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Securing the Peace: The Battle over Ethnicity and Energy in Modern Iraq by J. Dargin

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2008

Securing the Peace: *The Battle over Ethnicity and Energy in Modern Iraq*

by Justin Dargin /Dubai Initiative-Harvard University



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Glossary of Terms

B/P= Barrels per Day

FDI=Foreign Direct Investment

FOGC= Federal Oil and Gas Council

GAO= Government Accountability Office

INOC=Iraqi National Oil Company

IOC= International Oil Company

IPC=Iraqi Petroleum Company

KRG = Kurdistan Regional Government

PSA= Production Sharing Agreement

"There is something very sinister to my mind in this Mesopotamian entanglement,"

Winston Churchill wrote his Prime Minister, David Lloyd George, in August 1920.¹

I. Introduction*

This article examines the legal and political impediments to the Kurdish Regional Government's (KRG) exploration and production contracts, which the central government in Baghdad has refused to recognize. The newly established Iraqi national constitution significantly opened as many petroleum-control questions as it resolved. Negotiated in 2005, the constitution not only separated branches of government, but established Federalism as its lodestar. However, faced with unresolved issues over regional and national control over petroleum resources, International Oil Companies (IOCs) function in an ambiguous legal environment that fails to clearly distinguish between federal and regional powers

Article 112(1) of the constitution grants the central government a conditional right to "...undertake management of oil and gas extracted from **present** oil and gas fields..." (emphasis mine). Reflective of Iraq's commitment to federalism, the right to manage oil fields is shared by the central government, the producing governorates and the regional governments. Article 112(1) could, therefore, be construed to mean that the central government has no right to exercise authority over nonproducing fields and future fields: rights not explicitly granted to the federal government may be residual rights held by the regional authorities. The constitution declares that

¹ Quote taken from, Joe Klein, *Even Churchill Couldn't Figure Out Iraq*, Time (July 30, 2006)

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Iraq is a single, sovereign nation with a federal policy that all regions must respect, and declares that² the rights of Kurdistan must receive special recognition.³

This paper will analyze the Iraqi constitution and the controlling legislation against the current oil production and exploration policies of the Kurdish Regional Government (KRG), to determine which governmental authority has the right to sign contracts. The central proposition of this paper holds that Article 112(1) should be clarified to grant the federal government oversight of all oil and gas fields, whether present or future, whether producing or nonproducing, under a Federal Oil and Gas Council (FOGC) –as stated in Art. 5(c) of the Draft Hydrocarbon Law.⁴ A FOGC would allow each constitutionally-created region licensing authority in its oil and gas production as it deems necessary, and grant the federal authority the ability to ensure that petroleum contracts are harmonious throughout the country. Since a federal oversight board, incorporated as the FOGC, already has the preliminary political approval of the disparate ethnic/sectarian groups⁵, it could form the basis of reconciliation in Iraq’s heavily disputed energy sector. A firm constitutional and a reliable legislative hydrocarbon regime, based on the rule of law, are necessary to adequately rebuild the country and soothe sectarian tension.

Section 1 gives a brief overview of the Kurdistan region and the history of Iraqi national oil policy. Section 2 analyzes the current dispute between the Kurdish regional authorities and the federal government, and delves into the export ability of the Northern region of Iraq and its geopolitical relations. Section 3 discusses the legitimacy of regional licenses, and illustrates how that the current energy dispute is rooted in the initial negotiations of the constitution, when the drive for compromise resulted in later constitutional ambiguity. Section 4 considers the features of the Draft Iraqi Hydrocarbon Law, and its shortcomings. Section 5 concludes with several constitutional and legislative recommendations that will forge agreement among all major stakeholders in Iraq as a prelude to a viable hydrocarbon regime.

² Iraq Const. §1 Art. 1. The English translation of the original, Arabic text, full text of the constitution is available at <http://www.uniraq.org/documents/iraqi_constitution.pdf>

³ Iraq Const. §5 Art. 117(1).

⁴ Draft Oil and Gas Law, Full Text Available at <http://www.revenuewatch.org/news/oil_law_english_20070306.pdf>

⁵ See section V below, *Conclusion and Recommendation* for a fuller analysis of the political positions of the ethnic/sectarian groups.

A. Overview of Northern Iraq (Kurdistan Region)

Kurdistan, located on the Eastern flanks of the Middle East, is a land of antiquity containing a diverse and distinctive people. However widely feared in other contexts, Alexander the Great met his military misfortune here near Erbil, a Kurdish city in Northern Iraq, which became the last point for his epic conquests. Kurdistan, which literally been a focal point for military clashes since Roman times, is perhaps the largest ethnic-nation on Earth that lacks political self-determination.

With carnage in Iraq confronting world television viewers daily, many people do not know that the Northern portion of the country-referred to in the Iraqi Constitution as the Kurdistan Region- is not only a relative oasis of peace, but an active player in the fierce global competition for Foreign Direct Investment (FDI) to develop its natural resources.

B. Brief History of Iraqi Oil Policy

Repression does not make the Kurds unique among the ethnic-sectarian groups in Iraq. Kurdish history offers a legacy of endurance under tyrannical regimes. For example, the Kurds had been a constant irritant in the sides of the Ottoman Sultan and the Persian Shah.⁶ When World War I resulted in the Ottoman Empire's dismemberment, the newly created states of Turkey and Iraq struggled to control Kurdish territories. But, oil politics were pivotal to the Kurdish dynamic even in the early part of the 20th century, as shown by the fact that the British-controlled Turkish Petroleum Company (TPC) retained concessions in the Northern Iraqi city of Mosul.

After WWI, the TPC became the Iraq Petroleum Company (IPC), a commercial entity that not only remained in British hands, but that stubbornly managed to hold its Mosul concessions. Turkey and France obtained equity holdings, but Iraq received the Mosul area and its Kurdish

⁶ David McDowall, *A Modern History of the Kurds* (1997)

population.⁷

In 1961, Iraq expropriated ninety-nine percent of the area in which IPC had a concession, and restricted the company to those production areas that it actively utilized. By 1972, the Iraqi government, which sought to enhance its role in oil extraction by full nationalization, created the Iraq National Oil Company (INOC). After the 1960s, Northern Iraq experienced numerous Kurdish uprisings, and harsh governmental reprisals. Saddam's Baathist regime implemented excessively bloody preventive measures in the early 1990s, which led the US led Coalition forces in Desert Shield/ Desert Storm to create a Northern enclave that was totally off limits to Iraqi military forces.⁸ One should not surmise, however, that Iraqi-Kurdish relations suffered solely because of the crimes of Saddam Hussein; the Kurds had historically exhibited a rugged independence characteristic of most mountain peoples.

Under Saddam's reign, Iraqi national oil policy was heavily centralized.

⁷ The partners in the IPC were British Petroleum (23.75%), Shell (23.75%), Total (23.75%), Exxon (11.875%), Mobil (11.875%) and Partex (5%). *Iraq Oil Briefing*, Greg Croft Inc. Available at <<http://www.gregcroft.com/iraq.ivnu>>

⁸ *Id.*

II. Analysis of the Current Dispute

A. *The KRG Shows its Autonomy*

In the fourth quarter 2007, the KRG, which increased the rate at which it closed oil agreements, signed four new contracts for an estimated \$500 million (U.S.) in investment.⁹ A November 7, 2007 agreement illustrated the KRG's interest in signing weightier contracts with larger oil and gas companies. A subsidiary of MOL Hungarian Oil and Gas became a signing partner to two production sharing contracts, and India's largest private oil company, Reliance energy, and Austria's OMV, signed two additional production sharing agreements (PSAs).¹⁰ The KRG awarded four "strategic blocks" to the Kurdistan Exploration and Production Company, and granted the undeveloped Khurmala oil field to the Kurdistan National Oil Company.

These deals closed in the wake of five previous oil and gas PSAs the KRG signed in early 2007.¹¹ In total, the KRG has twenty-eight open or pending production and exploration contracts,¹² most signed with smaller, more risk-taking firms, because the larger IOCs fear censure from the central government if they participate in the KRG's fast moving auction. Even these relatively minor oil and gas deals drew the ire of the Iraq's Oil Ministry, which, in September 2007, declared that these deals were illegal and void of legal substance.

⁹ *Iraq's Kurdish Region Approves Four New Oil Deals*, Reuters U.K (Oct. 3rd, 2007)

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

The KRG, which flatly rejected the central government's constraints, stated that it not only had legal authority, but that it would continue current negotiations. The KRG signed a PSA with a subsidiary of Toronto's Heritage Oil for its Miran block, and with the French oil and gas company Perenco for its Sindi/Amedi block.¹³ Frustrated by the slow pace of the progress of the nationwide draft oil and gas law in the Iraqi parliament, the KRG sought increased production from the current levels of several hundred thousand barrels per day (b/d) to a million barrels p/d, within approximately a five-year window.

Because the KRG Oil and Gas Council also decided to increase the region's refinery capacity, the KRG, in 2007, approved plans to construct two 20,000 b/d refineries, worth a total of \$300 million. Heritage Oil will construct one refinery in the vicinity of the Miran block area, while Addax petroleum and Turkish partner Genel Enerji will build another refinery in the Taq Taq oilfield area.



Figure 1: Map of Sectarian/Ethnic Makeup of Iraq

Source: RadioFree Europe/RadioLiberty

¹³ See the Appendix for a detailed look at the location of Iraqi oil infrastructure and oil deposits.

B. The Kirkuk Flashpoint

Kirkuk, central in the objectives of the KRG, is an epic flashpoint between the federal authorities and the KRG. The Kirkuk region, which sits atop a field holding 15 billion barrels, out of Iraq's estimated 115 billion barrels, falls just outside of the Kurdish administered area, but within the Kurdish historical ethnic boundaries (see Figure One). As set forth in Article 140(2) of the constitution, Iraq scheduled a referendum for Kirkuk and its surrounding environs,¹⁴ to determine whether Kirkuk, and its surrounding provinces of Diyala and Ninawa, would become part of the Kurdistan region.¹⁵ Article 140(2) of the constitution initially required Kirkuk's return to normalization by a three step process to reverse Saddam's Arabization policy. The first step of the policy was to have a return to the city of the ethnic Kurds who were compelled to depart under the ethnic exclusion policy of Saddam's regime, and then a census conducted, and finally concluding with the Kirkuk referendum originally scheduled to be held at the latest by Dec. 31, 2007.¹⁶ However, persistent delays and allegations of ethnic expulsions convinced the KRG to follow the UN recommendation to delay the referendum for at least another six months.¹⁷

Tens of thousands of ethnic Kurds were exiled from Kirkuk during Saddam's forced "Arabization" campaign.

The Iraq Study Group described Kirkuk as a "power keg."¹⁸ That label does not reflect mean-spirited sentiments, considering the reports of rival ethnic groups clandestinely shuttling in

¹⁴ The Constitution allows that the referendum was not to exceed December 31, 2007.

¹⁵ *The KRGs Bold Moves on Oil*, Strategic Forecasting, Inc., (Nov. 30, 2007)

¹⁶ As many as 300,000 Kurds who were expelled under Saddam have returned to bolster their demographic weight, thus making them the largest ethnic group in that province. See Jonathan Finer, *Shiite Militias Move to Oil-Rich Kirkuk, Even as Kurds Dig in*, The Washington Post (April 25, 2007)

¹⁷ Sumedha Senanayake, *Iraq: Kirkuk Referendum Likely to be Delayed*, RFE/RL, (Sept. 13, 2007)

¹⁸ The Iraq Study Group, also known as the Baker-Hamilton Commission, was a ten person bipartisan panel appointed on March 15, 2006 by the U.S. Congress. The Iraq Study Group was created by the United States Institute of Peace which released the Group's final findings on the state of Iraq. See the report in its entirety at <http://www.usip.org/isg/iraq_study_group_report/report/1206/iraq_study_group_report.pdf>

fighters, and sectarian leaders, who vow to “fight” if the referendum has unfavorable results.¹⁹ Not only does the Kirkuk dispute have national reverberations, but international implications as well: Turkey’s Prime Minister warned that if Kirkuk is integrated into the KRG, “[He] fear[s] that it could come to a very big civil war.”²⁰ The Turkish Defense Minister, Vecdi Gonul, cautioned, at an International Institute of Strategic Studies Conference on December 10, 2006, that “[k]irkuk’s future status carried significant implications for Turkey,” and called on the KRG to resist an “unrealistic” future for Kirkuk. Turkey evidently believes that geopolitical security would be threatened if the Kirkuk came under KRG dominion.²¹ The Turkish government feels that, in addition to Kurdish oil and gas deals, a KRG affiliated Kirkuk could provide become a rallying symbol in a drive for an independent Kurdistan nation, and stir the sentiments of Turkey’s own restive Kurds.²²

Kurdish leaders speak openly of using force if necessary to gain control of Kirkuk, which may assume shades of the sacrosanct for them because it is considered the historical capital of the ancient Kurdistan that formerly extended into Iran and Turkey.²³ The President of the KRG, Massoud Barzani, threatened “a real civil war” if rival Iraqi political factions continued to delay the Kirkuk referendum.²⁴ A member of the KRG parliament, Ghafur Makhmuri, noted that, unless a satisfactory solution is found for Kirkuk, then the Kurds may consider themselves compelled to unilaterally announce independence.²⁵ Shiite militias have reportedly moved into Kirkuk vowing war if there is a successful vote to transform Kirkuk into an arm of the KRG.²⁶ The Kurds, who demand that article 140 be implemented, consider a failure of implementation a prelude to civil war.

¹⁹ Supra Note 17, *Iraq: Kirkuk Referendum Likely to be Delayed*.

²⁰ *Turkey Warns of a “very big civil war” in Kirkuk*, Middle East News (Jan. 27, 2007)

²¹ Sumedha Senanayake, *Iraq: Kurds Warn Against Delaying Kirkuk Referendum*, RFE/RFL News (Dec. 14, 2006)

²² *Id.* Further Turkey and Iran in 2008 have been seeking bilateral relations in cross anti-Kurdish guerilla operations. The two nations signed a memorandum of understating in 2006 pledging to cooperate for peace in the region and against terrorist groups, namely Kurdish ones. See *Iran and Turkey to Discuss< PKK, PJAK*, Turkish Daily News (April 14, 2008)

²³ See Supra Note 16, *Shiite Militias Move to Oil-Rich Kirkuk, Even as Kurds Dig in*.

²⁴ *Iraq Leader Warns of ‘civil war’ over oil rich city*, Associated Press (July 31, 2007)

²⁵ See Supra Note 21, *Iraq: Kurds Warn Against Delaying Kirkuk Referendum*

²⁶ See Supra Note 16, *Shiite Militias Move to Oil-Rich Kirkuk, Even as Kurds Dig in*

Iraqi Arabs and Turkomen argue that, because of the original date for the referendum has past (as stipulated by 140(2), Dec. 31, 2007), Article 140 is now null and void, and that any further attempt at holding a referendum contravenes the constitution.²⁷ Because of the political impasse, the Parliament Constitutional Amendments Committee agreed to refer Article 140 to the Iraqi constitutional court for a ruling on its legality.²⁸ In a public display of reconciliation, Kurdish authorities declared they would willingly accept an equitable political solution other than a referendum if it would “satisfy all parties.”²⁹ If a political or judicial settlement remains elusive, Kirkuk is likely to be another “disputed” city in the Middle East, with all the implications of that label.

C. Baghdad Reacts

As stated previously, Baghdad is distressed that the KRG contracted unilaterally with foreign oil companies. In October, 2007, the Iraqi oil minister Hussain al-Shahristani cautioned that, “[T]here are many measures the federal government is thinking of taking against these companies [the IOCs] and one of them is to blacklist them and prevent them from working in Iraq in the future,”³⁰ He ratcheted up the pressure on November 24, 2007, when he categorized the KRG/IOC deals as “null and void.”³¹ To counter the KRG law, especially in the absence of a national oil law, al-Shahristani threatened to invoke Saddam-era legislation to

“The federal government's position toward these new deals is that any contract signed without its approval isn't considered a contract.”

Iraqi Oil Minister- Hussain al-Shahristani

²⁷ *Iraqi Constitution Gets Kirkuk Issue*, United Press International (Jan. 11, 2008)

²⁸ *Id.*

²⁹ As stated by the KRG’s External Relations Official. See *Iraqi Kurds ‘Ready for Solution to issue of Kirkuk,’* Iraq Updates Website (Mar. 31, 2008)

³⁰ *Baghdad-KRG Oil Rift Deepening*, The New Anatolian (Oct. 15, 2007) Available at <<http://www.thenewanatolian.com/tna-29281.html>>

³¹ *Id.*

block these deals.³² He specified that, “[T]he federal government's position toward these new deals is that any contract signed without its approval isn't considered a contract.” However, the KRG responded to the oil minister’s threatened use of Saddam-era laws by stating that, because most of Saddam’s laws contradict the new constitution, they are null and void.³³

The federal officials increased the ante by declaring that contracts signed without the approval of the central authorities would be considered “smuggling.”³⁴ Al Shishstani contended that, under Hussein-era hydrocarbon law and current Iraqi draft law, the State Oil Marketing Body possesses sole authority to export crude Iraqi oil: exportation by any other means is “smuggling.”³⁵ The central authorities barred oil companies that signed contracts with the KRG after February 2007 from the purchase of Iraqi oil and from upcoming projects in Iraq's oil and gas sector. February 2007 is significant because it is the date when Baghdad and the KRG reached a temporary compromise that later crumbled.³⁶

The Oil Ministry sent cancellation letters to SK Energy of South Korea, OMV, and Reliance Energy³⁷ and cut exports of crude oil to SK Energy. International Oil Daily reported that South Korea’s Energy attempted to balance the quest for Iraqi oil with the desire to retain the KRG contract.³⁸ South Korea, which imports approximately 125,000 barrels per day, will probably shore up its short-fall from neighboring Mediterranean countries.³⁹



Figure 2: Map of Northern Iraq Oil Infrastructure

³² Sumedha Senanayake, *Iraq: Baghdad, Kurds at Odds of Oil Deals*, RFE/RL News Analysis (Nov. 30, 2007)

³³ *Iraqi Oil minister authorized to ban Kurdistan oil exports*, KurdNet. (Nov. 24, 2007)

³⁴ *Id.*

³⁵ Kathleen Ridolfo, *Iraq: Kurds Push Ahead with Oil Contract*, RFE/RL News (Nov. 12, 2007)

³⁶ Sumedha Senanayake, *Iraq: Baghdad, Kurds at Odds of Oil Deals*, RFE/RL News Analysis (Nov. 30, 2007)

³⁷ *Iraq makes good on Kurd Oil Blacklist*, United Press International (Jan. 21, 2008)

³⁸ International Oil Daily (March 05, 2008) South Korea has been trying to resolve this dispute through diplomatic and political measures. The KRG’s Prime Minister, Nichervan Barzani, visited South Korea to meet with its (then) President-elect, Lee Myung-Bak, to reassure him that all the energy deals signed were legal as per the Iraqi oil and gas clauses in the constitution. Further,

The KRG signed a controversial agreement with U.S. based Hunt Oil in September, 2007, “controversial” because the delineated territory marked for exploration and production lay outside of the Ninawa Governorate, and outside of KRG jurisdiction (see Figure Two below), even though it was historically populated by Kurds.⁴⁰ Although the KRG evidently believed that the ethnic composition legitimized its drive, these actions hint that the KRG may have broad ambitions upon control of oil and gas deposits in disputed areas adjacent to its territory.

D. Export Potential

Traditionally, the INOC contained two operating companies, i.e., the Northern and Southern subsidiaries. Oil from the southern subsidiary was exported through Basra, while northern oil (located in the now KRG territory) traveled to the Mediterranean port of Ceyhan (see Figure One).⁴¹ This northern pipeline⁴² was an important export route during the 1990s UN oil-for-food program. However, after Saddam’s 2003 fall, the northern pipeline incurred significant damage because of looting and sabotage. Persistent pipeline bomb attacks rendered the northern pipeline virtually useless.⁴³ Analysts estimate that the Ceyhan pipeline could export 1.6 million b/d of Iraqi crude to the west-of-Suez oil markets, if fully operational.⁴⁴

Setting aside the rhetoric and bluster, the Kurds must remain in the good graces of Baghdad to export its oil. Even though the KRG may sign contracts to the dismay of the central authorities, it requires a secure and reliable export route. Because the Kurdish region is

during the meeting, President –elect, Myung-Bak, requested for more cooperation with the KRG for expansion of oil and gas development by South Korean companies in the Kurdish region. *KRG Minister says New South Korean Energy Deal Constitutional*, Kurdish Regional Government Website (Feb. 15, 2008) < <http://www.krg.org/articles/detail.asp?lngnr=12&smap=02010200&nrnr=73&anr=22781>>

³⁹ *Id.*

⁴⁰ *Interview with Issam Chalabi on KRG and Hunt Oil*, Middle East Economic Survey (Oct. 15, 2007)

⁴¹ Lawrence Kumins, *Iraq Oil: Reserves, Production and Potential Revenues*, CRS Report for Congress. (Apr. 13, 2005)

⁴² The Kirkuk-Ceyhan pipeline is actually two pipes, of a 40 inch diameter with a nominal capacity of 1.1 million barrels per day. However, the US Department of Energy reports that 900,000 barrels per day was this section’s maximum export ability. The other pipe is a parallel 46-inch pipe with an average capacity of 500,000 barrels per day. However, it appears that the second line saw very little commercial use previously. *Id.*

⁴³ Most of Iraq’s exports have to go through the Basra export facility, as late as September 19, 2007; it has been attacked by a bomb blast on the line between Kirkuk and Baiji. See *Attacks Shut Down Kirkuk-Ceyhan Pipeline*, Iraq News Monitor (Sept. 19, 2007)

⁴⁴ *Id.*

essentially landlocked for oil export purposes, and the central authorities control the Southern Basra port, Umm Qasr, the KRG must collaborate with often hostile neighbors. Since Turkey has an existing political arrangement with Baghdad, the Ceyhan pipeline will be not be an option. Further, the central authorities secured an agreement with Kurdistan's neighbors, Iran, Syria, and Turkey to prevent the KRG from circumventing the central authority's embargo.⁴⁵

In lieu of a settlement with Baghdad, the Kurds could opt to smuggle the oil overland through routes in Syria or Iran in breach of the embargo. However, this option would be quite risky, and expensive to undertake.⁴⁶ Moreover, Syria and Iran have pledged assistance to the central authorities in any potential blockade. Syria and Iran have little incentive to see a prosperous Kurdish dominated region that could complicate already stressful relations.

Many oil and gas firms are reluctant to sign further contracts if a legal and safe export route were not available. For instance, the Norwegian oil firm DNO has repeatedly requested that Baghdad grant an export permit as a means to increase production.⁴⁷ Ankara would probably block any overland smuggling route through Turkey, again fearful that a vibrant and autonomous Kurdish region could stir its own Kurdish population.

Ironically, the inertia of the insurmountable political impasse may be transformed into the irresistible dynamic that spurs compromise between the various stakeholders.⁴⁸ After the KRG and Hunt Oil Company signed the 2007 production sharing contract, the United States State Department warned that this agreement hurt the efforts of the central government to "reconcile and rule the country."⁴⁹ President Bush, who denied prior knowledge, confessed that he was

⁴⁵ Supra Note 37, *Iraq makes good on Kurd Oil Blacklist*

⁴⁶ Northern Iraq, which is thought to sit upon substantial oil reserves, must resort to smuggling refined fuel from neighboring countries. There are no refineries, nor are any of the region's oil installations connected to central government Iraqi refineries for export. *Kurdish Struggle for Iraq's Oil*, BBC News. (Jan. 03, 2007) Available at <<http://news.bbc.co.uk/2/hi/business/6211853.stm>>

⁴⁷ *DNO: Iraqi Kurd Oil Needs Export Route*, United Press International. (Feb. 21, 2008)

⁴⁸ Pressure is mounting against the KRG's position, as in Jan. 15, 2008; a majority of Iraq's parliamentarians signed a public statement denouncing the KRG's "unilateral" actions to sign contracts. Osama Najafi, of former Prime Minister Ayad Allawi's secular National List party, stated at a news conference, "[T]here must be a formula for maintaining the unity of Iraq and the distribution of its wealth." *Iraq Factions Join against Kurd Oil Deals*, United Press International. (Jan. 15, 2008)

⁴⁹ *Analysis: Hunt, State Talked on Iraq Oil*, United Press International. (Oct. 12, 2007)

“concerned...to the extent that it does undermine the ability for the government to come up with an oil revenue-sharing plan that unifies the country.”⁵⁰

III. The Issue of Regional Licenses

The common problem facing the KRG and the IOCs is whether licenses granted by regional authorities are valid, and whether Baghdad will recognize them. Apparently to be all things to all stakeholders, the constitution grants licensing rights to both Baghdad and the regional governments.

A. Constitutional Clarity

Even after since its October 15, 2005 ratification, the Iraqi National Constitution somehow fails to ban regional governments from issuing drilling licenses in their own right. Constitutions, much like nature, abhor a vacuum. While they are at odds in so many ways, the Sunni and Shiite Arabs are prepared to jointly oppose regional autonomy in granting oil licenses. Article 112(2) of the Iraqi National Constitution obligates the various levels of government to bring wealth for the Iraqi people, with the following, highly emphatic, language:

“The federal government, and the governments of the producing regions, and provinces together will draw up the necessary strategic policies to develop oil and gas wealth to bring the greatest benefit for the Iraqi people, relying on the most modern techniques of market principles and encouraging investment.”

The last clause suggests that certain sub-sectors will be opened to FDI, even though it does not contain specific jurisdictional parameters or suggest specific stratagems.

Article 115 enumerates the separation of powers, and relegates to the regional governments, all powers not specifically allocated to the central government. On the other hand,

⁵⁰ Bush “Knew Nothing” on Hunt-Iraq Oil Deal, United Press International (Sept. 20, 2007)

Article 112(1) vests the central government with powers over “present” oil fields. Many analysts, therefore, conclude that the central government’s authority is limited to control over new fields or believe that fields not properly exploited come within the regional authority’s authority.⁵¹

Conflict, therefore, abounds, not only as to the separation of powers, but also as to the entity with legal authority to negotiate petroleum contracts. Kurdish authorities cite Article 115 as the authority to negotiate new contracts. Yet, Article 112(1) explicitly requires the various levels of government to draw up the necessary strategic policies to exploit Iraq’s oil wealth cooperatively. The fact that various levels of government are obligated to develop strategies logically bars unilateral action by any single level of government. It may be that each governmental unit is obligated to defer to the concerns of the other. Much is relegated to the realm of uncertainty when everyone must be pleased.

B. Differences in Constitutional Construction between the Federal and Regional Government

In a recent statement, Ashti Hawrami, the KRG's Minister of Natural Resources, contended that Article 112(1) vests the KRG with exclusive authority to administer undiscovered wells unilaterally. Article 112(1) reads:⁵²

“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, 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, and this shall be regulated by a law.”(emphasis mine)

⁵¹ Article 115 states “All that is not written in the exclusive powers of the federal authorities is in the authority of the regions. In other powers shared between the federal government and the regions, the priority will be given to the region’s law in case of dispute.”

⁵² *Iraq-Kurdistan Minister says in talks with Oil Majors*, Iraq Updates (Sep. 21, 2006)

Setting aside for the instant the fact that the words “extracted” (produced) oil reasonably limits the reach of this provision to oil already pumped from the oil field, there is ambiguity as to whether the term “present” oil and gas fields refers to all discovered fields in Iraq, to those in the process of current extraction (equals about seventy-eight of Iraq’s known reserves), or to fully developed fields (approximately thirty-six of the total).⁵³

Hawrami initially interpreted ‘present fields,’ to mean those currently producing oil.⁵⁴ He later broadened that definition by proclaiming that the regions and governorates should not only control the revenue from undeveloped fields, but also severely emasculating any notion of “joint administration,” boldly proclaimed that the KRG should have veto power over even the limited administrative role enumerated for the federal government in existing fields.⁵⁵ He reasoned that this seemingly innocuous verbiage constrains the federal authorities to the narrow administrative functions necessary to export and market extracted oil and gas from existing producing fields.⁵⁶

Not only does the KRG view even this limited administrative role as conditional upon a comprehensive agreement between the regions as to the petroleum proceeds, the KRG would probably desire to earmark additional shares to regions uniquely deprived under the Saddam-era, particularly the Kurdish and Shiite areas.⁵⁷

KRG officials insist that the regional governments (i.e. the KRG) also be vested with an added percentage of the revenue, because Saddam’s regime systematically deprived them of rightful shares. The KRG argues that, while the central government’s authority to handle extracted oil and gas is contingent upon an equitable revenue distribution, the daily management of the fields should be conducted locally.⁵⁸

⁵³ *Assessing Iraq’s Oil Potential*, Geotimes (Oct. 2003) Available at <http://www.agiweb.org/geotimes/oct03/feature_oil.html>

⁵⁴ *Iraq: Oil and Gas rights of regions and governorates*, Iraq Updates (June 14, 2006)

⁵⁵ *Id.*

⁵⁶ Perhaps through only having the authority to export under the Iraq State Oil Marketing Organization.

⁵⁷ As stipulated in Iraq Const. §4 Art. 112(1).

⁵⁸ Operations could be conducted through any number of the local state directed companies the KRG has intended to set up such as the: Kurdish National Oil Company, Kurdish Exploration and Production Company, or the Kurdish Organization for Downstream Operations.

C. Conflict of Laws

As previously indicated, the KRG receives much of its prowess from the concept of “residual powers.” The Iraqi constitution contains a conflict of laws provision in Article 115, which declares:

“All 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. With regard to other powers shared between the federal government and the regional government, priority shall be given to the law of the regions and governorates not organized in a region in case of dispute.”

Further, Article 121(2) declares that:

“In case of a contradiction between regional and national legislation in respect to a matter outside the exclusive powers of the federal government, the regional authority shall have the right to amend the application of the national legislation within that region.”

The KRG therefore views the conflict of laws functions of Articles 115 and 121(2) as trump cards that vest regional governments with authority to have their own petroleum laws: Iraq otherwise lacks a comprehensive Petroleum law that governs investment, jurisdiction and revenue allotment (as will be discussed in Section V).⁵⁹ This power vacuum inspires the regional powers to wax to the extent that central power wanes.

⁵⁹ This is subject to parliamentary approval of the Iraqi Draft Law.

D. Enumerated Powers

Because the constitution is silent about many aspects of the oil and gas industry, the KRG believes that the lion's share of rights vests in the regional authority. This is reflected in Article 115 (see above Section III(c)), which declares that non-enumerated functions are impliedly left to regional governance. It would seem that federal law would apply exclusively to matters under the exclusive authority of the federal government, as under Article 114. Article 114 sets out the competencies of both the central and regional authorities. Yet:

- Article 114 does not contain language pertinent to the discovery of new fields, or any unexplored areas.
- Article 114 does not specify if control of downstream activities⁶⁰ is vested in federal or regional authorities.

On the other hand, it is apparent is that the regional governments have entrenched residual authority which Article 121 illustrates with the following provisions:

- First: The regional authorities shall have the right to exercise executive, legislative, and judicial authority in accordance with this constitution, except for those powers stipulated in the exclusive powers of the federal government.
- Third: Regions and governorates shall be allocated an equitable share of the national revenues sufficient to discharge its responsibilities and duties, but having regard to its resources, needs and the percentage of its population.
- Fifth: The Regional Government shall be responsible for all the administrative

"...[C]entralized oil power was ... used to fund violent campaigns by elites against neighboring countries and against our own Iraqi citizens."

KRG Minister of Natural Resources,
Asti Hawrami on the history of
centralized power in Iraq

⁶⁰ Such as refining, storage facilities, pipeline, export terminals, tankers, etc.

requirements of the region, particularly the establishment and organization of the internal security forces for the region such as police, security forces and guards of the region.

Further, the grant of residual rights to the regions is recognized in the fourth clause of Article 126, which states that:

“Articles of the Constitution may not be amended if such amendment takes away from the powers of the regions that are not within the exclusive powers of the federal authorities, except by the approval of the legislative authority of the concerned region and the approval of the majority of its citizens in a general referendum.”

Therefore, the constitution bars a modification or lessening of the KRG’s powers without the approval of the KRG Parliament and a popular referendum in the Kurdistan Region.

E. Who has Jurisdiction?

The KRG may have the stronger legal argument with regard to jurisdiction over oil proceeds, because Baghdad is not sovereign over new field exploration or production.⁶¹ However, the KRG is constrained by Article 112(2), which flatly declares that national oil and gas policy will be jointly set by the central authorities and the resource rich region and by Article 111 which holds the more aspirational clause that “[o]il and gas are owned by all the people of Iraq in all the regions and governorates.” At the very least it appears that the KRG must consult Baghdad to set a national oil policy. Further, the KRG is constrained by its demography and geography, namely the practical reality that, with tremendous geographical advantages, the central government can embargo exports from the KRG and effectively block the sale of any Kurdish oil. At the date of writing, the parties have not engaged in a public reconciliation or

⁶¹ As per §4 Art. 112(1).

substantial debate on these issues. If Iraq is to heal, and develop its economic potential, the stakeholders must assemble and reason together.

1. The Dispute over Revenue Sharing: Equality versus Equity

Inequities in sharing Iraq's oil revenue generated lasting concerns among the Iraqi stakeholders. Due to the uneven geographical placement of the oil resources, and favoritism shown to some ethnic/sectarian groups under Saddam's reign, some groups experienced a sense of political and economic disenfranchisement. Even though the sectarian and ethnic violence have increased the interest in revenue distribution, the distribution framework is still largely undeveloped.⁶²

As stated above, Article 112(1) grants the Iraqi government the right to distribute 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, and this shall be regulated by a law.”

Iraq lacks a national energy consensus primarily because of conflicting formulas for assuring equitable revenue distribution, and collection. The controlling objective is to ensure equitable per capita distribution and provide for “damaged” and “unjustly deprived” regions as mandated by the constitution.⁶³ In spite of the conciliatory language, there is notable lack of cooperation as to whether the regions or the federal government should make decisions about the revenue collection and spending on their respective territories, whether the federal revenue distribution should be fixed and automatic, and most importantly whether Baghdad should have the ultimate authority (veto) over revenue allocation to the regions and governorates.⁶⁴

⁶² Christopher M. Blanchard, *Iraq: Oil and Gas Legislation Revenue Sharing and U.S. Policy*, CRS Report for Congress (June 26, 2007)

⁶³ Iraq Const. §4 Art. 112(1)

⁶⁴ *Id.*

IV. State of the Current Iraqi Draft Petroleum Law

After months of tense negotiations⁶⁵ that began in mid-2006, a three-member Oil and Energy Committee, under the authority of Iraqi cabinet committee prepared a draft petroleum law that serve as a framework for nationwide distribution of the country's immense oil wealth and as a reliable structure to induce foreign investment.⁶⁶ Following the approval by the negotiating committee, the Iraq Councils of Ministers (the cabinet) approved a draft version of the Hydrocarbon framework law in February of 2007.⁶⁷

On July 3, 2007, Iraqi Prime Minister Nouri al Maliki announced that the Council of Ministers approved a final draft of the framework law and sent it to the Council of Representatives for approval. However, the Council of Representatives then amended sections of the proposed Draft Law for the stated goal of compatibility with the constitution. Kurdish officials lashed out at the amendments as being tantamount to substantive changes of the law, rather than semantic modifications to ensure its constitutional compatibility.⁶⁸ Kurdish officials predictably withdrew their support for the measure.

As a consequence of the Kurdish reaction and infighting along sectarian and ethnic interests, the Iraqi parliament failed to enact the proposed law. The Draft Law still sits in limbo while the political parties negotiate the finer points of the proposals. However, if approved in anything close to its present incarnation, the law will err on the side of increased central oversight, as oil revenue would go to the Baghdad, which would distribute wealth to all eighteen provinces, based on population demographics. The guarantee of an equitable distribution of oil wealth could act be a balm for widespread Sunni fears that they will be left out of any oil plan by the politically (and oil rich) Shiites

⁶⁵ Iraqi Officials say that U.S. Ambassador Zalmay Khalizad has been instrumental in overcoming Kurdish objections to the draft and getting the Cabinet's approval.

⁶⁶ Eric Wong, *Iraqis Reach an Accord on Oil Revenue*, The New York Times. (Feb. 27, 2007)

⁶⁷ Christopher Blanchard, *Iraq: Oil and Gas Legislation Revenue Sharing, and U.S. Policy* (Oct. 2, 2007)

⁶⁸ *Id.*

and Kurds. Ali Baban, the Iraqi Planning Minister and a Member of the Sunni-dominated Iraqi Islamic Party stated publicly that he hoped that the draft law would serve as “the basis of the unity of this country,” because that the committee members “pushed for the center in Baghdad, but that “[they] did not neglect the Kurds or other regions.”⁶⁹

A. Features of the Draft Code

The draft law vests regions with power to negotiate exploration and development agreements with IOCs, subject to the review and approval by the central authorities.⁷⁰ A controversial aspect of the code is that it will allow regions to enter into PSA with IOCS, a feature that some Iraqis feel conceals a tacit bid by foreign IOCs to gain control over the country’s petroleum resources.⁷¹ To mitigate these fears, Iraqi officials insist that all contracts be subjected to a transparent bidding process. Many foreign delegates contend that changes in bidding protocols will do little to stem the corruption, which they believe is rife in the upper echelons of government, or to diminish the fear among non-US based companies that U.S. companies will be favored.

Oil industry experts respond that there is little to fear, because Iraq currently offers IOCs little incentive to invest, and because the law not only fails to adequately protect investors, but remains cloaked with uncertainty.⁷² However, as of February 2008, over seventy IOCs, representing some of the largest names in oil and gas production, such as Royal Dutch Shell, Total, Repsol YPF, ConocoPhillips, BP, and Norway's Statoil Hydro registered to compete for tenders in Iraq’s enormous reserves.⁷³ Even though the government has not stated yet the fields it will tender, and the terms; these service and extraction contracts are seen as a crucial hedge to maintain production, if and when

⁶⁹ James Glanz, *Iraq Produces Draft Law Governing Oil Industry*, International Herald Tribune (Jan. 19, 2007)

⁷⁰ Fundamentally, the central authorities have veto power. Additionally, Iraqi Officials say that they have received offers of interest from countries located in the United States, Russia, and China.

⁷¹ See Greg Muttitt, *Crude Designs: The Rip-Off of Iraq’s Oil Wealth*, Global Policy Forum (Nov. 2005) Available at <<http://www.globalpolicy.org/security/oil/2005/crudedesigns.pdf>> The report’s main thesis is that, under the likely terms, PSAs used in Iraq are likely to yield rates of return between 42% to 162%, which would be far in excess of average industry rates of return of 12%.

⁷² See *Key Iraq Sunni Group Warns Against Oil Law*, United Press International Energy Watch (Mar. 8, 2007)

⁷³ Ahmed Rasheed, *Over 70 Firms Bid for Iraq Oil Contracts*, International Herald Tribune. (Feb. 18, 2008)

parliament approves the Draft Law. In the political and cultural realm, however, the bitter sectarian feuds that have impeded the formulation and drafting of workable legislation promise to continue.⁷⁴

B. Potential problems

The US administration considers oil and gas sector management and revenue sharing legislation important benchmarks that will facilitate political reconciliation and economic development for the whole of Iraq.

Even though the Draft Law allows revenue to be divided according to population demographics, accurate population figures are elusive, since Iraqi census counts have always been politically-driven.⁷⁵ The Draft Law attempts a delicate balancing act between the powers of the regions, and those of the central authorities.⁷⁶ The law could placate Sunnis if it allows more petroleum exploration on their territory.⁷⁷ In a bid to revitalize exploration, the Iraqi government paid upwards of tens of millions of dollars to IOCs to conduct a review of old seismic data across the country, and to retrain Iraqi petroleum personnel.⁷⁸

Because revenue splitting was resolved fairly early in the draft negotiations, the main contention with regard to oil contracts, is whether authority to sign vests in the regions or the central authorities. Reflective of their ethnic and cultural polarization, the Kurds forcefully argued for expansive regional powers, and the Sunni Arabs sought a more centralized system.

⁷⁴ Drafts were sitting in limbo months before the cabinet approved it.

⁷⁵ Sunni Arabs hold that they are the majority in Iraq, even though officially, they represent 20%, Kurds 20%, and Shiite Arabs 60%.

⁷⁶ The minority Sunni Arabs are at the heart of the insurgency, ruling Iraq for decades under Saddam. Their principal fear is that the Kurds and Shiites will hoard the oil wealth. The Sunni Arabs oppose Shiite and Kurdish aspirations for more regional powers.

⁷⁷ However, early Sunni opposition has already emerged, as an influential group of Sunni clerics, the Muslim Scholars Association, asserted that the draft law is “invalid, and lacks legitimacy.” The group feels that the draft law is an attempt to put Iraq’s resource wealth in foreign hands, largely American and British. *See Sunni Clerics Group Attacks Iraq’s Draft Law*, Reuters (Mar. 06, 2007)

⁷⁸ *Id.*

The Draft Law sought to balance the interests of these two often adversarial groups with compromises that declared:

- Regions may enter into contracts with IOCs,⁷⁹ subject to overview of a powerful new committee termed “The Federal Oil and Gas Council (FOGC),”⁸⁰
- The INOC will be resurrected with a separate legal status from the Oil Ministry, and will be run according to a profit model.⁸¹
- Any region that produces more than 150,000 barrels a day can incorporate its own regional operating company.

The Draft Law draws harsh criticism⁸² because it lacks a mechanism for dispute resolution between the regions and the federal government. Some disaffected parties contend that the compromise was pushed through with significant political pressure from Washington.⁸³ The Draft Law has been held up seemingly indefinitely in parliament and it remains to be seen if parliament will pass it any time soon.

⁷⁹ The Draft law allows for the central authorities to review preexisting contracts that the KRG signed. See Draft Iraqi Petroleum Law Art. 39, Existing Contracts, Available at <http://www.iraqrevenuewatch.org/documents/oil_law_english_20070306.pdf>

⁸⁰ This council will be headed by the Prime Minister, who is able to reject any submitted contracts if they fail to comply with certain criteria. A panel of oil experts, consisting of Iraqis and non-Iraqis, will have an advisory capacity for the council. See *Id.* Article 5(b) “Council of Ministers”

⁸¹ *Id.* See Article 6(e) “Iraqi National Oil Company.” The INOC was established in 1964 to oversee oil production, but was dismantled in 1987 by Saddam Hussein. See, 1964: *Iraqi National Oil Company Incorporated*, The History Channel. Available at <<http://www.history.com/t dih.do?id=7226&action=tdihArticleCategory>>

⁸² Former Iraqi oil minister Faleh al-Khayat, stated “*the draft law is very dangerous; it should not be implemented at this time.*” See Robert H. Reid, Iraqi Cabinet Approves Draft Oil Law, Associated Press (Feb. 26, 2007)

⁸³ White House Spokesman, Tony Snow called the new oil law a “*key linchpin*” to Iraq’s recovery that “*gives everyone a shared economic interest in working together.*” *Id.* The draft law was one the “*bench-marks*” that the Bush Administration insisted that the Maliki administration meet by the end of 2006. Many critics viewed this as a possible short-term, forced compromise that is unlikely to produce lasting change. Critics underscore the pessimism by illustrating as examples the 2005 Shiite led election that ultimately activated the Sunni-led insurgency, and the constitution promulgation in 2006, which Washington now concedes needs to be heavily amended to produce peace.

V. Conclusion and Recommendation

Although Iraq has made long strides from its previous incarnation as a despotic regime, it finds itself in a very precarious position. The national constitution made headway as a starting point for national reconciliation towards a viable nation-state. Although expediency was perhaps necessary during the negotiation stage to forge agreement, intentional ambiguities have generated wedge-issue divisiveness. The crux of the overall debate goes to the question of federalism; what type of political system will be the best model to proactively develop the Iraqi energy sector?

The creation of modern Iraq from the remains of the Ottoman Empire at the conclusion of World War I seemed to support the contention that the British administrators were essentially interested in an entity to protect routes to India, and ensure a steady energy supply for its growing reliance on oil.⁸⁴

"I hate the corpses of empires. They stink so badly that I cannot believe that even in life they were healthy"

Rebecca West (1892-1983)

Although new Iraq is not entirely based on "Ethnic Federalism,"⁸⁵ it appears to be approaching that form of government.⁸⁶ The concept of ethnic federalism has had mixed success in the absence of overwhelming governmental threats, i.e. the Former Soviet Union. After early pangs, it became arguably successful in India; it had little success in the Ethiopian, and is still at issue in the Balkans. In Nigeria ethnic federalism was a

⁸⁴ This may be one for the first instances of overt "energy security" politics in the modern age.

⁸⁵ Ethnic Federalism is defined as a political system consisting of ethnic based territorial units overlapping with political administrative units.

⁸⁶ Iraq has a hybrid political system that melds a federalist system based on its eighteen existing governorates (provinces) and a more clearly ethnic form of federalism based on the Kurdish region in the North. One of the earliest and most famous proponents of the splitting up of Iraq into not just three main ethnic provinces based on the old Ottoman political demarcation or "Viliya" but into three separate countries based on ethnicity *ala* the Balkans, is former US ambassador to Croatia, Peter Galbraith, who has thinks that the US view of Iraq is based on "wishful thinking" and only ethnic partition can save the region. See generally, Peter Galbraith, *The End of Iraq: How American Incompetence Created a War without End* (2006).

robust disaster.⁸⁷ It is possible that in certain contexts ethnic federalism can be a divisive factor. However, in the current Iraq, granting ethnic/sectarian groups a measure of autonomy seems a reasonable measure towards an equitable distribution of wealth and the empowerment of previously disenfranchised minority groups.⁸⁸

U.S. Senator Kay Bailey Hutchinson, R-Texas, a firm supporter of three ethnically based provinces, with regions for Kurds,⁸⁹ Sunnis and Shiites, under a weak federal umbrella, opined that such a creation would “...*be hard to do, but it would be worth trying...[P]eople say, '[w]ell, that would balkanize the country.' Well, things are pretty stable in the Balkans right now. It's looking better than Iraq.*”⁹⁰ The supporters of ethnic federalism in Iraq think that the policy of attempting to force multiethnic provinces to cooperate with each other for scarce resources and political control has fuelled ethnic and sectarian violence.⁹¹ However, opponents of a pure type of ethnic federalism point out that, because many of Iraq's provinces are multiethnic/sectarian, a forced type of regional homogenization could induce large-scale population transfers (and associated slaughter), as with the India/Pakistan partition in 1947.⁹² A fair constitutional mechanism would control the oil resources that binds the ethnic groups together, rather than divides them.

⁸⁷ For a detailed analysis on the problems of Ethnic Federalism in Nigeria, see Rotimi T. Suberu, *Federalism and Ethnic Conflict in Nigeria* (2001). Furthermore, since 1991, Ethiopia has gone further than any other nation is utilizing ethnicity as the fundamental basis of federalism.

⁸⁸ To see a general review of ethnic federalism in the Ethiopian context, see Alem Habtu, *Ethnic Federalism in Ethiopia: Background, Present Conditions and Future Prospects*, Second EAF International Symposium on Contemporary Development Issues in Ethiopia. (July 11, 2003)

⁸⁹ Although it is beyond the scope of this paper, it must be pointed out though that the Kurds are not a homogenous group, they have cultural, economic, and political differences. Linguistically, the Kirmanci, Zaza and Sorani dialects (languages) are dominantly used by the several Kurdish groups, and may or may not be mutually intelligible. Further, Kurds are divided into Sunni, Shia, Alevi and Yezidi confessional groups. Moreover, they are separated politically; they have different political parties that are broken down delineated as well according to tribal lineages. See generally, Yavuz M. Hakan, *Provincial Not Ethnic Federalism in Iraq*, Middle East Policy (Spring 2004)

⁹⁰ Juan Cole, *Partitioning Iraq*, Salon.com.

⁹¹ For a general review of federalism in Iraq, see, Dawn Brancati, *Can Federalism Stabilize Iraq?*, The Washington Quarterly (Spring 2004)

⁹² It is estimated that as religious and ethnic groups fled for the relative safety of their co-religionists in provinces where they held the majority, upwards of 1,000,000 died in the accompanying communal riots. For a general discussion of the Indian partition see Sarah Ansari, *Life after Partition: Migration, Community and Strife in Sindh: 1947—1962* (2005) and see Urvasi Butalia, *The Other Side of Silence: Voices from the Partition of India* (1998)

The present Iraqi government can implement transparency and accountability through a national oil management regime. The sustainability of the Kurdish region depends on a measure of interdependency with the rest of the country. No development of the Kurdish administered area can take place without the development of institutions within a larger Iraqi national framework. There is increasing evidence that a national petroleum law with comprehensive support from all the stakeholders will support the Iraq's transition to peace, and defuse the Insurgency.⁹³ To develop respect for the rule of law within a country that has only seen the law of tyranny, will be a difficult and arduous process.

As examined above, the Iraqi constitution does not give exclusive authority over the oil and gas sector to Baghdad. Article 112(1) of the Iraqi constitution grants the central government only a conditional right to “undertake management of oil and gas extracted from present oil and gas fields.” When analyzed, this is not a preeminent right, but must be exercised in conjunction with the producing governorates and regional governments, and must be managed under a fair revenue distribution to the damaged regions.⁹⁴ In a conflict of law between the federal and the regional government, Article 115 grants the power firmly to the regions. With regard to the nonproducing fields and future fields under Article 112(1), there is no federal preemption or oversight, merely the requirement that the KRG must follow national energy policy set by Baghdad, but construed by the regional authorities.

⁹³ A significant portion of the insurgency's revenue comes from smuggling and profiteering off the oil production. See generally, Michael R. Gordon, et al, *Iraq's Insurgency Run on Stolen Oil Profits*, The New York Times (Mar. 16, 2008). And because many of the Saddam era price controls are still in place, Iraqi fuel products are more inexpensive domestically than in surrounding regions, making arbitrage very attractive. See James Glanz and Robert F. Worth, *Attacks on Oil Industry in Iraq Aid a Vast Smuggling Network*, The New York Times, (June 04, 2006) Further, it is estimated that smuggling has increased in Basra and is costing the federal authorities upwards of \$40 million a month. The smuggling groups are believed to be connected to Shiite militias connected to powerful Shiite political parties. See generally, Kathleen Ridolfo, *Iraq: Smuggling, Mismanagement Plaguing Oil Industry*, RFE/RL (Nov. 13, 2007) Although, documents obtained by CNN show that many of the smuggling routes set up by Saddam during the embargo were known, and even condoned by the US government and the UN. US officials familiar with the issue stated that the reason it was condoned was because it was in the “national security interest” of the US by providing a major source of income and trade for Iraq's major trading partners who happened to also be major US regional allies, such as Turkey and Jordan. See generally, Elise Labott and Phil Hirschhorn, *Documents: U.S. Condoned Iraq Oil Smuggling*, CNN News. (Feb. 2, 2005)

⁹⁴ Iraq Const. §4 Art. 112(1)

Some proposed recommendations to overcome the constitutional imbroglio follow in the next section.

A. Proposed Constitutional Amendments

The ambiguities of the constitution need to be clarified. While ambiguities may have speeded up initial compromises, they are a major factor behind current constitutional impasses. I suggest that Article 112(1) be amended to read, “The federal government, **through the Federal Oil and Gas Council**, will have **final approval over all agreements related to** oil and gas extracted from **all** fields in cooperation with the governments of the producing regions.” (My suggestions in bold). The central government's understanding of Art. 112(2) was that it conferred the soon to be formed INOC control over “present” producing fields, and the regions could form their own operating company (as according to the Draft Law) to produce their oil and gas if they produce more than 150,000 b/d.⁹⁵ Constitutionally recognized regions that produce more than 150,000 b/d should, if they desire, form an operating company to produce their oil, with the proceeds going to Baghdad for automatic distribution. However, if the producing region forms an agreement with an IOC, then the contract must be approved by the FOGC.⁹⁶

This modification will clarify any ambiguity over which governmental agency has control of oil fields and unequivocally declare that the power lies with the federal government to approve or disapprove energy contracts.

B. The Political Compromise: Will the Stakeholders Agree?

Even though the KRG was a stalwart opponent of increased federal authority over oil and gas issues, it now indicates that the Kurdish authorities are amendable to a FOGC which would have oversight over contracts the KRG signs with IOCs. To be compatible

⁹⁵ Draft Hydrocarbon Law Art. 6(b)5

⁹⁶ As stipulated under the draft law, Art. 5(c).

with the Draft Hydrocarbon Law Art. 5(c), a FOGC would be headed by the Prime Minister, who would be empowered to determine all national oil and gas sector policies, and set the overall strategy for the sector. The FOGC would have a very powerful position to set the tenor of the Iraqi oil sector, review all oil and gas contracts, and operate on a quorum of two-thirds. The FOGC would be made up of representatives of constitutionally recognized governments, energy experts, and “producing governorates.”⁹⁷ Although a departure from the Draft Law, the FOGC should have seats reserved for the Sunni minority, which might otherwise find themselves disenfranchised, because Sunni Arab governorates do not have a constitutionally recognized status.

The regional authorities should be empowered to license oil production in the region under a contractual form that adheres to the constitution, but is subject to the terms

“Kurdish dissatisfaction stems from its objection to a state-run, relatively unaccountable oil company that’s given almost all of Iraq’s proven reserves.”
— Jonathan Morrow, legal advisor to Kurdish government

of a national hydrocarbon law reviewable by the FOGC. If a region has a dispute with the FOGC’s decision, then the challenge should be sent to fast track binding international arbitration, with the claimants adhering to the results.⁹⁸ The Kurds have indicated their approval of the promulgation of an FOGC with oversight and veto authority that vests the KRG with the right to license.⁹⁹

However, because an FOGC will leave the regions with a decreased share of ultimate power, rules should be promulgated to assure a fixed automatic distribution mechanism, framed around a per capita population density model, to prevent the federal government from modifying allocations at a later date. While population figures are currently disputed, demographic statistics should be concluded by political agreement, with a comprehensive census target date set up within the near to medium term.

⁹⁷ Article four of the Draft Hydrocarbon Law designates a “producing governorate” as “any Iraqi Governorate that produces Crude Oil and natural gas on rates more than one hundred and fifty thousand (150,000) barrels a day.” See generally, Christopher M. Blanchard, *Iraq: Oil and Gas Legislation, Revenue Sharing, and U.S. Policy*, CRS Report for Congress (Oct 2, 2007)

⁹⁸ Arbitration could be sponsored by internationally recognized organizations committed to impartiality such as the Association of International Petroleum Negotiators or the International Commission of Arbitration.

⁹⁹ Kathleen Ridolfo, *Iraq: Draft Law Aims to Please All Sides*, Radio Free Europe/Radio Free Liberty (Mar. 2, 2007)

The disaffected Sunnis will likely support such a model, which would create a revenue distribution plan to earmark funds for their, as yet, energy poor regions. The crux of the Sunni dissatisfaction, which is playing a significant part in the insurgency, is the fear that a Shiite dominated government will leave them poor and voiceless. The Sunnis tend to prefer a more centralized state which will control the oil and gas resources. The Sunnis fear two related issues, that the regions are ill equipped to deal with overwhelming expertise of foreign IOCs, and thus will be exploited, and that the resource rich Shiite and Kurd regions will neglect development in the Sunni areas.¹⁰⁰ Therefore, the reorganization of the oil sector should serve two purposes with regard to the persistent insurgency: First it should cut off monies that are being funneled to the insurgents, through unaccountability of oil funds, and should simultaneously address their grievances.¹⁰¹

The most powerful Shiite dominated parties have expressed preliminary approval of this type of solution. The ruling Shiite United Iraqi Alliance (UIA)-composed of the Dawa Party and the Supreme Islamic Iraqi Council¹⁰² have supported the adoption of a comprehensive hydrocarbon legislative package that favors centralization in the approval process for licensing.¹⁰³

Closing Words

Iraq's shattered polity and decrepit infrastructure requires a massive infusion of investment and revenue for the development of the people and their physical environment. According to the May 2007 U.S. Government Accountability Office (GAO) report, Iraq needs an estimated \$20 billion to \$30 billion over the next several years to reach and sustain a crude oil production capacity of 5 billion b/d.¹⁰⁴ This does not include the equally important financial needs in other sectors such as transportation

¹⁰⁰ Lionel Beeher and Greg Bruno, *Why Iraqis Cannot Agree on an Oil Law?*, Council of Foreign Relations (Feb. 22, 2008)

¹⁰¹ A comprehensive, accountable system of metering will also serve to monitor the oil that is being pumped and keep track of where it is being transported.

¹⁰² Formally known as the Supreme Council for Islamic Revolution in Iraq.

¹⁰³ *Supra* Note 97, *Iraq: Oil and Gas Legislation, Revenue Sharing, and U.S. Policy*.

¹⁰⁴ GAO, *Rebuilding Iraq: Integrated Strategic Plan Needed to Help Restore Iraq's Oil and Electricity Sectors*, GAO-07-677 (May 15, 2007)

infrastructure, education, health and sanitation to name a few. To encourage investment, Iraq needs a regulatory certainty that provides IOCs clear guidelines as to the protocol for investments and investors. Further, a marked reduction in violence is needed before major companies even begin to consider sending personnel. A welcome sign of IOC support in Iraq came when Chevron and Total confirmed that they are in discussions with the Iraqi Oil Ministry to finalize a technical support agreement to increase production at the West Qurna Stage 1 field near the Southern port city of Basra. The agreement is a step in the right direction, because comprehensive and pervasive clarification would probably increase the FDI available to Iraq.¹⁰⁵

This proposal is offered as a legal balm that will mitigate debilitating constitutional ambiguity, and break political obstructions, while reducing sectarian inspired violence, by addressing the needs of all Iraqis.

¹⁰⁵ *Chevron, Total seek Oil Deal in Iraq*, Associated Press News (April 4, 2008)

Appendix One-Map of Iraqi Oil Infrastructure

