] and paragraph 3 stressed the "right of the Iraqi people freely to determine their own political future and to exercise full authority and control over the *financial and natural resources*."[27] With regard to the other replicated theme of immunity from legal claims, resolution 1546 reaffirms the notion expressed in paragraph 22 of resolution 1483 that Iraqi petroleum, petroleum products, natural gas, and revenues from their sale were to be insulated up to December 31, 2007, from all legal claims.[28] Paragraph 27 of resolution 1546 accomplished this by noting that the provisions of paragraph 22 of 1483 "shall continue to apply."[29] The revenues from the sale of oil and gas were to continue to be accumulated in DFI, subjected to continued IAMB oversight, but made subject to disbursement by the Iraqi successors to the CPA. This was made clear by language in resolution 1546's preamble acknowledging the "benefits to Iraq of the immunities and privileges [that had been] enjoyed by Iraqi oil revenues and by the Development Fund for Iraq,"[30] and in substantive provisions of the resolution providing that rules regarding the deposit into DFI of "proceeds from export sales of petroleum, petroleum products, and natural gas . . . shall continue to apply," that IAMB "shall continue its activities in monitoring the Development Fund for Iraq," and that disbursements from DFI

[23] See SC Res. 1546, available at www.iraqwatch.org/un/unscresolutions/s-res-1546.pdf (accessed Dec. 15, 2006).
[24] See text accompanying supra notes 9–10.
[25] See SC Res. 1546, supra note 23 at Preamble, third and fourth para.
[26] See SC Res. 1546, supra note 23 at para. 2.
[27] See id. at para. 3 (emphasis added).
[28] See text accompanying supra notes 11–21.
[29] See SC Res. 1546, supra note 23 at para. 27.
[30] See id. at Preamble, nineteenth para.

"shall be . . . solely at the direction of the Government of Iraq" after the CPA transference of power.[31]

The third theme reflected in resolution 1546 marks a significant change, but one perfectly consistent with both the handover to Iraqis of full sovereignty right before June 30, 2004, and the disbursement ordering authority of such a new Iraqi government. This theme involved, in part, the already-reviewed paragraph 27's idea of continuing insulation of Iraqi oil and gas and revenues from claims by creditors. In an entirely new twist, paragraph 27 also provided that such insulation from legal claims "shall *not apply* with respect to any final judgement [sic] arising out of a contractual obligation entered into by Iraq after 30 June 2004."[32] Essentially, this recognized that since the transition to full sovereignty acknowledged the growing maturity of Iraq's nascent democracy, complete responsibility for the legal consequences associated with new contractual decisions should be assumed by the new Iraqi government. Claims based on matters antedating June 30, 2004, continued to remain subject to the basic insulation date of December 31, 2007. However, all those arising from legal relations struck after June 30, 2004, could not plead protection from lawsuit or other causes of action.

Along with this twist in paragraph 27 of resolution 1546, paragraph 25 expressed a newfound willingness to consider even greater Iraqi autonomy over oil and gas revenues. To a certain extent, this expression represents another aspect of that third theme that was reflected in the transfer of full governmental sovereignty, the disbursement ordering authority of the Iraqi government, and Iraq's subjection to legal claims for contractual obligations subsequent to June 30, 2004. As noted earlier, revenues from oil and gas transactions were to be accumulated in a DFI account held by the Central Bank of Iraq and subject to IAMB monitoring, supervision, and auditing. Paragraph 25 of 1546, however, indicated that the obligations related to revenue deposits into DFI, and the role of IAMB "shall be reviewed at the request of the Transitional Government of Iraq or twelve months after the date of [1546's adoption], and shall expire upon the completion of the political process" that envisioned the drafting of the Iraqi Constitution in the latter half of 2004, and the January 2005 national elections that resulted, first, in the government of Ibrahim al-Jaafri, and second, in that of Nouri al-Maliki.[33] The effect of raising the elimination of both the UN-imposed obligations concerning the deposit of oil and gas revenues and those concerning IAMB oversight of how those deposits are handled represents a plain acceptance of the fact that increasing political autonomy is to be accompanied by increasing autonomy on all other fronts.

The next important predecessor to Security Council resolutions 1790 and 1859 came in early November 2005 with the adoption of resolution 1637.

[31] See SC Res. 1546, supra note 23 at para. 24.
[32] See id at para. 27 (emphasis added).
[33] See id. at para. 25.

Adopted against a backdrop suggesting that the process toward political development and the building of a stable governmental structure was being impeded by the acceleration of sectarian violence, the resolution sought to recalibrate the pace of transferring increased autonomy to the Iraqis over the deposit of revenues produced by oil and gas activities and the supervision of how those revenues were to be handled. On these matters, paragraph 25 of resolution 1546 had spoken of autonomy transitioning to the Iraqis by the completion of the political process that produced the Constitution, national elections, and the establishment of a governing structure. The tenuousness of that government's hold on power, however, especially in the face of intractable sectarian rivalry, resulted in Security Council resolution 1637 providing that the revenue deposit management authority of DFI, and IAMB's monitoring and auditing role concerning those revenues, was to extend until December 31, 2006,[34] 1 year prior to the expiration of immunity and privileges from legal claims.

Resolution 1637 was also important for a reason beyond the declaration that DFI and IAMB would continue to perform their duties until December 31, 2006. That additional reason had more to do with what its other substantive provisions had to say with respect to Iraq's control over that nation's oil and gas resources, the viability of DFI and IAMB, and the continued protection from creditors of both Iraqi oil and gas and revenues from its sale. Given that the provisions of 1637 addressing these matters closely parallel the provisions of Security Council resolution 1723, adopted but a few weeks before the close of 2006, focus in the balance of this section will be on the specific language of the relevant provisions from the latter resolution.[35] It should be kept in mind, though, that resolution 1723 seems to have had two broad objectives: one being UN reauthorization of the military role of U.S. multinational armed forces in Iraq; and the other being the extension of UN-established mechanisms designed to handle revenues generated by the sale of Iraqi petroleum, petroleum products, and natural gas. In keeping with the foregoing discussion, attention will be limited to the resolution's provisions that are relevant to Iraqi oil and gas and revenues from them, and the protection of these assets from claims by creditors.

In connection with resolution 1637's continuation of DFI and IAMB duties, paragraph 3 of resolution 1723 extended the duties of both until December 31, 2007,[36] the very date for the expiration of immunity of Iraqi oil and gas, and deposits held by DFI, from claims by prewar creditors. Clearly, the continued political turmoil and social unrest in Iraq suggested to the UN the advisability of refraining from any precipitous and potentially regrettable transference to

[34] See SC Res. 1637, available at http://daccessdds.un.org/doc/UNDOC/GEN/N05/592/77/PDF/N0559277.pdf?OpenElement (accessed Dec. 16, 2006).

[35] See SC Res. 1723, available at http://daccessdds.un.org/doc/UNDOC/GEN/N06/632/35/PDF/N0663235.pdf?OpenElement (accessed Dec. 18, 2006).

[36] See id. at para. 3.

Iraqis of complete control over monies generated by the sale of their oil and gas resources. At one time it may have been thought that a quicker transition could have been made in that direction. The growing sectarian tensions in the country now suggested a slower approach. Resolution 1723's other provisions were only slightly less significant than this extension of DFI and IAMB duties contained in paragraph 3. Though not affecting the matter of immunity and creditor claims in any particularly direct fashion, the other provisions did have the effect of reaffirming the international community's resolve that Iraqi oil and gas were subject to Iraqi control, with the monies produced from their sale being used to benefit the people of that nation.

Three specific provisions of resolution 1723's preamble proved instrumental in this respect. The fourth paragraph of the preamble reiterated the frequently stated commitment by the international community to the sovereignty and independence of Iraq.[37] This statement was designed to drive home the message that by no stretch of the imagination should the actions of the United Nations in facilitating the removal of Saddam Hussein from power and authorizing the subsequent military and political measures in Iraq be interpreted as minimizing or derogating from the statehood of that nation. The preamble's fifth paragraph followed the reaffirmation of sovereignty and independence by reiterating the declaration set forth in several earlier Security Council resolutions that the Iraqi people were entitled to determine their own political destiny, and "control their own national resources."[38] Though the reference to "national resources" was a slightly different configuration from the earlier references to "natural resources,"[39] the consequence was basically identical. Iraqi oil and gas was to be seen as under the control of the people of Iraq, not any foreign power or international organization. The twentieth paragraph of resolution 1723's preamble then complemented the fourth and fifth paragraphs, and provided a prelude to the just-described extension in paragraph 3 of the resolution's substantive provisions of the mandates of DFI and IAMB,[40] by noting the Security Council's recognition of the substantial role performed by both DFI and IAMB "in helping the Government of Iraq to ensure that Iraq's resources are being used transparently and equitably for the benefit of the people of Iraq."[41]

Although the combination of paragraph 3 of Security Council resolution 1723's substantive provisions and the fourth, fifth, and twentieth paragraphs from the resolution's preamble evidence reconsideration by the Council regarding the appropriateness of moving too much autonomy over fiscal matters to the new Iraqi government too quickly, it bears observing that both the end of December 2006 and end of December 2007 dates regarding DFI and IAMB

[37] See id. at Preamble, fourth para.
[38] See id. at Preamble, fifth para.
[39] See text accompanying supra notes 10 and 27.
[40] See text accompanying supra note 36.
[41] See SC Res. 1723, supra note 35 at Preamble, twentieth para.

found their way into resolutions 1637 and 1723, respectively, as a result of UN-obligated reviews of the duties of DFI and IAMB. Indeed, it was just such a required review – called for at the request of the Iraqi government – that led to the adoption of resolution 1723 and its time extension.[42] As a lead-in to the upcoming discussion of Security Council resolutions 1790 and 1859, it is important to recall this fact, since resolution 1723, in the paragraph immediately following paragraph 3's declaration of extension of DFI and IAMB duties, called for another review, one that was instrumental in precipitating the adoption of resolution 1790 in particular. More specifically, that follow-on paragraph in resolution 1723 – paragraph 4 to be exact – provided that the duties of DFI and IAMB "shall be reviewed [by the Security Council] at the request of the Government of Iraq or no later than 15 June 2007."[43] These periodic reviews, with consequent 1-year extensions of DFI and IAMB mandates, were intended to parallel transfers to Iraq of power over financial matters when it evidenced progress on both the political and security fronts.

III. SECURITY COUNCIL RESOLUTIONS 1790 (18 DEC. 2007) AND 1859 (22 DEC. 2008)

As calendar year 2007 unfolded, the security situation stabilized in those portions of Iraq subject to General David Petraeus's recommended troop surge. The political situation, however, remained as complicated and difficult as ever, and uncertainty persisted about whether areas subjected to the surge would see stability "take" following any eventual troop draw-down or redeployment.[44] In view of this situation, and the fact that the roles of DFI and IAMB, as well as the insulation of Iraqi petroleum, petroleum products, natural gas, and revenues from their sales, were, effective December 31, 2007, to lose all immunity from legal claims, the Security Council acted to adopt resolution 1790.[45] Herein there appears an examination of not only the specific language of that resolution relevant to the matter of claims by creditors, but also of the request from the Iraqi government that was a motivation for the resolution's adoption, and of the important comments that appear in the records of the Security Council's deliberations regarding the meaning of the language providing insulation from creditors claims, whether those comments were offered in the context of resolution 1790 or its predecessors. That examination of 1790 is then followed by a

[42] See letter dated Nov. 11, 2006 from the Prime Minister of Iraq addressed to the President of the Security Council, SC. Res. 1723, supra note 35, at Annex I.

[43] See SC Res. 1723, supra note 35, at para. 4.

[44] See Provisional Records of 5693d Mtg. of Security Council. UN Doc S/PV.5693, available at http://daccessdds.un.org/doc/UNDOC/GEN/N07/381/21/PDF/N0738126.pdf?OpenElement (accessed Apr. 24, 2008).

[45] See SC Res. 1790, available at http://daccessdds.un.org/doc/UNDOC/GEN/N07/650/72/PDF/N0765072.pdf?OpenElement (accessed Feb. 15, 2008).

similar, but brief, examination of the thrust of, and deliberations surrounding, the adoption of Security Council resolution 1859.

Chronologically speaking, the adoption of 1790 on December 18, 2007, was preceded by Security Council deliberations examining the Iraq situation, and most particularly by the Iraqi government's December 7, 2007, letter to the President of the Security Council.[46] This letter represents an aspect of the mid-2007 review that had been required by Security Council resolution 1723.[47] In that letter, Iraq noted its desire to have the mandate of the multinational force in Iraq extended, and then urged the Security Council to once again renew its insulation from prewar legal claims, extend the duties of DFI and IAMB, with another midyear review to take place in early summer 2008, and consider reducing the requirement established in Security Council resolution 687 immediately following Gulf War I that Iraq make available 5% of all its oil and gas revenues for claims paid by the UN Compensation Commission.

The particular language of the Iraqi letter on the matter of insulation from prewar legal claims stated that Iraq was keenly aware of the importance of earlier Security Council resolutions aimed at guaranteeing the country's natural resources, and proceeds from the sale of such deposited with the Central Bank in the Development Fund for Iraq account would be used for the benefit of the peoples of Iraq. As a consequence, the letter requested that the Security Council continue to apply the provisions of paragraph 22 of resolution 1483 until December 31, 2008 – not ending them at the conclusion of calendar year 2007. The effect of this request was to prevent potential claimants from getting at petroleum, petroleum products, or natural gas originating in Iraq until after title had passed to an initial purchaser; to protect revenues generated by such sales and then deposited with DFI; and to obligate member states to enshrine these protections in their own domestic legal systems. Of course, given that the Security Council in resolution 1546 had earlier eliminated Iraqi protection from legal claims based on contractual obligations arising after June 30, 2004, the Iraqi letter voiced acceptance of that situation.[48]

In the paragraph of the Iraqi letter to the Security Council immediately following that requesting an extension on insulation from legal claims, the government notes its view that the requirement that revenues from oil and gas dealings be deposited with DFI increases the chance that the country's natural resources will be used to benefit the Iraqi people. And in view of the role played by IAMB in monitoring and supervising the handling of those funds, the same can be said with confidence about that entity. Therefore, the paragraph requests that the "mandate of the Development Fund for Iraq and the International Advisory and Monitoring Board be extended" as well until December 31,

[46] See SC Res. 1790, supra note 45, Annex I, Letter dated Dec. 7, 2007 from the Prime Minister of Iraq addressed to the President of the Security Council (hereafter Letter dated Dec. 7, 2007).

[47] See text accompanying supra note 43 for this requirement.

[48] See Letter dated Dec. 7, 2007, supra note 46 at seventh para.

2008, again subject to midyear review.[49] As the Iraqi government evaluated the situation, the existence of DFI and IAMB provided a degree of confidence to Iraq's international partners that the opportunity for abuse and mischief regarding financial resources was substantially minimized. The effect was to make it easier to convince their partners of the wisdom of continuing the provision of economic and other assistance.

In substance, the terms of Security Council resolution 1790, adopted by a vote of 15 in favor, with no objections or abstentions,[50] appear to have heeded Iraq's specific requests. The fourth paragraph of the resolution's preamble repeats the Security Council's reaffirmation of the sovereign independence and territorial integrity of Iraq.[51] In the fifth paragraph the preamble again reiterates that it is the Iraqi people's right to control their own "national resources."[52] Though this formulation, which appeared in the earlier Security Council resolution 1723, is more encompassing than "natural resources," it would certainly seem to include "natural resources" within its reach. The twenty-second paragraph of resolution 1790's preamble then declares the Security Council's complete awareness of the important role played by both DFI and IAMB since their establishment, and of the significance of the concomitant insulation from legal claims accorded to Iraqi oil and gas, revenues from its sale, and DFI itself.[53] The paragraph declares that, collectively, these entities and dispositions both ensure transparency and increase the likelihood that Iraq's natural resource patrimony will be used for the benefit of its people.

With respect to the substantive provisions of Security Council resolution 1790, it accomplished two basic objectives sought by the Iraqi request of December 7. Though not important for current purposes, it first renewed the mandate of the multinational security forces operating in that country,[54] and then it spoke to the matter of DFI and IAMB, as well of the issue of immunity for Iraqi oil, gas, and revenues.[55] On that second matter, paragraph 3 of the resolution provided for several things. At the outset, it provided for an extension of the obligation initially established by resolution 1483 that revenues from sales of oil and gas must be deposited with DFI.[56] It then provided for an extension of IAMB's monitoring and auditing authority over DFI.[57] And finally, it provided for an extension of Iraqi oil, gas, and revenue immunity from legal claims.[58]

[49] See id. at eighth para.
[50] See Provisional Records of 5808th Mtg. of Security Council (Dec. 18, 2007), available at http://daccessdds.un.org/doc/UNDOC/PRO/N07/650/65/PDF/N0765065.pdf?OpenElement (accessed Apr. 25, 2008).
[51] See SC Res. 1790, supra note 45 at Preamble, fourth para.
[52] See id. at Preamble, fifth para.
[53] See id. at Preamble, twenty-second para.
[54] See SC Res. 1790, supra note 45 at paras. 1, 2, and 5.
[55] See id. at paras. 3 and 4.
[56] See id. at para. 3.
[57] See id.
[58] See id.

The latter extension of immunity, however, did not apply to those claims arising from contractual obligations of the Iraqi government entered into after June 30, 2004. And, the extension on all matters – the revenue deposit obligation, the DFI/IAMB mandate, and immunity from legal action – was said to run until December 31, 2008. As in both resolution 1637 and 1723, paragraph 4 of resolution 1790 called for a review of the revenue deposit obligation and the DFI/IAMB mandate at the request of the Iraqi government or no later than mid-June 2008.[59]

The exact language of paragraph 3 of Security Council resolution read that the Council:

> *Decides* to extend until 31 December 2008 , the arrangements established in paragraph 20 of resolution 1483 (2993) for the depositing into the Development Fund for Iraq of proceeds from export sales of petroleum, petroleum products, and natural gas and the arrangements referred to in paragraphs 12 of resolution 1483 (2003) and paragraph 24 of resolution 1546 (2004) for the monitoring of the Development Fund for Iraq by the International Advisory and Monitoring Board and further decides that, subject to the exception provided for in paragraph 27 of resolution 1546 (2004), the provisions of paragraph 22 of resolution 1483 (2003) shall continue to apply until that date, including with respect to funds and financial assets and economic resources described in paragraph 23 of that resolution.

The record of the deliberations of the Security Council on this aspect of resolution 1790 is not particularly instructive, perhaps because the resolution was adopted without a single dissent or abstention, and the drafters' central concern was the renewal of the multinational force's security mandate. Examining the records of the deliberations surrounding the earlier seminal Security Council resolutions that first articulated the immunity protection and established DFI and IAMB provides a better picture of the intended significance of these features. The negotiations associated with resolution 1483's establishment of DFI and IAMB,[60] and the notion of immunity from prewar claims set out in paragraph 22 of that same resolution,[61] prove especially instructive. Resolution 1483 was drafted by the United States, the United Kingdom, and Spain. Prior to its unanimous adoption, on a vote of 14 to 0, with no abstentions, and with Syria not participating (despite its indication that it harbored no particular opposition to the text of the resolution itself), the resolution went through two earlier drafts. The development of the resolution as evidenced in the evolution of the drafts is much more informative than the record of the deliberations that occurred in the Security Council. Perhaps because of the solidity of the consensus on

[59] See id. at para. 4.
[60] See text accompanying supra notes 13–22.
[61] See text accompanying supra notes 11–14.

the various issues concerning Iraq, that record reveals little more than agreement that Iraqis should control their own natural resources, that supervision and transparency should exist until the country could become fully self-governing, and that the resolution being adopted was only a first step toward addressing the many complicated issues facing the community of nations regarding Iraq, including that of its sovereign debt.[62]

The first draft of 1483 was disseminated on May 9. Concerning the matters of immunity from suit and DFI/IAMB, the resolution contained a couple of important provisions. Paragraph 12 of that first draft called for the establishment of an Iraqi Assistance Fund, with an international advisory board that would select independent public accountants to audit the Fund.[63] Paragraph 15 then provided that the Fund was to have "the privileges and immunities of the United Nations,"[64] and paragraph 19 followed this by indicating that proceeds from export sales of Iraqi oil and gas were to be deposited into the Iraqi Assistance Fund, with the exception of a designated portion to go to the UN Compensation Commission.[65] The central provision of this first draft, however, was paragraph 21. It provided that "petroleum, petroleum products and natural gas originated in Iraq, and proceeds of sales thereof, shall be immune from judicial, administrative, arbitration, or any other proceedings (including any prejudgment or postjudgment attachment, garnishment, or execution or other action to satisfy a judgment) arising in relation to claims, of whatever kind and whenever accrued" against Iraq, its agents, the CPA or states participating in such or their instrumentalities or agents.[66] Further, that same paragraph also obligated member states of the UN to adopt domestic legal measures giving full effect to the foregoing obligation.[67]

Obviously, what the first draft referenced as the Iraqi Assistance Fund, and the international advisory board, became DFI and IAMB. It was also clear that from the beginning the drafters saw the thing that would hold revenues from Iraqi oil and gas as being eligible for all the privileges and immunities that protect the United Nations. On the matter of legal actions against such oil and gas, or the revenues from its sale, this first draft contained a complete listing of the types of actions from which these were to be immune, thus leaving no doubt of the intent to provide insulation from every conceivable form of legal or quasi-legal proceeding or procedure. As if to drive home the true scope of

[62] See Provisional Records of 4761st Mtg. of Security Council (May 22, 2003), available at http://daccessdds.un.org/doc/UNDOC/PRO/N03/367/58/PDF/N0336758.pdf?OpenElement (accessed Apr. 29, 2008).

[63] See Draft of a new UN resolution on Iraq, at para. 12, reprinted in The Guardian (May 9, 2003), available at www.guardian.co.uk/world/2003/may/09/iraq.iraq1/print (accessed Apr. 28, 2008).

[64] See id. at para. 15.

[65] See id. at para. 19.

[66] See id. at para. 21.

[67] See id.

this listing, the draft also included the broad and encompassing language "or any other proceedings."

Consultations and negotiations between the members of the Security Council over the terms of the first draft resulted in a second draft being circulated on May 15.[68] That draft differed from the first in a couple of ways. At the outset, it essentially dropped the language of paragraph 15 of the first draft that extended all the privileges and immunities of the UN to the so-called Iraqi Assistance Fund – the name of which had been changed in the second draft to DFI.[69] Additionally, without seriously altering the substance of some of the other paragraphs relevant to oil, gas, revenues and how they were to be handled, the second draft reordered and renumbered the first draft's various provisions. Further, paragraph 14 of the second draft now included language that seemingly acknowledged the importance of Iraq's prewar debts, by welcoming "the readiness of international financial institutions to assist the people of Iraq in . . . multilateral consideration of issues relating to Iraq's sovereign debt."[70] Of greatest import, however, was the alteration made by the second draft in the language of the first draft's paragraph 21 – the paragraph concerning causes of action. In the second draft that matter was taken up in paragraph 19. That new language indicated that "until an internationally recognized representative government of Iraq is properly constituted and the debt-restructuring process referred in paragraph 14 . . . is completed, all funds of the Development Fund for Iraq, petroleum, petroleum products and natural gas originated in Iraq, and proceeds of sales thereof including indebtedness incurred in connection with such sales, shall be immune from judicial, administrative, arbitration or any other proceedings."[71] The language then continued with precisely the same listing of illustrative examples of actions and procedures set forth in the parallel provision of the earlier draft, identified the same entities identified by the earlier draft as entitled to immunity, and then concluded with the earlier draft's language about member states adopting implementing domestic legislation.[72]

As is apparent, with the exception of certain aspects of the quoted portions of paragraph 19 of the second draft, the language of the first draft was entirely replicated, word for word. The quoted portions of paragraph 19, though, did contain three prominent points of distinction from its predecessor. The first concerned linkage of the duration of the immunity from legal action to both the putting together of a recognized and representative Iraqi government and the restructuring of Iraqi debt. No language of that sort appeared in the

[68] See U.S.-U.K.-Spain Revised Draft Resolution on Post-War Iraq (May 15, 2003), Global Policy Forum, available at www.globalpolicy.org/security/issues/iraq/document/2003/0515reviseddraft htm (accessed Apr. 28, 2008).

[69] On the name change to DFI, see id. at para. 11.

[70] See id. at para. 14.

[71] See id. at para. 19.

[72] See id.

U.S.-U.K.-Spain draft of May 9. The immunity provided by the earlier draft was not designed to end with the ascension of a representative government in Iraq or the development of an Iraqi debt restructuring plan. The second point of distinction had to do with the fact that paragraph 19 of the second draft extended immunity not just to Iraqi oil and gas and proceeds from its sale, but to all funds held by DFI. The effect was to include in the paragraph's protection monies held by DFI and that came from transfers from the oil-for-food program and other sources. The final point of distinction relates to that just mentioned. Specifically, the assets benefiting from paragraph 19's immunity were not limited to funds held by DFI, and Iraqi oil, gas, and revenues from its sale. They included, as well, anything considered an "indebtedness incurred in connection with [oil and gas] sales."

Reactions of Security Council members to this revised draft resulted in the slightly different language of paragraph 22 of resolution 1483, language recounted earlier.[73] Placed in the context of its predecessor draft language, it is important to note that paragraph 22 did not link the duration of immunity from legal action to the formation of a representative Iraqi government or the restructuring of that nation's debt. It did, though, call attention to the "relevance" of both matters and fixed the end date of December 31, 2007,[74] the date extended by paragraph 3 of resolution 1790 to December 31, 2008.[75] As for immunity to all of the funds of DFI, and any indebtedness associated with oil and gas sales, and not just for oil, gas, and proceeds from such, paragraph 22 of resolution 1483 used a slightly different verbal configuration than the May 15 draft. Nonetheless, the language selected accomplished the same result. Again, on that score, the language read: "unless the Council decides otherwise, petroleum, petroleum products, and natural gas originating in Iraq shall be immune until title passes to the initial purchaser from legal proceedings against them and not be subject to any form of attachment, garnishment, or execution . . . and that proceeds and obligations arising from sales thereof, as well as the Development Fund for Iraq, shall enjoy privileges and immunities equivalent to those enjoyed by the United Nations."[76] The reference to immunity from "legal proceedings" seems more than sufficient to encompass administrative proceedings and arbitration, both explicitly mentioned in the May 15 draft, because they are unavoidably legal in nature. Likewise, the absence of some of the other language appearing in the earlier draft's reference to attachment, garnishment, or execution does not seem meaningful, given that paragraph 22 of 1483 prefaces their mention with the words "any form."[77]

[73] See text accompanying supra notes 11–14.
[74] See SC Res. 1483, supra note 7 at para. 22.
[75] See text accompanying supra notes 59–60.
[76] See SC Res. 1483, supra note 7 at para. 22.
[77] See id.

In spite of the fact the language of paragraph 22 of resolution 1483 seems as encompassing as that of its immediate predecessor draft version, at least in terms of what was eligible for the immunity it provided and the kinds of proceedings it protected against, it did contain a very noticeable and significant difference with respect to the immunity from legal action accorded to oil and gas proper. Remember, the relevant language spoke of "petroleum, petroleum products, and natural gas originating in Iraq [being] . . . immune, *until title passes to the initial purchaser*."[78] No such language appeared in either of the draft versions of the resolution. That this notion found its way into what the Security Council ultimately adopted cannot be ignored or minimized. Presumably, there was widespread agreement with the idea that, as long as title to Iraqi oil and gas remained in Iraqi hands, the future of the country and the Iraqi people were best served by insulating it from any legal claim. Once title had passed to an initial purchaser, however, immunity under paragraph 22 of Security Council resolution 1483 vanished. This was a significant difference from both of the earlier draft resolutions.

Without getting into the full consequence of this difference until the next section of this chapter, the successor resolutions to 1483 – the previously discussed resolutions 1546, 1637, and 1723 – left in place, with the exception of claims from contractual relations arising after June 30, 2004, the essentials of paragraph 22's immunity regime. The objective appears to have been something close to "blanket insulation" for DFI and for Iraqi oil and gas, as well as for proceeds from its sale. With the December 18, 2007, adoption of Security Council resolution 1790, its paragraph 3 serves not only the purpose of extending that insulation through the end of calendar year 2008, but also that of extending the mandates of DFI and IAMB, and the revenue-collection duties of the former, through the same period of time. Curiously, however, with respect to the extension of immunity, the exact language of paragraph 3 of 1790[79] references the immunity spelled out in 1483 being extended to December 31, 2008, and then adds the clause "including with respect to funds and financial assets and economic resources described in paragraph 23 of that resolution." This should not be understood as somehow bringing a new class of assets within the ambit of paragraph 22's immunity protection, because any examination of the language of paragraph 23 of resolution 1483 reveals that the assets listed there (i.e., Iraqi assets located in and frozen by foreign countries) have been entitled to the same kind of immunity as those referenced in the accompanying paragraph 22.[80] The inclusion of language in paragraph 3 of resolution 1790, about the assets listed in paragraph 23 of resolution 1483, accomplished nothing more than pulling into paragraph 3's very terse and tightly crafted language on the extension of immunity a group of assets that otherwise would have been left aside.

[78] See text accompanying supra note 76. Emphasis added.
[79] For the text of paragraph 3 see text accompanying supra notes 59–60.
[80] See SC Res. 1483, supra note 7 at para. 23.

An examination of the Security Council's deliberations in connection with the adoption of resolution 1790 suggests nothing inconsistent with this interpretation of paragraph 3. As observed previously, the prime focus of the deliberations on that resolution seemed to have been the matter of continuation of the multinational security forces' mandate in Iraq. Nonetheless, when the record of the Council's proceedings are closely winnowed, at least two of the representatives made clear reference to the importance of continuing the legal regime established by earlier resolutions and aimed at protecting Iraqi assets in a manner beneficial to the Iraqi people. In that respect, the representative of the United States, Zalmay Khalilzad, stressed that the text of resolution 1790 "enable[d] DFI to continue to ensure that the [Iraqi] Government's revenues [would be] used for the benefit of the Iraqi people."[81] Plainly, this was an allusion to the significance of the language of paragraph 3 of resolution 1790. Similarly, Iraq's representative, Hamid Al-Bayati, noted his country believed "that the . . . deposit of proceeds into the Development Fund for Iraq (DFI) [would] help to ensure that proceeds from Iraq's natural resources [would be] used to serve the interests of the Iraqi people. . . . Toward that end, the Government of Iraq . . . requested the Security Council . . . continue to apply the provisions of paragraph 22 of resolution 1483 (2003) until 31 December 2008, including in respect of the funds, financial assets, and economic resources described in paragraph 23 of resolution 1483 (2003)."[82] The implication of these two statements seems to be that protection of Iraqi assets remained extremely important to the Security Council, and that resolution 1790 was designed, among other things, to continue the immunity from legal action originally envisioned by resolution 1483 through the end of 2008.

As recalled just two paragraphs earlier, the successor resolutions to 1483 all left in place its basic immunity regime; Security Council resolution 1790 simply extends its termination date. The only exception to this was the fact that Security Council resolution 1546, adopted in June of 2004, immediately prior to the CPA's end-of-June transfer of sovereignty to the transitional Iraqi government, removed Iraq's protection against legal claims associated with contractual obligations arising after June 30, 2004.[83] Even examining the records of the Council's proceedings on that resolution, a resolution that provides the first crack in what is otherwise an absolute insulation of Iraqi assets from legal claims, gives little insight into the true meaning and character of the Council's judgment that Iraq's oil and gas and proceeds from its sale should be used to benefit the Iraqi people alone, not creditors around the globe. The record reveals a Council intent on a UN legal regime striking a balance between the need to ensure Iraq's sovereign independence and the desire to thwart security challenges that could

[81] See Provisional Records of 5808th Mtg. of Security Council, supra note 50 (Statement by Khalilzad).

[82] See id. (Statement by Al-Bayati).

[83] See text accompanying supra notes 78–79.

jeopardize that independence.[84] In this context, it seems natural to have Iraqis bear legal responsibility for matters subsequent to their resumption of political control. To be sure, the language of 1546's final version differs from what had been first proposed by the U.S.-U.K. on the matter of removing immunity for post-June 2004 claims, in that what was adopted spoke of removal concerning "any final judgement [sic] arising out of a contractual obligation" entered after that date, whereas the proposal referred to "any claim arising out of an obligation" entered after that date.[85] This difference has no impact whatsoever on the basic insulation from legal claims provided by paragraph 22 of resolution 1483, as continued by resolution 1790.

Moving to Security Council resolution 1859,[86] the most recent of the United Nations resolutions addressing the matter of Iraqi assets and their insulation from legal claims, its adoption occurred in the context of growing concern about an unending presence of U.S. and coalition military forces in Iraq, conjoined with recognition of the importance of Iraq's oil and gas resources to that nation's full recovery. As to the latter, the resolution extends until the end of December 2009 the insulation and protections referenced in paragraph 3 of resolution 1790. Adopted on December 22, 2008, resolution 1859's paragraph 1 contains verbatim, with the exception of a date of expiry 1 year later than that identified in paragraph 3 of resolution 1790, the exact same language utilized in its predecessor. In other words, both the revenue collecting duties of the DFI and monitoring obligations of the IAMB, called for in resolution 1483, as well as the insulation and protections from legal claims set forth in that same resolution, as modified by paragraph 27 of resolution 1546 with respect to matters arising after June 30, 2004, continue in place until December 31, 2009.

Security Council resolution 1859 was presented to the Security Council in the form of a draft proposal – S/2008/805 – offered by the United Kingdom and the United States.[87] As with resolution 1790, the draft proposal was adopted by a unanimous vote of 15 to 0, with no abstentions. Examining the records of the Security Council, it appears that formal comments on the resolution were not advanced by Council members until after the resolution's adoption. None of the delegates proffering comments felt inclined to suggest interpretations regarding any of the language utilized in paragraph 1 of resolution 1859. That is not to

[84] See Provisional Records of 4987th Mtg. of Security Council (June 8, 2004), available at http://daccessdds.un.org/doc/UNDCO/PRO/N04/380/68/PDF/N0438068.pdf?OpenElement (accessed Apr. 29, 2008).

[85] Compare SC Res. 1546, supra note 23 at para. 27, with Text of U.N draft resolution on Iraq proposed by the United States and Britain at para. 17, USAToday.com (May 24, 2004), available at www.usatoday.com/news/world/iraq/2004–05–24-text-un-iraq_x htm (accessed Apr. 29, 2008).

[86] See Security Council resolution 1859 (December 22, 2008), available at http://daccessdds.un.org/doc/UNDOC/GEN/N08/666.05/PDF/N0866605.pdf?OpenElement (accessed Dec. 27, 2008).

[87] See S/208/805 (December 19, 2008), available at http://daccessdds.un.org/doc/UNDOC/GEN/N08/666/11/PDF/N0866611.pdf (accessed Dec. 27, 2008).

say, however, no one voiced their government's thoughts on the paragraph's essence. The representatives of Iraq,[88] Indonesia,[89] the United Kingdom,[90] and the United States[91] all made a point of emphasizing the importance of the contribution made by paragraph 1's extension of the duties of the DFI and IAMB, and the significance of protecting Iraqi oil and gas, and revenues from the sale of such. Additionally, and with greater specificity, Mr. Zebari of Iraq, who had been invited by the Council to share his country's views on the resolution, alluded to the fact his country had debts outstanding to other nations, and that strides were being made in the effort to settle those debts.[92] The British representative, Mr. Sawer, picked up that theme and called attention to the legal immunity extended until the end of 2009 by resolution 1859, and that immunity's operation in the context of the DFI and Iraqi oil and gas. Similar observations were articulated by the United States representative, Mr. Khalilzad. Mr. Sawer expressed his nation's great delight with the fact the resolution continued the responsibilities of the DFI and its management of Iraqi oil and gas revenues. He also took pains to note his nation's approval of the resolution's "extension of the special arrangements for that Fund [DFI], given the need for particular protection" associated with Iraqi financial assets.[93] Mr. Khalilzad observed that 1859 provided "immunities for Iraq's funds so that these funds . . . [would be] available for the Iraqi government."[94]

The fact that the Council's record of deliberations regarding the adoption of resolution 1859 contains nothing even remotely helpful in navigating the complexities of that resolution is not surprising. It was more than apparent to the Council members that the insulation from legal claims and the role of the DFI and IAMB provided by resolution 1790, adopted the preceding December, were about to expire unless urgent action was taken. Extension until December 31, 2009, was the sole and exclusive objective of the Security Council. To accept that as a given, does not somehow remove the interpretive questions surrounding the practical implications of the substantive thrust of Security Council resolution 1859. While it may be thought unfortunate that the record of the Council's deliberations regarding 1859 provides no insight on such interpretive matters, that fact is a simple reality that must be accepted. In the immediately following Section IV, we endeavor to grapple with some of the more important interpretive questions that arise when the language of the various predecessor Security Council resolutions referenced in paragraph 1 of 1859 is closely examined and

[88] See Official Records of the Security Council meeting 6059 at 4, December 22, 2008, S/PV.6059, available at http//daccessdds.un.org/doc/UNDOC/PRO/N08/665/93/PDF/N0866593.pdf (accessed December 27, 2008).
[89] See id. at 6.
[90] See id. at 7.
[91] See id.
[92] See id. at 4.
[93] See id. at 7.
[94] See id.

contrasted with other formulations. What is offered in that respect could have been just as easily applied to the analytical thrust of paragraph 3 of resolution 1790, as to that of paragraph 1 of resolution 1859, in light of the identity of the language of both those two provisions.

IV. ANALYTICAL SIGNIFICANCE OF PROTECTION FROM LEGAL CLAIMS

As just suggested, the focus of this section will be on the technical and specialized matter of discriminating between the consequences of subtle variations in the use of language. It will involve both an examination of the practical legal implications of the protection from legal claims granted by the Security Council and extended under resolution 1859 until December 31, 2009, and of three major language aspects of the predecessor resolutions embodying this protection. The section unfolds by weaving the practical legal implications into the discussion about each of the major language aspects. With that in mind, the three language aspects examined will be, first, the difference between the language in paragraph 27 of resolution 1546, speaking of "any final judgement [sic] arising out of a contractual obligation," and that of the original proposed draft resolution, speaking of "any claim arising out of an obligation";[95] second, the fact that, in establishing the protection, paragraph 22 of resolution 1483 referenced oil, gas, and revenues from the sale of such being protected "until title passes to the initial purchaser,"[96] whereas its draft predecessor failed to contain any such limitation; and third, paragraph 22's description of the protection of oil and gas being that of making it "immune . . . from legal proceedings" and not subject to "any form of attachment, garnishment, or execution," and its description of the protection accorded to "proceeds and obligations" from the sale of oil and gas, and DFI itself, as "enjoy[ing] privileges and immunities equivalent to those enjoyed by the United Nations."[97]

The language difference between the reference in paragraph 27 of resolution 1546 to "any final judgement [sic] arising out of a contractual obligation" and that to "any claim arising out of an obligation" in the corresponding provision of the resolution's original proposed U.S.-U.K. draft predecessor is not insignificant. It should be recalled that this language comes in with resolution 1546's objective of transitioning sovereignty to an indigenous Iraqi governing structure, but one subjected to the duty of bearing legal responsibility for actions it takes after the June 30, 2004, transition was completed. It was in this context that the seminal U.S.-U.K. proposal suggested that the duty of bearing legal responsibility would encompass "any claim arising out of an obligation" entered into by

[95] See text accompanying supra note 85.
[96] See text accompanying supra notes 78–79.
[97] See text accompanying supra note 76.

Iraq after the end of June 2004. What the Security Council members who unanimously adopted the resolution finally settled upon, however, was the language "any final judgement [sic] arising out of a contractual obligation" entered into after that date.

It seems reasonable to suggest that a principal difference between the final resolution and the proposed draft has to do with the draft being capable of subjecting Iraq to causes of action based on noncontractual matters, such as personal injury, government denial of guaranteed rights, nonaccidental harm to the environment, and other related matters. The proposed draft spoke only of the need to show the existence of "an obligation" dating from the post-transition period. Paragraph 27 of the final resolution, on the other hand, linked potential Iraqi exposure to legal action to the existence of a "contractual obligation." Noncontractual matters proved not to fall within the ambit of resolution 1546's removal of insulation from legal liability, whereas they were within that of its draft predecessor.

Though this reading of the final resolution's difference from the proposed draft has its attractiveness and interpretive appeal, what proves especially troubling in accepting it concerns the fact the language of the draft proposal itself spoke not only of "an obligation," but of an obligation "entered into by Iraq" after June 30, 2004. Without explicitly stating so, it seems next to impossible to ascribe to this language any reading other than that which would require the existence of a consensual or contractual obligation. How is it any different to say one is subject to legal action regarding a "contractual obligation" executed after an identified date, and to say that same subjection exists with respect to "an obligation entered into" after a prescribed date? One "enters into" obligations through volitional, consented-to, contractual acts. Exposure to legal action that arises out of duties and responsibilities imposed by operation of law requires no volitional, consented-to, or contractual act. As a consequence, even though the language of the U.S.-U.K. draft proposal utilized the seemingly broader linguistic formulation of "an obligation," the reality was that it carried precisely the same narrower connotation as resolution 1546's narrower reference to "contractual obligation." Actions for such things as tortuous government conduct or government deprivation of guaranteed rights after June 30, 2004, would not lie, given that culpability for these acts hinges on duties and responsibilities imposed by operation of law alone.

The other distinction between the language of paragraph 27 of resolution 1546 and the original U.S.-U.K. draft involves the requirement of the former that there be a "final judgement [sic]," with the latter referencing only "any claim." The effect of this difference is markedly distinct from that suggested in connection with the difference between the language of "contractual obligation" and that of "an obligation." The reason for this revolves around the fact that one must delineate between a mere "claim" and a "final judgment." A judgment, any judgment, necessitates the making of a claim, the presentation of evidence

in support of and opposition to that claim, the evaluation of that evidence, the application of law to facts found with regard that evidence, and the rendering of a decision by an adjudicator or adjudicative body. A claim, by way of contrast, represents only an assertion of a putative legal injury. It may be based on an erroneous or fabricated understanding of the facts. It may be grounded in a mistaken assessment of the law. And beyond all of this, the Security Council required in paragraph 27 of resolution 1546 not simply the existence of a "judgment," but it required a "final" judgment. Stated clearly, this requires that any judgment serving as a basis for an action against Iraq, and growing out of a dispute involving a contractual obligation entered into with that nation after June 30, 2004, would be entitled to proceed only if all appellate processes had been exhausted, or the time for appeal had elapsed. Restated, if one were to seek reliance on the removal of immunity from legal action incident to paragraph 27 of resolution 1546, one would be obligated to show they had a final judgment concerning a contractual arrangement entered into by Iraq after the end of June 2004.

Now with respect to the second of the three language aspects – the fact that paragraph 22 of Security Council resolution 1483 spoke of Iraqi oil and gas being immune from legal proceedings "until title passes to the initial purchaser" – it should be recollected that neither of the proposed drafts that preceded the resolution itself actually contained that language.[98] The original May 9 draft simply read, as quoted earlier,[99] that "petroleum, petroleum products and natural gas originated in Iraq, and proceeds of sales thereof, shall be immune from . . . proceedings . . . arising in relation to claims" against Iraq.[100] The revised May 15 draft, also quoted previously,[101] read that "petroleum, petroleum products and natural gas originated in Iraq, and proceeds of sales thereof . . . shall be immune from . . . proceedings . . . arising in relation, to claims" against Iraq.[102] The absence of language predicating the continued protection from legal claims on the retention of title by Iraq cannot be viewed as inconsequential. Under both proposed draft resolutions, once Iraqi oil and gas, always so. The effect would have been to continue in perpetuity insulation from legal action. By deliberately including the condition of passage of title in the language of what finally became paragraph 22 of resolution 1483, the Security Council must be understood as sending the message that, once title passed to a first purchaser, all protection from legal claims provided by resolution 1483 had been lost.

The effect of including this language about the passage of title in resolution 1483 would not mean that if, say, an overseas company operating at arm's length

98 See text accompanying supra notes 78–79.
99 See text accompanying supra note 66.
100 See id.
101 See text accompanying supra notes 71–72.
102 See id.

from Iraqi authorities successfully negotiated a purchase of some of that nation's oil and gas, that to which the purchaser now held title would be subject to legal process in order to satisfy some *Iraqi* obligation or debt earlier owed to the party commencing the process. Any such effect would be to compel innocent and unassociated third parties to bear the consequences of some inadvisable and illegal past conduct of the Iraqi government. Under certain highly unusual circumstances, it may be possible that such actions could go forward, but that would be the truly exceptional case. One should suffer for one's own legal infractions, not those of others. This suggests that what the Security Council aimed at accomplishing by resolution 1483's conditioning of immunity upon Iraq retaining title was the elimination of possible confusion over whether oil and gas of Iraqi origin would forever be immune from legal action, even after title had passed out of Iraqi hands and the concerned matter involved some asserted infraction of the oil and gas purchaser or one of its successors. The way the language of paragraph 22 of resolution 1483 was written, it departed from the two earlier draft proposals in that it did not speak in terms of immunity of oil and gas for claims against Iraq. In fact, all paragraph 22 referenced was immunity for oil and gas from legal proceedings generally, thus potentially giving rise to the erroneous view that it could never become the subject of legal proceedings. By linking immunity with title remaining in Iraq's hands, the language suggested that immunity remained intact for claims against Iraq as long as the subject oil and gas remained with Iraq. But once title to such had been transferred to an initial purchaser, that purchaser, and any downstream, could witness the oil and gas being the subject of a legal claim for infractions by the purchaser, its sub-purchasers, or anyone other than Iraq. A BP or Royal Dutch Shell tanker full of purchased oil of Iraqi origin sitting at a quay in Rotterdam could be subject to legal process for actions or inactions of BP, Shell, or others sufficiently connected to such.

Even accepting this as the correct reading of paragraph 22, a much more complicated question remains. Specifically, what is required under this language to effectuate the actual passage of title? Those familiar with the common-law concept of equitable title will appreciate that the law often views one as having the right to insist on and to protect a title interest, even though technically one may not have the kind of document that represents what is typically understood as title. For example, in the context of real property, a deed typically represents title. Nonetheless, it is not unusual for some jurisdictions to consider the mere giving of a mortgage on a piece of property as tantamount to passing title to that property. Thus, in a so-called "title theory," as opposed to a "lien theory" jurisdiction, the giving of a mortgage on a piece of property held by two or more individuals in joint tenancy can be viewed as producing a severance of the joint tenancy, because the giving of the mortgage itself is seen as the equivalent of passing title. Similarly, under the doctrine of equitable conversion, even though a purchaser who has entered into an enforceable real estate contract has no deed to the property until the transaction has been fully closed, the law will view them

as having sufficient title interest in the property to warrant fixing the risk of loss on them in certain situations where the property is damaged or destroyed prior to closing. With respect to personal property, however, it might be that a mere security interest (e.g., something analogous to a mortgage in the real property context) is not seen as rising to the level of a transfer of title. And when it comes to something like the international sale of personal property, title might be considered as passing at slightly different times, depending upon the nature of the matter in dispute. The point to be made is that the language of paragraph 22 referencing "until title passes to the initial purchaser" is not self-defining and does not have some inherent meaning.

Clearly, the plain language of the paragraph would result in loss of the immunity from legal process once Iraq actually sold oil and gas proper to an overseas or domestic purchaser operating at arm's length from the Iraqi government. In such a case, the passage of the invoice of the sale or bill of lading would represent the passage of title. Under the terms of Security Council resolution 1483, the oil and gas would then be subject to legal process by any entity with a claim against the purchaser, whether that claim was recent or distant in origin. The purchaser would not find its oil and gas subject to legal process by one whose grievance was against Iraq itself, however, because, as indicated, the aim of the resolution was not to penalize innocent and unassociated third parties for the infractions of the Iraqi government. If the purchaser was not at arm's length from the Iraqi government, an inclination would exist to treat the transfer of title as not operating to remove resolution 1483's protection from legal process. The absence of adequate managerial and decision-making daylight between the government and the purchaser would render the transfer as from one governmental hand to the other. And as long as the government of Iraq retains title to its oil and gas, it can count on the protection from legal process provided by paragraph 22 of resolution 1483. Transactions with arm's-length entities involving something short of a purchase would prove significantly more troublesome to evaluate. Examples could include the Iraqi government's use of its oil and gas as security for infusions of capital, as a pledge for the extension of time on repayment of an old debt, or as the subject of a negotiated development agreement looking toward the extraction of the resource by an international oil and gas company given a fractional share in what is actually produced. The ambiguous nature of paragraph 22's language about what actually results in the passage of title suggests, especially since the paragraph calls for member states to implement the immunity requirement by "steps that may be necessary under their domestic legal systems to assure th[e] protection," that the implementing law of the state where legal process is contemplated be consulted.

On that score, it may prove interesting to note the exceedingly protective approach adopted by the United States when it comes to Iraqi-origin oil and gas. No matter the nature of the interests in the oil and gas, the operative legal instrument in the United States provides few opportunities to witness them serving

as the basis for legal action. The very day that the Security Council adopted resolution 1483, President George W. Bush issued Executive Order 13303 providing that "any attachment, judgment, decree, lien, execution, garnishment, or other judicial process is prohibited, and shall be deemed null and void, with respect to . . . all Iraqi petroleum and petroleum products, and interests therein, and proceeds, obligations, or any financial instruments of any nature whatsoever arising from or related to the sale or marketing thereof, and interests therein," if those are within or later come into the United States or the possession or control of a United States person.[103] The fact that the executive order protects from legal action not just Iraqi oil and gas, but also "all . . . *interests therein*, and proceeds, *obligations*, or *any financial instruments of any nature whatsoever*" suggests the intent to sweep every sort of arrangement concerning Iraqi oil and gas within the order's reach. Consequently, would it not seem logical to conclude that interests arising from a pledge or a mere development agreement fall within the scope of the order? It is true that in late November 2004 this order was amended to include resolution 1483's reference to protection for oil and gas remaining "until title passes to the initial purchaser."[104] The amendment to include that language, though, did nothing to affect the order's reference to protection applying to "all . . . interests therein," "obligations," or "any financial instruments of any nature whatsoever" connected to Iraqi oil and gas. Thus, even though sound arguments might be advanced that resolution 1483's paragraph 22 language removes the protection from legal process for transactions such as security interests, pledges, development agreements and the like, U.S. law seems to leave no doubt of protection being extended to such.

There is at least one other dimension of paragraph 22's language about protection from legal process "until title passes to an initial purchaser" that should briefly be mentioned. What was just examined about that language had to do with the kinds of transactions executed by Iraq that could be considered to pass title and, thereby, end the paragraph's protection. The other dimension now referred to concerns the status required of the one on the other side of the transaction from the Iraqi government. Paragraph 22 requires the status to be that of a "purchaser." Does that include, as suggested in Chapter 4 of this book,[105] an entity providing a technical service to the Iraqi oil and gas industry, who receives compensation for its service through some payment-in-kind arrangement – perhaps one that shows its invoice of charge receiving a credit for oil and gas taken in partial or full payment? Not regarding such an entity as a "purchaser" would continue paragraph 22's protection. This seems a hyper-literal reading of the paragraph's language, and it is obvious that any

[103] See Executive Order No. 13303 (May 22, 2003), available at www.whitehouse.gov/news/releases/2003/05/20030522–15 html (accessed May 1, 2008).

[104] See Executive Order No. 13364 (Nov. 29, 2004), available at 69 Fed. Register 70177 (Dec. 2, 2004). For another later amendment, see Executive Order No. 13438 (July 17, 2007).

[105] See Chapter 4, text accompanying note 22.

such reading would serve to completely frustrate resolution 1483's objective of a thoroughly monitored, transparent, and independently audited oil and gas sales revenue system free from the potential for abuse, with earnings available for distribution under a federal revenue-sharing law.

Leaving aside the second of the three identified language aspects of the Security Council resolutions relevant to protection from legal claims, we now focus on the third and final aspect: the fact that paragraph 22 of resolution 1483 used the words "privileges and immunities equivalent to those enjoyed by the United Nations" in some contexts, and the words "immune . . . from legal proceedings" in others. As a transition into examining the significance of this difference in language, it bears recalling that both the May 9 and the May 15 proposed draft predecessors provided that petroleum, petroleum products and natural gas, and proceeds from the sale of such were to be "immune from judicial, administrative, arbitration or any other proceedings."[106] This is pointed out because not only petroleum, petroleum products and natural gas, but also proceeds from the sale of such were said to be "immune" from legal process. Looking at paragraph 22 of resolution 1483, however, while petroleum, petroleum products, and natural gas are said to be "immune" from legal proceedings, proceeds from the sale of petroleum, petroleum products, and natural gas are said, along with "obligations arising from sales thereof, as well as the Development Fund for Iraq," to enjoy "privileges and immunities equivalent to those enjoyed by the United Nations."

What inference should one draw about the difference between immunity from legal proceedings, and privileges and immunities tantamount to those accorded the United Nations? Does the former offer a degree of protection more or less extensive than that of the latter? If less, then the switch with regard to proceeds from the sale of oil and gas would result in a reduction in the protection under paragraph 22 of resolution 1483 over what had existed under its proposed draft predecessors. And, the same could be said for the protection assured both to "obligations arising from sales" of such and to the DFI itself, because resolution 1483 placed them as well under the same privileges and immunities accorded to the United Nations. Conversely, if the notion of privileges and immunities like those granted to the UN provides more protection than simple immunity from legal process, proceeds from oil and gas sales would be entitled to greater protection as a result of the switch in language appearing in paragraph 22.

The background concerning how this difference in language between immunity from legal process, on the one hand, and the same privileges and immunities accorded to the UN, on the other, crept into the text of paragraph 22 seems worth recounting. Again, with reference to the May 9 proposed draft predecessor, it contained, as seen earlier, three relevant provisions. The first, paragraph 12, established the Iraqi Assistance Fund, the proposal's analogue

[106] For the language from the May 9 draft (para. 21), see text accompanying supra note 66; for the language from the May 15 draft (para. 19), see text accompanying supra note 71.

of what became DFI.[107] The second, paragraph 15, provided to that Fund the "privileges and immunities of the United Nations."[108] And the third, paragraph 21, provided immunity from legal process to Iraqi oil and gas, and proceeds from its sale.[109] The May 15 draft, however, switched away from delineating between UN style privileges and immunities for the Fund, and immunity from legal process for everything else. Its paragraph 11 substituted DFI for the Iraqi Assistance Fund, but, unlike the May 9 draft, it contained no provision according DFI the privileges and immunities of the UN.[110] Instead, in paragraph 19, the basic protection provision, it noted that Iraqi oil and gas, proceeds from the sale of such, including indebtedness incurred in connection with such sales, and "all funds of the Development Fund for Iraq" were immune from legal process.[111] With the adoption of paragraph 22 of resolution 1483, the Security Council returned to the distinction first introduced in the May 9 draft proposal between privileges and immunities of the UN and immunity from legal process.

It would certainly seem that the May 15 draft's movement away from such a distinction suggested the complete absence of any significance between UN privileges and immunities, and immunity from legal process. By putting DFI under the same protection rubric as petroleum, petroleum products and natural gas, and proceeds from the sale of such, would it not seem reasonable to conclude that the May 15 draft's movement away from the approach of May 9 indicated that the architects of the proposal felt that, no matter the linguistic formulation, DFI, oil and gas, and proceeds from such should be extended exactly the same level of protection? As attractive as this reasoning may appear, its acceptance unavoidably suggests that when the Security Council in paragraph 22 of resolution 1483 moved back toward the notion of UN-like privileges and immunities for DFI and proceeds from the sales of Iraqi oil and gas (as well as for "obligations arising from" such sales), relegating oil and gas proper to immunity from legal process, it was intent upon restoring a distinction in levels of protection that had been captured in the May 9 draft and then obscured in the draft of May 15. A modicum of corroboration for this suggestion is provided by the way the concluding language of paragraph 22 fits into the totality of the paragraph itself.

Without belaboring the matter, the already oft-repeated language of paragraph 22 notes that Iraqi oil and gas are immune, until title passes to an initial purchaser, from legal process, and that proceeds and obligations arising from oil and gas sales, as well as DFI, are to enjoy the same privileges and immunities as the UN. Immediately following this, the paragraph concludes with language stating "except that the [just-]mentioned privileges and immunities will not

[107] See text accompanying supra note 63.
[108] See text accompanying supra note 64.
[109] See text accompanying supra note 66.
[110] See text accompanying supra note 69.
[111] See text accompanying supra note 71.

apply with respect to any legal proceedings in which recourse to proceeds or obligations is necessary to satisfy liability for damages assessed in connection with an ecological accident, including an oil spill, that occurs after the date of adoption of this resolution."[112] In clearly distinguishing between those assets and financial resources that can be gotten at to satisfy damage resulting from environmental injury, notwithstanding the existence of otherwise general protection, the language limits itself to oil and gas sales proceeds and obligations – things benefiting from the same privileges and immunities applicable to the United Nations. This may be taken as suggesting not just an appreciation by the Security Council that there could be practical reasons why oil and gas proper should not be subjected to action for environmental harm, but that a distinction exists between privileges and immunities, and the concept of immunity from legal process.

Admittedly, on the basis of the record of the evolution of the language that became paragraph 22 of resolution 1483, one cannot conclude that the matter of the Security Council's view about a glaring difference existing between privileges and immunities and immunity from legal process is beyond doubt. In terms of the very content of the two notions, however, it seems that such a case can be made. To begin with, it seems clear that immunity from legal process, especially given that paragraph 22 states it as being from "legal proceedings" and "any form" of attachment, garnishment, or execution, is quite comprehensive in its reach. Yet without downplaying the comprehensive nature of the concept of immunity from legal process, the notion of "privileges and immunities equivalent to those enjoyed by the United Nations" appears to reach substantially further. The United Nations' Charter does not explicitly spell out the privileges and immunities to which that international organization is entitled. Article 105 (1) of the Charter merely provides that "[t]he Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes."[113] Almost immediately after the adoption of the Charter, however, the community of nations entered into the Convention on the Privileges and Immunities of the United Nations (13 Feb. 1946), specifying in great detail the nature of the UN's rights and protections.[114] In addition to providing the UN with complete immunity from any and all legal process, Article II, Section 3, of that Convention clearly provides that all property and assets of the organization are totally immune from any form of "executive, administrative, judicial or legislative action."[115] Essentially, then, while immunity from legal process may be immunity of a substantial nature, the immunity granted to the United Nations by the terms of the Convention on Privileges

[112] See SC Res. 1483, supra note 7 at para. 22.
[113] See UN Charter, art. 105 (1).
[114] See Convention on the Privileges and Immunities of the United Nations, 13 Feb. 1946, 1 U.N.T.S. 15.
[115] See id. at art. II, Sec. 3.

and Immunities extends as well to immunity from actions of every imaginable branch of government. The language of paragraph 22 of resolution 1483 would, thus, have to be read as according to the proceeds of oil and gas sales, obligations arising from such sales, and DFI itself, protection more extensive than that provided to Iraqi oil and gas proper.

V. CONCLUSION

Security Council resolutions 1790 and 1859, and all of their predecessors, aim at maximizing the level of financial revenues, associated with Iraqi oil and gas activity, available for use by that nation as it endeavors to restore stability and address its many pressing economic needs. Effective December 31, 2009, however, the legal protections designed to ensure the requisite revenues run out. The UN mandate permitting U.S. and allied military forces to continue security operations in Iraq ran out when resolution 1790 expired the December 31, 2008. The latter, however, has been continued under the terms of the Status of Forces Agreement (SOFA) recently negotiated between Baghdad and Washington. Unofficial versions of the SOFA accessed by informed members of the media with well-placed sources connected to the process indicate that, apart from addressing the central matter of the conditions associated with an extension of the earlier UN security mandate, the terms of article 26 of the SOFA also purport to address renewal of the Security Council's long-established protection of Iraqi oil and gas assets from claims by creditors, thus dove-tailing with the later adopted Security Council resolution 1859.[116] Whether the language of article 26 of the SOFA standing alone could prove successful at providing the necessary insulation from legal claims has been disputed by some.[117] In a broad sense, however, the article's language aims at accomplishing three specific objectives, all of which bear reference.

Article 26's first objective can be identified as the general protection of Iraq's oil and gas assets, with this being accomplished by both claims forgiveness and claims resolution. Article 26 (1) is said to provide, in relevant part, for the continued safeguarding of Iraq's "revenues from oil and gas and other . . . resources and its financial and economic assets located abroad, including [in] the Development Fund for Iraq." To secure this objective, the United States commits to support Iraq to both "obtain forgiveness of international debt resulting from the . . . former regime," and "achieve a comprehensive and final resolution of

[116] For the text of SOFA, and its article 26, see Breaking: Text of Status of Forces Agreement, Iraq Oil Report (Nov. 18, 2008), available at www.iraqoilreport.com/2008/11/18/breaking-text-of-status-of-forces-agreement/ (accessed Nov. 28, 2008) (hereinafter SOFA).

[117] See U.S. accord exposes Iraqi assets, Sydney Morning Herald (Nov. 25, 2008), available at www.smh.com.au/news/world/us-accord-exposes-iraqi-assets/2008/11/24/1227491461367 html (accessed Nov. 28, 2008).

outstanding reparations claims." Article 26's second objective can be characterized as a commitment by the United States to continue the protections expressed in the earlier referenced Executive Order 13303 against all legal action in U.S. courts.[118] As article 26 (2) provides, Washington remains cognizant of Iraq's concern with legal claims arising out of the actions of the Saddam regime and, therefore, "the President of the United States *has exercised* his authority to protect from United States judicial process" the DFI and "certain other property in which Iraq has an interest." The referenced exercise of authority is reflected in the Presidential Notice of May 20, 2008, extending for 1 year the protections of Executive Order 13303, and its amendments.[119] Further, article 26 (2) indicates that the United States will remain engaged with Iraq "with respect to continuation of such protections." Article 26's third objective recognizes the very limited scope of the commitment to make U.S. judicial action an impossibility, in that it has no effect on causes of action lodged elsewhere. This is addressed in article 26 (3) by its expressed desire to see the UN Security Council protections incident to resolution 1483 and 1546 continued. As the language of that provision declares, President Bush obligates himself to send a letter to Prime Minister al-Maliki stating that "the United States remains committed to assist Iraq in connection with its request that the UN Security Council extend the protections and other arrangements" established by those resolutions and protecting "petroleum, petroleum products, and natural gas originating in Iraq, proceeds and obligations from [the] sale thereof, and the Development Fund for Iraq." Plainly, that commitment seems to have been met by the United States' support and the Security Council's adoption of resolution 1859.

Though it may be difficult to comprehend the full nature of the SOFA's undertakings with respect to Iraqi oil and gas assets, it is clear that the intention was to prevent the expiration of the protections guaranteed by Security Council resolution 1790 and its predecessors from simply evaporating into thin air at the end of 2008. At the beginning of December 2008, while the acceptability of the SOFA to the Iraqi government was not entirely finalized, the precise form of the envisioned replacement Security Council resolution (that became 1859) spoken of by article 26 (3) of SOFA remained to be seen. Iraq had reportedly indicated to the UN that it would embrace an extension of the legal protections accorded by 1790 and its predecessor resolutions,[120] And there were reliable indications that the Security Council would take such up for consideration before 2008 ended.[121] Had that not occurred, and the Presidential Notice of

[118] See text accompanying supra note 94.

[119] See 73 Fed. Register 29683 (May 21, 2008).

[120] See Letter dated June 10, 2008, from the Permanent Representative of Iraq to the President of the Security Council, UN Doc. S/2008/380 (June 11, 2008). See also Security Council Report December 2008, Iraq (MFN-1), available at www.securitycouncilreport.org/site.c.glKWLeMTIsG/b.4780501/ (accessed Nov. 29, 2008).

[121] See Security Council Report December 2008, id. (action expected in December 2008 on Iraqi request for an extension of resolution 1790's legal protections for oil and gas assets, and proceeds from sales of such).

May 20, 2008, had to be supported by legal underpinnings that lacked a Security Council resolution, it is not inconceivable that questions would have arisen concerning the validity of the legal protection provided against claims by creditors in U.S. courts, considering that the protection would have had the SOFA (rather than a binding UN Security Council resolution) as a pillar of its foundation, and article 26 of that bilateral agreement addresses matters seemingly outside the president's Article II constitutional authority as commander-in-chief of the armed forces. Without suggesting how such questions might have been resolved, it must be kept in mind that, beyond the express commander-in-chief powers of article II of the U.S. Constitution, the president also possesses certain other inherent concurrent powers, as well as powers delegated in various legislative enactments of the Congress. Further, the importance of the protected assets and revenues to the successful accomplishment of the SOFA's security objectives cannot be underestimated. As a result, the president's authority to issue an effective executive order based on a bilateral agreement containing a provision that might be otherwise constitutionally suspect may well not have been presented in this particular instance.

8 CENTRAL GOVERNMENT AUTHORITY TO STRIKE OIL AND GAS DEVELOPMENT AGREEMENTS IN THE ABSENCE OF A FEDERAL FRAMEWORK LAW

I. INTRODUCTION

Before considering the question of whether the federal government is vested, in the absence of the adoption of oil and gas framework legislation, with sufficient authority under the Iraqi Constitution to enter into oil and gas development agreements, one would do well to reflect on the large variety of contractual arrangements that such development agreements might take. In the broadest sense, such arrangements can be categorized on the basis of the form of payment used to compensate foreign partners, or according to the nature and character of the labor to be provided. The Introduction to this chapter, however, blends these together and speaks of the arrangements in more traditional terms common in the international oil and gas industry.

One form of development agreement arrangement could involve a production-sharing contract (PSC). Those have been employed by the Kurdistan Regional Government (KRG) in attempting to enlist overseas support for developing Kurdish oil and gas resource deposits. And, as observed in Chapter 4, they are regulated under both KRG and federal legal provisions. The production-sharing contract involves the international oil and gas company in providing a vast range of activities associated with developing identified oil and gas deposits. In return, the company receives some fractional share of the product actually lifted. The fractional share can be calculated in a number of ways, from a share of the total amount of oil and gas produced, to a share from what remains after adjustments have been made for items such as costs, taxes, fees, and other exactions.

A second form of development agreement could involve a so-called participation agreement. In a sense, this is like a joint venture operation or joint operating agreement in which both the international oil and gas company and its local Iraqi or other international partner share responsibilities for the development of oil and gas resources. There is no particular magic about how payment is to be made to the international oil and gas company for the performance of

its responsibilities, but it is not uncommon for payment to take the form of a fractional share of the oil and gas produced.

Aside from the production-sharing contract and the participation agreement, a host country might attempt to secure assistance in the development of its oil and gas resources by employing farm-out or farm-in agreements. These are essentially designed to induce an external source with particular skills or expertise to provide assistance to the host country, or to one employed by that country to develop its oil and gas resources. Again, payment would come in the form of some small fractional share of the end product actually produced. This not only serves as an incentive to the provider, it also reduces the amount of product the host country or the party contracting with the provider will finally receive.

Another form of contractual arrangement that an oil and gas development agreement might take would be that of the licensing agreement. Again, typically payment under a licensing agreement will be in cash, but there is nothing that inextricably ties payment to that form. It is quite conceivable that payment might take the form of oil or gas itself. The licensing agreement, as with the farm-out or farm-in contract, however, is designed to secure a complex and sophisticated skill, and it will not usually result in payment or compensation taking the form of a fractional share in oil and gas production itself.

Like the farm-out or farm-in and the licensing agreement, the technical service agreement or contract (TSA or TSC) is designed to elicit support for some specific, limited, and typically complex and sophisticated activity not performable by the host country, or some international partner it has employed to spearhead and supervise the overall exploration and exploitation effort. The TSA or TSC may or may not require the service provider to assume the risk that any compensation it is to receive will depend upon successful production of oil and gas. But no matter how the compensation aspect of the contract is structured, service contracts commonly call for payment in cash or in product. A TSA or TSC provider is not one who receives a fractional share of production in return for the service it provides. Chapter 7 referred to a hypothetical situation involving the permissibility, under the controlling United Nations Security Council resolutions, of Iraqi authorities striking a technical service agreement with a foreign company for the provision of a particular service with payment to take the form of deliveries of oil for export from Iraq.

Related to the TSA or TSC, but operating on a much more superficial level in terms of the complexity and extent of service provider involvement, is the technical cooperation agreement (TCA). Generally, in this form of development agreement, the service provider simply transfers specific technology to the host country or its international partner and provides the transferee with the necessary training and expertise to appropriately and effectively utilize the technology. It may also involve the provider in various aspects of the evaluation

of information collected through the use of transferred technology. Again, payment typically involves cash, but may be made through oil and gas deliveries. The usual TCA does not give the provider any fractional share in production.

Even further removed from actual connection with oil and gas field production activity is the so-called Engineering, Procurement and Supervision of Construction Contract (Eng.&PC). In that form of development agreement, an international oil and gas field company provides engineering design services, actual procurement of needed field items, and supervision of the construction of facilities associated with the oil and gas production. Here, too, payment will normally be in cash. There is nothing that prevents it from taking some other form, however.

In looking at the reports concerning the various forms of development agreements concluded or considered by the Iraqi federal government, it seems that, although not all may have been used to date, there is no reason to believe they may not eventually come to be used. If any reservation exists on that score, it would have to be with respect to the PSC. The Russian giant Lukoil, in conjunction with its operating partner in Iraq, ConocoPhillips, has continued to insist on prior rights in the massive West Qurna field, a priority it traces to a Saddam-era PSC negotiated with Iraq.[1] The central government in Baghdad, though, has been extremely hesitant to either acquiesce in Lukoil's claim or conclude any new PSCs with other international oil and gas companies until the oil and gas framework law becomes effective.[2] Nonetheless, as of early 2008, indications were that as many as 70 international operators had registered with Baghdad for the eventual submission of tenders on various aspects of oil and gas operations.[3]

With regard to examples of Eng.&PCs and TCAs, the Irish oil and gas services company Petrel Resources in September 2005 signed the first agreement for work in Iraq following the ouster of Saddam. The agreement was a $197 million Eng.&PC to provide all the necessary engineering, procurement, and construction to assist in the development of the Subba and Luhais oil and gas fields. The aim is to bring the fields online at 200,000 bpd of oil and 120 million cubic feet (mcf) of natural gas.[4] In October 2005, Petrel also signed TCAs to provide seismic reprocessing, well log and core analysis, and stratigraphic work and mapping services for the development of the Merjan field in the center of the country, and the Dufiah field in the south.[5]

[1] See Oil Giants Move to Cash-In on New Iraq Oil Law (Apr. 3, 2007), available at www.polarisinstitute.org/oil_giants_move_to_cash_in_on_new_iraq_oil_law (accessed May 14, 2008).

[2] See id.

[3] See Foreign Firms Seek Iraq Oil Deals, Al-Jazeera (Feb. 18, 2008), available at www.globalpolicy.org/security/oil/2008/0218foreignfirm htm (accessed May 14, 2008).

[4] See www.petrelresources.com/iraq/projects.aspx (accessed May 14, 2008).

[5] See id. and www.proactiveinvestors.co.uk/articles/art.php?PET3 (accessed May 14, 2008).

In terms of TSAs, the Iraqi Oil Minister, Hussein al-Shahristani, has actively pursued short-term TSAs with a number of major international oil companies in more recent months. Royal Dutch Shell, for example, is said to have been offered a short-term TSA to assist in the development of fields in the Kirkuk area, as well as in Misan province. The Anglo-Australian company BHP-Billiton has been extended a similar arrangement to help Shell in Misan province. Both Chevron, the U.S.-based international oil and gas company, and Total, the French international resource company, have been offered TSAs in the West Qurna field – Phase I. The American giant ExxonMobil has been extended a TSA for the al-Zubair field, with the British company, BP, offered one for the Rumaila field. In addition to the TCAs held by Petrel Resources in the Subba and Luhais fields, a consortium led by U.S.-based Anadarko has been extended a TSA for the same fields.[6] The latter deal was said to have paired Anadarko with Vitol, the European-based company, and Dome, the Dubai-based enterprise, and to be worth approximately $500 million, aiming to boost oil output from the relevant field by 100,000 bpd.[7] At the time of this writing, the majors were said to be expressing some reluctance to rush into the consummation of the TSAs for fear that Iraq may have trouble freeing up the financial resources necessary to pay for the technical services provided, given that extant UN Security Council resolutions regarding Iraqi oil and gas and revenues from its sale may prevent or hamper the making of such payments. Some concern was also being expressed on the Iraqi side about the majors wanting to use the short-term TSAs as a door opener that would guarantee increased chances of landing longer term service arrangements, or equity-based contracts, in the future. Nonetheless, beginning in April and May 2008, news reports indicated that some majors were in advanced stages of negotiation with Iraq on TSAs of interest.[8] The expectations were that the terms of finalized agreements would be wrapped up by later in the summer.[9]

The start of the late-spring 2008 short-term TSA round began in mid-April with roughly 120 companies registering with and seeking to be qualified by the Iraqi government for the right to engage in oil and gas development activity. In the neighborhood of thirty-five companies were eventually classified as "qualified IOCs" (international oil companies) by the petroleum contracts and licensing office of the Oil Ministry. Beyond those mentioned earlier as being deeply involved in the first round of TSAs, qualified companies have been reported

[6] See Shahristani Warns Majors Not to Miss TSA Boat, available at www.zawya.com/story.cfm/sidv51n17–1T504/Shahristani%20Warns%20Majors%20Not%20To%20Miss%20Boat (accessed May 15, 2008).

[7] See Iraq in Advanced Talks on Sixth Oil Deal: Sources (May 8, 2008), available at www.iraqupdates.com/p_articles.php/article/30826 (accessed May 15, 2008).

[8] See Iraq signs it first service contracts in June (Apr. 25, 2008), available at www.iraqupdates.com/p_articles.php/article/30298 (accessed May 15, 2008).

[9] See Iraq Talks with Oil Majors; Deals Seen June (May 4, 2008), available at www.iraqupdates.com/p_articles.php/article/30680 (accessed May 15, 2008).

to include Hess Corp., Marathon International Petroleum Ltd., and Occidental Petroleum Corp. from the United States, and Edison International SpA and Eni SpA from Italy. From China, CNOOC Ltd., China National Petroleum Corp., Sinochem International Co. Ltd., and Sinopec Shanghai Petroleum Co., Ltd. were all designated as qualified.[10] Other British companies found qualified include BG International and Premier Oil PLC. Japanese international oil companies receiving a designation as qualified include Inpex Holdings, Inc., Japex, Mitsubishi Corp., and Nippon Oil Corp. In addition to Lukoil, Russia's JSC Gazprom Neft, South Korea's Korea Gas Corp., Norway's Schtatoil Hydro ASA, Germany's Wintershall Basf Group, Canada's Nexen Inc., Denmark's Maersk, India's ONGC, Malaysia's Petronas Gas BHD, and Indonesia's Pertamina all received qualification.[11] By the beginning of July 2008, the Ministry of Oil also announced the opening of bidding on long-term TSAs for six oil fields (Rumaila, Kirkuk, al-Zubair, West Qurna Phase I, Bai Hassan, and the Maysan complex) and two gas fields (Akkas and Mansuriyah), with the bid tender period closing the end of March 2009, and the expectation being that the longer-term arrangements would elicit just as much interest as the shorter-term TSAs and could serve to more effectively attract serious interest by the majors.[12]

At some future juncture, the indications are that Iraq will move beyond these less adventurous, less ambitious, status quo, virtual maintenance forms of development contracts and in the direction of other business agreements that will put international oil and gas companies in a position to receive a fractional share of Iraqi production. The speculation is that, when this comes, it will initially involve partially developed fields already tapped or being tapped, and only later will come to include giant undeveloped fields, such as the Akkas gas field that has been eyed by Royal Dutch Shell for some time. Reports claim that Shell has already presented to the Iraqi government a master plan for the development of the nation's hydrocarbon resources.[13] Further, they also suggest that the Akkas field, located in the Sunni stronghold of al-Anbar province, may contain as much as 2.15 trillion cubic feet (Tcf) of natural gas; the expectation is that first production levels could come in at approximately 50 mcf per day, topping

[10] See Iraqi Qualified 4 Chinese Cos for Oil Contracts (Apr. 16, 2008), available at www.iraqupdates.com/p_articles.php/article/29945 (accessed May 15, 2008).

[11] See Iraq Oil Min: 35 of 120 Cos Qualified to Bid for Deals (Apr. 15, 2008), available at www.iraqupdates.com/p_articles.php/article/29895 (accessed May 15, 2008).

[12] See (Reuters) Iraq Unveils Oilfields Open for Long-term Contracts (July 1, 2008), available at www.iraqupdates.com/p_articles.php/article/33155 (accessed July 2, 2008); Gina Chon, Iraq Government Says Oil Contracts Bid Out for Technical Services (July 1, 2008), available at www.iraqupdates.com/p_articles.php/article/33161 (accessed July 2, 2008); Iraq Opens 6 Oil Fields for Bidding (July 1, 2008), available at www.iraqupdates.com/p_articles.php/article/33162 (accessed July 2, 2008).

[13] See Ben Lando (UPI), Analysis: Iraq oil deals moving in phases (Mar. 10, 2008), available at www.upi.com/International_Security/Energy/iraq_oil_deals_moving_in_phases/5881/ (accessed May 14, 2008).

out at as much as 500 mcf per day.[14] Of the 120 or so companies that initially registered to secure status as "qualified," many others are likely to submit all the necessary documentation and assurances requisite to being granted that status. Thus, the pool of potential development agreement partners the Iraqi government will eventually be able to draw from is likely to increase well beyond the current modest level.

II. THE CONSTITUTIONAL CONTEXT

As indicated in Chapter 2, where attention was focused on the question of whether subcentral governmental entities such as the KRG possess sufficient constitutional power to enter into oil and gas development agreements with international partners such as DNO, Genel Energi, and Schtat Oil, articles 110, 112, and 114 of the Iraqi Constitution set forth the powers of the federal government. Although these powers may not signify that subcentral governmental units are precluded from entering into oil and gas development agreements because constitutional power concerning these agreements is not assigned exclusively to the federal government, articles 110, 112, and 114 standing alone could provide more than sufficient authority for the federal government to claim concurrent power to negotiate and conclude its own development agreements with international partners interested in exploiting or helping to exploit Iraqi oil and gas resources. The following sections of this chapter will examine those specific constitutional provisions to determine whether any such assertion should be deemed as meritorious. It will begin with a brief overview of the constitutional context, and in particular that associated with articles 110, 112, and 114.

Article 110 contains two provisions that might provide some basis for the federal government to assert the existence of its own constitutional authority to negotiate and conclude oil and gas development agreements with international partners, even in the absence of the framework law. One provision appears in the reference in article 110, First, to the federal government's power over "economic and trade policy."[15] Presumably, the argument might be that any power over "economic" policy would necessarily include the power to enter into oil and gas development agreements, in view of the fact that the principal source of economic stimulation and revenue production, indeed, the main driver of Iraq's entire economy, happens to be the hydrocarbon natural resource patrimony of the nation. The second provision in article 110 for federal constitutional authority on matters of oil and gas is found in article 110, Third. That provision

[14] See Associated Press, Iraq's oil ministry invites companies to bid on oil, gas development projects (Mar. 23, 2008), available at http://rawstroy.com/news/2008/Iraqs_oil_ministry_invites_companies_to_0323 html (accessed May 16, 2008).

[15] See Iraqi Constitution, at art. 110, First, available at www.export.gov/iraq/pdf/iraqi_constitution .pdf (accessed May 5, 2008).

references federal authority to both formulate "fiscal . . . policy" and also to regulate "commercial policy" across regional and governorate boundaries.[16] With this provision the idea would be that, by its very nature, striking international development agreements with foreign oil and gas enterprises constitutes an aspect of both fiscal and commercial policy. The development agreements provide the fiscal resources integral to implementing and effectuating any policy decisions of a fiscal nature, and because the agreements deal with oil and gas that will be exported from where they are produced, the agreements concerning their production necessarily implicate commercial policy.

Article 112, it will be recalled from Chapter 2, speaks expressly of the matter of oil and gas and also of the Baghdad federal government's role in such. As was indicated, article 112 is broken into two specific provisions, one dealing with the management of oil and gas extracted from present fields, and the other with the formulation of strategic policy for the development of Iraq's oil and gas resources. These two provisions are distinctly more explicit than anything appearing in article 110's general listing of powers assigned to the federal government. It may be that article 110 references such things as a federal government power over economic, fiscal, or commercial policy. And conceivably these might be made to fit the oil and gas sector. Article 112's language, however, leaves no question that it is aimed directly at the oil and gas sector, being equally clear about the position of the federal government in regard to that sector. No strained inference need be drawn from broad language that might arguably be suggested to extend the federal government a constitutional power to enter into oil and gas development agreements. Article 112, First, makes clear that the federal government has authority to manage oil and gas extracted from present fields. And article 112, Second, does the same with respect to the formulation of long-term, strategic policies concerning the development of the oil and gas resources of Iraq.

But in addition to the more general language of article 110, and the language of article 112 that speaks very directly and plainly to the federal government's power in relation to oil and gas, article 114 of the Iraqi Constitution also contains language that might support any claim by the federal government to a constitutional right to enter into oil and gas development agreements. Most relevant in this regard would be the language of article 114, Fourth. Essentially, it provides that the federal government is vested with constitutional authority to formulate "development and general planning policies."[17] Were the federal government in Baghdad to explain the constitutional basis for its various oil and gas development agreements by reference to article 114, Fourth, the explanation might be along the lines of noting that such development agreements not only by definition concern "development . . . policies," but also that, because

[16] See id. at art. 110, Third.
[17] See id. at art. 114, Fourth.

they reflect or manifest how the federal government has decided to plan on the tapping the nation's natural resource patrimony, development agreements implicate "general planning policies." Stated in a slightly different way, article 114's grant to the federal government of a power to formulate development and general planning policies implies a power to enter into oil and gas development agreements with international partners, because such agreements are the ultimate reflection or manifestation of the thinking and desires of the federal government on development and planning with respect to oil and gas.

The context in which these three articles – articles 110, 112, and 114 – of the Iraqi Constitution are set suggests that any extant constitutional power of the federal government to enter into international oil and gas development agreements is not its exclusive reserve. As Chapter 2 has noted, subcentral governmental authorities also possess constitutional power to negotiate and conclude such development agreements. Articles 110, 112, and 114 may provide a basis for federal government contentions that it possesses the requisite legal authority to enter into oil and gas development agreements even without the adoption of a federal oil and gas framework law. Yet those articles are situated in a context that involves not only grants of authority to subcentral governmental entities, but also assignments of constitutional responsibility to various branches of government, and guarantees of civil and individual rights to Iraqi citizens. Without retracing the precise steps of Chapter 2's description of the overall structure of the Iraqi Constitution, it bears reiterating that, prior to articulating the federal government powers set forth in articles 110, 112, and 114, that document states in its Section 1 certain so-called fundamental principles, and then expresses in Section 2 the political, individual, social, economic, and cultural rights and duties of Iraqis. Section 3 of the Constitution then follows with an assignment of responsibilities to the legislative, executive, and judicial branches within the federal government. It is in Section 4 that articles 110, 112, and 114 are situated, and that section of the Constitution is essentially directed at stating the powers had by the federal government. Section 5 of the Constitution follows the federal powers with various articles, eight of which list the powers of the subcentral units. Section 6 of the Constitution then concludes with certain final and transitional provisions, addressing such matters as the entry into force of the Constitution, the process for amending it, the matter of de-Baathification, and the relationship between various provisions of the Constitution and its predecessor Transitional Administrative Law (TAL).[18]

III. EVALUATING THE ARTICLE 110 ARGUMENTS

With respect to article 110's references to the federal government possessing constitutional power over matters of "economic and trade policy," as well as

[18] See supra Chapter 2, at note 2.

"fiscal . . . policy," and "commercial policy" across regional and governorate boundaries, reasonably enticing arguments exist for viewing these references as supporting federal government claims that the Constitution grants it authority to enter oil and gas development agreements. As suggested, such agreements necessarily involve economic policy, fiscal policy, and commercial policy across regional and governorate boundaries. The exploitation of Iraq's oil and gas resources represents the single most significant source of revenue for the country's economy, thus directly affecting economic policy. The exploitation also implicates fiscal and cross-boundary commercial policy. The former arises from the fact that no formulation of realistic policy related to fiscal matters would be possible without having some governmental authority in the arena of oil and gas activity, and the latter from the fact that international parties involved in such activity in Iraq are aiming to assist in the export of the product from the country.

Just think about the notions of "economic and trade policy," and "fiscal . . . policy" more generally, in regard to oil and gas activity. If the federal government is provided power over these by the language of article 110 of the Iraqi Constitution, that power would be meaningful only if the federal government could exercise authority to negotiate, structure, and finalize the terms and provisions of oil and gas development agreements. Oil and gas activity have a direct and immediate impact on economic policies settled upon by the federal government. The existence and the amount of revenue streams associated with oil and gas activity affect the basic economic and fiscal policies formulated at the federal level. Whether the federal government desires to spend a designated amount on some particular societal need, or concludes that the financial resources happen not to be currently available to meet that need, can be affected by what oil and gas development agreements the federal authorities may decide to negotiate. And likewise with respect to the matter of federal power concerning trade policy: most oil and gas produced in Iraq will not be destined for consumption in that country, but will be exported for consumption abroad. Given the language of article 110 assigning the federal government power over matters of trade policy, would it not make sense to understand that power as including the concomitant power to enter into oil and gas development agreements with international partners? All trade policy concerns have been assigned by the Constitution to Iraq's federal government. Thus, there seems ample room to construe that particular grant of power as including, albeit indirectly, federal government power to negotiate agreements that might result in trade in some particular product, such as oil and gas.

The same kind of approach seems available in connection with the Constitution's grant of power to the federal government over so-called commercial policy across regional and governorate boundaries. If oil and gas produced in Iraq will be exported, thus triggering the "trade policy" language of article 110 as a basis for contending federal government authority exists in connection with entering into oil and gas development agreements, then much the same could be said

regarding the Constitution's language about "commercial policy." That specific language relates to federal power over commercial policy across regional and governorate boundaries. Oil and gas development agreements, as indicated in connection with the notion of "trade policy," will be exported from Iraq, necessarily meaning that commerce will cross regional and governorate boundaries. As a consequence, there certainly appears room to suggest that article 110, in granting the federal authorities power over commercial policy across regional and governorate boundaries, provides them with a commensurate power to enter into oil and gas development agreements.

Notwithstanding the seeming attractiveness of the foregoing arguments, however, there are several reasons why the language of that article should not be read as supporting those contentions. The first is that article 110 stands in stark contrast to two other provisions of the Iraqi Constitution – articles 111 and 112. Article 112, as will be recalled, speaks directly and explicitly to the matter of oil and gas,[19] while the language of article 110 says absolutely nothing about oil and gas, compelling one to conclude that, if any of the powers that article assigns to the federal government encompass entry into oil and gas development agreements, that result can only be inferred. Article 111 of the Iraqi Constitution is identical to 112 in expressly referencing oil and gas. It does so in its statement that "[o]il and gas are owned by all the people of Iraq in all the regions and governorates."[20] Apart from this language's significance in regard to asserting the entitlement of all Iraqis, wherever situated and of whatever ethnic or religious persuasion, to the natural resource riches that bless the nation, article 111 represents the first of two back-to-back constitutional provisions addressing the matter of oil and gas in a direct and unequivocal fashion. Article 110 precedes these two provisions with language that speaks not at all about oil and gas and contains, rather, a listing of powers over other more general matters. If the drafters knew how to say "oil and gas" when they desired to do so, would not the absence of any such mention in the context of article 110 suggest that the various powers listed in that provision were not to be seen as extending to oil and gas development agreements?

An aspect of this first reason for not favoring the view that article 110 encompasses the power to enter into oil and gas development agreements is the simple placement of the article in the overall context of the Constitution's assignment of constitutional powers. More specifically, article 110 is the next to the opening provision of Section Four of the Constitution, the section that lists the various federal powers. Article 109, the provision opening Section Four, merely indicates the duty of the federal government to keep Iraq together as a unified and democratic federal system of government.[21] Article 110 then lists

[19] See text accompanying supra notes 16–17.
[20] See Iraqi Constitution, supra note 15 at art. 111.
[21] See id. at art. 109.

powers assigned exclusively to the federal government, with 114 indicating certain other powers that are to be shared with the subcentral units.[22] After the inclusion of article 115, which speaks to the matters of subcentral authorities having powers not granted to the federal government and the resolution of conflicts when powers shared by both the federal government and the subcentral entities are exercised inconsistently,[23] Section Five of the Constitution then follows with a listing of constitutional powers assigned to the regional governments and governorates. Articles 111 and 112 are situated after 110's listing of exclusive federal powers, and before both article 114's listing of federal powers shared with subcentral units and Section Five's listing of powers had by regions and governorates alone. Thus, it seems reasonable to view the Constitution's structure as indicating that article 110 is to be read narrowly to cover only the matters it mentions, with articles 111 and 112 setting out the federal government's powers in connection with oil and gas, article 114 then providing for powers the federal authorities are to share with subcentral units, and Section Five of the Constitution ultimately addressing powers exclusive to the regions and governorates.

A second reason for being troubled by the view that article 110, and in particular article 110, First, somehow entitles the federal government to claim constitutional power to enter into oil and gas development agreements has to do with language in which that provision's assignment to the federal government of power over "economic and trade policy" is set. To begin with, article 110, First, provides the federal government with power in three specific areas: foreign policy and diplomatic representation; international treaties and agreements; and debt policies and economic and trade policy. However, it speaks of constitutional power with respect to "[f]ormulating" foreign policy and diplomatic representation, "negotiating, signing, and ratifying" international treaties, agreements, and debt policies, and "formulating" economic and trade policy.[24] Thus, to the extent that the federal government is vested with constitutional authority concerning "economic and trade policy," that authority relates to the "formulation" of mere "policy," not to the routine particulars of whether a certain type of oil and gas development agreement, containing specific terms and not others, should be entered into with a particular international partner. Article 110, First, clearly vests the federal government with constitutional authority to create a rational and well-thought-out plan that articulates the goals, directions, and implementing strategies for accomplishing the nation's economic and trade desires. In this realm the subcentral governing entities are not permitted to meddle. Article 110, First, does not, however, provide the federal government with anything more than policy formulation power. On such a

[22] See id. at art. 114.
[23] See id. at art. 115.
[24] See id. at art. 110, First.

slender reed it would seem difficult to rest any federal claim to a weighty authority to strike international oil and gas development agreements with foreign oil and gas companies.

Even beyond this concern, the federal government's power over the formulation of economic and trade policy under article 110, First, is set in language indicating that it relates to economic and trade policy with other nations. The specific language of the provision references federal power to formulate "foreign sovereign" economic and trade policy.[25] And this is consistent with the general thrust of article 110, First, which is cast in terms of exclusive federal authority to deal with matters of international relations involving other nation-states. Again, the article provides the federal government with the sole power to create Iraq's foreign policy and designate diplomatic representatives; negotiate, sign, and ratify treaties and agreements with other countries, including those affecting debt policies; and formulate foreign sovereign economic and trade policy. Clearly, any federal authority under article 110, First, concerning economic and trade policy must be an authority involving a "foreign sovereign." It is simply not sufficient under the terms of that provision to contend that a foreign business enterprise is involved. Any claim to federal power on the basis of article 110, First's, assignment over the formulation of foreign sovereign economic and trade policy hinges on the involvement of a matter implicating economics or trade, not merely with a foreign business enterprise, but with a foreign sovereign. In some unusual instances of oil and gas development agreements with state-owned enterprises, such may be found to exist. The typical case of an agreement with a private international operator would not rise to the requisite level.

A third, and final, reason exists for hesitancy regarding the persuasiveness of the contention that federal oil and gas development agreement authority rests on article 110, and in particular article 110, Third. As with article 110, First, and its power regarding "economic and trade policy," the context of the language of article 110, Third's, reference to federal power over "fiscal policy" and "commercial policy" across regional and governorate boundaries fails to indicate a vesting in the federal government of authority to enter oil and gas development agreements. As was the case in conjunction with economic and trade policy, the language regarding "fiscal policy" and "commercial policy" provides for federal authority in the "policy" realm alone, and then in the "formulat[ion]" of policy of a "fiscal" nature, and the "regulat[ion]" of policy involving "commercial" matters across regional and governorate boundaries.[26] Surely it is one thing to assign the federal government power to deal with the formulation and regulation of policy of a fiscal and commercial nature, and something entirely different to find in such an assignment a federal authority to actually negotiate and conclude the details of oil and gas development agreements with international oil and gas

[25] See id.
[26] See id. at art. 110, Third.

companies interested in exploring for and exploiting Iraq's natural resource patrimony. While not entirely out of the question, it would be understandable to think that the former extends to the identification and specification of overarching and long-term objectives associated with fiscal and commercial regulatory matters, whereas the latter involves the mundane, commonplace, and tediously repetitive process of making sure all the relevant terms and conditions associated with any day-in and day-out business deal are incorporated into a final agreement.

The context of article 110, Third, also suggests that the federal assignment of power over "fiscal policy" and "commercial policy" across regional and governorate boundaries aims to give federal authorities the leverage necessary to control financial, commercial, and other critical economic matters – such as national budgetary, monetary, and banking matters – within Iraq. In a sense, the suggestion proceeding from article 110, Third, is that the formulation of all policy related to, and the regulation of all matters concerning, national financial, commercial, and economic matters resides in the federal government. Plainly, however, it is a completely distinct matter to infer from this assignment that the provision grants the federal government the constitutional power to enter into oil and gas development agreements. Article 110, Third, seems confined to vesting the federal government, and not the regional governments and governorates, with the power to deal with federal or national financial, commercial, and economic matters. It seems reasonable to conclude from this that nothing is stated, suggested, or implied with regard to the federal government being thus empowered to strike oil and gas development agreements with international partners.

IV. ARTICLE 114'S SHARED POWERS ARGUMENTS

If article 110 fails to provide persuasive constitutional authority for contending that the federal government possesses the requisite power to enter into oil and gas development agreements, what about the language of article 114? After all, the language of that provision, even though cast in terms of constitutionally shared competencies, competencies the federal government must admit it shares with the subcentral units, references in article 114, Fourth, the power over "development and general planning policies."[27] Arguably, the federal government could contend that this provision empowers it to enter into international oil and gas development agreements, because by description such agreements involve development and article 114, Fourth, grants the federal government power over development. Furthermore, the language of that provision speaks of a federal power, shared with the subcentral units, over general planning. Surely such a broad grant of authority is sufficient to encompass oil and gas development agreements, because those agreements seem in every way to affect any

[27] See id. at art. 114, Fourth.

sort of governmental planning. Decisions about whether or not to enter into oil and gas development agreements, and whether to insist they contain particular terms, all have consequences for general planning activities of the relevant governmental bodies.

Again, it is true that the language of article 114, Fourth, of the Iraqi Constitution can in no way be construed to suggest that the federal government alone is vested with the power to enter into oil and gas development agreements. Accepting the view that the language's reference to "development and general planning policies" is adequate to cover a power to negotiate and conclude such agreements, it is clear that this is a power to be shared with the subcentral governmental units. The language of article 114's chapeau describes the power over "development and general planning policies" and the other powers listed in the balance of the provision, as "competencies . . . shared between the federal government and regional authorities."[28] Thus, it is inconceivable that the federal government would insist that article 114, Fourth, provides it with some sole or exclusive authority to strike oil and gas development agreements with international petroleum companies. It is article 110 that enumerates the powers exclusive to the federal government and, as seen, nowhere in that provision is there any language referencing oil and gas development agreements or capable of being construed as indirectly doing so. If the language of article 114, Fourth, is seen as envisioning a power to enter into such development agreements, there can be no doubt that this power is shared by both the federal and the subcentral governments. Of course, as with the language of article 110, First, and Third, there are serious problems with reading the reference in article 114, Fourth, to "development and general planning policies" as suggesting a power to enter into development agreements.

Reminiscent of article 110, the first problem with reading article 114, Fourth, as encompassing a power to strike oil and gas development agreements, has to do with the fact the provision's language plainly states that the power extends to development and general planning "policies." This would cover the identification and articulation of basic goals and objectives, as well as the specification of mechanisms for accomplishing them. The usual form this would take would be planning statements, policy platforms, legislation, and regulatory measures. It would not, however, seem to cover the tasks associated with negotiating and concluding oil and gas development agreements. These would tend to constitute a reflection of what appears in planning statements, policy platforms, legislation, and regulatory measures. But they remain entirely distinct in that they address the day-to-day matters of particular business operations and commercial associations, not the more sweeping, general, and overarching concerns of policy deciders. Thus, in providing that the federal government has shared power with

[28] See id. at art. 114.

the subcentral units when it comes to development and general planning policies, article 114, Fourth, of the Iraqi Constitution intends nothing more than that both levels of government collaborate in the creation of a vision for the rational and coherent future growth of the nation. In this there is no intimation of a federal power to strike international oil and gas development agreements.

Equally reminiscent of article 110, the second problem with construing article 114, Fourth's, language of "development and general planning policies" as encompassing oil and gas development agreements is the fact that power extends only to policy "formulat[ion]." Article 114, Fourth, reads that the competencies shared between the federal authorities and the regional authorities include the competency "[t]o *formulate* development and general planning policies."[29] As indicated in connection with article 110's references to "formulating" economic and trade policy, fiscal policy, and commercial policy across regional and governorate boundaries,[30] it is one thing to speak of a governmental entity being vested with a power to "formulate" policy, and something entirely different to speak of it being vested with a power to "implement," "effectuate," or "enter into agreements giving effect to" policy. The language of article 114, Fourth, opts for the much more general, broad, and nonspecific grant of power to be shared by both the federal and subcentral governments in Iraq. And it is not as though the distinction between this nonspecific grant of power to "formulate" policy regarding development and planning somehow escaped the drafters of the Iraqi Constitution. In the context of article 110's assignment of powers exclusive to the federal government, article 110, Seventh, explicitly indicates an intent to vest the federal government with constitutional authority to "[d]raw[ ] up" both the general and the investment budget bills.[31] Given the clarity of such language in article 110, Seventh, it would seem that had the drafters intended the language of article 114, Fourth, to encompass the power to do more than merely "formulate" policy regarding oil and gas development agreements, it would have stated something like the following: one of the shared competencies includes the power to "formulate development and general planning policies, and take action to draw up contractual agreements implementing such policies." Obviously, however, no such language was selected for inclusion in article 114, Fourth.

V. ARTICLE 112: DIRECT REFERENCE TO OIL AND GAS

The foregoing review of the terms of articles 110 and 114 indicates that, although both provisions may appear to contain language that the federal government could use to support an assertion that it possesses constitutional authority even in the absence of the adoption of a national oil and gas framework law, all such

[29] See id. at art. 114, Fourth. Emphasis added.
[30] See text accompanying supra notes 24–26.
[31] See Iraqi Constitution, supra note 15 at art. 110, Seventh.

language suffers from serious weaknesses that would undercut the ability of the federal government to ground its assertion on either of those two articles. But does that mean there is no case to be made for the federal government to claim a constitutional authority for striking oil and gas development agreements with international partners? As noted at the outset of this chapter, the federal government has for some time negotiated and concluded a host of various forms of development agreements aimed at encouraging both the exploration for and exploitation of Iraq's oil and gas resources. While there has been some reluctance on the part of major oil and gas companies and that of the Iraqi federal government, to move forward aggressively with the full panoply of available development agreements, in part because of lingering concern over the difficulties associated with getting the oil and gas framework law through all the constitutionally required legislative channels, the sheer volume of development agreements to date suggests at least a modicum of confidence that the Iraqi Constitution offers some basis for legitimating federal action on that matter. One sound basis for such would appear to be found in the language of article 112 of the Constitution.

As seen in Section II, which set out the general constitutional context relevant to question of federal authority to strike oil and gas development agreements, article 112 contains two separate provisions. The first, article 112, First, provides: "The federal government, with the producing governorates and regional governments, shall undertake the management of oil and gas extracted from present fields, provided that it distributes its revenues in a fair manner in proportion to the population distribution." The second, article 112, Second, provides: "The federal government, with the producing regional and governorate governments, shall together formulate the necessary strategic policies to develop the oil and gas wealth in a way that achieves the highest benefit to the Iraqi people."

There can be little dispute regarding the consequences of the language of article 112, First, for federal government assertions of power in the matter of oil and gas. It leaves no room for confusion. By virtue of its terms, the entirety of article 112 provides the federal government with a role in both the management of Iraqi oil and gas and the development of strategic policies regarding such. However, from the article's two paragraphs, it is clear that the federal government's power is far from plenary and absolute. Not only does the language of article 112, First, make plain that the oil and gas management authority of the federal government is conditioned upon federal compliance with the revenue-sharing obligations discussed at length in Chapter 5, but it also provides two other kinds of important limitations. The first is that federal government power is a cooperative and collaborative one to be exercised in conjunction with the regional governments and the governorates in Iraq – most prominently the KRG – but also any other regional units formed in subsequent referenda. In other words, the federal government is given a role in regard to the exercise of a constitutional power, not a power exclusive to itself, like those set forth in

article 110. The second limitation is that even the federal role in regard to oil and gas is confined, by article 112, First, to "management" of oil and gas "extracted from present fields," and by article 112, Second, to "formulat[ing] . . . strategic policies" to develop Iraqi oil and gas in a way producing the greatest benefit to the nation. Article 112 does not appear to leave federal authority unconfined and free-roaming.

The concept of "management" includes decisions regarding the handling, transportation, distribution, allocation, sales, and use of oil and gas. Thus, whether this company or that will be entitled to hold, store, stockpile, or transfer oil and gas would fall within the ambit of the concept. Similarly, all shipping of oil and gas by pipeline, rail, motorized transit, or water-going craft would come within the reach of the federal government's authority under the term "management," along with any subsequent disbursement of oil and gas by those who take shipments from initial transporters. That is to say, all subdistribution by those serving as intermediaries between those transporting from production or storage or collection sites, to those who supply to end consumers, would be subject to the constitutional reach of the federal government's powers. Further, the same could be said about decisions related to how much oil and gas to assign to, and precisely which entities are to receive or be entitled to acquire Iraqi oil and gas. The scope of federal authority over "management" of oil and gas is broad enough to include such decisions, as well as those concerning price and other transaction terms, and decisions regarding oil and gas usage.

Arguably, the concept of "management" standing alone also includes the power of the federal government to negotiate and conclude the terms of oil and gas development agreements. It requires notation that development agreements can, as observed at the outset of this chapter, run the entire spectrum of commercial transactions related to oil and gas – from exploration and geological or petroleum analysis, to site construction, actual production, subsequent transport, storage, distribution, and sales. To the extent that effective accomplishment of the task of "management" of Iraqi oil and gas is seen as necessitating federal government involvement in the actual process of entering into development agreements on the front end of that spectrum, then article 112, First's, grant to the federal government of such a role would empower it to strike development agreements of even that sort. Although it is true that 112, First, fails to reference development agreements as such, "management" is a sufficiently broad term to extend to those agreements, especially given that it may be possible to exert the full range of management authority only through authority regarding the full range of activities concerning oil and gas.

Even accepting such an expansive interpretation of the term "management" standing alone, the fact that article 112, First, references a federal role on that score being connected to oil and gas "extracted" cannot be ignored. The Constitution's distinction between oil and gas that has been "extracted," and the process of actually "extracting" oil and gas, indicates that it is incorrect to suggest that the term "management" is to be accorded an expansive interpretation

encompassing the power to negotiate and conclude developments agreements involving actual exploration and exploitation. The only oil and gas over which article 112, First, assigns the federal government any management role is that which has already been removed or lifted from the ground. While oil and gas remain *in situ*, they are not "extracted" and are thus not subject to assertions of federal article 112, First, management power. What this means is that, while the federal government has authority under article 112, First, in connection with development agreements on such matters as storage, stockpiling, processing, transport, distribution, allocation, and sales of oil and gas, it cannot claim authority on the basis of that provision's management power over such things as petroleum exploration agreements, production-sharing arrangements, or other sorts of contracts dealing with oil and gas that is still in the ground.

Then there is the further limitation in article 112, First, concerning management of oil and gas extracted from "present fields." Even if one discounts the effect of the term "extracted" on attempts to deduce an understanding of the reach of the Constitution's grant of a role to the federal government in oil and gas management, it remains that article 112, First, connects that role to the oil and gas extracted not from any and all hydrocarbon fields in Iraq, but only from so-called "present fields." The result, of course, is that article 112, First provides no federal role in regard to management of oil and gas coming from fields not considered "present fields" at the time of the effective date of the Iraqi Constitution. As will be recalled from Chapter 2, there are numerous complexities associated with the concept of "present fields." Setting those aside, article 112, First's, "management" authority vested in the federal government does not extend to any oil and gas field not regarded as "present."

Article 112's other provision, 112, Second, contains language proving more profitable than that of article 112, First, in some areas related to Iraqi oil and gas. Its reference to a cooperative, collaborative role for the federal government in connection with "strategic policies" to develop the nation's petroleum resources in the most beneficial manner can be invoked as a basis for the drafting of the federal oil and gas framework law. After all, as with most laws conceived, developed, drafted, and adopted by legislatures representative of an entire populace, the framework law seems aimed at constructing a legal regime for oil and gas exploration and exploitation that effectuates the most beneficial long-term development of Iraq's natural resource patrimony. This captures the essence of "strategic polic[y]" for developing the nation's oil and gas so as to produce the greatest national benefit. It bears recalling, however, that although the oil and gas framework law may envision the federal government entering into the full panoply of oil and gas development agreements, in the absence of the adoption of that law, only the more general and less explicit terms of the Iraqi Constitution can be relied upon.

But is it conceivable that, in the absence of the adoption of the framework law, the language of article 112, Second, alone might legitimate federal government contentions of constitutional power to enter into oil and gas development

agreements involving exploration for and exploitation of hydrocarbons still in the ground? And further, would it matter that such oil and gas were located in fields not regarded as "present"? In connection to the latter, article 112, First, grants the federal government a role in the management of oil and gas extracted, but not from fields not considered "present." Given the language of the grant in article 112, Second, of federal authority regarding "strategic policies" for the development of Iraq's oil and gas resources, to the extent that such authority is thought to empower federal action in the development agreement context, even fields not considered "present" seem subject to such federal authority. This is because the language of article 112, Second, does not tie that federal authority to "present fields" in the way its article 112, First, management authority over extracted oil and gas is tied to such fields.

Article 112, Second's, grant to the federal government of a role in "strategic policies" for developing Iraq's oil and gas presents interesting questions when one considers whether the provision authorizes federal action to enter into development agreements covering exploration and exploitation of hydrocarbons. At the outset, just as with much of the language examined in connection with both articles 110 and 114, reference is made to oil and gas strategic development "policies." Again, "policies" are significantly different from their articulation in legislative form, or their implementation through individualized, detailed, and specific agreements or contracts. Beyond that, the language of article 112, Second, refers to the power to "formulate" strategic development policies for Iraq's oil and gas. As with articles 110 and 114, this is yet another illustration of the Constitution's repeated reference to a concept distinct from the enunciation or implementation of policies that have been "formulate[d]." Another way of putting this is that, in regard to the federal government's exclusive power under article 110, its shared powers under article 114, and even its cooperative and collaborative powers over oil and gas under article 112, the repeated use of the term "formulate" suggests a conscious and deliberate insistence on the part of the drafters to limit and confine the character of federal authority. The Constitution establishes a central government that is federal in form, but it is careful not to centralize all constitutional power in that government. Thus, pursuant to article 112, First, the federal government possesses limited authority to enter certain kinds of development agreements under its "management" power. But under article 112, Second, the power over formulating "strategic policies" for oil and gas development does not extend beyond authorizing the adoption of national legislation that might then empower federal action in oil and gas exploration and exploitation development agreements.

VI. POWER CARRIED OVER FROM SADDAM-ERA MEASURES

Beginning in mid-2007, the Iraqi Minister of Oil, Dr. Hussein al-Shahristani, a nuclear physicist by training, began to offer indications that the failure of the

Iraqi Council of Representatives to act quickly on passage of the new oil and gas framework law, despite the approval of the law by the Council of Ministers, did not prevent the Oil Ministry entering into oil and gas development agreements with international oil companies, because Saddam-era authorization continued to provide an adequate legal basis for such agreements.[32] Presumably, in the Oil Minister's estimation, the federal government had constitutional authorization under article 112, First, to manage oil and gas extracted from present fields, but, as indicated in the preceding section, when it came to all other oil and gas matters and all other oil and gas fields, article 112, Second, only provided constitutional authority to "formulate . . . strategic policies to develop" the nation's oil and gas wealth. The federal oil and gas framework law purports to provide such a formulation. In Shahristani's estimation, failure to enact that law did not leave the federal government without power to enter a broad range of oil and gas development agreements, because legal authorization antedating the creation of the existing Iraqi government continued to provide the requisite juridical power.

After much research and consultation with knowledgeable individuals intimately involved in the drafting of the federal oil and gas framework law, and subsequent consideration of the results of those efforts, it would appear that Minister Shahristani's indications are at least plausible. Given the paucity of explicit and detailed explanations of the Minister's position, and being compelled to "read between the lines" in order to elaborate any such explanation, the case for federal development agreement authority based on Saddam-era legal power could be said to proceed somewhat as follows. Stated broadly, Iraqi constitutional and other legal provisions under which Saddam operated did not preclude the negotiation of development agreements with international oil companies, and in fact Saddam demonstrated an inclination to pursue those. The CPA (Coalition Provisional Authority) controlling Iraq in the immediate aftermath of Gulf War II refrained, as required by international law, from displacing or altering the legal situation related to Iraqi oil and gas. And, under the terms of the new 2005 Iraqi Constitution, various provisions of which were examined previously, unless and until some new legislative measure, such as the federal oil and gas framework law, modifies or changes the preexisting legal regime, that regime and its authorities continue to remain intact.

With much greater particularity, in the aftermath of the First World War, the territory of Iraq was placed under League of Nations British Mandate, and by the mid-1920s the British installed plenipotentiary, King Faisal,[33] had negotiated and concluded an oil and gas concession agreement with the Turkish Petroleum

[32] See Ben Lando (UPI), Analysis: U.S. OK's Saddam law oil deals (Oct. 31, 2007), available at www.upi.com/Energy_Resources/2007/10/31/Analysis_US_OKs_Saddam_law_oil_deals/UPI-56531193861217/ (accessed June 6, 2008).

[33] See John Kifner, Britain tried first. Iraq was no picnic then, New York Times (July 20, 2003), reprinted at www.globalpolicy.org/security/issues/iraq/history/2003/0720britain htm (accessed June 11, 2008).

Company (TPC), predecessor to IPC (Iraq Petroleum Company).[34] As with concessions typically, the agreement relinquished title to oil and gas fields to IPC for 75 years, though only in an area of 192 square miles,[35] reserving royalties in return. The terms of the royalty arrangement provided for payments on a flat fee-per-ton basis, linked, however, to TPC actually making profits, and provided that no royalty payments to Iraqi were to begin until after 20 years of operations.[36] In 1927 IPC struck oil in the north of the country near Kirkuk. The terms of the original concession were revised in 1931, providing IPC with an exclusive concession over all areas of Iraq east of the Tigris River.[37] Two Iraqi subsidiaries wholly owned by IPC received additional concessions in 1938 and 1942, with the effect being to give IPC exclusive rights to all oil and gas fields in the country.[38]

Over time, the Iraqis grew not only weary of the fact that IPC and its subsidiaries undertook little oil production, but also, after having turned out Faisal and his family in a deadly revolution, resentful of long-endured British meddling. In 1961 the Iraqi leader, General Qassim, issued Law No. 80, depriving IPC of 99.5% of its concession holdings, leaving it only with fields from which it was actually producing.[39] Consistent with the general trend occurring in the oil-rich world during the late 1960s and early 1970s, Iraq then moved forward in 1971–1972 to nationalize IPCs remaining concession assets through the issuance of its Law No. 69.[40] In fact, in 1970 the Iraqis adopted a new Constitution, which provided in article 13 that all "national resources," including oil

[34] The history of IPC is quite interesting. It was originally incorporated as the African and Eastern Concessions Limited in 1911. In 1912 it became the Turkish Petroleum Company Limited. As a result of the 1920 San Remo Oil Agreement between the major powers in the wake of World War I and the division of the Ottoman Empire, shareholding in the TPC was assigned as 47.5% in the Anglo-Persian Oil Company Limited, which became the Anglo-Iranian Oil Company and, ultimately, BP, 22.5% in Shell, 25% in Compagnie Francaise de Petroles, which ultimately became Total, and a 5% stake in the Armenian-born petroleum entrepreneur C. S. Gulbenkian, the mastermind behind most Middle East oil deals. The so-called Red Line Agreement of 1928 reassigned this shareholding allocation, allowing the seven U.S. majors to gain a 23.7% share in the company. A further reassignment occurred in 1948. In 1929, TPC's name was changed to IPC. See www.archiveshub.ac.uk/news/0300ipc html (accessed June 10, 2008). See also Ferruh Demirmen, Oil in Iraq: The Byzantine beginnings, Global Policy Forum (Apr. 25, 2003), available at www.globalpolicy.org/security/oil/2003/0425byzantine htm (accessed June 11, 2008).

[35] See The International Petroleum Cartel, Staff Report to the U.S. Federal Trade Commission (1952), available at www.mtholyoke.edu/acad/intrel/Petroleum/ftc5 htm (accessed June 11, 2008).

[36] See The Turkish Petroleum Company, available at http://countrystudies.us/iraq/53 htm (accessed June 10, 2008). The concession is said to have grown out of an earlier concession received by the Germans from the Ottoman Turks, which lapsed, and a concession granted personally to C. S. Gulbenkian himself. Originally, the Germans, through a share held by Deutsche Bank, were participants in TPC. As a result of World War I, they were replaced by the French.

[37] See The International Petroleum Cartel, supra note 35.

[38] See id.

[39] See www.archiveshub.ac.uk/news/0300ipc html (accessed June 10, 2008).

[40] See id.

and gas, as well as "basic means of production," were owned by "the People" of Iraq, and it was thus prohibited to transfer title to these to foreign natural or juridical persons.[41] Article 18 further emphasized the impermissibility of concession agreements regarding Iraqi natural resources by also prohibiting foreign ownership of immovable property, except as otherwise provided by law.[42]

After the resignation of Iraqi President al-Bakr in 1979, Saddam Hussein, who had been a high-ranking government official within the ruling Baath party, ascended to the position of formal leader of the nation. By 1990, though never officially adopted, a new Iraqi Constitution was proposed. Much like the earlier one, both its article 13 and article 18 contained, verbatim, the same language that had appeared in the 1970 version.[43] The effect was to confirm the continuing prohibition of concession agreements with foreign oil companies. UN sanctions imposed on Iraq for its actual and suspected weapons activities both before and following Gulf War I, as well as for its brutality against various ethnic groups throughout the country, naturally resulted in Saddam endeavoring to break the cohesion within the Security Council necessary for the sanctions' continuing maintenance. This apparently contributed in the mid-1990s to Saddam's decision to negotiate various sorts of oil and gas development agreements with foreign companies, including arrangements in the form of production-sharing agreements (PSAs), agreements in which title to oil and gas resources was left in the host country, at least until the point of export, with developing companies receiving a cut from the results of the production activity. Such agreements were pursued with international oil companies from Russia, China, and France. Presumably, the thinking within Iraqi government circles was that potentially lucrative oil and gas deals might serve to increase the receptivity of certain Security Council members toward the Iraqi position on the sanctions issue.[44] To this end, it was reported that PSAs were concluded with the Russians and Chinese, and negotiated with the French.[45] Some knowledgeable practitioners

[41] See 1970 Constitution, art. 13, available at www.mallat.com/iraq%20const%201970 htm (accessed June 8, 2008).

[42] See id. at art. 18.

[43] For articles 13 and 18 of the 1990 Constitution, see http://cofinder.richmond.edu/admin/docs/local_iraq1990.pdf (accessed June 8, 2008).

[44] See Michael Renner, Post Saddam Iraq: Linchpin of a new oil order, at 3, Foreign Policy in Focus, World Watch Inst. (Jan. 2003), available at www.fpif.org/pdf/reports/PRoil.pdf (accessed June 12, 2008).

[45] There appears to be some difference of opinion as to whether it was a PSA or a development and production contract that was negotiated with the Russians. For relevant discussion, see Florence C. Fee, Russia and Iraq: The Question of the Russian oil contracts, 46 Middle East Economic Survey No. 14 (Apr. 7, 2003), available at www.mees.com/postedarticles/oped/a46n07d01 htm (accessed June 12, 2008) (Russia and the West Qurna field); Revenue Watch Institute, Countries/Iraq, available at www.revenuewatch.org/our-work/countries/iraq-extractive.php (accessed June 12, 2008) (China National Petroleum Corporation and the North Rumailah field); No overnight oil boom in post-Saddam Iraq, major rehabilitation needed, 46 Middle East Economic Survey No. 7 (Feb. 17, 2003) (France and the Majnoon and Nahr Umar fields).

have suggested that certain general legislative measures may have supported these agreements.[46] Although these suggestions have not been corroborated, it nonetheless seems that Saddam's government could have legitimated such merely by reference to the operative constitutional provisions – articles 13 and 18 – and the historical context surrounding Iraqi oil and gas development agreements.

The case for the actions of Saddam's government probably could have been made by noting that Iraq had originally been prepared in the 1920s through the 1950s to grant concession agreements to international oil companies. Such agreements effectively transferred a title interest in oil and gas resources to the concessionaire – in this case IPC. With the issuance of Law No. 80 in 1961, stripping IPC of most of the benefits of its concessions, and with the eventual Iraqi move toward nationalization in the early 1970s of foreign-held oil and gas properties, coincident with the adoption in 1970 of an Iraqi Constitution containing the prohibitions found in articles 13 and 18, it had become clear that the nation's oil and gas legal regime could no longer tolerate natural resource development agreements that went so far as to provide the foreign beneficiary with a title interest in relevant resources. Articles 13 and 18 of both the Iraqi Constitution adopted in 1970 and that proposed in 1990 established the outer limit of the nature of permitted development agreements. Both provisions made clear that the Iraqi people held title to all the nation's resources and basic means of production, and that, in the absence of specific subsequently adopted legislative authority to the contrary, foreign ownership of all immovable property was constitutionally prohibited. Any development agreement containing terms at variance with these strictures was unconstitutional and, therefore, beyond the power of government to make.

By their very nature, PSAs do not transfer title to oil and gas properties to international oil companies that partner with host countries to explore for and exploit the host's natural resource patrimony. And, clearly, the same can be said for the array of other forms of development agreements that do not even envision formal sharing in oil and gas actually produced, such as engineering, procurement and supervision of construction contracts (Eng.&PCs), development and production agreements (D&Ps), technical service contracts (TSCs or TSAs), and assay and evaluation agreements. In other words, at the time Saddam began to contemplate enticing Russia, China, and France with offers of oil and gas development agreements that would come up just shy of actual concessions,[47] the state of Iraqi law was such that it only established an

[46] See Ben Lando, Interview: J. Jay Park on the Iraqi Oil Law (Sept. 26, 2007), available at www.spacedaily.com/reports/Interview_J_Jay_Park_on_the_Iraq_oil_law_999 html (accessed Aug. 1, 2008) (referencing a 1980s law seventeen articles in length).

[47] On the fact that Iraq has recently announced its intention to revive a 2003 development agreement with the Chinese, see Iraq, China to revive oil deal, Iraq Updates (Aug. 12, 2008), available at www.iraqupdates.com/p_articles.php/article/35052 (accessed Aug. 12, 2008).

outer limit prohibiting arrangements inconsistent with articles 13 and 18 of the Constitution, thereby at least implicitly permitting all other forms of agreement. It appears that Saddam availed himself of this permission and committed Iraq to negotiating and concluding in some instances, and endeavoring to conclude in others, different kinds of oil and gas development agreements with receptive Russian, Chinese, and French collaborators.

Though the references of Oil Minister Shahristani over the past many months to Saddam-era laws and regulations supporting the activities of the federal government in striking oil and gas development agreements in the form of Eng.&PCs, TSCs or TSAs, and sundry other forms probably allude to reasoning such as that just explained, rather than some parliamentary enactment explicitly referencing such, the Minister's claim to legal authority for the federal government's current course of action certainly seems quite plausible. A conceivable Achilles' heel would have to do with whether the Saddam-era legal regime survived Saddam's ouster, Iraq's occupation by CPA forces, and the ascendancy of a new and fundamentally different political regime. Two considerations seem relevant here.

The first deals with the general rules of international law regarding changes in government brought about through interstate conflict and belligerent occupation, and the effect of this on the ability of antecedent laws to survive. On that matter, it is well known that occupying powers are prohibited from considering their military victory and subsequent occupation as a justifiable basis for making wholesale changes in the legal system of the vanquished nation. A fundamental premise of international law is the independence and sovereign political integrity of every individual nation-state. It is certainly true that the legal systems in defeated states often undergo significant alteration. And while one cannot pretend that such change comes about exclusively because new constituencies in the defeated states reconsider the old ways and find them wanting – for such constituencies are often under subtle and not-so-subtle pressure to advance particular changes – to meet the demands of international law it must be effected by the local population, not the occupying power. The essence of these notions has long been captured and respected by article 43 of the 1907 Hague Regulations on the Laws and Customs of War on Land.[48] Article 43 provides that "[t]he authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while *respecting, unless absolutely prevented, the laws in force in the country*."[49] The article's language provides for situations in which preexisting law might be ignored or displaced. However, those situations are few and far between, depending upon

[48] The Regulations annexed to 1907 Hague Convention IV Respecting the Laws and Customs of War on Land are available at www.icrc.org/ihl.nsf/385ec082b509e76c41256739003e63d/1d1726425f6955aec125641e0038bfd6 (accessed June 13, 2008).

[49] See id. at art. 43. Emphasis added.

unusual and exigent circumstances. The clear general rule under international law is the continuation by the occupying power of the antecedent legal regime, thus suggesting that the Saddam-era oil and gas regime survived his removal from power and the initiation of the occupation.

The second consideration would have to do with whether the CPA, even though prohibited by general international law as reflected in article 43 of the Hague Regulations, evidenced any intent to attempt to displace the antecedent oil and gas legal regime. After all, for anyone to make out a persuasive case for the proposition that the Saddam-era oil and gas legal regime did not survive his ouster from power and the ascendancy of a new governing structure, it would seem that they would have to either point to some rule of international law indicating that legal regimes of ousted governments fall when the government falls, or that when any nation removing another's government from power and then occupying its territory proceeds to adopt (as noted earlier, in violation of international legal obligations) measures aimed specifically at displacing antecedent laws and regulations, such adoptions are effective. The problem on this score is that, although some who advised the American government may have desired to create a legal regime in Iraq that was more receptive to outside investment by companies interested in that nation's oil and gas resources, the CPA made clear that it was not the appropriate entity to move in that direction.[50] Specifically, CPA Order 39, the Order on Foreign Investment, issued December 20, 2003, plainly stated in Section 6, paragraph 1, that "direct and indirect ownership of the natural resources sector involving primary extraction and initial processing *remains* prohibited."[51] By the language's prohibition on any form of "ownership of the natural resources sector involving primary extraction," Order 39 seems to parallel the legal regime in place under the language of articles 13 and 18 of the 1970 and 1990 Iraqi Constitutions. Concessions would constitute such ownership, and therefore would be impermissible under Order 39, whereas development agreements establishing a relationship to natural resources falling short of ownership would not. Confirmation of the intent to retain the antecedent oil and gas legal regime appears in the language of Section 6, paragraph 1, which states that the prohibition "remains" in place. Clearly, if the objective had been to promulgate a new and different regime from what had existed before, no such reference would have appeared.

Aside from these considerations, it should also be noted that when the Iraqi Constitution was adopted in 2005, it contained a provision – article 130 – ensuring that the Constitution would not, in and of itself, alter preexistent legal standards. In a fashion that tracks the approach of the Hague Regulations and the actions of the CPA, the precise language of article 130 stated: "Existing

[50] See Greg Muttitt, Crude Designs: The Rip-Off of Iraq's Oil Wealth, Global Policy Forum, available at www.globalpolicy.org/security/oil/2005/crudedesigns htm (accessed June 12, 2008).

[51] See CPA Order 39 "Foreign Investment," available at www.cpa-iraq.org/regulations/20031220_CPAORD_39_Foreign_Investment_.pdf (accessed June 11, 2008). Emphasis added.

laws shall remain in force, unless annulled or amended in accordance with the provisions of this Constitution."[52] This plainly allows for measures like the framework law on oil and gas to change the oil and gas legal regime carrying over from the Saddam era. Without the enactment of such a new regime, the legal standards of the earlier regime remain in place.

VII. CONCLUSION

From the foregoing review, it can be concluded that, even in the absence of the eventual adoption of the proposed federal oil and gas framework law, the federal government possesses sufficient legal authority to legitimate its entering into oil and gas development agreements. Federal officials have expressed hesitancy to negotiate PSAs or PSCs on the basis of such authority, preferring instead, at least for the time being, to await the passage of the framework legislation that is capable of being interpreted as sanctioning the negotiation and conclusion of PSCs. Nonetheless, if that proposed legislation is stillborn, it still seems plausible that a case could be made for federal efforts to go beyond current Eng.&PCs, TSCs or TSAs, D&P contracts, and other forms of development agreements, and begin negotiating more involved and lengthy production-sharing arrangements.

The 2005 Iraqi Constitution does not provide, on its own, authority for entering into production-sharing arrangements. As seen, article 112, First, of the Constitution provides the federal government with authority to collaborate with subcentral governmental units of producing regions to manage oil and gas that has already been extracted from present fields. And article 112, Second, goes further to vest the federal government with authority to formulate strategic policies for the development of Iraq's oil and gas resources in a manner that best suits the interests of the nation. The proposed federal oil and gas framework law represents an exercise of that latter authority, but the constitutional provision standing alone is insufficient to serve as a basis for federal desires to strike oil and gas development agreements with international oil companies. Only under article 112, First, would federal claims to authority to enter into agreements with international oil companies have appeal. However, as seen earlier, the reach of those agreements would necessarily be sharply limited, since the constitutional language of the provision extends only to matters of managing oil and gas that has already been removed from fields that are considered present.

As suggested by Iraqi Oil Minister Shahristani, the strongest case for the various development agreements that the federal Ministry has been negotiating since late 2007 and early 2008 is to be found in the continuation of the oil and gas legal regime that antedated the initiation of Gulf War II and the ascendancy of the governing structure replacing Saddam Hussein. The current 2005 Constitution provides authority for a very limited spectrum of agreements. It does envision the

[52] See Iraqi Constitution, supra note 15 at art. 130.

passage of legislation substantially enhancing that authority, and that legislation has taken the form of the oil and gas framework law. Until that implementing legislation is adopted, though, there seems every reason to believe that the federal government remains able to exercise the kinds of permitted legal authorities in the oil and gas sector that had been possessed by the political administration that preceded it. As observed, the language of articles 13 and 18 of both the 1970 and 1990 Iraqi Constitutions, especially when seen in historical context, implicitly authorized every form of development agreement just short of the concession. And nothing in the measures of the CPA, adopted in the interregnum between the fall of Saddam and the ascendancy of Iraq's new governing structure, was either capable of, or evidenced an intent to, alter that state of affairs.

9 DISTRIBUTING PROFITS IN THE ABSENCE OF A FEDERAL REVENUE-SHARING LAW

I. INTRODUCTION

As indicated in Chapter 8, under some circumstances one may be compelled to determine whether the central government in Baghdad is empowered to enter into oil and gas development agreements in the absence of a national framework law on oil and gas. Similarly, it is possible to envision having to confront the question of whether and, if so, how revenues from oil and gas activities of the central government or its subcentral components are to be distributed in the absence of a federal revenue-sharing law of the sort examined in Chapter 5. The answer to this query is informed by various layers of analysis, with the first being, as with the matter of the central government's legal authority to enter development agreements, what the terms of the Iraqi Constitution provide directly or indirectly on revenue distribution. Several provisions of the Constitution speak to the matter in one way or another, many in a roundabout and oblique fashion. However, articles 111 and 112, examined earlier in several different contexts, and article 121 much more squarely address the issue of sharing oil and gas revenues.

Beyond the Constitution, reference might also be made to what the terms of extant subcentral governmental unit law provide. After all, inherent in the nature of the central or federal government unit would be the inclination to provide for the distribution of available revenues throughout the entire country. In the absence of a political system concentrating all decision-making power and spending authority in the central governmental unit, any other course of action than distributing revenues across the nation would erode confidence in the central government and imperil its ability to demand fidelity and support. This suggests that if revenues collected by not the central, but the subcentral units were, pursuant to their own laws, subjected to distribution requirements, then a strong sense of responsibility, though perhaps not binding legal obligation, would exist in favor of the concept of revenue-sharing. Any such sense of responsibility would clearly not carry the same weight as constitutional provisions indicating

a legal obligation to share or distribute revenues. And further complicating the matter is the fact that to date only the region of Kurdistan has organized itself into a recognized subcentral unit that has adopted legal measures speaking to the issue of oil and gas revenues.

Aside from what the Constitution says about revenue distribution, and what might appear in the subcentral legal enactments of the Kurdistan Regional Government (KRG), it also makes sense to examine what is currently happening in terms of revenue distribution, because that is occurring in a situation in the absence of a formally operating federal revenue-sharing law and provides a strong indication of what the relevant governmental entities consider fair and appropriate. It cannot be denied that, as with respect to subcentral legal enactments, current practice of the relevant governmental entities does not establish legal obligation; it only suggests the opinion of those entities, for moral reasons or reasons of political expediency, that following a particular course of action is appropriate or wise. In spite of this fundamental limitation, however, current practice undeniably indicates developing or evolving normative standards. To the extent that those practices are also reflected in proposed legal rules, the reluctance of the key political actors to move forward and adopt those rules, or the actual consideration of and eventual rejection by those actors of the particular set of rules proposed, may simply suggest a variety of concerns and complications that have little to do with the palatability of the basic notion of revenue distribution or sharing. Thus, if revenues collected by the different levels of governmental entities are being made available for distribution throughout Iraq despite the absence of a formal national revenue-sharing law, the practice certainly seems suggestive of at least soft law on the matter.

Given that any hard law on the matter of revenue distribution in the absence of a federal revenue-sharing law must derive from the provisions of the Iraqi Constitution, the next three sections of this chapter will concentrate on the three distinct areas of constitutional provisions speaking directly or indirectly to the issue. First, attention will be focused on articles 1, 3, and 14, which can be categorized as the solidarity and diversity provisions. Second, articles 27, 30, and 34 will be examined. With regard to article 30, the First paragraph will be concentrated on; for article 34, it will be the Fourth paragraph. The collective of this second set of three provisions might be categorized as the economic and social security provisions of the Iraqi Constitution. The third set of provisions is comprised of articles 111, 112, First, and 121, Third. Unlike the preceding provisions, these directly and explicitly address the question of revenue distribution, fully recognizing the vast oil, gas, and natural resource wealth of the nation and the revenues that can be produced by various activities concerning it.

The last section in the chapter will take up the other two matters alluded to earlier. The first will be the matter of legislative enactments of the KRG that would tend to accept the notion of the distribution throughout Iraq of

collected revenues. As noted, at present other recognized subcentral units with measures of this sort do not exist. However, the KRG is a substantial player in Iraqi oil and gas production and, therefore, what it has provided with respect to revenue distribution is not insignificant. The other matter examined is the current practice within Iraq of the distribution of revenues. As indicated, that practice is strongly suggestive of soft law on the question of revenue distribution, as the practice itself has emerged from a situation in which there is no formal federal revenue-sharing law yet in place, but genuine sensitivity exists regarding the need to share revenues that are collected.

Intervening between the chapter's examination of those constitutional provisions indicative of a revenue-sharing obligation, and the final section's discussion of both other sources of law – such as the legislative enactments by the KRG – and current practice pointing in the same direction, the matters of whether subcentral units are subjected to a constitutional distribution obligation and basic deficiencies associated with exclusive reliance on the provisions of the Iraqi Constitution are taken up. It is one thing to examine the terms of the Constitution to ascertain whether the federal or central government is to distribute or share the revenues that it has collected from oil and gas and other activities. It is something quite different to search that same document for indications as to whether subcentral governments can keep the revenues they collect, or must make them available for distribution beyond the jurisdictional confines of that subcentral unit. Likewise with respect to basic deficiencies associated with exclusive reliance on the Constitution for the proposition that revenues are to be distributed throughout Iraq. It might be thought that, if one can demonstrate that the terms of the Iraqi Constitution alone supply a foundation for a revenue distribution obligation, all problems deriving from a failure to put a federal revenue-sharing law in place disappear. One complication, however, concerns the degree of specificity and detail reflected in relevant constitutional provisions. A revenue distribution system works best when both the revenue-collection and the disbursement sides of the program contain adequate standards and precision. The shortcomings of the Iraqi Constitution on this front are not to be ignored.

II. THE SOLIDARITY AND DIVERSITY PROVISIONS: ARTICLES 1, 3, AND 14 OF THE CONSTITUTION

Of the various provisions of the Iraqi Constitution that are relevant to the question of the distribution of oil and gas profits in the absence of a federal revenue-sharing law, articles 1, 3, and 14 are somewhat instructive. The principal emphasis of these articles is the solidarity and diverse nature of the Iraqi nation. It may strike one as strange to reference such provisions in the context of a discussion about revenue-sharing, but the fact that the Constitution has

seen fit to explicitly insist in its opening articles on the unity of such a diverse collection of peoples and traditions captures the importance of revenue distribution. Surely, if revenues were not to be shared, it would not be important to stress a desire to maintain the solidarity of the nation, to recognize the differing ethnic, religious, and cultural traditions, or to condemn discrimination. By doing so, these provisions of the Constitution establish fundamentals that lead to revenue-sharing as a natural and necessary result.

Article 1 of the Constitution states: "The Republic of Iraq is a single federal, independent and fully sovereign state in which the system of government is republican, representative, parliamentary, and democratic, and this Constitution is a guarantor of the unity of Iraq."[1] The two concepts contained in article 1 that are instrumental with regard to the solidarity of Iraq and, thus, the need to share revenues, if that solidarity is realistically to be preserved, are the concept that Iraq is a "single" federal state, and the concept that the Constitution serves as a guarantor of the "unity" of Iraq. The insistence of the drafters in referencing the concepts of the singleness and the unity of Iraq in the opening provision of the Constitution cannot be minimized, because opening provisions are frequently employed to express central and key goals. And, at least indirectly, this suggests that, given that it is the Kurdish north and the Shiite south of the country that are known to have substantial deposits of oil and gas, with the Sunni midsection perhaps missing out, unity and singularity demand revenue-sharing. If those who had long been in power, despite their numerical minority status, were denied a fair portion of the revenues generated by oil and gas activity in the rest of Iraq, it would seriously undermine the constitutional aims of a single state, guaranteed by the Constitution to remain united.

As article 1 makes clear the importance of the solidarity of Iraq, a matter that at least indirectly suggests constitutional recognition of the need for the sharing of revenues, article 3 makes clear the recognition of the diverse nature of the Iraqi nation, a matter that cannot be fully recognized in the absence of genuine measures that truly indicate that diversity is a critical and valued condition. Article 3 of the Constitution provides that "Iraq is a country of multiple nationalities, religions, and sects."[2] To ensure that the diverse nature of the country remains intact, it certainly seems reasonable that one sort of measure essential would be the distribution throughout the nation, irrespective of the nationalities, religions, or sects represented, of the revenues collected as a result of Iraqi oil and gas activity. Refusal to share revenues across ethnic or sectarian lines would militate toward undermining the diverse nature of Iraqi society. Through the distribution of revenues, the potential for Iraq retaining its diverse character is enhanced.

[1] See Iraqi Constitution, art. 1, available at www.export.gov/iraq/pdf/iraqi_constitution.pdf (accessed May 5, 2008).

[2] See id. at art. 3.

Indisputably, article 3's recognition of Iraq's diversity does not necessarily and automatically imply support for that diversity. In providing that Iraq is made up of various nationalities, religions, and sects, article 3 might be argued as suggesting nothing more than a frank and honest acknowledgment of the situation on the ground. In other words, the acknowledgment of article 3 should not be taken as an expression of an earnest desire to perpetuate and consolidate that diversity. Article 14 proves especially troubling for such an interpretation, however. Its language quite explicitly endorses the notion of nondiscrimination.[3] This seems to preclude viewing article 3's recognition of diversity as anything other than both an acknowledgment of the situation on the ground and an expression of support for, and articulation of fervent need to maintain, the ethnic and sectarian diversity of the nation. If Iraq is diverse in many different ways, yet that diversity is not to be preserved, then why should discrimination be something to avoid? Article 14's standard of nondiscrimination, when construed in conjunction with the language of article 3, suggests that the diverse nature of Iraq is a national treasure to be preserved. And how better to ensure the preservation of that diversity than to provide the nation's various groupings with access to revenues they themselves may not have had the natural resources to generate?

III. ECONOMIC AND SOCIAL SECURITY PROVISIONS: ARTICLES 27, 30, AND 34 OF THE CONSTITUTION

Articles 1, 3, and 14 of the Constitution do not speak directly to the matter of revenue-sharing. They do, however, establish constitutional standards that are best advanced when revenues that may be earned by one region of the country, or level of government, are distributed to other regions or governmental levels that are not so fortunate as to possess oil and gas or other natural resources that can be sold to produce such revenues. Similarly, articles 27, 30, and 34 address the matter of revenue-sharing only indirectly and inexplicitly. They do so by pronouncing constitutional standards providing a degree of economic and social security for all Iraqis. Although economic security itself does not signify that collected revenues are to be distributed to the inhabitants of Iraq, it certainly seems that by sharing such revenues with those who may not have collected them, the goal of economic and social security for Iraqis may better be attained.

Article 27, First, provides that "[p]ublic assets are sacrosanct, and their protection is the duty of each citizen."[4] While not touching on economic and social security as such, in mandating the protection of public assets – and, as will be seen later, oil and gas is regarded by article 111 of the Constitution as a public

[3] See id. at art. 14.
[4] See id. at art. 27, First.

asset – article 27 sets up an apparent precondition for such security. Unless some sort of essential protection is given to the assets capable of providing economic and social security to all Iraqis, the aim of economic and social security is itself, at least potentially, hollow and illusory. How can economic and social security be achieved if the necessary assets are not themselves secure from impairment or diminution? Thus, through the establishment of the sacredness of public assets, and the duty of citizens to provide protection to such assets, article 27, First's, standard lays the basic foundation for economic and social security.

Obviously, there are many levels of economic and social security, running the gamut from basic to lavish. But no matter how important one might consider such security, few if any would envision a Constitution going beyond an assurance of basic economic and social security. The Iraqi Constitution appears to fit this more modest goal. In article 30, it sets forth a list of guarantees the State makes to its inhabitants. Relevant to the matter of economic and social security, article 30, First, in particular, provides that the State shall guarantee to Iraqis "social and health security" as well as "suitable income."[5] Two observations seem warranted at this juncture. One would be that, consistent with the realistic and attainable goal of the drafters' to provide for only basic economic and social security, the language of article 30, First, talks of nothing more than an income level that is "suitable" and security for one's "social and health" situations. These are modest and basic objectives or aspirations, far from lavish. The other would be that, although the notion of "suitable income" certainly ties into economic security, "social and health security" are a necessary concomitant of economic security alone. That is to say, even in the absence of any reference in article 30 to health and "social security," with economic security alone comes social and health security. Conversely, in the absence of security at the economic level, there is likely to be little security at the social or health level.

In protecting public assets, article 27, First, provides what is necessary for article 30, First, to be able to guarantee Iraqis social, health, and income security. And as with the notions seen in the preceding section of a single and united Iraq that recognizes its ethnic and sectarian diversity and proscribes discrimination because of difference or distinction, article 30, First's, guarantee of social, health, and income security indirectly and inexplicitly suggests a constitutional rule of revenue distribution. If a basic and simple level of social, health, and income security is to be ensured the Iraqi populace, it seems reasonable to expect a distribution of revenues. With the nation's oil and gas resources providing the lion's share of revenue potential, and the known reserves of those resources being deposited largely in the north and the south of the country, it certainly seems that if those inhabiting the midlands are to realize the constitutional standard of basic economic and social security, they must share in the revenues from oil and gas activity. To be clear, nothing in the text of articles 27 and 30 expressly

[5] See id. at art. 30, First.

and directly provides that the economic and social security envisioned is to come about by virtue of revenue-sharing. All the two provisions address is the protected status of public assets and the guarantee by the State of a minimum level of economic and social security. Nonetheless, it seems reasonable to infer that translating the guarantee of economic and social security from written expression to tangible reality requires monetary resources, and those resources may very well have to proceed from funds generated by oil and gas activities occurring anywhere within the territorial confines of Iraq. No single region of the country where revenues are collected, nor level of government engaged in the collection of such, should be entitled to insist upon keeping all revenues to themselves.

Article 34, Fourth, of the Constitution is perfectly consistent with this idea. Just as article 30, First, addresses State guarantees of social, health, and income security, so article 34, Fourth, addresses the assurance of educational opportunity. In pertinent part, it declares that "[p]rivate and public education shall be guaranteed."[6] This not only guarantees that education can be private, if that is so desired, but also that the Iraqi people shall have public education available. The guarantee of education, like the guarantee of social, health, and income security, requires substantial outlays of fiscal resources. How is it possible to maintain a modicum of health or income security without funding from available revenue sources? Similarly, how is it possible to give meaning to a commitment to public education without monies for books, instructors, buildings, and operating expenses? And to the extent that certain areas of the country, or ethnic, or sectarian groups have fewer sources of revenue at their disposal to supply the requisite funding, how are health or income security, or an assurance of a basic level of public education, to be achieved without revenue-sharing?

Although it may make sense to think of article 34, Fourth's, guarantee of private and public education as indirectly and inexplicitly endorsing some constitutional principle of revenue-sharing, there is admittedly at least one possible problem that cannot be entirely swept aside: looked at in the abstract, the language of article 34, Fourth, can be construed as going no farther than guaranteeing individuals a right to education, whether privately or publicly provided. In other words, though it is entirely possible to interpret 34, Fourth, as requiring the government to provide a system for public education and to guarantee that those who wish to may opt for education through a private system instead, it is also possible that article 34, Fourth, standing alone, means only that individuals have a right to education, whether through private or public mechanisms. This interpretive difference stresses the distinction between a constitutional guarantee of education and the declaration of constitutional freedom of education. The former implies a governmental obligation to establish and fund an educational system. The latter, on the other hand, implies only the right of Iraqis to

[6] See id. at art. 34, First.

seek education through private or public means, without any obligation on the government's part to establish or fund an educational system.

The first comment in order is that such a distinction is not unreasonable. The way the language of article 34, Fourth, is written, it could be read as suggesting a mere constitutional freedom of education, not an assurance of the establishment and funding of a system of public education. Though there are innumerable examples from constitutions around the globe, any construction of article 34, Fourth, of the Iraqi Constitution that renders it nothing more than a guarantee to the people of Iraq of a right to seek education if they so desire relegates that particular provision to a long list of substantively meaningless expressions regarding noble and even very basic societal building blocks. Second, apart from the construction accorded the language of article 34, Fourth, it cannot be denied that article 30, First's, guarantee of social, health, and income security is clear in providing constitutional assurance of a basic level of actual social, health, and income security for each and every Iraqi. This assurance cannot be satisfied by a mere freedom or right on the part of each Iraqi to seek social, health, and income security; it must be provided by the State. The third, and final, comment has to do with the context in which the Fourth paragraph of article 34 appears. More specifically, when article 34, Fourth, is read in light of the language of article 34, Second, there seems little question that the former's guarantee of public education promises far, far more than just a right or freedom to seek education. Article 34, Second, expressly provides that "[f]ree education in all its stages is a right for all Iraqis."[7] And because the provision of such requires outlays of funding, revenue distribution across the nation may be an imperative.

IV. OIL, GAS, AND NATURAL RESOURCES PROVISIONS: ARTICLES 111, 112, AND 121 OF THE CONSTITUTION

It bears recollecting that the task of this chapter is to determine whether a legal obligation exists to distribute monies generated from oil and gas activity in Iraq in the absence of a federal revenue-sharing law. On that score, articles 111, 112, and 121 speak much more directly and explicitly than any of the other constitutional provisions seen so far. It is clear, however, that 111, 112, and 121 do not contain the same detail and specificity contained in the federal revenue-sharing law reviewed in Chapter 5. They do presage it, though, in their plain and unequivocal directives on the issue of revenue distribution. As a consequence, it is safe to conclude that oil and gas revenues are required by the terms of the Iraqi Constitution to be shared or distributed throughout Iraq.

Of the three constitutional provisions taken up in this Section, article 111 is the least direct and explicit on the question of revenue-sharing. Its language

[7] See id. at art. 34, Second.

states that the nation's oil and gas resources are "owned by all the people of Iraq in all the regions and governorates."[8] This language has many implications, including for disputes between central and subcentral governmental authorities about power to enter into development agreements. For present purposes, the implication for the sharing throughout Iraq of revenues from oil and gas activities is the sole and exclusive focus. With respect to this, by virtue of article 111's constitutional assertion that no single region or governorate or group of people own Iraqi oil and gas, but it is owned by all Iraqis in every region or governorate, there is little room for questioning claims that, no matter where reserves happen to be situated, Iraqis elsewhere are also owners. The effect is to defeat contentions that oil and gas situated in the Kurdish north, or the Shiite south, belong completely and exclusively to the peoples, regions, and governorates where they are situated.

It is one thing to state that all Iraqis have a rightful claim to ownership of the oil and gas resources of the nation, wherever those resources may exist, and something entirely distinct to state that the language of article 111 is instructive on the matter of revenue-sharing. Nonetheless, by providing all Iraqis with ownership of all such resources, the Constitution clearly seems to suggest that oil and gas revenues are to be shared. After all, the existence of oil and natural gas in Iraq has practical meaning only in terms of activities with respect to such and the revenues that such activities generate. Although article 111 could be taken to mean that the ownership claim of all Iraqis to all oil and gas resources could entitle each to an in-kind portion of any oil and gas produced from reserves, given the impracticality of each Iraqi having to deal with in-kind resources, it seems eminently more sensible to read the article as calling for all Iraqis to share in the revenues generated by oil and gas development activities. In view of this, even though article 111 does not provide for revenue-sharing in a straightforward manner, its thrust is plainly in that direction.

Article 112, First, is entirely different. Its language is extremely explicit on the matter of revenue distribution. As seen already in Chapter 2 of this book, however, article 112, First, also serves the purpose of addressing the matter of central and subcentral governmental authority to engage in oil and gas development activities. It may be recalled that it is in that particular context that revenue distribution is raised, essentially as a condition on the federal government being able to retain authority with regard to oil and gas development in so-called present fields. The exact language of article 112, First, provides: "The federal government, with the producing governorates and regional governments, shall undertake the management of oil and gas extracted from present fields, provided that it distributes its revenues in a fair manner in proportion to the population distribution in all parts of the country," and taking

[8] See id. at art. 111.

into consideration deprivations and damage caused by the former regime, and the need to ensure balanced development.[9]

The solidarity and diversity provisions of articles 1, 3, and 14, and the economic and social security provisions of articles 27, 30, and 34 may speak in only a roundabout fashion to the matter of revenue distribution. Indeed, even article 111's statement regarding the ownership of Iraqi oil and gas, though implicitly addressing the issue of revenue distribution, is not nearly as direct and explicit as the language of article 112, First. There can be absolutely no doubt that 112, First, makes clear that revenues, including those collected from oil and gas development activities, are to be shared across Iraq. By virtue of the article's express terms, the federal government is accorded, with the producing governorates and regional governments, management authority over oil and gas extracted from present fields, but only so long as it "distributes its revenues" in a fair and proportional manner, taking certain specified factors into consideration. The plain language of article 112, First, leaves no question that revenue distribution is constitutionally required.

In light of the fact the language of article 112, First, is cast in terms of requiring federal revenues to be distributed, and conditions the retention of federal management authority over oil and gas extracted from present fields upon such distribution, it seems reasonable to ask whether the dictates of that article also extend to the distribution of revenues collected at the subcentral level. The federal or central government may be involved in much revenue collection, whether associated with oil and gas activity or other triggering events, statuses, or situations. But it is also possible that subcentral governmental authorities might be involved in revenue collection. After all, as shown in Chapter 2, subcentral governments are empowered by the Constitution to engage in various sorts of oil and gas development activities capable of generating substantial amounts of revenue. Does the revenue distribution obligation of article 112, First, apply to revenues collected at the subcentral level, or are those revenues outside the ambit of that provision's dictates?

Again, the precise language of article 112, First, indicates that the federal government, with the producing governorates and regional governments, is to engage in the management of oil and gas extracted from present fields, "provided that it distributes its revenues" in a fair and proportionate manner, taking various important factors into consideration. A couple of things seem clear from the article's wording. First, and most importantly, it is only those revenues collected by the federal government that are the focus of 112's distribution obligation. The proviso on the retention of management authority by the federal government over oil and gas extracted from present fields applies to "it," meaning the federal government. If revenues collected by the federal government are not

[9] See id. at art. 112, First.

appropriately distributed, then the proviso results in the loss of authority by the federal government. As a consequence of the limited application of article 112's distribution obligation, it cannot be said to extend to revenues collected at the subcentral level, even though those revenues may be associated with oil and gas activities of subcentral governmental authorities. Something else in the Constitution, or another source of law, may require the sharing by subcentral governments of revenues they have collected, but not the language of article 112, First. Second, and less relevant for present purposes, the reference to "its" in the language of article 112's proviso indicates that all federal revenues, from whatever source, are subject to the distribution obligation. The proviso refers to the federal government retaining its management authority over oil and gas extracted from present fields so long as it distributes "its revenues" in an appropriate manner. The revenues to which the distribution obligation applies include not just those connected to oil and gas extracted from present fields or other sorts of oil and gas development activities, but federal revenues from every conceivable source.

While it may be that article 112, First, establishes no obligation on subcentral governments to share revenues collected, there is no question that it directly and explicitly requires the distribution of revenues originally collected at the federal level. Similarly, article 121, Third, speaks directly and explicitly of revenue distribution. It provides: "Regions and governorates shall be allocated an equitable share of the national revenues sufficient to discharge their responsibilities and duties, but having regard to their resources, needs, and the percentage of their population."[10] This language allows no escape from the conclusion that revenue distribution is constitutionally required. By its terms, "[r]egions and governorates shall be allocated an equitable share of the national revenues."[11] No option exists. An equitable share allocation of national revenues "shall" be made to all regions and governorates.

It is interesting to observe that the language of article 121, Third, references "national revenues" being allocated, whereas article 112, First, as just seen, references "its revenues," or federal revenues to be more precise, being distributed. Though this difference in phraseology is certainly open to the reading that article 121, Third, may supply the necessary constitutional directive for requiring subcentral governments to share the revenues they have collected, it seems more accurate to interpret the reference to "national revenues" as meaning those revenues collected at the central or federal, rather than subcentral, governmental level. Supporting this is the fact that, in directing to whom such revenues are to be distributed or allocated, article 121, Third, references "[r]egions and governorates." From this there seems little dispute that the notion of "national" revenues must mean revenues generated by efforts of the central government.

[10] See id. at art. 121, Third.
[11] See id.

It seems crystal clear that the combination of articles 112, First, and 121, Third, establish a constitutional principle of revenue-sharing. Article 111, providing that all Iraqis own the nation's oil and gas resources, is perfectly consistent with this principle, but only indirectly and inexplicitly addresses the distribution of collected revenues. It also seems clear that the constitutional sharing principle, at least from the perspective of these three articles, and in particular article 112, First, and article 121, Third, extends no farther than to revenues generated at the federal or central governmental level. That is not to say, however, that no other provision of the Constitution, or no other source of law, fixes an obligation on subcentral authorities to distribute revenues they may have collected. Subcentral governments may be under a sharing obligation similar to that of the federal government. They may not be entitled to retain all revenues they collect, and to ignore the requirements and needs of Iraqis situated elsewhere. Nonetheless, if any obligation on subcentral governments to distribute revenues is to be found to exist, it cannot be traced to the language of articles 111, 112, or 121.

V. A CONSTITUTIONAL SHARING OBLIGATION FOR REVENUES COLLECTED AT THE SUBCENTRAL LEVEL?

While both articles 112, First, and 121, Third, may not establish an obligation on the part of subcentral governmental entities to share with or distribute to other governmental entities monies collected by virtue of oil and gas development or other activities, the provisions of the Iraqi Constitution seem not entirely silent. The two articles just referenced are the most explicit in the Constitution on the issue of revenue-sharing. Yet it has been seen that articles 1, 3, and 14, as well as articles 27, 30, and 34, also address the matter, albeit much more indirectly and inexplicitly. What they have to say with respect to revenue distribution comes about by taking up the tangential questions of Iraqi solidarity and diversity, and economic and social security. As examined earlier, the constitutional expectations and standards articulated on those subjects simply provide oblique and inferential evidence regarding the need for revenue-sharing. Illustrative is the fact it would be unlikely that the unity of Iraq as a single and diverse nation could be maintained – as articles 1 and 3 reference – or the social, health, and income security, and educational access of its inhabitants be guaranteed – as articles 30 and 34 require – without the distribution of revenues between governmental units that have the wherewithal to provide and those that have needs that would otherwise go unmet.

The present inquiry concerns whether those indirect and inexplicit constitutional provisions that strongly suggest a legal requirement of revenue distribution also apply to revenues that have been collected at the subcentral level. Nothing is offered about whether some other potential source of legal obligation, apart

from the Iraqi Constitution, might indicate a requirement to share revenues generated by activity of subcentral governmental units. That matter will be taken up in a subsequent section. Regarding the present inquiry, however, it seems there is every reason to believe that the constitutional provisions that more indirectly and inexplicitly touch on revenue-sharing extend to revenues collected at the subcentral as well as the central governmental level.

The declarations of fundamental principles contained in articles 1 and 3, and the statement of basic rights and liberties contained in article 14 and its associated provisions, are cast in terms that either merely characterize the nature of the Iraqi state, or provide for the freedoms of Iraqi citizens. There is nothing in the language of these particular provisions that confines their application to the federal or central government alone. In fact, article 2, First, paragraph C, of the Constitution provides in the most expansive of terms that "[n]o law may be enacted that contradicts the rights and basic freedoms stipulated in this Constitution."[12] Further, article 13, First, states that "[t]his Constitution is the preeminent and supreme law in Iraq and shall be binding in all parts of Iraq without exception."[13] And again, the follow-on paragraph of article 13 provides: "No law that contradicts this Constitution shall be enacted. Any text in any regional constitutions or any other legal texts that contradicts this Constitution shall be considered void."[14] Thus, with respect to the Constitution's rights and basic freedoms, and any of its other provisions, the terms of the Constitution would control the actions of government at every level. From this there can be no argument that the terms of articles 1, 3, and 14 of the Constitution apply at the subcentral and central governmental levels.

As for the economic and social security provisions of articles 27, 30, and 34, they, too, provide nothing that would suggest inapplicability to the subcentral level. In indicating the sacrosanct nature of public assets – including the nation's oil and gas reserves, in which every Iraqi possesses an ownership claim – as well as articulating a guarantee of social, health, and income security, and one of the availability of educational opportunity in public or private form, articles 27, 30, and 34 offer nothing that would tie their assurances to the federal or central government level alone. Especially illustrative of this is article 30, First's, promise regarding social, health, and income security. As quoted earlier, it provides that "[t]he State"[15] shall guarantee all such forms of security. This assiduously refrains from linking the guarantee to one made by the central government, or, for that matter, the subcentral government alone. The concept of "[t]he State" is sufficiently broad to encompass both the central and the subcentral units, thereby obligating both units to ensure "social and health security" and "suitable income."

[12] See id. at art. 2, First, para. C.
[13] See id. at art. 13, First.
[14] See id. at art. 13, Second.
[15] See id. at art. 30, First.

With respect to article 27, First's, declaration of the protected status of all public assets, and article 34, Fourth's, guarantee of private and public education, it is undeniable that they make no comparable reference to "[t]he State." This distinction from the terminology of article 30, First, might suggest to some that the dictates of 27 and 34 do not apply to subcentral governmental units, thus derogating from the notion that various provisions of the Iraqi Constitution at least indirectly and inexplicitly indicate a revenue distribution obligation. Given what was argued earlier about the significance of articles 2, First, paragraph C, and 13, First and Second,[16] it is difficult to find any such suggestion persuasive, however. Articles 2, First, paragraph C, and 13, First and Second, establish the supremacy of the Constitution and, consequently, imply the application of its principles at both the federal and subcentral levels, unless some clear language confines the application of a particular principle to the federal level alone. Even more significant is the fact that Section Two of the Constitution, the section listing "Rights and Liberties" and containing articles 27 and 34, in addition to articles 14 and 30, First, is cast in terms suggesting that those rights and liberties are applicable to both central and subcentral governments. Making this point is the repeated reference in Section Two to the State – and not just at the federal level – having to respect the rights and liberties enumerated. Examples include article 16, providing all Iraqis with equality of opportunity, and declaring "the State" shall ensure such;[17] article 20, providing Iraqis with the right to participate in public affairs, when plainly those affairs can be at every level of government;[18] article 22, providing that "the State" shall ensure the right to unionize;[19] article 23 providing protection of private property, when assaults on such can be engineered by either central or subcentral governmental units;[20] articles 24, 25, and 26, declaring that "[t]he State" guarantees free movement, economic reform, and encouragement of investment;[21] article 29, that "the State" is to preserve the family;[22] article 31, that "[t]he State" shall care for the handicapped;[23] 33, that "[t]he State" shall protect and preserve the environment;[24] and, 35, that "the State" shall promote cultural activities.[25]

It is certainly correct to say that articles 112 and 121 that deal with oil and gas and natural resources revenues both speak in terms of revenue distribution, allocation, or sharing of revenues collected at the central or federal governmental

[16] See text accompanying supra notes 12–13.
[17] See Iraqi Constitution, supra note 1 at art. 16.
[18] See id. at art. 20.
[19] See id. at art. 22.
[20] See id. at art. 23, First.
[21] See id. at arts. 24, 25, and 26.
[22] See id. at art. 29, First.
[23] See id. at art. 31, First.
[24] See id. at art. 33, Second.
[25] See id. at art. 35.

level. Their silence with respect to revenues collected at the subcentral level, though, should not be taken to suggest the absence of a constitutional principle on the sharing of revenues originally collected at the subcentral level. The foregoing review of the indirect and inexplicit revenue distribution provisions of the Iraq Constitution – articles 1, 3, and 14 regarding the solidarity and diversity of Iraq, and articles 27, 30, and 34 on social and economic security – demonstrates their applicability to both the central and the subcentral governmental units. Before examining the possibility that other sources of law suggest an obligation to distribute either centrally or subcentrally collected revenues, it may be worthwhile to point out some of the chief inadequacies of having to rely on the constitutional principles reviewed earlier for dictating revenue distribution, rather than being able to place reliance on a federal revenue-sharing law like that analyzed in Chapter 5.

VI. INADEQUACIES OF THE RELEVANT CONSTITUTIONAL PROVISIONS

As will be recalled from that earlier discussion of the federal revenue-sharing law, at least two broad aspects of concern arise anytime revenue-sharing is discussed. The first has to do with the collection side of revenue-sharing, and the second with the distribution side. Again, the collection side concerns matters such as how much or what percentage of revenue is to be collected for ultimate distribution; whether it is only certain types of activities or forms of contractual relations that trigger collection; whether collection applies to monies generated by the production of only oil and gas, or also the associated production of other sorts of natural resources; and also whether the oil and gas undertaking that is generating monies must involve an international dimension in order to be subject to revenue collection. The distribution side, on the other hand, concerns questions such as who is entitled to claim a distribution; how the amount of any such entitlement is to be calculated; whether the pool of collected revenues available for distribution is to reflect initial deductions taken for particular costs, expenditures, or allotments, or is to be the entirety of what was originally collected; and if it is to reflect certain initial deductions, whether a cap or upper limit exists on how much of what was collected can be reduced by deductions in order to arrive at the final distribution pool.

In focusing on the constitutional provisions and the matter of revenue collection, it is pretty obvious that a genuine paucity of attention was devoted to the various collection issues that might arise. Without meaning to overstate the situation, the relevant provisions of the Iraqi Constitution completely and absolutely leave aside any standards for revenue collection. Just recalling the various constitutional articles alluded to earlier, their whole thrust seems directed

toward explicit or inexplicit establishment of a revenue distribution requirement. Nowhere do they even remotely hint at any collection standard. Again, a provision such as article 112, First, speaks directly about revenue distribution, whereas provisions like articles 27, 30, and 34, do so only implicitly by declaring rights that might be realizable only through the distribution of revenues. Neither these nor other provisions of the Constitution contain language suggesting anything about standards regarding revenue collection.

Irrefutably, it is an admirable thing that the various articles of the Iraqi Constitution suggest indirectly and inexplicitly, or directly and explicitly, the existence of an obligation to share and distribute revenues across the nation. Revenue distribution supports basic needs of Iraqis, helps to dampen ethnic and sectarian rivalry, and facilitates the unity and development of the entire nation. Against this backdrop, the total absence from the Constitution of any language even remotely touching on collection standards is extremely unfortunate. Yes, the Constitution suggests that revenues, including those generated by oil and gas activities, are to be distributed throughout the nation. And yes, such a suggestion necessarily implies that revenues have to be collected if distribution is to occur. But the implication that revenues require collection in no way speaks to the various issues that surround collection as such. The thorough silence of the Constitution on the entire matter of revenue collection is extremely lamentable and unfortunate. The federal revenue-sharing law also clearly has problems of its own. But if one is forced to rely exclusively on the terms of the Iraqi Constitution in order to resolve questions concerning the collection of revenues, one is left rudderless in a sea of difficult and extremely sensitive issues that could have impact of monumental proportions.

The relevant terms of the Constitution offer nothing on how one is to calculate the amount of revenue to be collected for distribution. A formula describing the government's take for permitting oil and gas development activities would have been helpful. The ways in which such a formula could have been stated are virtually innumerable. Also, the Constitution offers nothing on whether revenues associated only with certain particular forms of agreement or contracting, and not with others, trigger the principle of distribution. Conceivably, the provisions of the Constitution could have addressed this question by providing that revenues collected for ultimate distribution are those coming from something like sales of actual oil and gas, or production-sharing agreements or PSCs to develop existing reservoirs, but not revenues generated by government fees or receipts associated with licensing or permitting connected to oil and gas activity. Similarly, the Constitution speaks not at all about whether government oil and gas revenues must be generated by dealings with foreign (as opposed to indigenous) enterprises exploring for and exploiting Iraqi hydrocarbons. The guidance provided on this and so many other matters is woefully deficient and could precipitate much dispute if constitutional provisions alone must be relied on to resolve controversies involving revenue collection.

Focusing on the distribution side of the equation, again, next to nothing concrete and specific appears in those constitutional provisions that deal with the matter of revenue distribution. It is indisputable that the provisions which speak only indirectly and inexplicitly about revenue distribution – articles 1, 3, 14, and 27, 30, and 34 – and even those such as articles 112 and 121, which address distribution more directly and explicitly, fail to provide any precise and formulaic approach to the sharing of collected revenues among the governmental units, regions, and peoples of Iraq. Articles 1, 3, 14, 27, 30, and 34 do indeed provide for the accomplishment of certain significant goals and objectives, all of which require revenue distribution. Nothing is stated in any of those provisions, however, about how to determine or calculate the amount of revenues to be distributed. Articles 112 and 121 are only slightly clearer on such determinations or calculations. Article 112 speaks to distributions that are "fair"; are "proportionate to population"; address the concerns of "damaged regions" or previous "unjust[] depriv[ation]"; or are designed to "ensure[] balanced development."[26] Article 121 speaks to distributions that are "equitable" enough to allow regions and governorates to "discharge their responsibilities" while still "having regard to their [extant] resources," "needs," and the "percentage of their population."[27] Yet for all such general guidance, both provisions fail to provide any numerical figures or mathematical formulae. It seems relatively obvious that, without such formulae, the terminology used by 112 and 121 is likely to be a source of frequent haggling.

The constitutional provisions on the distribution side of the equation could have been substantially more specific. It is understandable that the constitutional nature of such provisions militates against the same degree of specificity and detail found in implementing legislative enactments. Nonetheless, as with the comparable lack of specificity and detail on the collection side provisions, the absence of some formula or objective and nonevaluative standard for determining the level of revenue distribution proves a significant deficiency and source of potential dispute. The same can also be said about the fact that the relevant constitutional provisions concerning the distribution side offer nothing about whether the revenues to be available for distribution are what remains of collected revenues after deductions initially have been made for particular costs, expenditures, or allocations to certain priorities. Even if making revenue distributions on the basis of the general guidance implicit in article 112's and 121's standards of fairness and equitability, consideration of previous unjust deprivation, or other factors, it is still important to be able to determine the precise level of funds available for distribution by knowing what portion of the funds originally collected are first to be used to cover other costs, expenses, or priorities. Then there is also the matter of the Constitution's silence on a cap or upper

[26] See id. at art. 112, First.
[27] See id. at art. 121, Third.

limit to such costs, expenses, or priorities. None of the relevant provisions even comes close to touching on this. In the absence of such, however, nothing exists in the Constitution to prevent collected revenues from being exhausted or substantially depleted, thereby rendering the notion of a constitutional distribution requirement rather inconsequential.

VII. PROPOSED CONSTITUTIONAL AMENDMENTS: HOW THEY WOULD AFFECT REVENUE DISTRIBUTION

It may be recalled from the discussion in Chapters 2 and 5 that, following the adoption of the Iraqi Constitution, an examination of the possibility of amending the document was commenced by a so-called Constitutional Review Committee (CRC). In late May 2007, the CRC issued its report on proposed amendments.[28] Though clearly these proposed amendments cannot affect current legal analysis of the question of revenue distribution, brief reference to them is worthwhile for calling attention to how changes in relevant constitutional provisions might alter the preceding suggestions about interpretation of those provisions. Particularly important are the amendments proposed for articles 111 and 112 of the Constitution. The overall thrust of the proposals is one that strengthens the role of the federal or central government with respect to oil and gas activities, removes any distinction between present or existing fields and future fields, and speaks to revenue distribution.

In its amended form, the new article 111 would read:

> First: Oil and gas are owned by all the people of Iraq.
> Second: The federal government shall collect the oil revenues and distribute them equally to all Iraqis in accordance with the state budget law in transparent and fair way to be consistent with population distribution in governorates.
> Third: The approved quota in the state budget shall flow to regions and governorates not organized in a region automatically in an effective and transparent mechanism.
> Fourth: Allocate a quota of revenues to the producing governorates to compensate their damages.
> Fifth: Allocate a quota for specific period to the deprived and aggrieved regions to ensure the balanced development of various regions in the country.
> Sixth: A law shall regulate the above provisions of this Article.

In regard to the matter of revenue distribution, this proposed new language for article 111 makes clear that the Iraqi people have as their object of attention not

[28] Constitutional Review Committee Report (May 23, 2007), available at www.forumfed.org/pubs/IraqConstitutionalReviewENG.pdf (accessed July 18, 2008).

only the oil and gas resources themselves, but the revenues that are produced by the resources. Article 111, Second, fixes an undeniable obligation on the federal government to both collect and distribute such revenues. Budgeted revenue quota amounts are to go automatically to the regions and governorates, under article 111, Third. And while the language of article 111, Sixth, mandates a legislative enactment (like the federal revenue-sharing law) to regulate implementation of article 111, the bare terms of the article itself provide no greater degree of specificity, precision, and detail on many of the issues involved in distribution than do the provisions of the extant Iraqi Constitution.

The amended version of article 112 would read:

> First: The federal government, with the producing governorates and regional governments, shall undertake the management of oil and gas operations, (the federal government shall market them).
>
> Second: The federal government, with the producing regional and governorate governments, shall together formulate the necessary strategic policies to develop the oil and gas wealth in a way that achieves the highest benefit to the Iraqi people using the most advanced techniques of the market principles and encouraging investment.

The most prominent changes proceeding from such an amendment would be the strengthening of the role of the federal government in matters of oil and gas and the elimination of any distinction between present or existing fields and those to be developed in the future, as well as the conditioning of the federal government's management authority with respect to oil and gas on its satisfaction of its revenue distribution responsibilities. The elimination of the link between the oil and gas management authority of the federal government and its revenue distribution responsibilities seems rather inconsequential, given that article 111 now speaks so directly and explicitly to federal authorities having to automatically budget for the distribution of oil and gas revenues. In other words, the proposal to remove from article 112 all reference to revenue distribution does not in any way alter the basic idea captured in the existing constitutional language, and in the CRC's suggested amendments, that revenues collected at the federal level are to be disbursed to the regions and governorates. As concerns the flow of revenues from collecting subcentral units to a nationwide distribution fund, the CRC's report suggests no changes in articles 1, 3, 14, 27, 30, or 34 that are of import. Sight should not be lost of the fact, however, that the proposed amendments to article 111, First and Second, indicate that oil and gas belong to all Iraqis and that the federal government is to collect and distribute hydrocarbon revenues. The only way the latter could be accomplished for revenues not initially collected by the federal government, would be to have the subcentral governmental entities that collect them follow that with an appropriate disbursement to federal authorities.

VIII. OTHER SOURCES OF LAW SUGGESTIVE OF AN OBLIGATION TO DISTRIBUTE REVENUES

Aside from the provisions of the Iraqi Constitution, is it conceivable that other sources of law may suggest a distribution obligation applicable to those governmental units in Iraq collecting revenues? As noted at the outset of this chapter, although such other sources may not establish a direct, hard-law legal obligation, they are clearly indicative of a developing potential legal obligation. Two such sources are of concern here: subcentral governmental legislative enactments, and current practice regarding the distribution of revenues.

In 2007 the KRG adopted its basic hydrocarbons law, known as the Oil and Gas Law of the Kurdistan Region – Iraq No. (22).[29] The Oil and Gas Law contains a variety of extremely interesting provisions, most designed to assert extensive regional authority over local oil and gas resources, as was intimated in Chapter 4. For present purposes, articles 3, 15, 18, 19, 20, and 57 of that Law are of greatest interest. As a group, these six articles form the core of the Kurdistan Oil and Gas Law provisions addressing the matter of revenues. And of these half-dozen provisions, centrally important are article 15, Fifth, article 19, First, and article 20. In summary form, what these latter three provisions do is accept the idea that revenues collected by Kurdish authorities in accordance with the powers of the Oil and Gas Law are to be shared throughout Iraq, but perhaps only in the event that the federal or central government is seen as complying with its oil and gas obligations as spelled out in the Iraqi Constitution. Despite the apparent conditional nature of this KRG legislative recognition of a revenue distribution obligation, it still represents clear acknowledgment of a subcentral governmental unit's preparedness to refrain from keeping for its exclusive and sole use all revenues collected as a result of oil and gas activities.

Article 3 of the KRG's Oil and Gas Law provides the basic assertion of the regional government's claim to a share of the revenues proceeding from oil and gas activity. This is true with respect to both present and future fields.[30] Article 15 picks up by establishing the Kurdistan Oil Trust Organization (KOTO) and indicates that it shall be charged with responsibility of holding and managing the KRG's share of revenues.[31] Article 15, Fifth, then states that, until such time as the federal or central government fulfills the terms of article 19 of the Oil and Gas Law, which, as will be seen, relates to a nationwide petroleum revenue fund from which disbursement across Iraq is made, KOTO shall keep any revenues collected from oil and gas activity in Kurdistan; these shall be

[29] See Oil and Gas Law of the Kurdistan Region – Iraq No. (22) 2007, available at www.krg.org/uploads/documents/Kurdistan%20Oil%20and%20Gas%20Law%20English_06_h14m0s42.pdf (accessed July 15, 2008).

[30] See id at art. 3, First and Second.

[31] See id. at art. 15, First–Fourth.

"part of the general revenue of the Region" and shall be subject to monitoring by the KRG Parliament.[32]

Before the terms of article 19 are set forth, article 18 establishes specific requirements that are to be met as a result of negotiations with the federal government regarding the matter of oil and gas. On the matter of oil and gas revenues, article 18, Fourth, provides that the federal government and the KRG are to reach agreement that "all the Revenues obtained by the Region from Petroleum Operations be deposited to a general petroleum revenue fund for Iraq."[33] Taking only articles 15 and 18 into consideration, it is clear that the KRG's Oil and Gas Law envisions KOTO controlling oil and gas revenues collected by Kurdistan, until agreement is reached with the federal government on the establishment of a general, nationwide revenue account. In this context, article 19, First, then provides that the basis of any cooperation under article 18 shall be the creation of "a general petroleum revenue fund [that] must receive all of Iraq's petroleum revenue"; must be managed by a joint commission pursuant to articles 112 and 121 of the Iraqi Constitution; and must be maintained by a reputable international bank, with a subaccount for the KRG "into which an agreed share for the [KRG] is deposited."[34] Though the Oil and Gas Law of the Kurdistan Region plainly envisions revenue distributions, the Kurds expect to hold their own funds under their own control, in the absence of the establishment of an agreed-upon national revenue account.

Article 20 both confirms the KRG's recognition of the Iraqi Constitution's interest in revenue-sharing, and the fact that, without some broad-based agreement on a national revenue-sharing plan, revenues generated by oil and gas activities in the Kurdistan Region will be part of the general revenues of the region. It does this with language that states: "Until the conditions set out in Article 19 of this Law are met and implemented in full, the Regional Government shall proceed with its rights on the basis of Articles 112, 115, and 121 (3) of the Federal Constitution, with Revenues received by KOTO pursuant to Article 15 of this Law."[35] Translation: KOTO controls Kurdish-collected oil and gas revenues, unless an Iraq-wide revenue-sharing account is created. Article 57 then provides that any revenue distributions are to take into consideration future generations, the immediate needs of Iraqi citizens and Kurds, strategic projects, the environment, and other things. Aside from all the vagaries of the Kurdistan Region's Oil and Gas Law, however, it is clear that it anticipates the distribution of revenues – even those it collects – across the entirety of the Iraqi nation.

Now what about current practice? Does it evidence that subcentral governments and even, perhaps, the federal government in Baghdad have pursued a

[32] See id. at art. 15, Fifth.
[33] See id. at art. 18, Fourth.
[34] See id. at art. 19, First.
[35] See id. at art. 20.

policy of, or expressed assent to the notion of, distributing oil and gas revenues across the entire country? The simple answer to this question is a resounding yes. Media reports indicate that the federal or central government has shared its revenues, a substantial portion of which are generated by oil and gas activities, with provinces throughout Iraq.[36] Indeed, the federal government's revenue-sharing efforts have caused it to make distributions to the KRG that match the 17% share provided for in the federal revenue-sharing law. In his state of the union address of January 2008, the president of the United States, George W. Bush, was quick to call attention to this effort of Baghdad to spread revenues around the nation.[37] And although some may express the cynical view that it is not surprising the federal government would share its revenues with the subcentral units, given that it would like to strengthen the hand of the central authorities, Baghdad's actions in providing revenues to both oil-rich Kurdistan and oil-poor mid-Iraqi provinces evidences a commitment not compelled by revenue-sharing legislation.

As best as can be determined, the oil-rich Kurdish north is also supportive of sharing with all other areas of Iraq revenues collected by regional authorities as a result of oil and gas activities taking place within the reach of its jurisdictional power. Indications of that appear at least as early as 2007, in conjunction with the KRG reaching oil and gas development agreements with outside oil companies, despite federal government consternation over those agreements.[38] And again, in late June 2008, it was reported that the Kurdish region was prepared to set aside a portion of revenues from a development agreement negotiated with the Korean National Oil Corporation, and make those revenues available for a fund that would distribute the revenues throughout the various provinces of Iraq.[39] These episodes and others certainly suggest that the Kurds accept the notion expressed in article 111 of the Iraqi Constitution that the nation's oil and gas resources are owned by all the people of Iraq, in all regions and provinces. It does not matter if a particular region, province, or group of people is geographically situated so as to be oil-poor. The KRG's actions and statements endorse the idea that those Iraqis blessed with natural resources, and revenues from activities concerning them, have a responsibility to share with all others. When conjoined with the similar expressions and conduct of the federal government in Baghdad,

[36] See Marian Karouny, Interview – Iraq sees $42bln 2008 budget, up $1bln on 2007 (Oct. 8, 2007), available at http://uk.reuters.com/article/oilRpt/idUKKAR4380932007/1008 (accessed July 17, 2008).

[37] See President Bush Delivers State of the Union Address (Jan. 28, 2008), available at www.whitehouse.gov/news/releases/2008/01/20080128–13 html (accessed July 17, 2008).

[38] See Richard A. Oppel, Kurds reach new oil deals, straining ties With Baghdad, New York Times (Oct. 4, 2007), available at www.nytimes.com/2007/10/04/world/middleeast/04kurds html (accessed July 17, 2008).

[39] See KRG and Korea National Oil Corporation Sign New Petroleum Contracts (June 25, 2008), available at www.krg.org/articles/detail.asp?rnr=223&lngnr=128&smap=02010100&anr=24663 (accessed July 17, 2008).

there certainly seems some reason to believe that current practice reflects at least a felt need to ensure that revenues from Iraq's oil and gas resources are spread throughout the country.

IX. CONCLUSION

The benefit of a federal revenue-sharing law is that it provides detail to the general matter of revenue distribution. There is no question that the existing law is replete with ambiguities and gaps. Nonetheless, in the absence of any such law, despite its shortcomings, one would be forced to rely on the basic terms of the Iraqi Constitution to establish a legal obligation relative to revenue distribution, whether at the federal or subcentral level. The terms of the Constitution would also have to be looked to for all relevant rules and standards concerning the collection of revenues to be distributed, and concerning the measure of any distribution to be made. The constitutional principles touching on these matters are clearest only with respect to the federal government's obligation to distribute revenues in its possession. Short of being able to rely on constitutional principles that in many cases are terribly general and broad, resort would have to be had to soft-law indications of a distribution obligation. These nonconstitutional sources of law are even less satisfactory, in that they depend on inferences of obligation drawn either from legislative enactments of subcentral governments or current practice at the federal or subcentral level regarding revenue distribution. As for the proposed constitutional amendments put forward by the CRC, they prove interesting and helpful in many areas, but not any more substantial with respect to the various issues associated with revenue distribution.

10 CHANGING THE MIX: TRANSITION FAILS AND THE FACE OF IRAQ IS ALTERED

I. INTRODUCTION

It has never been the objective of this study to focus upon, illuminate, and untangle the political aspects of the controversies surrounding the various components of Iraqi oil and gas law. Instead, the effort has been concentrated on providing insight about the purely legal dimension of the measures, both domestic and international, that make up that body of law. To be sure, the political scientist or expert in international relations might look askance at such an effort, lamenting that a narrow and technical focus of that sort not only ignores the realities that drive the development of law itself, but proves mundane, obtuse, and soporific when compared to an exploration of the social, religious, ethnic, and economic domestic forces within Iraq that shape debate and positions regarding oil and gas law, or the great-power posturing and need for energy that motivates actors on the international stage to advance the positions they do.

Such presumed criticisms are not without merit. There can be no doubt that a complete understanding of any legal issue requires a modicum of sensitivity to the political context in which it is set. Nonetheless, to the extent that such criticisms are advanced by those insistent either that law counts for less than one might think or, worse, that it obscures and frustrates the only valid, authentic, and genuine compulsions that should be freely permitted to shape the structure of societies both nationally and internationally, it bears reiterating that people around the globe constantly profess admiration for the rule of law, and those charged with administering the law must be fully attentive to all the hypertechnical and nuanced aspects of the various legal principles with which they are entrusted. In the context of Iraqi oil and gas law, this translates into a need for complete familiarity with the legal sources that make up that body of law and an understanding of the kinds of microdetails about it that either launch the strict social scientist into a tirade or induce a sense of languorous disconnection.

This said, of the various issues and controversies that have complicated the ability of Iraqis to neatly tie up all the aspects of its developing oil and gas

legal regime, there are five in particular that warrant mention. First is the ongoing tug-of-war between the federal government in Baghdad and the regional government of Kurdistan over their respective roles with regard to oil and gas resources,[1] the former desirous of centralization, and the latter of as great a role as possible for regional governmental units. Second is the fact that the so-called Dubai Annexes to accompany the February 2007 Iraqi federal oil and gas framework law categorize Iraq's oil and gas resources in such a way as to result in the Iraq National Oil Company (INOC) and the Ministry of Oil controlling the overwhelming preponderance. Third would be the distinction drawn in the Iraqi Constitution and picked up on in the Kurdistan Regional Government (KRG)'s 2007 Oil and Gas Law (though not the federal oil and gas framework law), between present and future oil and gas fields. Fourth is the sharing of revenues, particularly those collected as a consequence of authorized oil and gas activity, whether carried out by foreign entities and partners, or the units of the host government. And fifth, the acceptability of using the production-sharing contract (PSC) to induce foreign entities to assist in the development of the nation's oil and gas resources, especially given that such form of contract creates extensive resource-related rights in holders of such, rather than relegating them to the more subservient position associated with some variant of a service contract.

Deep differences of opinion between the federal government and regional authorities, and even within the circles of knowledgeable individuals comprising both of these two governmental units themselves, bedevil the Iraqis to this day. In conjunction with the overlay of complications emerging from the historic ethnic, religious, and sectarian divisions within the country, the difficulty of foreseeing the successful conclusion of the valiant efforts that have been made over the course of the past several years to structure a comprehensive and widely acceptable legal regime for Iraqi oil and gas that is likely to endure becomes more than apparent. In view of this, it seems fitting that in this last substantive chapter of this study, we should reflect on the nature of the legal regime (or regimes) that could arise in the event of the failure of the current effort to put in place a framework law on oil and gas, a revenue-sharing law, a law reconstituting INOC, and a law reorganizing the Iraqi Ministry of Oil.

There are at least a couple of ways in which such a failure could come about. To begin with, it is not inconceivable that the four measures at the federal level designed to flesh out the oil and gas legal regime may prove unacceptable to those in the federal legislature and, as a complete package, or piecemeal, may fail to come to a vote or, if they do, fail to receive the necessary support to embed them as permanent fixtures in Iraqi law. In such an event, given that

[1] On the fact of this tug-of-war spreading so the Shiite-dominated southern provinces are now proving assertive against Baghdad, see Resource nationalism rises in Iraq, Iraq Updates (Oct. 16, 2008), www.iraqupdates.com/p_articles.php/article/30859 (accessed Oct. 17, 2008) (tide of separatism from central government rising in south).

the KRG already has an oil and gas law in place and has been operating pursuant thereto, a bifurcated system could develop. This could mean the Kurds operating on the basis of an express legal regime as articulated in their 2007 Oil and Gas Law and its associated model PSC, with the federal government limping along throughout the rest of Iraq on the basis of either independent application of its legislatively unacceptable regime or, in order to avoid especially vocal objection, something that comes up just short of the most extensive powers envisioned under that regime, in either case citing preexisting Saddam-era laws and practices as legitimating its actions. Another not inconceivable situation might involve a complete failure of the federal structure, possibly as a consequence of irreconcilable enmity between rival groups spilling over in the post-U.S. occupation period and resulting in a "balkanization" of the country – the Kurdish north going its own way, with the limited Sunni center and much larger Shiite south either attempting to make a go of it as a separate unit, or splitting apart into two additional separate political units. In such a case, if the predominantly Sunni and Shiite portions of the country have the good fortune to overcome their rivalry and temper their hostility toward each other, they might be able to remain together, setting the stage for renewed efforts to adopt the extant four measures representing the oil and gas legal regime. However, in the event they, too, like the Kurds, decide to go their separate ways, international oil companies interested in what had formerly been the oil and gas resources of the one country of Iraq may very well have to contend with three distinct legal regimes, each interested in exploiting individual resource deposits situated in its own new international territorial units. It certainly is possible that resentment associated with the splitting of the country, cross-boundary attacks, and attacks resulting from nonruling ethnic and sectarian populations residing in each of the political units could complicate the ability and desire of international oil and gas companies to engage in aggressive exploration and development activities.

Other situations regarding the future configuration of Iraq are conceivable, but not quite as likely. For instance, an eventual draw-down in U.S. and coalition forces could leave a power vacuum that is filled by terrorists, with the country becoming a failed state and a haven for the likes of bin-Laden and other jihadists. No matter the political rhetoric preceding the 2008 presidential elections in the United States, any new administration sufficiently understands the threat of international terrorism that they will not be inclined to allow this to happen. Further, the Awakening movement among Sunnis in the past 2 years suggests a turning of at least one corner in the battle against al-Qaeda in Iraq.[2] It is also not inconceivable that certain elements within the federal government in Baghdad might be interested in attempting to subjugate recalcitrant Kurds

[2] See Alissa J. Rubin & Stephen Farrell, Awakening councils by region, New York Times (Dec. 22, 2007), available at www.nytimes.com/2007/12/22/world/middleeast/23awake-graphic html (accessed Sept. 2, 2008).

through the use of military force, concentrating all power in Baghdad itself. Certainly the events of late August 2008 in the central Iraqi town of Khanaqin suggest that elements within the Iraqi military are actively hostile toward the Kurds and their peshmerga military units.[3] There remains reason to believe, however, that the principal actors within the federal government – some of whom are themselves Kurdish – are committed to the idea of a unified and federal Iraqi state, with regional governments entitled to respect and a degree of constitutional autonomy. But even though neither of the latter two dire scenarios is very likely to play out, the more likely possibilities that Iraq's federal structure will remain intact, but with the Kurds going their own way under their own oil and gas legal regime while the federal government goes its own way, or that the country splits into separate units, each under independent governing structures, present important challenges. With respect to the first possibility (a possibility not dramatically different from that which currently exists), there would remain the question of the sharing of revenues, especially from oil and gas. Language appears in both the Iraqi Constitution and the KRG's 2007 Oil and Gas Law that speaks to the sharing of revenues. Would the entreaties of those provisions be ignored, or would the parties – both of whom would presumably continue to be bound by the *national* Constitution – feel themselves obliged to implement the provisions? With respect to the possibility of Iraq splitting into two or more separate international territorial units, there would likely be no question about the sharing of revenues, but there may very well be questions concerning the development of new constitutional documents and revised oil and gas legislation. What exists presently contemplates an Iraq comprised of Kurdish, Sunni, and Shiite sections of the country, all coexisting in a state of détente. If each goes its own way, foundational legal instruments would have to be drawn up or revised, where needed.

In the pages that follow, an attempt will be made to explore some of the possibilities for an oil and gas legal regime in each of the two situations that are more likely to arise if current efforts fail to establish such a regime at the national or federal level. Over the course of the past year or so, demonstrable progress appears to have been made in bringing military stability to Iraq. But the fact that genuine and lasting reconciliation between rival factions on the political level remains elusive suggests that an eventual collapse of the current governing superstructure in the country, with either a consequent rearranging of the distribution of constitutional power or, more drastically, a complete and radical redrawing of political boundaries, is far from unimaginable. Only those of ineffable political prescience or vested with the ability to see around all the corners that obscure vision of the long-range political future can know the eventual

[3] See Kurds warn of "violent reaction" if Iraqi Army enter their areas, Iraq Updates (Aug. 26, 2008), available at www.iraqupdates.com/p_articles.php/article/35667 (accessed Sept. 3, 2008).

outcome. It may be that, as some suggested early on in the Iraq conflict, the country would be better off partitioned into three separate international political units. And although in the end this may come to pass, there seems reason to believe, and hope, that the most dramatic alteration in its structure will be one in which the central government in Baghdad accedes to the notion of the KRG exercising extensive authority over its territory and its oil and gas resources, revenues being shared with the rest of Iraq, with the central government exercising authority over the territory and resources in the balance of the country, revenues being shared with the KRG. In other words, of all the possible situations likely to develop, the most probable is akin to what presently exists – the Kurds remaining within a federal structure, but wielding authority over natural resources situated within Kurdistan; and the federal government, though unable to get the Kurds to submit to thorough-going federal oil and gas legislation, receiving a pass from the KRG to apply such in its own way throughout the rest of Iraq.

II. KRG AND CENTRAL GOVERNMENT APPLY THEIR OWN APPROACHES

Of the two scenarios most likely to occur, the most plausible appears to be the one in which current efforts to seek support for the entire package of legislation comprising the federal government's oil and gas legal regime become paralyzed, causing the Kurds and the central government to apply their own respective legal regimes to oil and gas resources situated within territory they control, yet not formally separating from each other, or disputing the application of a shared Constitution. The sheer messiness, drama, and prospects for hostility associated with the second scenario, involving a more formal splitting of the country into two or more independent international political units, each with its own formally adopted constitutional provisions and laws regulating oil and gas development activity, all seem to militate against its probability. With that in mind, it may prove useful to explore the particulars of the respective oil and gas legal regimes accompanying the first of the two scenarios, taking up the regimes accompanying the second in the subsequent section of this final chapter.

Preliminarily, what can be stated with absolute certainty are the terms of both the KRG's 2007 Oil and Gas Law and Baghdad's February 15, 2007, federal oil and gas framework law, as well as the terms of the most recent version of the KRG's model PSC made available in July of 2008. The former two pieces of legislation were reviewed at great length in Chapter 3 of this study, and the model PSC in Chapter 4. A definitive description of what the central government contemplates as the terms of its model forms of contract – service contract, field development and production contract, or risk exploration contract, to use the language of the framework law, and whether termed TSC (technical service

contract), Eng.&PC (engineering, procurement, and construction contract), DPC (development and production contract), or something else, such as EDC (exploration and development contract) or FDC (field development contract) – cannot be offered because, although the Oil Ministry has provided insight into these through commentary by high-ranking officials, relevant model contracts formally and *officially* offered by the federal government have not been publicly disseminated as of this writing. From all of these various sources of information, it is possible to piece together the basic contours of the two oil and gas legal regimes most likely to emerge in the event Iraq stays united as a single nation, governed by a single Constitution, but with the KRG regulating oil and gas development within the parameters of its region, and Baghdad regulating these in the balance of Iraqi territory. In the context of describing those contours, it must be kept in mind that the entirety of oil and gas development regulation consists not just of the basic legislative measures governing oil and gas activity, but also of its related measures governing what is to be done with the revenues that are produced from such activity, and the assignment to internal government agencies of authority to regulate, oversee, and participate in oil and gas activity. Just regarding the latter, that is the objective of the federal government's measures reconstituting INOC and reorganizing the Ministry of Oil. Any complete picture of what might emerge by way of an oil and gas legal regime in the event Iraq stays together under one Constitution, but the KRG and the central government each operating independently regarding oil and gas deposits over which they have territorial jurisdiction, not only must take into account the respective basic oil and gas laws, but it must also consider the matters of revenue-sharing and agency authority in the oil and gas sector.

Kurdistan Regional Government

Beginning first with the KRG, it can be said without the slightest hesitancy that the authority provided in its Oil and Gas Law to enter into PSCs with international oil companies for the exploitation of the hydrocarbon riches in Kurdistan has been and is very likely to continue to be exercised, even in the event that the Kurdish region, remaining inside the larger structure of Iraq, becomes estranged from the political and legal structure of the rest of the nation. As well as can be determined, the Kurds are perfectly prepared to use the PSC or the other forms of development and production contracts described by their Law as "other contracts which the Minister [of Natural Resources] considers provides good and timely returns."[4] In fact, the Kurds' use of such over the past many months has caused great irritation to the central government and heated exchanges between the two. But aside from PSC and other forms of development and production contracts, the Kurds' Law also permits the granting of so-called

[4] See supra Chapter 3, note 158.

prospecting authorizations and access authorizations – the former having to do with geological and other technical work involved in seeking out oil and gas,[5] and the latter having to do with construction, installation, and other work at a petroleum operations site.[6] It is not probable that the use of such would change with an increase in Kurdish autonomy, and it is also not probable that the KRG would, on the other end of the spectrum, move in the direction of finding some modern variant of the traditional concession agreement acceptable. The same hesitancy that afflicts the central government's political constituencies with respect to the PSC surely haunts the halls of the Ministry of Natural Resources, the parliament, and the Prime Minister's office in Erbil. What all Iraqis consider a less than satisfactory experience spanning from the 1925 Turkish Petroleum Company (TPC) concession to the nationalization of foreign oil companies in the 1960s and 1970s has left most skeptical of surrendering too much authority over development rights and oil and gas actually produced. Even the Kurds, who have embraced the PSC, seem unlikely to express any sense of attraction for a concession agreement.

The really difficult problems with respect to Kurdish administration of their own oil and gas legal regime are likely to revolve around squaring their inclination to subject all hydrocarbons within the territorial confines of the KRG to plenary Kurdish control, when the terms of the Iraqi Constitution clearly provide for something far less. It should be recalled on this matter that article 111 of the Constitution provides that the nation's "oil and gas are owned by all the people of Iraq in all the regions and governorates."[7] And article 112, First, provides that the "federal government, with the producing governorates and regional governments, shall undertake the management of oil and gas extracted from present fields," whereas article 112, Second, states that federal and subcentral authorities "shall together formulate the necessary strategic policies to develop the oil and gas wealth [of Iraq]."[8] Then there is the further problem of the sharing of revenues. On that, it must be remembered that the Constitution's article 112, First, conditions the federal government's role in collaborative management of oil and gas extracted from present fields on federal authorities fairly and appropriately sharing the revenues they collect, including those from oil and gas activities. The implication is that, by constitutional directive, revenues must be shared. Yet if the KRG and the central government are to wind up in a situation in which they both act somewhat autonomously on oil and gas deposits within their respective territorial purview, how is that constitutional directive to be fulfilled? And finally there is the problem of the distribution of regulatory authority within the agencies of the KRG with respect to oil and gas development activity. There is no question that the KRG's 2007 Oil and

[5] See supra Chapter 3, notes 149–157.
[6] See supra Chapter 3, notes 163–164.
[7] See text accompanying supra Chapter 8, note 20.
[8] See text accompanying supra Chapter 8, notes 31–32.

Gas Law calls for the establishment of the Kurdish Exploration and Production Company (KEPCO), the Kurdish National Oil Company (KNOC), the Kurdish Oil Marketing Organization (KOMO), and the Kurdish Organization for Downstream Operations (KODO) and provides a basic description of what they are expected to do. By way of contrast, the federal authorities in Baghdad long contemplated the promulgation of legislative measures supplementing both the basic oil and gas framework law and the revenue-sharing law that would reconstitute INOC and reorganize the Ministry of Oil. The reconstitution and reorganization measures were sketched in articles 6 and 7 of the central government's February 15, 2007, oil and gas framework law, providing advance insight into a detailed distribution of regulatory authority over oil and gas activity within Iraq. The absence of anything comparable when it comes to the KRG might present difficult issues were the Kurds and Baghdad to suffer an estrangement that separated them, but left the nation intact.

Approaching each of these three matters in some detail, clearly articles 111, 112, First, and 112, Second, of the Iraqi Constitution, in speaking to authority over oil and gas, indicate that no single region or governorate within Iraq is entitled to assert absolute, total, and thoroughgoing control over all oil and gas fields, with respect to every conceivable matter. The nation's oil and gas is owned by all Iraqis, throughout the whole country, and in many respects collaboration between the federal government and the governorates and regional governments is constitutionally required. If the subcentral political units within Iraq can, in part, base their right to assert a degree of authority over oil and gas on article 111's indication that oil and gas belong to "all the people . . . in all the regions and governorates," then surely any governmental unit – like that at the federal or central level – which purports to represent Iraqis who find themselves outside a particular resource-blessed governorate or region legitimately can base any claim of authority it voices on the same sort of language. The language of article 112's two provisions further buttresses the notion of shared, instead of exclusive power. When it comes to the management of oil and gas extracted from fields considered "present," or when it comes to the formulation of strategic policies for developing the nation's oil and gas resources, neither the governorates and regional governments nor the federal authorities in Baghdad are vested with any exclusive constitutional power.

With respect to the second matter, that of revenue-sharing, the language of article 112, First, of the Iraqi Constitution leaves little doubt that the "federal" government must share the revenues it collects. Similarly, article 121, Third, of the Constitution takes the same approach with its language that "regions and governorates shall be allocated an equitable share of the national revenues."[9] As was discussed at length in Sections V and VIII of Chapter 9, while the Constitution seems to leave no room for debate about the need for the federal

[9] See text accompanying supra Chapter 9, note 10.

government to share the revenues it collects, the matter is less clear when it comes to whether, in the absence of a federal revenue-sharing law, regions and governorates – all subcentral governmental units – must share with others the revenues that they happen to generate. In that context, however, as long as the KRG consents to remain subject to the provisions of the Iraqi Constitution, there are several specific provisions that would appear to support the argument that subcentral units have a constitutional obligation to share their revenues with others; articles 1, 3, 14, 27, 30, and 34 in particular should be recalled here.[10] As Chapter 9 also notes, apart from the terms of the Iraqi Constitution itself, both legislative enactments and current practice of the KRG suggest at least recognition of a soft-law obligation to share with all other Iraqis revenues that it collects,[11] an obligation that would be applicable in the case of a growing estrangement between federal and regional authorities.

As for the matter of assignment between agencies within the KRG of regulatory power over Kurdistan-based oil and gas activities, issues could arise in the event that the package of federal oil and gas legislation designed to establish a new legal regime encounters resistance, and Baghdad and the KRG come to a parting of the ways. Although far from completely silent on the issue, the KRG's 2007 Oil and Gas Law comes up short of offering a comprehensive set of rules and standards that speak to all the questions that might arise regarding distribution of regulatory authority and jurisdictional turf squabbles among KEPCO, KNOC, KOMO, and KODO. As briefly sketched earlier in Chapter 3 of this study, articles 10–14 of the KRG's Law creates each of these entities and assigns them particular authorities with respect to petroleum operations.[12] Article 10, Fourth, indicates that KEPCO's authority extends to future fields (i.e., those not producing at 5,000 bpd prior to August 15, 2005), at least in being able to "compete" for exploration, development, production, or access authorizations, entering into "joint ventures," and "creating operating subsidiaries for Petroleum Operations in respect of" such fields.[13] Article 11, Fourth, provides essentially the same concerning KNOC and current fields (i.e., those producing at 5,000 bpd prior to August 15, 2005), with the sole difference of providing nothing about "creating operating subsidiaries," instead substituting for that the power to, "on a case by case basis, compete to obtain Authorizations regarding Future Fields."[14] As for KOMO, article 12, Fourth, permits it to, "with the agreement of a Contractor to a Production Sharing Contract," market the contractor's share of petroleum, and the additional power to "market or regulate the marketing of the production of Petroleum Operations."[15] KODO's authority

[10] See text accompanying supra Chapter 9, Sec. V.
[11] See text accompanying supra Chapter 9, Sec. VIII.
[12] See text accompanying supra Chapter 3, notes 140–150.
[13] See KRG Oil and Gas Law, supra Chapter 3, note 121 at. art. 10, Fourth.
[14] See id. at art. 11, Fourth.
[15] See id. at art. 12, Fourth.

pursuant to article 13, Fourth, extends to managing regional government-owned "infrastructures related to Petroleum Operations," competing with other companies for authorizations, creating operating subsidiaries and joint ventures for specific petroleum operations, and teaming up with international oil companies or local private parties for new downstream petroleum operations.[16] No matter the entity concerned or power to be exercised, however, it must be remembered that article 6 of the KRG's Law provides the Ministry of Natural Resources with the authority to "oversee and regulate Petroleum Operations,"[17] and article 14 follows this up with the declaration that the Ministry can regulate KEPCO, KNOC, KOMO, and KODO.[18]

Central Government

Shifting away from the implications for the KRG of an estrangement from the federal government born out of both a failure of Baghdad to secure satisfactory political acceptance of its key pieces of oil and gas legislation, and a conscious decision by the KRG to continue contracting under its 2007 Law while the central government continues doing the same in the context of its own parallel legislation, what can be said about the implications of all of this for the federal oil and gas legal regime in the balance of Iraq? In other words, if the federal oil and gas legal regime is unable to garner sufficient support to bring it into force, yet Iraq, while remaining together as a single unit, witnesses the KRG and the central government moving in their own distinctly separate directions, what form is the federal government's oil and gas law likely to take? In offering some informed commentary on that question, it might be useful to consider the same three matters referenced in connection with the KRG: the Iraqi Constitution; the sharing of oil, gas, and other revenues; and the distribution of authority among central government agencies to deal with oil and gas activities.

With respect to the Iraqi Constitution, its articles 111, 112, First, and 112, Second, might leave no debate about individual regions or governorates lacking constitutional power to claim exclusive authority over oil and gas situated within their territorial jurisdiction. These provisions plainly contemplate a collective ownership in which all Iraqis hold a share in such resources. But this does not necessarily translate into the central government being able to say that, if the KRG and Baghdad had a falling out, the resources in Kurdistan would come under exclusive federal control, as would those throughout the balance of Iraq. Clearly, the constitutional provisions referenced contemplate not exclusive federal, but rather shared, control over the management of oil and gas extracted from present fields; and not exclusive federal, but rather shared, formulation of strategic policy regarding oil and gas development. In both instances, the federal

[16] See id. at art. 13, Fourth.
[17] See id. at art. 6.
[18] See id. at art. 14.

government's power is to be shared with "the regional governments and producing governorates." And the fact that no more than the Kurdish peoples may have formed themselves into regional governments does not permit the constitutional directives to be sidestepped, for the Constitution speaks of all "producing governorates" within Iraq having an opportunity to provide input regarding both oil and gas management and strategic policy for the development of such. Under no circumstance would it seem constitutionally permissible for the federal government to invoke estrangement from the KRG as a basis for asserting exclusive authority over all oil and gas situated in that region, or for making a comparable claim to exclusivity throughout the rest of Iraq. As long as the Constitution remains in place, its terms cannot be ignored.

As for the matter of revenue sharing, articles 112, First, and 121, Third, of the Iraqi Constitution are important, as seen previously, for obligating the federal government to share its revenues with the subcentral governmental units. Thus, just as any estrangement between federal government authorities and those in the KRG cannot free the former from its obligations to share both the management of oil and gas extracted from present fields and the formulation of strategic policies for developing the nation's oil and gas wealth, neither can it free them from having to distribute the revenues it collects. The language of articles 112, First, and 121, Third, is unequivocal, and as long as the provisions of the Constitution remain in place, the obligation they establish continues to bind. There is an essential appropriateness in this, given that, as mentioned earlier, the federal government and the KRG going their own ways does not free the latter from its duty to share the revenues that it collects from oil and gas activities within the limits of its own region.

On the distribution of authority among the central government agencies, the failure of Baghdad to secure acceptance of its oil and gas legal regime, with a consequent application by the central government and the KRG of their own approaches, could produce an interesting configuration of legal rules at the federal level. Two parts of the overall legal regime envisioned by the central government are evidenced in the measure to reconstitute INOC and the companion measure to reorganize the Iraqi Ministry of Oil. Were neither to be embraced as permanent parts of the Iraqi oil and gas legal regime, then all that would remain regarding the distribution of authority to deal with oil and gas activities would be the terms of the central government's February 15, 2007, oil and gas framework law and whatever relevant language happens to exist in the Iraqi Constitution.

Concerning the framework law, articles 6 and 7 speak to reconstituting INOC and reorganizing the Oil Ministry, but in language that, although instructive, is strikingly similar to the general language seen in the KRG's Oil and Gas Law about KEPCO, KNOC, KOMO, and KODO – that is, language deficient in the specifics of power distribution and jurisdictional turf squabbles. Article 6 simply provides that INOC has management and operational authority over

fields in the framework law's Annex 1 (i.e., producing fields); the right to participate in development and production in Annex 2 fields (i.e., discovered, but not producing fields); the right to compete with others for exploration and production opportunities in Annex 3 fields; and ownership, management, and operational authority (at least for a few years, until the Federal Oil and Gas Council (FOGC) decides upon an assignment of responsibility) over the main pipelines and ports of export.[19] Article 7 opens with the sweeping declaration that the Ministry must "create important institutional and methodology changes to reflect its new responsibilities and duties."[20] Yet in providing for such responsibilities and duties, the only references are extremely broad and speak of the establishment of a department in charge of "planning, developing, and following up [on] the process of obtaining rights" and the fact that any proposed law reorganizing the Ministry must include provisions that "guarantee[] a full separation" between production and service companies and the regulators, monitors, and supervisors who oversee them.[21] As for the Iraqi Constitution, it quite remarkably fails to provide even passing reference to either the Ministry of Oil or INOC, let alone to specify in detail their powers and jurisdictional turf. In fact, although it mentions the Ministry of Defense and the National Intelligence Service,[22] as well as a couple of independent commissions – the High Commission for Human Rights, the Electoral Commission, the Communication and Media Commission, and the Endowment Commission[23] – it is completely silent in even naming the other ministries that make up the government.[24] From such generality it is impossible to draw inferences regarding the assignment within the central government of authority over oil and gas activities.

III. THE COUNTRY SPLITS APART

The other situation likely to occur, though perhaps less likely than that just examined, would involve a failure of the central government to secure implementation of its oil and gas legal regime, continuing suspicion and enmity between rival ethnic and sectarian factions, a draw-down of American military and security forces, uncontrollable resurgence of Iraqi violence, and eventual disaffection between the KRG and the central government with the latter leaving the union. It is understandable that such a situation would be intolerable to Baghdad and completely unacceptable to Iraq's northern neighbor, Turkey, given the complications it would create within Turkey's own Kurdish minority population. Were it to come about, however, there would then exist at least two completely

[19] See February 2007 draft, supra Chapter 3, note 8 at art. 6.
[20] See February 2007 draft, supra Chapter 3, note 8 at art. 7.
[21] See id.
[22] See Iraqi Constitution, supra Chapter 2, note 28 art. 9.
[23] See id. at art. 102–103.
[24] See id. at art. 76 (discussing the Council of Ministers).

separate political entities where there had previously been only one. And in the event that the remaining Sunni and Shiite populations forming the overwhelming majority of the remainder of Iraq's inhabitants found themselves unable to live together in relative harmony and security, there could eventually be three separate international political units, each with its own constitution and set of laws.

Kurdistan as a Separate Nation-State

With this possibility as an analytical starting point, what would this mean by way of a KRG oil and gas legal regime? The short answer to that query seems much like the answer provided to the more likely situation of Iraq staying together as a single unit, but with the Kurds and the central government going their own ways on many matters, including that involving oil and gas activities. In other words, the KRG's 2007 Oil and Gas Law, and its model PSC issued pursuant thereto, would continue to be administered as at present. There seems no reason to anticipate some radical change in the way the Kurds view oil and gas activities in Kurdistan, simply because of splitting from Baghdad and establishing their own separate nation-state. Obviously, though, the fact of complete independence from the rest of Iraq and, consequently, independence from the potential application of a set of legal rules at variance with the terms of Kurdish law could significantly clarify the situation for international oil companies, perhaps inducing more majors to look seriously at opportunities in Kurdistan. The principal unknown in the equation would not be the potential application of conflicting legal regimes (i.e., that of the federal government and the KRG), but rather the threat of border instability, given the likelihood of residual anger from Baghdad over the KRG's political break from union, and apprehension from Turkey about the implications of an independent and full-fledged Kurdish state to its south.

A separately established Kurdish state would eliminate the application of any Iraqi constitutional rules related to sharing in the management and development planning of oil and gas activities; it would even eliminate constitutional arguments about the sharing of financial resources earned from oil and gas. Those rules, and others, proceed from what the terms of articles 112, First, 112, Second, and 121 of the Iraqi Constitution declare. If the KRG is unwilling to continue giving its assent to that foundational instrument of the Iraqi state, the provisions contained therein would have absolutely no applicability. It would be correct to say that the language of the KRG's Oil and Gas Law would remain in place. Thus, what that Law provides regarding control over oil and gas activities within Kurdistan, the sharing of revenues, and the distribution within KRG governmental circles of authority to deal with oil and gas matters would remain important. Also, it should be noted that the KRG has moved forward, in accordance with article 120 of the existing Iraqi Constitution, with drafting its

own regional constitution. As of this writing, however, no such document has been enacted by the appropriate parties.[25]

As for the first matter, that of control over oil and gas activities within Kurdistan, it is one thing to speculate about the consequences for oil and gas law of the KRG and the central government being estranged from each other, but remaining together as a single nation, and something entirely different to think about that same matter from the perspective of complete political separation, with the Iraq dissolving as a single unit. In the former situation, provisions of the Iraqi Constitution such as articles 112 and 121 would remain relevant. In the latter, those same provisions would be rendered nugatory, and importance would be placed exclusively on the provisions of the KRG's Oil and Gas Law. Most pertinent in this respect would be that Law's articles 18, 19, and 20. The essence of these three provisions is to acknowledge the requirement established by articles 112 and 121 of the Iraqi Constitution that regional and federal authorities cooperate regarding authority over oil and gas management, the formulation of strategic development policies, and the sharing of revenues, but indicate that the Kurds are prepared to act on oil and gas within Kurdistan unless the federal government demonstrates the willingness to come to an accommodation with the KRG on several identified and very particular matters.[26] Those matters are listed in article 19 of the KRG's Law as being: (1) establishment of an independent and secure "general petroleum revenue fund . . . receiv[ing] all of Iraq's petroleum revenue"; (2) a "restructur[ing] in all of Iraq" of the petroleum industry so as to "encourage private investment"; (3) "joint manage[ment] [of] Current Fields" with the KRG having a "proportional role on the Federal Oil and Gas Council" and "partner[ship] in the management of the Iraq National Oil Company"; and (4) restraint by the federal government in new petroleum operations in disputed territories (such as Kirkuk) without prior "approval of the Regional Government."[27] As article 20 of the KRG's Law articulates it, until all the article 19 matters are addressed, the KRG "shall proceed with its rights on the basis of Article 112, 115, and 121 (3) of the Federal Constitution."[28] The implication seems plain: if Iraq implodes and the federal Constitution collapses, the Kurds reserve, by virtue of their own Oil and Gas Law, the right to proceed without regard to Baghdad. And given that no one would expect one country to be able to claim a right to interfere in the internal domestic decisions of another, there seems nothing unusual in thinking of the Kurds as having complete autonomy over what to do with oil and gas

[25] On recent statements from high-ranking KRG political officials regarding the KRG Constitution still being in only draft form, see Full Text of President Barzani's Speech in Kirkuk (Aug. 16, 2008), available at http://krp.org/articles/detail.asp?rnr=&lngnr=12&smap=&anr=20526 (accessed Sept. 18, 2008).

[26] See text accompanying supra Chapter 9, notes 32–35.

[27] See KRG Oil and Gas Law, supra Chapter 3, note 121 at art. 19.

[28] See id. at art. 20.

located within their borders if they were to separate from Baghdad and the rest of Iraq.

What about with respect to revenue sharing in particular? Should not precisely the same reasoning apply? In other words, would not a formal and complete political split between Kurdistan and the balance of Iraq make meaningless not only the provisions of the Iraqi Constitution that are suggestive of an obligation on the part of regions to share revenues, but the unequivocal expressions on revenue sharing contained in the KRG's 2007 Oil and Gas Law, and current practice on that front? After all, as just noted, the conditional and predicated cooperation and collaboration with Baghdad spoken of in articles 18 through 20 of the KRG's Law extends not just to management of oil and gas extracted from current fields and the formulation of strategic policies to developed oil and gas resources, but also to revenue-sharing itself. No doubt, with the union dissolved, reliance on the terms of the Constitution would be inconsequential. In terms of the KRG's Oil and Gas Law, it seems that dissolution would nullify any expectation of cooperation and collaboration between Kurdistan and Baghdad with regard to oil and gas revenues. As if to make that clear, article 15, Fifth, of the KRG's Law provides, as noted in Chapter 9 of this book, that until all the article 19 matters just listed are satisfied, oil and gas revenues collected by the KRG from activities in current fields or future fields "shall be part of the general revenue of the Region" and subject to monitoring by the Kurdistan parliament.[29] The matters in article 19 can never be satisfied in the event Iraq disintegrates into two or more independent states. The result would free the Kurds to use the revenues they collect as they alone see fit.

But what about the language of article 18, Fourth, of the KRG's 2007 Oil and Gas Law, which provides that the government of Kurdistan shall "agree that all the Revenues obtained by the Region from Petroleum Operations be deposited to a general petroleum revenue fund *for Iraq*."[30] Does not its clear indication that such revenues collected in Kurdistan are to be for Iraq, and not just the Kurdish region, signify that, even in the event of a failure of the union and the creation of wholly separate nation-states, the Kurds irrevocably and permanently commit themselves to sharing revenues with the rest of Iraq? There can be no doubt of the genuineness of the Kurds' commitment evidenced in the terms of article 18, Fourth. The problem, of course, is that to construe that language in the manner advanced not only is unreasonable in the event of a collapse of the central government and "balkanization" of the Iraqi state – for it is unlikely that the Kurds would still be prepared to share their resource revenues with others – but also fails to comport with the express terms of the Oil and Gas Law. Article 18, Fourth, speaks of KRG-collected revenues going to a petroleum revenue fund for Iraq. In the context of both articles 19 and 20 that follow it, however, there is no dispute whatsoever that that commitment is

[29] See text accompanying supra Chapter 9, note 32.
[30] See KRG Oil and Gas Law, supra Chapter 3, note 121 at art. 18, Fourth. Emphasis added.

predicated upon the federal authorities meeting the KRG's list of particulars elaborated at length in article 19. In the absence of each and every article 19 particular being satisfied – and that simply could not occur were the Kurds and Baghdad to split into autonomous nation-states – then no promise exists to set aside collected petroleum revenues for Iraq as a whole.

While those in the oil and gas industry are not likely to find the revenue-sharing consequences associated with a collapse of a single, national Iraqi government all that relevant, can the same be said with respect to the effects of such a collapse on the matter of legal control over oil and gas activity in Kurdistan? As indicated, the fact that a collapse results in two (or more) distinctly separate and wholly autonomous national political entities, one in the Kurdish north and another in Baghdad, would result in the inapplicability to Kurdistan of provisions of the Iraqi Constitution addressing oil and gas, leaving in place just the terms of the KRG's 2007 Oil and Gas Law, and then only to the extent of expurgation of any originally contemplated power of the federal government within Kurdistan. This is made clear by articles 18 through 20 of the Law. Thus, technically speaking, industry representatives would have to deal only with the appropriate ministries and instrumentalities of the KRG when interested in activities in the Kurdish north. In that regard, it is important to note that the KRG, unlike the central government, is perfectly prepared to utilize the PSC to accentuate industry interest in the oil and gas resources controlled by that region. That might prove especially attractive to representatives of the international oil and gas industry.

If one switches focus from the matters of KRG control over oil and gas activities within its borders, and revenue sharing with the central government, and centers on the jurisdictional issue of the assignment within the organs of the KRG of authority to deal with and regulate oil and gas activities, what would be the consequences for Kurdistan of Iraq becoming two or more nations? Is sufficient law already in place to make clear, as between KEPCO, KNOC, KOMO, and KODO, the Ministry of Natural Resources and others, who is in charge of what, and how disputes over turf are to be resolved? And how is the answer to this query likely to shape the oil and gas legal regime in a way to which the representatives of the oil and gas industry should be attentive?

As for what the law presently provides vis-à-vis the assignment of regulatory power within Kurdistan, it was observed in Section II of this chapter that the KRG's Oil and Gas Law is far from silent, but falls short of offering a detailed description of jurisdictional delimitations and standards for resolving controversies over turf.[31] Articles 10 through 13 of that Law establish KEPCO, KNOC, KOMO, and KODO, generally referencing their scope of authority, and articles 6 and 14 empower the Ministry of Natural Resources to oversee all petroleum operations and regulate the other agencies. Though this is useful and instructive, absent is any detailed and fully descriptive demarcation of jurisdictional

[31] See text accompanying supra notes 11–18.

authority and specification of what is to be done in the many areas where unavoidable overlapping assertions of authority are sure to arise. Similarly, no detail at all is provided about the creation of mechanisms and safeguards designed to prevent the kinds of interactions between the Ministry and those it regulates, or between KEPCO, KNOC, KOMO, and KODO themselves: interactions that could compromise independence and objectivity, and thereby lead to collusive activities not in the best interest of the Kurdish people. In short, the KRG's Oil and Gas Law is a respectable starting point for the development of subsequent legislative or regulatory measures that exhaustively address the whole range of conceivable issues that may come up in the context of overseeing oil and gas activities in Kurdistan's hydrocarbon fields. It should not, however, be viewed as the final word on the matter.

From the vantage of the oil and gas industry, although it is true that the loss of independence and objectivity by any of the various Kurdish regulatory bodies scrutinizing its activities could prove problematic on a variety of different fronts, the one of most practical, day-to-day significance probably has to do with potential overlapping authority between regulatory entities. Just imagine a company that has expended much time, money, and emotional energy on laying the groundwork for taking advantage of an oil and gas opportunity in Kurdistan now being confronted with claims from two or more governmental entities, each with seemingly opposed perspectives, and the activities in which the company will be engaged must meet with the approval of each. This could not only generate confusion and frustration on the part of industry representatives, coloring both their perception of the instant experience and affecting willingness to pursue prospects in the future; it could also have consequential financial implications for the bottom line. A succinct illustration of this point has to do with the language of articles 6, First, and 12, Fourth, of the KRG's 2007 Oil and Gas Law.

In regard to those provisions, it should be recalled that the Law basically applies to "Petroleum Operations," defined as including a variety of activities, from exploring for, developing and producing crude oil and natural gas, to pipelines for transporting, and the actual "marketing" of such.[32] Article 6, First, then provides the Ministry of Natural Resources with the authority to "oversee and regulate Petroleum Operations," necessarily meaning, inter alia, the marketing of the product of oil and gas activity. As if to make that perfectly explicit, it also states that "[t]he responsibilities of the Ministry include the formulation, regulation and monitoring of Petroleum Operations policies as well as the *regulation* . . . of all Petroleum Operations by all Persons and all activities relating thereto, *including the marketing of Petroleum*."[33] Half a dozen articles later, the same Oil and Gas Law provides in article 12, Fourth, that

[32] See KRG Oil and Gas Law, supra Chapter 3, note 121 at art. 1(18).
[33] See id. at art. 6, First.

KOMO (the Kurdistan Oil Marketing Organization) "may market or *regulate the marketing* of the production of Petroleum Operations."[34] Article 12, Second, establishes the independence of KOMO board members from the influence of the Ministry,[35] and article 14, Second, indicates clearly that it shall be KOMO, and not the Ministry, that "determines the manner in which its [(i.e., KOMO's)] functions are discharged."[36] Collectively, if these provisions do not create a conflict between powers of the Ministry and those of KOMO, they certainly give the distinct impression of creating one.

Other comparable sorts of conflicts exist with respect to the authorities allocated between all the KRG governmental actors with a stake in oil and gas activities in Kurdistan. Nonetheless, much appears to recommend the KRG's 2007 Oil and Gas Law. But imagine if a foreign oil company, already nervous about the fragility of the security situation in Kurdistan, and sensitive to the fact that its status as a foreign operator, in particular an operator of an industry linked to a natural resource on which the "apostate" West, as some would characterize it, is completely and thoroughly dependent, were to encounter claims by several Kurdish governmental entities, perhaps each with differing views on the activity to be executed, that each one's approval and continuing oversight are imperative. At some point, in the absence of legislative or regulatory clarity about who is entitled to control or supervise what, foreign participants are likely to express reluctance to pursuing potentially profitable ventures.

Separate State(s) in the Balance of Iraq

A formal and complete split between the Kurdish north and the balance of present-day Iraq could result either in the formation of another single nation-state, perhaps retaining Iraq as its name, or two states, one representing the largely Sunni middle of the country, and the other the largely Shiite southern portion. In the event of either situation developing, international oil companies would be interested in the likely oil and gas law consequences, in terms of each the three matters that have formed the basis of this chapter: legal control over oil and gas activities; the sharing of revenues resulting from such; and the distribution between governmental entities of authority to oversee and regulate oil and gas activities.

If only a single other state were to emerge from a separation with the Kurdish north, it is certainly quite possible that the terms of the Iraqi Constitution and the four measures talked of as comprising the oil and gas legal regime would be retained, with all the relevant, and, in most respects, previously discussed consequences of that for legal control over oil and gas activities, the sharing of revenues, and the distribution of power between interested governmental

[34] See id. at art. 12, Fourth.
[35] See id. at art. 12, Second.
[36] See id. at art. 14, Second.

entities. Indeed, even if separate Sunni and Shiite states were to emerge, it could well be that the Shiite state would prefer to retain the current Constitution and legal measures, given that Shiite political leaders were instrumental in their drafting and have shepherded them through the political labyrinth. Of course, this could lead to the nettlesome problem of creating a whole new body of law – from constitution to oil and gas legislation – in the Sunni-controlled state, a state likely to extend through much of the center of Iraq, and particularly the western portion of the country, where little oil exploration has been conducted but much of the nation's undiscovered reserves are thought to be located. Having to grapple with two separate legal regimes – one in the Kurdish north and another in the rest of Iraq – would be difficult enough. Three such regimes would serve to multiply the complications, particularly in light of the fact that any Sunni nation-state would have to undergo the long and tedious process of constructing a legal framework where none now exists.

The focus here, however, is not on the nature and magnitude of all those various complications, but rather on what they mean for the oil and gas legal regime and the industry representatives that would be concerned with such. One way to get at that would be by examining each of the three matters mentioned earlier and raised repeatedly in this chapter – legal control over oil and gas activities, sharing of revenues, and the distribution of power between interested government entities – in the context of that portion of Iraq not including Kurdistan either staying together as a single unit or splitting into two. With respect to the matter of legal control over oil and gas activities, were the balance of Iraq, after a separation from the Kurdish north, to remain together as a single Shiite/Sunni nation-state, the principal question would probably revolve around, not the terms of the Constitution, but those of the February 15, 2007, oil and gas framework law. There is no doubt that measure would be seen as applying within the territorial confines of such a new state. The fact of the Kurds going their own way could increase the political palatability of the measure by eliminating the objections voiced from Erbil. To be sure, though, even its full acceptance within the political circles of the new state – which is itself not a sure thing, given the deep-seated and long-standing enmity between Shiites and Sunnis and recent rumblings from influential leaders in southern Iraq – could still present difficult issues, not the least of which may be about the contractual relations that should be employed to help induce participation in the revitalization of Iraq's oil and gas industry by the widest range of the most capable foreign partners.

As suggested on occasion in this study, Iraq would surely like to attract extensive investments and commitments by the world's major oil and gas companies. To date, there has been intense interest, but a certain reluctance to witness a conversion of that interest into legal commitment, in light of the indefinite security and political situation. One device that might permit or facilitate the bridging of the gap between interest and actual commitment could be the offering

by Iraq's Ministry of Oil of longer-term contractual arrangements providing for greater producer rights in oil and gas actually lifted. This suggests that a central, critical issue that any new, unitary Iraqi Shiite/Sunni state freed from Kurdistan will have to meet head on is whether to construe the permission in article 9 of the February 15, 2007, oil and gas framework law as envisioning such in its reference to service contracts, field development and production contracts, and risk exploration contracts.[37] As indicated, the draft immediately preceding that framework law had provided for long-term PSCs.[38] It is not inconceivable that so-called field development and production contracts, most likely to be used in undeveloped fields where oil and gas are already known to exist, and surely so-called risk exploration contracts, most likely to be used in unexplored areas where it is not known whether oil and gas are even present, could take the form of long-term arrangements providing for producer rights in oil and gas lifted. The question is really one for the Iraqis who might find themselves without the full and aggressive assistance of the international majors, perhaps made more interested in opportunities in an independent and autonomous state of Kurdistan that readily embraces the long-term PSC. Should they confront those apprehensions that emerged out of the unsatisfactory experience with TPC and its successor the Iraq Petroleum Company (IPC)? Or should they give in to those apprehensions, and also use hydrocarbons and how to permit foreign entities to participate in exploiting them as convenient wedges to maintain ethnic divisions at the political level?

Even without a Shiite/Sunni state moving to ensconce the February 15, 2007, oil and gas framework law in the juridical structure of a new Iraq, the exact same question would present itself were the new state to simply proceed as is currently being done – on the basis of Saddam-era legal rules and practices. Though there have been questions about the extent to which those rules and practices resulted in the use of PSCs to attract foreign companies during the Saddam era,[39] recent statements by Oil Minister Shahristani and other officials associated with the Ministry seem to indicate recognition that such had been used on occasion. A good example, in this respect, is a 1997 contractual arrangement with the Chinese, a contract just recently reviewed by the Oil Ministry and revised as an operative service contract, instead of a PSC.[40] And then there is also the Iraqi Oil Ministry's publication of model PSCs in both 2001 and 2003.[41] These certainly suggest precedent for the use of long-term arrangements with accompanying

[37] See February 2007 draft, supra Chapter 3, note 8 at art. 9.
[38] See text accompanying supra Chapter 3, notes 11–12.
[39] See text accompanying supra Chapter 8, notes 43–45.
[40] See Campbell Robertson, Iraq seeks to revive oil deal with China reached under Saddam, International Herald Tribune (Aug. 21, 2008), available at www.iht.com/articles/2008/08/20/business/oil.php (accessed Sept. 11, 2008).
[41] For links accessing such, see CEPMLP Information Service: Barrows Alert (May 8, 2003), available at www.dundee.ac.uk/cepmlp/infoserv/Barrows_Alert.php (accessed Sept. 11, 2008).

rights in operators to oil and gas actually produced; and, even in the absence of the February 15, 2007, oil and gas framework law, indicate the existence of plausible legal authority for negotiating such arrangements.

These complexities would only be exponentially increased were Iraq to split into three, rather than just two separate international states. After all, what would be done in the Sunni state? Might it also invoke Saddam-era laws and practices, given that Saddam himself had headed a Sunni-controlled government? Might it also try to lay claim to the terms of the Iraqi Constitution and the package of oil and gas laws, in view of Sunni participation in the drafting of those? Or might it simply strike out on its own and create new parallel documents from whole cloth?

One can only speculate as to the answers to these questions. One thing is clear for international oil companies interested in Iraqi oil and gas, however: whether two states or three are in the future, any reliance on something as indeterminate and necessarily open-ended as Saddam-era rules and practices is not likely to address all concerns. By their very nature, since such rules and practices emerged from dictatorship, much must have been left to the subjective whim of the leader and his administrative cohorts, rather than being generated by rational decision making controlled by straightforward preexistent standards. Reliance on the terms of the Iraqi Constitution would be a significant improvement, but still problematic. After all, as already seen throughout this study, on the matter of legal control over oil and gas activities, many issues remain. Just reflect on the various ambiguities associated with articles 112, First, and 112, Second, of the Constitution, and that becomes apparent. Ideally, the best situation would be one in which any new nation-state(s) to arise out of what would remain of Iraq in the event of Kurdistan splitting off from the rest of the country enacted legislation along the lines of the current 2007 oil and gas framework law. To be sure, as Chapter 3 of this book points out, that measure is not completely free from interpretive difficulties and other problems. Nonetheless, it provides much detail regarding the matter of legal control over oil and gas activities that is understandably absent in the Iraqi Constitution.

As for the matter of revenue sharing and the legal rules relative to such, what would be the practical effect of a formal split by the Kurds leading to the formation of a single Shiite/Sunni state, or two separate states – one Shiite and the other Sunni? Practically speaking, it would be impossible to imagine revenues from oil and gas being shared between the new nation-states. Each would be understandably inclined to keep its own revenues, though in the event of a separate Sunni state in the largely unexplored areas of western Iraq, this could prove especially harsh for such a state until viable large-scale oil and gas activity moves forward. From the legal perspective, nothing appears in the terms of the Iraqi Constitution that would change this. Clearly, a single Shiite/Sunni state, governed by the terms of that document, however, would witness revenue

sharing under the mandatory directives of that instrument. Article 111 of the Constitution leaves no doubt about oil and gas belonging to all the Iraqi peoples in all the provinces and governorates, thereby implying that all Iraqis have a claim to the revenues from that oil and gas. Article 112, First, explicitly establishes an obligation on the part of the central government to share revenues with the subcentral units, with article 121, Third, following up by way of reemphasis. Thus, revenues from oil and gas activity would have to be shared throughout any unified Shiite/Sunni state. Were the governing structures of any such state to go beyond the terms of the Constitution and also implement the current federal revenue-sharing law, that obligation would be made all the more unequivocal and would be fleshed out with additional helpful detail.

This is not to say that a division of Iraq between Kurds and other groups would not present certain problems on the revenue-sharing front for the non-Kurdish portion(s) of present-day Iraq. Two in particular warrant brief reference. First, any separate, stand-alone Sunni state not incorporating the extant Iraqi Constitution (or, perhaps, even the terms of the federal revenue-sharing measure) into the corpus of its law could, in the event of adopting a federal system, face questions regarding whether the central government and its subcentral units would be obligated to share oil and gas revenues with each other through a single, national revenue fund. And second, irrespective of the whether the non-Kurdish portions of Iraq divide into one or two distinct and separate nation-states, simple incorporation of the revenue-sharing provisions of the Iraqi Constitution, or even the federal revenue-sharing law, does not leave all confusion eliminated and all questions answered. As seen in Chapters 5 and 9, many issues surround revenue sharing that remain to be resolved. Concentrating here only on the first of these two problems, whether revenue-sharing would be required in a stand-alone Sunni nation-state were it not to incorporate the terms of the extant Iraqi Constitution (or federal revenue-sharing law), it is clear that, from the perspective of international oil companies, the existence or nonexistence of revenue-sharing would be somewhat immaterial. Revenue-sharing could be relevant in ensuring the provision of necessary services and infrastructure throughout such a Sunni state. And to the extent that representatives of the oil and gas industry make use of or rely upon such services and infrastructure, they would have a modicum of interest in the revenues purchasing such being shared across the entire territory of that separate nation-state. Aside from this, however, the real question seems to concern whether a revenue-sharing obligation could be found to exist in the absence of some constitutional or legislative directive. Without evidence of at least some practice of revenue-sharing, the absence of any constitutional or legislative directive seems fatal.

Switching to the matter of distribution of oil and gas regulatory authority between the governmental entities interested in overseeing such, and away from that of revenue-sharing or general legal control over oil and gas activities,

what would be the consequence of developments leading to a separate state or states within the non-Kurdish portion of Iraq? In connection with a separate Kurdish nation-state, it was indicated that the KRG's 2007 Oil and Gas Law provided some modest direction and clarification on the matter of distribution of such regulatory authority. With respect to a separate Shiite/Sunni state, or two separate states, one Shiite and the other Sunni, any answer would depend on whether the terms of the current Iraqi Constitution, federal oil and gas framework law, or measures reconstituting INOC and reorganizing the Ministry of Oil were incorporated into the internal, domestic law of the respective state(s). The measures reconstituting INOC and reorganizing the Oil Ministry would provide any separate state or states incorporating them with a good degree of specificity and clarity. Particular jurisdictional powers of the respective entities are adequately delineated. The provisions of the oil and gas framework law, on the other hand, offer significantly less detail on the matter of distribution of regulatory power. As seen earlier,[42] article 6 of the framework law just provides for INOC's reconstitution and gives it management and operation authority over Annex 1 fields (i.e., developed and producing fields); the right to participate in development and production in Annex 2 fields (i.e., developed and nonproducing fields); and the right to compete for exploration and production rights in Annex 3 fields (i.e., discovered but undeveloped fields), as well as ownership, management, and operational authority over main pipelines and ports of export. Article 7 on the Ministry of Oil simply calls for it to establish a new department in charge of planning, developing, and follow-up on the process of obtaining petroleum operation rights, and emphasizes the need for separation between production and service companies and the regulators, monitors, and supervisors that oversee them.

Articles 6 and 7 of the framework law, though covering issues of importance, are extremely rudimentary and provide little detail in regard to potential jurisdictional controversies that might be of interest to international oil companies pursuing oil and gas activities in territories of what is now present-day Iraq. Thus, the incorporation of these into the body of law administered by either a unitary Shiite/Sunni state, or two entirely separate states – one Shiite and the other Sunni – would prove far from determinative on the large variety of jurisdictional disputes that could arise in the context of regulating extensive oil and gas activities. Clearly, much to be preferred would be the adoption of measures in the form of those designed to reconstitute INOC and reorganize the Ministry of Oil in the present federal Iraqi nation-state. Those who expect that assistance on jurisdictional matters might be provided through the incorporation of relevant terms of the Iraqi Constitution are sure to be sorely disappointed. Recounted earlier at length is the fact the Constitution does not even mention

[42] See text accompanying supra notes 18–26.

either INOC or the Ministry of Oil, despite its mention of a variety of other doubtless important, but comparatively insignificant, governmental entities.

IV. CONCLUSION

The preceding analysis has been predicated on Iraq either remaining together as a single nation-state, but with the KRG and Baghdad each going its own way on matters of oil and gas, or entirely splitting apart, leaving the Kurdish north as a separate nation-state, and one or two other states in the balance of Shiite/Sunni present-day Iraq. The possible, but not likely, development of Iraq as a failed state and haven for international terrorists or, conversely, as a strong centralist power where Baghdad attempts to forcefully repress recalcitrant Kurds and assert dominant political authority are two other potential, though somewhat remote, scenarios. Obviously, in the event of the former, personal security and civic stability would push oil and gas activity far too low on the priority list to merit much worry about the legal regime surrounding it. In the event of the latter, all the legal measures that have been examined at length in this volume would surface as definitive and controlling because, after all, what Baghdad has pronounced would govern the entirety of Iraq. In short, this represents a simple explanation for why time was accorded to a brief analysis of the more likely scenarios involving Erbil and Baghdad going their own ways while remaining together politically, or Iraq splitting apart as two or more separate states.

Each of these more likely scenarios retains risks and the potential for low-level hostility between contending ethnic and political elements. Even to someone who is far from being an expert in the internal politics of Iraq, it is still evident that little love has been lost over the centuries between the Shiites and Sunnis, the Arabs and Kurds, and all the other religious and ethnic groups comprising modern-day Iraq. The injection of radical fundamentalism, of whatever stripe, has served only to harden positions and fan the flames of intolerance and hatred. The counterinsurgency strategy of U.S. General David Petraeus, and the accompanying troop surge of early 2007, tempered the external manifestations of this problem, but there is reason to believe ardent and deep-seated antipathies simply remain dormant. With this as the case, whether Iraq holds together as a unitary, single nation, but sees the Kurds and Baghdad go their own ways on the matter of oil and gas law, or, alternatively, witnesses the nation split apart, with each new international unit establishing its own legal system and addressing oil and gas as it sees fit, the potential for sectarian violence and physical attacks remains ever present.

Indications surfaced in early fall 2008 that Baghdad's dissatisfaction with Kurdish governmental authorities negotiating various forms of contractual commitments with international oil companies had progressed beyond simple declarations that these were considered illegal and inconsistent with the constitutional

allocation of oil and gas authority, to the point that the central government's Oil Ministry insisted that it would refuse to allow any oil produced under KRG contracts to be exported from the country.[43] During September and October 2008, negotiations on this matter were undertaken.[44] The hard-line position of the central government on exports suggested a stiffening of Baghdad's resolve in regard to the gradual move by Kurdistan to exercise greater autonomy over its natural resource base. It may be that, to a certain extent, the central government's developing backbone reflected the coalescence of a variety of factors – what to do about new KRG oil production, the ending of the UN mandate for Iraq under Security Council resolution 1790 and talks concerning its replacement with resolution 1859, then on-going Status of Forces Agreement negotiations with the United States, the impending change in administrations in Washington, and looming provincial elections in Iraq. Nonetheless, it could also have signaled a general increase in intolerance by the central government in dealings with those in Erbil or elsewhere who entertain visions for Iraq not based on federal authorities as having *the* preeminent role in all aspects of governance, including that concerning oil and gas. In a sense, during early autumn 2008, the al-Maliki government might have considered the time to have finally arrived for changing the dynamics of governance. This would have increased the likelihood of the scenario of a more determined and assertive central government attempting to compel subcentral units, such as the KRG, to accept Baghdad's hegemony, making it a legitimate contender with what have been deemed the two more probable scenarios: Iraq staying together as a country, but with the KRG and the central government going their own ways on oil and gas; or, Iraq splitting apart into two or more independent political units, each operating under its own oil and gas legal regime. By late November, early December, however, there were indications that Erbil and the Oil Ministry were making some progress on the matter of crude oil exports,[45] thus suggesting, perhaps, either a change in Baghdad's attitude, or an effort by Shahristani to assert a larger and more influential presence in Iraqi domestic political circles.

[43] See Iraq Kurdistan Region Said Ready to Export 100,000 Barrels of Oil Per Day (1 May 2008), available at www.redorbit.com/news/business/1366578/iraq_kurdistan_region_said_ready_to_export_100,000_barrels_of_oil_per_day/index html (accessed Nov. 1, 2008); Empty Kurdish Pipeline Awaits Oil Deal with Baghdad, UPI (June 19, 2008), available at www.washingtontimes.com/news/2008/jun/19/Empty-Kurdish-pipeline-awaits-oil-deal/ (accessed Nov. 5, 2008).

[44] See Iraqi Oil Minister interviewed on contracts, oil and gas law, corruption, Iraq Updates (Sept. 30, 2008), available at www.iraqupdates.com/p_articles.php/article/37244 (accessed Nov. 6, 2008).

[45] See Sinan Salaheddin (Associated Press), Iraqi Kurds to begin solo exports of crude oil (Nov. 26, 2008), available at www.mlive.com/newsflash/business/index.ssf?/base/business-89/122770314131830.xml&stronglist=business (accessed Dec. 5, 2008) (agreement in principle reached on connecting a couple of Kurdish fields to the main-pipeline to Ceyhan, but no agreement yet on permitting actual exports).

What is most feared in the near-term years, notwithstanding the legitimate consternation over the original involvement in removing the Saddam Hussein regime from power and dismantling the Iraqi army and security forces,[46] is a draw-down of coalition military forces that is either overly rapid or too large in number, combined with inadequate training and arming of indigenous replacement police and national security forces. There has been only marginal political reconciliation in the country to date; next to none of the big issues have been tackled successfully. And if the manpower is absent to contain the pressure for resurgence of sectarian violence that is sure to accompany the many points of heated contention that will be faced over the ensuing years, then when crunch time is reached, Iraq could return to the seemingly uncontrolled chaos of the 2005–2006 period and find itself sliding toward the abyss of all-out civil war.[47] The campaign posturing that typifies an American presidential election year, with all the hyperbole and promises to voters that accompanies it, has not been especially helpful. It is ineluctable that the central front in the War on Terror is and continues to be the provinces straddling both sides of the Afghanistan-Pakistan border region. It only makes sense that any new U.S. administration should redouble its efforts in that area. In doing so, however, extreme care must be taken to avoid acting so precipitously in Iraq that it appears the new president either is attempting to reward elements of his own party for election political support, or is acceding to a reality of lost domestic backing for an unpopular war – a pressure to which even the victor in a political campaign is not immune. Troop adjustments are most appropriate when pegged to conditions on the ground, not to the direction or force of political winds, the oscillations of public support, or the legitimate demands for troops elsewhere.

The perfectly natural tendency is to view every situation encountered through the prism of our own experience. For those in the developed countries of the West, this often means approaching problems with a can-do attitude, marked by rationality, pragmatism, and impatience with and disdain for what is viewed as adherence to and belief in the non-demonstrable, especially to the extent that it gets in the way of problem solving. It requires no particular foreign policy or international affairs genius to appreciate the complexities of Iraqi society and politics. The divisions that separate many of that nation's peoples have plagued them for well over a millennium. Freed from the demands of dictatorial direction, nothing suggests that they see any particular urgency in reaching a conclusive accommodation. As a consequence, it seems clear that precisely

[46] On the events leading up to the U.S.-led coalition invasion in March 2003, see Rex J. Zedalis, Developments regarding the United Nations weapons inspection regime in Iraq, 8 International Peacekeeping: Yearbook of International Peace Operations 171 (2002); Rex J. Zedalis, Weapons of mass destruction in Iraq: The "final word" on efforts to eliminate Saddam Hussein's biological, chemical, and nuclear weapons threat, 10 International Peacekeeping: Yearbook of International Peace Operations 115 (2006).

[47] See generally Linda Robinson, Tell Me How This Ends: General David Petraeus and the Search for a Way Out of Iraq (2008).

the type of situation exists that proves most disturbing and frustrating to those schooled in the culture and political ways of the West. When deadline after deadline for regional plebiscite,[48] the submission of legislative measures to the parliament, and the issuance of model contracts comes and goes because political differences motivated by ethnic and sectarian enmity cannot be resolved, frustration mounts and a sense of resignation sets in. Yet Iraq's geographical position in one of the world's biggest tinder boxes, and its oil and gas abundance in an international economy that has only recently begun to think seriously about transitioning from hydrocarbons to alternative energy sources, means that such frustration and resignation must be countered with a healthy dose of patience and understanding that not every culture sees problems, or proceeds on them, in the same way as we do. A careful and measured reduction of troops could supply the Iraqi people with the time necessary to allow the forces of moderation to prevail, and a reasonable and acceptable oil and gas legal regime to emerge.

[48] Finally, in late September and early October 2008, the parliament adopted and the Presidential Council approved a law on provincial elections, which were then scheduled to be held in early 2009. See Iraq presidency approves provincial election law, Iraq Updates (Oct. 3, 2008), available at www.iraqupdates.com/p_articles.php/article/37461 (accessed Oct. 19, 2008). It should be noted that the elections will not involve the disputed area of Kirkuk and that such elections had to be scheduled earlier and postponed.

EPILOGUE

To say nothing of the as yet undiscovered reserves of oil and natural gas in Iraq, its 115 bbl (billion barrels) of proven crude oil and 112 Tcf (trillion cubic feet) of proven natural gas reserves provide it with immense potential wealth and make it a critical link in the energy and economic demands of the industrialized world. From the earliest days of the TPC and IPC during the opening decades of the last century, the significance of Iraq's position as an energy supplier was well recognized. With the marked growth in output that followed Iraq's hydrocarbon nationalization efforts in the 1960s and 1970s, the nation sought to capitalize on both increased world energy demand and its own position of being a beneficiary of sizable energy deposits. The intervening years witnessed the maturation of INOC as a key player in energy production, the stagnation incident to the Eight-Year War with Iran, the national move toward centralization of the entire energy sector under the watchful eye of an Oil Ministry reporting directly to Saddam Hussein, the legal limits on oil and gas development that grew out of Gulf War I for fear of Iraq reconstituting its weapons of mass destruction programs, the continued UN supervision of and protection for the industry following in the wake of Gulf War II, and the eventual birth of a democracy accompanied by rumblings for a new legal regime for Iraq's hydrocarbon resources.

As the proverb of ancient origins notes, "there is many a slip betwixt the cup and the lip."[1] The current and immediate predecessor Iraqi governments have labored long and hard to formulate or contribute to the formulation of a package of oil and gas legal measures, constitutional and otherwise, that would establish law capable of moving the nation into a new and forward-looking phase of hydrocarbon development. Noticeably different visions of that future between the central government in Baghdad and the Kurdistan Regional Government (KRG) in Erbil, and now apparently spreading to provinces in the

[1] This notion that many things can go wrong between the time of formulating a plan or intention, and the reality of its ultimate execution, dates at least from the early Greeks and was recorded by the sixteenth-century Dutch Renaissance scholar Desiderius Erasmus as a classic Latin saying ("multa cadunt inter calicem supremaque labra") in his famous Adagia at I.iv.1.

south of Iraq as well, have complicated the acceptability of the overall federal plan reflected in the package of four measures dealing with oil and gas exploitation, revenue-sharing, reconstituting INOC, and reorganizing the Oil Ministry. The tensions, suspicions, and maneuverings that have long characterized relations among Iraq's various ethnic, religious, and sectarian groups, accentuated by the involvement of al-Qaeda, other radical fundamentalists, and what some perceive as the occupation of the homeland by foreign forces, serve to make Iraqi legislators less receptive to entreaties for flexibility, compromise, and promotion of broader national interests. In view of all this, it remains to be seen whether the comprehensive oil and gas legislative package can garner eventual acceptance of the relevant political organs within Iraq. Indeed, it has even been suggested by some close to the process that the United States and its allies want the package far more dearly than do the Iraqis themselves.

Clearly, the situation is in a state of constant flux. At present, however, there are some indications that the al-Maliki government has settled upon a legislative process that involves presenting the four measures that form the hydrocarbon package to the parliament as a single and unitary set, rather than as individual legislative measures to be voted on piecemeal.[2] While not articulated, such an approach might be designed to tie the attractive features of the package with the unattractive, thus compelling those ardently intent upon securing adoption of what they like to vote affirmatively at the cost of acceding to features they may not find quite so appealing. The risks inherent in this stratagem are grave, for it could eventuate in doing little more that guaranteeing wide and broad-based opposition to the entire package of legislative measures. In any event, progress toward the development of an acceptable version of the framework law on oil and gas alone has encountered repeated obstacles.[3] As the end of calendar year 2008 approached, weekly status reports from the U.S. Department of State suggested that the revenue-sharing law had fared little better, with the INOC reconstitution and Oil Ministry reorganization measures not even appearing on the radar.[4]

To be sure, the ethnic and sectarian tensions in Iraq seriously compound the normal impediments to the process of flexibility and compromise that typify many negotiations over legislative measures. These tensions make movement

[2] See Agreement on Considering Endorsement of Four Oil Laws in "One Go," available at www.iraq-enterprise.com/page1.cfm?ser=1253 (accessed Nov. 2, 2008).

[3] See Iraqi parliament committee fails to back oil law, Iraq Updates (Oct. 27, 2008), available at www.iraqupdates.com/p_articles.php/article/38789 (accessed Oct. 28, 2008) (the fourth redraft of the original February 15, 2007, oil and gas framework law refused by the parliament's Oil and Gas Committee).

[4] See Iraq Weekly Status Report, Bureau of Near Eastern Affairs, U.S. Department of State (Oct. 22, 2008) at 7, available at www.state.gov/documents/organization/111308.pdf (accessed Oct. 28, 2008)(the revenue-sharing law has been reported out of the Council of Ministers and is under consideration by the Shura Council prior to transmission to the Council of Representatives (parliament)).

toward success exceptionally slow, halting, and as wandering as it is straight-line. Apart from the ethnic and sectarian overlay, there are at least two other complications that recently have come to contribute to the difficulties that appear to bedevil attempts to navigate the process of law-making. The first would be the upcoming change in political leadership in the United States, and the second the fact that legal authority under controlling UN Security Council resolution 1859 is set to expire December 31, 2009. With respect to the latter, Chapter 7 has reviewed the importance of resolution 1859 in regard to potential claims by creditors against Iraqi oil and gas, or proceeds from the sale of such. As noted in that chapter, however, the SOFA between the United States and Iraq, which is an agreement loosely affiliated with resolution 1859, also establishes the overall legal authority for military operations by the U.S.-led coalition. The prospects that 2009 will bring a change in American political leadership and, over the course of a couple of years, an eventual end to the international legal basis for operations in Iraq,[5] appear to have combined in a way that has stiffened the resolve of the indigenous political constituencies in that country – Baghdad and Erbil are less inclined to demonstrate magnanimity and flexibility toward each other, and Sunnis and Shiites, Arabs and Kurds, centralists and regionalists find themselves manifesting an equivalent level of obstreperousness and insistence on their own positions.

To a certain extent, the impact of the change of administrations in Washington, D.C., and the expiry of the UN military mandate seem to have suggested to the various and diverse political elites in Iraq the option of "buying time." This was evident in the difficulties associated with concluding, and in attempting to persuade the Iraqi parliament to accept, the intermediate-term SOFA between the Bush Administration and Prime Minister Nouri al-Maliki's government, an agreement designed to govern the maintenance of American and coalition military forces in Iraq until the end of 2011. And, presumably, if the thinking of the elites within Iraq can affect their willingness to conclude and legislatively endorse a SOFA, or settle upon the terms and conditions they find acceptable, it can also just as easily have an affect on their attitude toward (oil and gas) legislative measures that some within that country might see as too heavily influenced by, and carrying the imprint of, the United States and allied interests desirous of access to the nation's petroleum resources. Whether or not there is substantive merit to such perceptions, it is understandable that any Iraqi who operates on such a premise would envisage obstruction, procrastination, and delay as legitimate mechanisms for frustrating the enactment of the extant

[5] There are indications that the Iraqi government flatly refuses to tolerate another extension; see Frederick W. Kagan, Iraq: The Way Ahead, Phase IV Report, American Enterprise Institute, at 56, available at www.docstoc.com/docs/609545/Iraq-The-way-Ahead-Report (accessed Oct. 29, 2008), and it appears the recent cooling of relations between Moscow and Washington over the Republic of Georgia and other issues could confound efforts to get the UN to adopt a new resolution.

comprehensive package of oil and gas measures. If the various provisions of the Iraqi Constitution represented a balance between the central government and the subcentral units in regard to the nation's oil and gas resources, and the terms of the framework law, the revenue-sharing law, and the laws reconstituting INOC and reorganizing the Oil Ministry effected a continuation and elaboration of that balance, why should not those elements in the central government desirous of a concentration of power in Baghdad, or their counterparts in Kurdistan or Iraq's provinces preferring a greater role for Erbil or provincial capitals, attempt to stall and interfere at every juncture with any effort to enact the current package of oil and gas measures? Soon enough they can be rid of the United States, and in a position to allow the natural forces always in play in Iraq to shape the oil and gas law of the future.

To date, it is known that the central government and the KRG have gone their own ways when it comes to oil and gas development agreements within their respective spheres of jurisdiction – the Oil Ministry in Baghdad preferring to use various forms of employment and service contracts to secure outside assistance, with the Kurds demonstrating a willingness to even utilize production-sharing arrangements providing outside participants with a long-term commitment and stake in actual production. As if that fact alone were not a sufficient source of irritation and driver of hard feelings and enmity, disagreements between the KRG and the central government have surfaced about the very scope of the respective governmental units' jurisdiction over oil and gas fields, on occasion leading to security-force standoffs over activities at certain hydrocarbon development sites.[6] Further exacerbating the situation has been the Oil Ministry's reluctance to permit Erbil to export oil drilled under the contracts struck over the past couple of years by the KRG with various international oil and gas companies.[7] Though there may be a new showing of some flexibility regarding the latter, indubitably the Ministry's approach has been targeted at maximizing the central government's pressure on the Kurds on several fronts, and as a riposte for the intense dissatisfaction felt by Baghdad over the independent and autonomous route taken by the Kurds in connection with oil and gas development. As a capstone and festering source of tension, there remains the unresolved matter of the permanent status of the oil-rich area of Kirkuk, a matter that some have

[6] See Ben Lando, Iraq's Khurmala oil field sees national struggle (June 17, 2008), available at www.iraqenergyexpo.com/story_detail.php?id=3176&language= (accessed Oct. 29, 2008); Kirkuk field product stymied by Baghdad-Erbil fight and unclear course for development, Iraq Oil Report (June 17, 2008), available at www.iraqoilreport.com/2008/06/ (accessed Oct. 29, 2008).

[7] See DNO, Still waiting for Iraqi export license, Iraq Updates (Oct. 15, 2008), available at www.iraqupdates.com/p_articles.php/article/38010 (accessed Oct. 29, 2008); Iraq says it has given no export license to DNO, Iraq Updates (Oct. 17, 2008), available at www.iraqupdates.com/p_articles.php/article/38142 (accessed Oct. 29, 2008); Iraqi Oil Ministry denied giving the export license to DNO, Iraq Updates (Oct. 20, 2008), available at www.iraqupdates.com/p_articles.php/article/38292 (accessed Oct. 29, 2008).

suggested could precipitate military confrontation between the central government and the KRG.[8]

It has never been the objective of this study to explore the intricacies of the Iraqi political situation. Others much more qualified have held forth on such during the years that both preceded and have intervened since the removal of Saddam from power. Nonetheless, that situation clearly is the proverbial "elephant in the room," whether one is concerned with the status and content of oil and gas law in the territory of Iraq, or any of the sundry other issues that leave international policy makers unable to sleep during the wee hours of the night. The exclusive focus of this study has been the description and critical analysis of Iraqi oil and gas law. This focus has spanned, on the one end of the spectrum, the relevant terms of the 2005 Iraqi Constitution, the February 15, 2007, oil and gas framework law, the federal revenue-sharing law, and the KRG's Oil and Gas Law (No. 22) of 2007 (with corresponding Model PSC), all of which have been made accessible to scholars and students of Iraqi public law. It has also included, on the other end of the same spectrum, an examination of what could appear in the Iraqi Oil Ministry's model forms of oil and gas contract, as well as of the law designed to reconstitute INOC and the law reorganizing the Ministry of Oil itself, none of which have been available for general public scrutiny as of this writing. In other words, it has been the law, and not the dynamics of the internal political situation bearing on oil and gas, that has preoccupied attention throughout these many pages. The sole and limited exception in this regard has been connected with the offering of speculations in Chapter 10 about the potential future developments in Iraq's oil and gas law in the event no smooth transition is made to complete Iraqi autonomy. A passing consideration of Iraq's internal political dynamics was therein rendered somewhat unavoidable. But as a general proposition, an attempt has been made throughout this work to concentrate on the law alone, and steer clear of the intricacies of the Iraqi political situation.

In closing, it cannot be denied that a certain sense of dissatisfaction and frustration is felt about not knowing the exact form and precise verbatim content of some aspects of Baghdad's complete petroleum law legislative and contract package. The delays in the issuance of official versions of model service, exploration and production, and risk exploration contracts proves disturbing, as do the secrecy and lack of transparency surrounding both the legislation reconstituting INOC and that reorganizing the Ministry of Oil. Further, equally unsettling is the harsh reality that, even the texts of measures that have seen the light of day – those constituting the February 15, 2007, oil and gas framework

[8] See Kirkuk dispute threatens to plunge Iraq into Kurdish-Arab war, Iraq Updates (Oct. 28, 2008), available at www.iraqupdates.com/p_articles.php/article/38787 (accessed Oct. 29, 2008); Oil for soil: Towards a grand bargain on Iraq and the Kurds, Iraq Updates (Oct. 29, 2008), available at www.iraqupdates.com/p_articles.php/article/38906 (accessed Oct. 29, 2008).

law and the federal revenue-sharing law – may not represent the final word, because efforts to rework them continue in advance of ultimate legislative action by the Iraqi parliament. This has meant that some of what has been offered in the foregoing chapters is necessarily built on informed conjecture regarding the particular elements of the complete petroleum law legislative package, or use of extant texts of legislative measures that may witness changes in their particular terms prior to final adoption. Nevertheless, even if some or all of Iraq's oil and gas law develops in a way distinctly different from what has formed the basis of examination throughout the many pages of this study, there can be absolutely no doubt of the utility and value of the analytical exercise undertaken herein. Not only has it provided a broader context, both factual and legal, within which to situate an examination of any of the law that eventually emerges, but it also has offered two other items of not insignificant value: first, an analysis and critique of established legal principles affecting Iraqi oil and gas and articulated in controlling Security Council resolutions and various provisions of the 2005 Iraqi Constitution; and second, an analytical review of several of the various texts that will represent either, in considerable part, legal standards that control oil and gas activity or, at the very least, the potential legislative history supporting what eventually becomes the totality of the oil and gas law of Iraq. Both of these two items prove extremely useful to anyone seeking a better understanding of the meaning and content of relevant oil and gas legal rules, or the processes by which such rules eventually take final shape. And so, in ending where this project began, Iraqi petroleum is of vital importance to the world community, the establishment of a comprehensive legal regime covering its development is essential to assuring effective oil and gas production, and a commitment to rationality, compromise, and tolerance is imperative to putting such a regime in place.

INDEX