The Iraqi Federal Oil and Gas Law 2011: Exploration, Exploitation and Expropriation

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1. Introduction

Officially ranked as having the third largest reserves of oil and gas in the world, Iraq holds 70 discovered fields; of which only 24 are exploited. These contain up to 141 billion barrels of proven petroleum reserves and an estimated further 214 billion barrels of probable reserves.[1] The Iraqi Government has recently stated that recent geological surveys and seismic data have shown that Iraq holds as much as 350 billion barrels—a figure which exceeds Saudi Arabian reserves; the largest in the world.[2] In Iraq, however, wars and political instability have caused a severe crisis affecting political, economic and social development.[3] Oil and gas hydrocarbons are the only possible source of income capable of rebuilding its economy.[4] Accordingly, Iraq has been seeking a legal framework capable of developing the upstream sector and stimulating its wealth. In fact, the proposed Federal Oil and Gas Law 2011 (FOGL) provides that "revenues of oil and gas are the main pillars for the re-development of the country in general, and the Iraqi economy in particular".[5]

The FOGL provides that such re-developments must be achieved on a "sustainable and sound basis and in a coordinated and planned manner that takes into account the objective of the Constitution, including the unity of the Republic of Iraq and the depletable nature of natural petroleum resources".[6] Failing to do so, the legal regime proposed by the FOGL, (which replaced the 2007 Draft Oil and Gas Law) (DOGL), has raised debates, causing a delay in its promulgation. There are four different versions of the FOGL circulating, with the differences in their provisions resulting in different issues and implications. Nevertheless, the Council of Ministers (CoM) has approved the version which was compiled by the Federal Ministry of Oil (MoO) and presented on August 25, 2011, thus invalidating all other versions.[7]

Accordingly, on the basis of the MoO's version, this paper seeks to provide an analysis on whether the FOGL protects the national interests of Iraq and its people and whether it provides a framework which can meet its declared objectives. The paper will first assess the interpretation of constitutional provisions regarding the distribution of powers related to oil and gas matters between the Federal Government, the Kurdish Regional Government (KRG) and governorates which are not organised in a region. Secondly, an evaluation will be made on the adequacy of the contractual instruments which the FOGL opts for. Finally, the manner in which the FOGL weakens the most important bodies related to oil and gas in Iraq will be highlighted. The paper concludes that, despite the best of intentions, the FOGL is an inadequate piece of legislation to meet its stated objectives and also does not function within the correctly stated context of politics, economics, physicality and technicality. Its provisions do not only hinder the stability of the Iraqi economy but also weaken and expropriate the ownership of oil and gas, entitled collectively to the people of Iraq in all regions and governorates.

2. The division of power between the State, the regions and governorates not organised in a region

On several occasions misalignments have arisen over whether the KRG has constitutional authority to enter into international oil and gas agreements, such as the Production Sharing Contracts (PSCs) concluded with DNO and Hunt Oil.[8] Such debates stem from the ambiguity found in the constitutional provisions which regard both the competencies of the Federal Government, the regional governments and the management of oil and gas. Although the position of the KRG is "far from crystal clear",[9] it incorrectly interprets the constitutional provisions in a selective and unilateral manner. Such interpretations would entitle the KRG to supremacy over

[1] US Energy Information Administration, "Iraq" (EIA April 2013), available at: *www.eia.gov/countries/analysisbriefs/Iraq/iraq.pdf* [Accessed on 22 April 2013]; Christopher Blanchard, "Iraq: Oil and Gas: Legislation, Revenue Sharing and US Policy" (2009) 7-5700 CRS 1, available at *http://www.fas.org/sgp/crs/mideast/RL34064.pdf* [Accessed May 9, 2013].
[2] Muhammed Abed Mazeel, "Hydrocarbon Reservoir Potential Estimated for Iraq Bid Rounds Blocks" *Oil and Gas Journal* May 3, 2012, available at *http://www.ogj.com /articles/print/vol-110/issue-3/exploration-development/hydrocarbon-reservoir.html* [Accessed May 9, 2013].
[3] OPEC, "Commentary: Investing in OPEC" (2003) 14(4) *OPEC Bulletin* 3.
[4] Ibid.
[5] Ministry of Oil, Council of Ministers, Federal Oil and Gas Law of 2011 (August 25, 2011) art.50, available at *http://www.iraq-businessnews.com/wp-content/uploads/2011 /10/CoM-Draft-Oil-and-Gas-Law-English-Version-by-IEI.pdf?d9c344* [Accessed May 9, 2013]. (Hereinafter FOGL.)
[6] Ibid.
[7] Ahmad Jiyad, "Brief Review of the Federal Oil and Gas Law Proposed by the Ministry of Oil" (Iraq Development and Consultancy Research Paper, 2011), p.1, available at *http://www.iraq-businessnews.com/wp-content/uploads/2011/08/Ahmed-Mousa-Jiyad-Review-of-FOGL-MoO-version-July-2011.doc?d9c344* [Accessed May 9, 2013].
[8] Rex Zedalis, "Foundations of Baghdad's Argument that Regions Lack Constitutional Authority Over Oil and Gas Development Agreements" (2008) 26(2) JENRL 303, 305.
[9] Ibid.

the Federal Government and other governorates not organised in a region, as well as complete autonomy in oil and gas affairs.[10]

The Director of Revenue Watch Middle East, Yahia Said, has stated that "Despite the media's focus on the role of the private sector, the most contentious issue in the Iraqi legal framework is the division of authority between the federal centre and the regions."[11] The Constitution has established a binary system with the Federal Government when dealing with the KRG, and a decentralised administration when dealing with governorates that are not organised in a region. In the case of Iraq, the decentralised administration does not entail the simple approach of an elected commission (which operates in the local interest under the supervision and cooperation of the Federal Government) but rather a special and unknown approach that could be better described as confederacy.[12]

The FOGL is weakening the federal authority by adopting this position, which implies that the regional governments have ceded such powers and are enforcing a superiority which violates the Constitution.[13] In contradiction, the FOGL itself takes art.111 of the Constitution into account by declaring that "oil is the ownership of the Iraqi people in all the regions and governorates".[14] In its objectives, it asserts that the main premise of the FOGL is to ensure "the control over oil and gas in a way that guarantees the fair distribution of their returns to the people".[15] This chapter will assess and interpret the constitutional provisions regarding the division and supremacy of powers between the regional governments and governorates not organised in a region and also between the Federal Government and the KRG.

2.1. The regions and governorates not organised in a region

First, it must be noted that the Constitution deals with regional governments and governorates in an equal manner, particularly when dealing with oil matters.[16] For this reason the Constitution always refers to "regions and governorates that are not organised in region"[17] or rather, "governments of regions and governorates producing oil and gas".[18] This is important as it directly recounts the "fundamental struggle between centralist and decentralist forces in Iraq as well as to the debated structure of Iraq's future democracy".[19] Article 115 of the Constitution provides that:

> "All powers not stipulated in the exclusive powers of the federal government belong to the authorities of the regions and governorates that are not organised 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 organised in a region in case of dispute."[20]

Thus, it is clear that any regional governments and governorates which do not hold a federal status equally enjoy powers that are not entrusted with the central government. Accordingly, any law that gives the regional government's powers that exceed the powers of the governorates could be challenged for being unconstitutional.[21] Moreover, such power differential may potentially encourage harmful fragmentation of the country, as well as complicate oil policy and create chaos in the oil and gas industry. Such shortcomings are not limited to the regional governments but may also affect the oil-producing[22] and non-oil-producing governorates.[23] Nevertheless, it is important to note that the Constitution allows the formation of new regions under specific conditions. Article 119 of the Constitution provides that governorates have the right to form a region based on a local referendum either by a request by "one-third of the council members of each governorate intending to form a region" or by "one-tenth of the voters in each of the governorates intending to form a region".[24] In this respect, the implementation of art.119 may be thorny due to the existence of internal rivalries.[25]

[10] Ahmed Jiyad, "Iraq Federal Oil & Gas Law", (2011) 2(1) MEES 34, 70.
[11] Yahia Said, "Iraq Hydrocarbons Legal Framework" (Revenue Watch Paper Submitted to the US House of Representative Subcommittees on the Middle East and South Asia and International Organisations, Human Rights and Oversight, 2006), p.2, available at *http://www.caspianrevenuewatch.org/news/RWI_YahiaSaid_HydrocarbonFramework_071707.pdf* [Accessed May 9, 2013].
[12] Sabah Al-Bawi, "Influences of Ambiguity of Constitutional Provisions on the Administrative System of Iraq" (2012) 32(5) U Pa J Int'l L 1325, 1327.
[13] Fouad Al-Amir "As in August 2011: New Oil and Gas Law" (Al-nnas, Opinion Paper, August 23, 2011), p.13, available at *http://al-nnas.com/ARTICLE/is/wm25.pdf* [Accessed May 9, 2013] (in Arabic).
[14] FOGL art.2(1).
[15] FOGL art.2(2).
[16] Reider Visser, "Towards Asymmetrical Decentralisation in Iraq?" *Gulf Analysis-Wordpress* February 14, 2012 available at *http://gulfanalysis.wordpress.com/2012/02/14/towards-asymmetrical-decentralisation-in-iraq* [Accessed May 9, 2013].
[17] See arts 105, 106, 114, 115 of the Constitution of the Republic of Iraq, October 15, 2005, available at *http://www.unhcr.org/refworld/docid/454f50804.html* [Accessed May 9, 2013] (hereinafter, the Constitution).
[18] See fn.13 above, p.9.
[19] Reider Visser, "The Law on the Powers of Governorates Not Organised in a Region: Washington's "Moderate" Allies Show Some Not-So-Moderate Tendencies" *Historiae* February 11, 2008, available at *http://www.historiae.org/governorates.asp* [Accessed May 9, 2013].
[20] Constitution, art.115.
[21] See fn.19 above.
[22] FOGL art.1(12) defines a producing governorate as "A governorate achieving sustained oil and gas production at commercial rates of no less than (100,000) one hundred thousand barrels of oil equivalent per day."
[23] See fn.13 above, p.10.
[24] Constitution art.119.
[25] William Habeeb, *The Middle East in Turmoil: Conflict, Revolution, and Change* (ABC-CLIO, 2012), p.64.

2.2. Federal Government v Regional Government

The FOGL has failed to consider art.110 of the Constitution, which explicitly stipulates the exclusive powers of the Federal Government.[26] Such exclusive powers include the formulation and regulation of: foreign policy; national security and defence policy; fiscal and customs policy; standards, weights and measures; citizenship and immigration; broadcastings and postal policies; budget; Iraqi water matters; consensus; and statistics.[27] These powers are general and not limited to oil and gas matters.[28] This generality also applies to the powers found in art.114, which are "shared" between the Federal Government and regional governments and relate to the management and regulation of: customs; electric generation and distribution; environmental, development; planning; public health; educational policy; and internal water resources policy.[29] These two combined articles fail to exhaust all possible powers that the state or the regions may exercise and so assign all residual powers under art.115 noted above. In the absence of art.112, it could have been argued that the omission of specifying powers related to oil and gas in arts 110 and 114 could have indicated a reservation of such competencies by art.115.[30]

Article 112, however, negates such an argument and is the provision which has created most complications between the Federal Government and the local governments of the regions and governorates.[31]Article 112(1) provides that the "federal government, with the producing governorates and regional governments, shall undertake the management of oil and gas extracted from present fields … ".[32] Moreover, art.112 (2) provides that "in collaboration with the RGs and governorates, the Federal Government shall formulate strategic policies for developing oil and gas resources".[33] The former has created an "antagonistic" relationship between central and sub-central governments, particularly with the KRG.[34] This is because it only serves the central Federal Government as a guideline to the management of the resources extracted from current fields and does not provide any specifications related to exploitation or similar use.[35] Moreover, the provision may be read in a way that it only applies to resources already extracted and not hydrocarbons which are still in the reserves. On this basis, the KRG "clings" to the narrow interpretation that the Federal Government's cooperation in managing the resources is necessary only in relation to oil and gas extracted from the present fields in 2005.[36]

In harmony with art.111 of the Constitution, which states that "oil and gas are owned by all the people of Iraq in all the regions and governorates", the Federal Government negates such interpretation and confirms its authority to control exploitation. Although art.111 contains a general single legal principle which does not allocate the constitutional power over the management of the resources, its stipulation of ownership is not "inconsequential".[37] A literal interpretation of art.111 endorses all Iraqi citizens separate property interests in the national oil and gas resources. However, this is unworkable and so it is appropriate to read the article as entrusting the Federal Government to represent all ethnic, religious, ideological, regional and tribal groupings in the country, with the power to contract on the people's behalf.[38]

In fact, all exclusive powers set out in art.110 imply central authority over oil and gas matters. First, the conclusion of international agreements and compliance with the decisions of OPEC on production ceilings (amongst others) requires the control of the Federal Government.[39] Secondly, when looking at the Federal Government's exclusive power to regulate commercial and trade policy, it can be easily argued that oil and gas agreements are a type of commercial contract and for this reason, regions such as the KRG do not have the power to negotiate, structure and certainly not finalise such agreements.[40] Thirdly, PSCs include many types of allowances that fall under customs policy and which must be limited to the control of the Federal Government.[41] Fourthly, oil and gas matters are undoubtedly a prime element related to setting the national investment budget.[42] Last, but not least, authority over water matters is closely related to efforts in exploiting oil and gas, shipment, distribution, and transportation. As well as this, involving commercial crossing and regional and governorate boundaries is involved in the process. Even the negotiation, conclusion and implementation of commercial commitment are international in nature and thus exclusive to the Federal Government.[43] In other words, most oil and gas matters fall under the

[26] See fn.13 above, p.13.
[27] Constitution art.110.
[28] See fn.8 above, p.306.
[29] Constitution art.114.
[30] See fn.8 above, p.307.
[31] See fn.12 above.
[32] Constitution art.112(1).
[33] Ibid, art.112(2).
[34] See fn.12 above.
[35] Ibid.
[36] Ibid.
[37] See fn.8 above, p.308.
[38] Ibid, p.314.
[39] See fn.13 above, p.14.
[40] See fn.8 above, p.310.
[41] See fn.13 above.
[42] Ibid.
[43] Rex Zedalis, *Oil and Gas in the Disputed Kurdish Territories: Jurisprudence, Regional Minorities and Natural Resources in a Federal System* (Routledge, 2012), p.54.

competencies of art.110 of the Constitution, since the hydrocarbons and their returns are directly related to the said powers.

Moreover, the language of art.112, which states that the management of the resources should be conducted in collaboration between the Federal Government and the regional governments, implies that in such collaboration, the leading role rests with the Federal Government.[44] Thus, even in circumstances when powers under arts 112 and 114 are shared, it is clear that the Constitution rejects the possibility of regions or governorates acting independently and entering into international oil development agreements without the involvement of the Federal Government. This conclusion remains unchanged when considering art.115 which, essentially, says that competencies stated in art.110 are exclusive to Federal Government and the KRG does not have the authority to conclude any agreements which fall under the scope foreign economic, trade, and commercial policy.[45] It is the broad nature of the powers in art.110 which leaves no margin for the regional governments or governorates to gain authority under art.115 in case of conflict.[46] To exemplify, in the Model PSC published by the KRG, there are provisions which conflict with the Constitution. A number of these conflicts relate to technical provisions such the length of exploration periods and royalty which may pass under art.115. However, in other cases, the KRG is raising a systematic claim over powers exclusive to the Federal Government such as claiming the right to negotiate international unitisation disputes or offer tax exemptions.[47]

Nevertheless, it is the Constitution itself which raises confusion and allows the violation of this principle.[48] The Constitution could have been drafted in a more direct and straightforward way as usually the notion of residual powers in a federal system, requires only one specification of powers.[49] In the case of Iraq, the Constitution specifies a few exclusive powers whilst assigning other powers to regional governments and governorates not organised in a region. In theory, the federal principle revolves around the division of powers between distinct but coordinated governments.[50] Such allocation of power is a fundamental challenge when drafting a federal constitution. This problem however, has been addressed in several jurisdictions which have provided better arrangements than the Iraqi one. The ideal approach for Iraq is the one taken by the United States of America, where specific powers are assigned to the Federal Government, leaving all other powers to the state governments.[51] In India and Canada, the same approach is followed but the arrangement differs by the presence of concurrent powers shared between the central and sub-central government. Unlike art.115 of the Constitution, in the case of conflicting concurrent competencies, the federal law of these states prevail and any residual powers inhere to the Federal Government.[52]

In conclusion, the Constitution, which was negotiated in unstable circumstances, entitles the regional governments to a large degree of autonomy in the absence of the necessary tools to provide adequate coordination amongst the central and sub-central units. This is the result of the constitutional ambiguity regarding the division of powers between the governments. Although the above analysis affirms a supremacy enjoyed by regional laws over federal laws in case of a conflict, it provides that matters of oil and gas fall out of the ambit of art.115 and are more suited to fall under the broad exclusive powers assigned to the Federal Government in art.110. Even in circumstances where art.112 mandates collaboration, the fact remains that the involvement of the Federal Government with a leading role is a constitutional requirement. In any case, any other interpretation not only violates the law but will affect the structure and unity of the state, therefore harming the interest of the nation and its people. Such approach might lead Iraqi federalism to "lurch in a confederal direction", especially if the Federal Supreme Court becomes a powerful entity "even mildly friendly to the regions".[53]

3. The contractual instruments under the FOGL

The FOGL, which is aimed at redeveloping the Iraqi economy, allows foreign participation in upstream activities. The FOGL allows such participation through the use of Production Sharing Contracts (PSCs) which, in the Iraqi context, have been subject to a strong opposition by a number of experts; each with a view that such contracts not only expropriate the Iraqi ownership of its resources but also provide unnecessary generous incentives to foreign International Oil Companies (IOCs) at the detriment of the state.[54] In fact, the debate over the use of such agreements has been a major factor in delaying the enactment of the proposed hydrocarbons law. In view of that, this chapter will discuss and analyse the viability of such contracts by outlining their features and legitimacy and will assume to settle the debate as to whether they serve the economy and the national interests of Iraq.

[44] See fn.8 above, p.310.
[45] See fn.13 above, p.16.
[46] See fn.8 above, p.313.
[47] See fn.11 above, p.7.
[48] See fn.16 above.
[49] See fn.19 above.
[50] John Kendle, *Federal Britain: A History* (Taylor and Francis, 1997), p.129.
[51] Ibid.
[52] Ibid.
[53] Al Sadi, *Crushing State's Sovereignty: Iraq Project* (AuthorHouse, 2011), p.161.
[54] See fn.11 above.

3.1. Production Sharing Contracts

To start, the FOGL ambiguously adopts two types of contracts; namely, Exploration, Development and Production Contracts (EDPCs) and Development and Production Contracts (DPCs).[55]Article 15 of the FOGL provides that the Iraqi Ministry of Oil (IMO) or the competent body may grant a license for exploration, development and production based on the applicant's technical and fiscal capability.[56] Moreover, it states that the said contracts must be formulated in a way that takes into account national control, ownership and optimum economic return, amongst other factors.[57] Although not explicitly stipulated, EPCs are flexible in the sense that they imply the inclusion of the development phase. However, they may also be seen as restrictive as they rule out the formulation of mere exploration contracts.[58] Nevertheless, this is only true, if the contract does not provide the contractor the right to terminate the contract before entering the development and the production phase.

Like the authors of the Draft Oil and Gas Law 2007, the drafters of the FOGL have "cleverly avoided" any reference to Production Sharing Contracts (PSCs).[59] However, it is indicated that EPCs are a form of these arrangements.[60] Such agreements have become widely used around the world since they were introduced in Indonesia in the 1960s.[61] In theory, the main feature of such an agreement is that the ownership of oil remains with the state, thus retaining sovereignty over the resources.[62] Under PSCs, the IOC will bear the costs, risks and expenses of oil exploration and exploitation.[63] The agreement, however, will stipulate cost recovery terms allocating the "cost oil" to the contractor, to allow it to recover permissible costs set for it in the PSCs: the contractor's share of the "profit oil".[64]Article 13 of the FOGL provides that

> "the Iraq National Oil Company shall be deemed the Operator and shall be delegated to, directly or indirectly, enter into service contracts and management contracts with qualified companies for producing fields and adjacent undeveloped fields".[65]

This is not mirrored by art.16 (which specifies the contents of the model contract), as it does not explicitly refer to service contracts and the fiscal components it mandates, such as "suitable return on investment", represent a foundation for the use of PSCs.[66] This is primarily supported by the fact that, in service contracts, the return on investment is fixed rather than being analogous to the production rate.[67] Mr Ahmad Jiyad further supports this implication of PSCs by noting arts 41 and 43 which use terms that are commonly found in, or refer to, PSCs.[68] In art.41, it is provided that foreigners shall be entitled to transfer their "shares" of interests which could imply PSCs.[69]Article 43 uses the terms "royalty payment" and "production bonus" which are amongst the key features found within the parameters of PSCs.[70] Fiscal components, such as royalties, are amongst the contractual provisions of PSCs which have created most disagreement, as they seem to offer generous incentives to IOCs, particularly when they apply to all oil fields despite differences in their qualitative characteristics.[71]

3.2. Criticisms against the use of PSCs in Iraq

Professor Thomas Walde stated that PSCs give "… to the government political and to the company commercial satisfaction …".[72] Nevertheless, such satisfaction would be subject to the bargaining powers of the parties at time of negotiation.[73]PSCs may have been widely satisfactory and used by several host governments, however they are not necessarily suitable for all countries and circumstances. Iraq's weak political and economical position endorses IOCs with a strong bargaining position.

[55] See fn.10 above, p.40.
[56] FOGL art.15(1).
[57] FOGL art.16.
[58] See fn.7 above.
Ahmed Jiyad, "Oil and Gas Law in Iraq-Comprehensive and Critical Assessment" (Opinion Paper, 2007), p.1, available at *http://www.iraqoillaw.com/Jiyad.pdf* [Accessed December 2, 2011].
[59] Production Sharing Agreements and Production Sharing Contracts are identical, the difference is terminological and subject to translation preference; Daniel Johnson, "Changing Fiscal Landscape" (2008) 1(1) JWELB 31, 46.
[60] Ibid.
[61] Alexander Kemp, *Petroleum Rent Collection around the World* (IRPP, 1987), p.42.
[62] Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (CUP, 2010), p.118.
[63] Bernard Taverne, "Production Sharing Agreements in Principle and Practice" in Martyn David (ed.), *Upstream Oil and Gas Agreements* (Sweet & Maxwell, 1996), p.45.
[64] See fn.60 above, p.98.
[65] FOGL art.13.
[66] See fn.7 above.
[67] Valerie Marchel and John Mitchell, *Oil Titans: National Oil Companies in the Middle East* (Brooking Institution Press, 2006), p.43.
[68] See fn.7 above.
[69] FOGL art.41(3).
[70] FOGL art.43(1)(a); Kirsten Bindemann, "Production-Sharing Agreements: An Economic Analysis" (1999) Oxford Institute for Energy Studies WPM 25, 14, available at *http://www.oxfordenergy.org/wpcms/wp-content/uploads/2010/11/WPM25-ProductionSharingAgreementsAnEconomicAnalysis-KBindemann-1999.pdf* [Accessed May 9, 2013].
[71] See fn.10 above, p.44.
[72] Thomas Walde, "The Current Status of International Petroleum Investment: Regulating Licensing, Taxing and contracting" (1995) 1(5) CEMLP B, available at *http://www.dundee.ac.uk/cepmlp/journal/html/Vol1/article1-5.html* [Accessed May 9, 2013].
[73] See fn.61 above.

Hence, IOCs are able to negotiate a grand income and favourable terms which could last up to 40 years.[74] Even poorer terms would be achieved by the regions when dealing with IOCs. This could be gained upon the implementation of the authority decentralisation over oil contracts, from a national level to a regional one, as suggested by the constitution.[75]

3.2.1. Depletion rates

The first point of criticism relates to depletion rates, that is, the pace at which oil and gas is produced from a field. Its control is vital as it affects a number of other economic activities such as employment, government revenue and the profits of IOCs.[76] The state and IOCs have different views on the optimal levels of production and "if left unfettered, the oil companies would choose to produce at a much higher level than the State would wish them to".[77] This results from commercial considerations which aim for rapid and high levels of petroleum production, which may conflict with the current socio-economic situation of the State.[78] In this regard, PSCs are usually considered one-sided, benefiting the IOCs due to the broad rights on the control of production levels.[79] Thus, upon the conclusion of a PSC, Iraq surrenders the control of production rates, and this would result in faster depletion rates of its resources.[80] Although this is negotiable, experience shows that Iraq will be disadvantaged, as was the case with Algeria and Nigeria who failed against IOCs in controlling depletion rates. Therefore, it may be safe to assume that the current situation in Iraq may not lead to different results.[81] Moreover, amongst the stipulated objectives of the FOGL is the achievement of the highest level of growth in production.[82] In other words, with such a goal stated in the FOGL, not only there is a larger margin for IOCs to take advantage of the Iraqi resources in a manner which negatively affects depletion rates but violations of OPEC's production caps are likely to occur.[83] Particularly when assuming that Iraq wishes to abide by OPEC's quotes, replacing the word "highest" with "economically optimal" and including requirements to comply with OPEC's production criteria is crucial (see above fn.7).

3.2.2. Stabilisation clauses

Generally in PSCs, stabilisation clauses are used as a form of political risk management: an important mechanism which protects the investor from unjust political interference by ensuring the stability and predictability of agreements, particularly against any changes which may affect their profitability.[84] They do so by immunising the gains of an agreement from legal and fiscal alterations, to the benefit of the investor after the conclusion of the contract.[85] For instance, in Indonesian PSCs, IOCs are subject to fixed base taxes in accordance with the rate that was in place at the time of signing the agreement.[86] An example of more relevance is the Model PSC prepared by the Kurdish Regional Government (KRG), in which the stabilisation clause exempts IOCs from any "change to the law, or by revocation, modification, or non-renewal of any approvals, consents or exemptions granted to the contractor, in order to maintain the contractor's financial interests under this contract reasonably unchanged".[87] Such pre-emptive capture, however, limits successive governments in adapting or changing these contracts to future regulation.[88] This type of classical stabilisation clause restrains the sovereign authority of the state, causing an imbalance between the interests of the states and the investors.

Instead of such clauses, there are other balanced and modern practices which do not "freeze" the law and which may serve as alternatives for political risk management.[89] For instance, the Iraq National Oil Company (INOC) could be assigned the responsibility to compensate IOCs for any economic damage which may arise from a change of the law, affecting the specific contractual terms.[90] Other flexible techniques mitigate any disturbances caused by a unilateral state action, by allowing the parties to rebalance the economic interests of the contract.[91] Among them is the "stipulated economic balancing", where a

[74] Steve Hiatt, *A Game as Old as Empire* (RHYW, 2009), p.234.
[75] Greg Muttitt, "Crude Designs: The Rip-Off of Iraq's Oil Wealth" (Platform Research Paper, 2009), p.5, available at *http://www.carbonweb.org/documents/crude_designs_large.pdf* [Accessed May 9, 2013].
[76] Terje Lind and George Mackay, *Norwegian Oil Policies* (1980), p.28.
[77] Tina Hunter, "Legal Regulatory Framework for the Sustainable Extraction of Australian Offshore Petroleum Resources" (PhD dissertation, University of Bergen, 2010).
[78] Finn Arnesen et al, "Energy Law in Europe", in Martha Roggenkamp et al (eds), *Energy Law in Europe: National, EU and International Regulation* (Oxford University Press, 2007), p.899.
[79] See fn.69 above, p.7.
[80] Carole Nakhle, "Iraq's Oil Future: Finding the Right Framework" (Surrey Energy Economics Centre Research Paper, 2008), p.12, available at *http://www.seec.surrey.ac.uk/research/Publications/SEECIraqReportByCaroleNakhleNov2008English.pdf* [Accessed May 9, 2013].
[81] See fn.74 above, p.44.
[82] FOGL art.2(5).
[83] See fn.13 above.
[84] Bede Nwete, "To What Extent Can Renegotiation clauses Achieve Stability and Flexibility in Petroleum Development Contracts" (2006) 2 IELTR 56, 57.
[85] Megan Richardson, "Policy versus Pragmatism? Some Economic Conflict of Laws" (2002) 31 Com L W'ld Rev 189.
[86] Deloitte, "Taxation and Investment in Indonesia 2011: Reach, Relevance and Reliability" (Deloitte Publication, 2011), p.13, available at *http://www.deloitte.com/assets/Dcom-Global/Local%20Assets/Documents/Tax/Taxation%20and%20Investment%20Guides/2011/dttl_tax_guide_2011_Indonesia.pdf* [Accessed May 9, 2013].
[87] Ahmed Al-Janabi, "Oil and Gas Contracts in Iraq" (*Who's Who Legal*, July 2010), available at *http://www.whoswholegal.com/news/features/article/28421/* [Accessed May 9, 2013].
[88] Ibid.
[89] Elizabeth Eljuri and Clovis Trevino, "Political Risk Management in Light of Venezuela's Partial Nationalisation of the Oilfield Services Sector" (2010) 28 (3) JENRL 375, 387.
[90] Ibid.
[91] Peter Cameron, "Stabilisation in Investment Contracts and Changes of Rules in Host Countries: Tools for Oil and Gas Investors" (*AIPN Final Report*, 2006), p.18, available at *http://lba.legis.state.ak.us/sga/doc_log/2006-07-05_aipn_stabilization-cameron_final.pdf* [Accessed May 9, 2013].

contract is automatically amended when a unilateral state action significantly affects the economic balance of the contract.[92] Elizabeth Eljuri and Clovis Trevino explain that this may be done in different forms, including calculating the price owed for oil services via a contractual formula, which assesses variations in the oil price in the international energy market or even through terms which automatically alter interest rates in accordance to specified indices.[93] It is clear that there are alternatives to a strict "freeze of the law". Such alternatives are particularly necessary in Iraq's current redevelopment phase, which may require a range of legislative amendments or other measures necessary to reconcile uncertainties resulting from a decade of wars and instability. Nwete provides that host governments regard oil "as a patrimonial inheritance belonging to the whole nation including future generations", and so must ensure their obligations towards citizens by avoiding stabilisation clauses which would allow IOCs to keep any "windfall profits" arising from circumstances where the acreage results in more fruitful results than predicted.[94]

3.2.3. Dispute resolution

Disputes related to the agreements or the interpretation and application of the law will be heard by an International Court of Arbitration rather than domestic courts.[95] Such dispute-resolution mechanism is usually advocated by IOCs, on the grounds that national courts, particularly in developing countries, cannot be trusted in providing a neutral decision. Such an argument constitutes a "cover up" for IOCs to fulfil their motive of controlling oil resources of countries like Iraq.[96] The basis of this can be illustrated by the words of Susan Leubusher, which provide that

> "the system of International Dispute Resolution Tribunals assigns the role of another commercial partner to the country, ensures that non-commercial issues will not be aired and excludes representation and redress for populations affected by wide-ranging powers granted FOCs under international contracts".[97]

Thus, such tribunals will not consider national laws and will treat the dispute purely as commercial.[98] In such circumstances, the national interests will be ignored and so Iraq's democracy will not be achieved.[99] In addition, the provided dispute-settlement mechanisms should only deal with contract-related conflicts and not with the interpretation of the law. This is based on the fact that art.5 of the Constitution, which provides that "[t]he law is sovereign.[100] The people are the source of authority and legitimacy, which they shall exercise in a direct, general, secret ballot and through their constitutional institutions."[101] Moreover, in cases where the IOCs believe that they were subject to unfair decision, they could, with the help of their governments refer the matter to the International Court of Justice which has jurisdiction to hear international investment disputes.[102]

In any case, like most countries, an elementary legal principle of the Iraqi Constitution is that it has jurisdiction to hear disputes on matters within its sovereignty.[103] The stipulation found in the FOGL and the clauses of PSCs providing that disputes cannot be heard in national courts evidently violate this constitutional principle. Normally, the IOCs would be registered in Iraq and in this sense they are subject to laws and courts of Iraq without any exception.[104] The oil and gas industry, or rather oil and gas law, "is not a hermetically sealed division of civil law to which only special rules apply".[105] Accordingly, this paper suggests that not only international arbitration courts hinder the sovereignty and interests of Iraq but also that it is legally unjustifiable to disregard the authority of Iraqi federal courts on oil and gas matters.

3.2.4. Issues on the legality of PSCs

The legality of PSCs in Iraq has faced controversy. Critics argue that PSCs entitle the IOCs to have a partner ownership,[106] hence decreasing the level of sovereignty and control of the state. This conflicts with the Iraqi Constitution, as art.111 provides that oil and gas is the property of "all the people of Iraq in all the regions and governorates".[107]Article 112 assigns the administration and the management of the resources to the government which is responsible for distributing the revenues in an

[92] See fn.88 above, p.389.
[93] Ibid.
[94] See fn.83 above, p.58.
[95] FOGL art.45(3) and (4).
[96] Paul Tamuno, "The Unsuitability and Inadequacy of the Option of Agreed Dispute Resolution Process in Disputes Between Foreign Oil Companies and Developing Oil Producing Countries" (CEPMLP International Energy Law and Policy Research Paper Series, 2010) Working Research Paper No.2010/13, p.5, available at *http://www.dundee.ac.uk/cepmlp/gateway/files.php?file=CEPMLP_RNWP_2010_13_858317554.pdf* [Accessed May 9, 2013].
[97] Susan Leubusher, "The Privatisation of Justice: International Commercial Arbitration and the Redefinition of the State" (MRes thesis, Birkbeck College, 2003).
[98] Nathan Pino and Michael Wiatrowski, *Democratic Policing in Transitional and Developing Countries* (Ashgate Publishing, 2006).
[99] See fn.73above.
[100] See fn.7 above.
[101] Constitution art.5.
[102] See fn.95 above.
[103] Constitution, art.93.
[104] See fn.95 above, p.6.
[105] Roderick Paisley "Aspects of Land Law Relative to the Transportation of Oil and Gas in Scotland" in Greg Gordon, John Paterson and Emre Usenmez (eds), *Oil and Gas—Current Practice and Emerging Trends* (Dundee University Press, 2011), p.511.
[106] Muhammed Abed Mazeel, *Iraq Oil and Gas Papers 2010* (Disserta-Verlag, 2011), p.10.
[107] Constitution art.111.

efficient and fair manner to the people.[108] Thus, the constitutional provisions clearly illustrate that IOCs have no right or share in the Iraqi hydrocarbons. Consequently, the grant of such right by way of PSCs is unconstitutional and accordingly, any law which permits the grant of such right shall be null and void.[109] On the other hand, it may be argued that there is no provision in the Iraqi legal framework which actually prohibits the government to transfer ownership on the "people's behalf".[110] In the absence of any explicit provision, those agreements may be treated as valid.[111] In addition, the state does not in fact transfer the ownership until the production or rather the export phase.[112]

Nevertheless, oil experts concur that the rationale behind PSCs is principally political as technically, the host government retains the state ownership.[113] Yet in practice, oil companies will enjoy the same benefits of the prior concession agreements regime.[114] To explain, in the regime of PSCs, the IOC has no share in the oil as long as it is still in the reservoir. Then again, it will have a share of such oil, according to their entitled percentage stipulated in the contract when the resources are extracted from the well.[115] In view of that, the oil has no economic value as long as it is still in the reservoir. The oil only becomes valuable when it is extracted and sold. In practice, however, this requires a contract. The company would then be guaranteed a share of the oil in the reservoir until it is extracted, which is prohibited under the current constitution. Thus, it may well be said that such a concept is a manipulation of words and an attempt to distort the meaning of oil and gas state ownership. Since the creation of PSCs, this approach has been used in different countries of the world to bypass the right to state sovereignty over their resources. [116]

Moreover, IOCs increase their company value by booking the relevant Iraqi reserves and issue them in their account balance sheets.[117] To explicate, prior to the extraction of oil, IOCs do not consider their share of oil unavailable and add it to their assets. In this way the company looks valuable, increasing both their stock price in proportion to their share of reserve existing in the reservoir and their apparent financial position for receiving loans.[118]

In fact, this happened recently with DNO International ASA (Norwegian Oil Company)—the operator of three PSCs in the Kurdistan Regional Government.[119]DNO has increased its proved and probable oil reserves estimate by 35 per cent from incomplete wells in the Tawke Field in the KRG, thereby increasing the company value.[120] In 2004, however, Royal Dutch/Shell Group had overstated their reserves by 20 per cent and eventually announced a downgrade in their reserves. This not only led to a decrease in their share prices by 8 per cent, but also affected the company's reputation in the industry.[121] Muttitt comments that the importance of reserve booking "should not be underestimated for the oil majors" and that this is illustrated by Shell who, after the 2004 event has been left desperate to find new reserves, rationalising their efforts to make friends in Iraq.[122]

Furthermore, when some countries try to nationalise oil companies working under PSCs or similar contracts, IOCs will not accept customary compensations but instead will ask for compensations against their share of the oil existing in the reservoir.[123] Thus, it may well be said that the expressions found in art.16 (b) of the FOGL (which mandates "Iraq's ownership of petroleum resources" as a criteria in structuring model contracts)[124] and art.53 of the FOGL, which reads:

> "Whereas the Republic of Iraq entered a new phase upon the coming into force of the Constitution in 2006, which established the principle that 'Oil and Gas belong to all Iraqi people in all Regions and Governorates …' as a ground for enacting the law"[125]

are merely structural sentences which have no meaning, unless being endorsed as legal articles which prohibit PSCs.[126] Fouad Al-Amir explains that PSCs are not the only approach in attracting an investment; it is also possible to grant a simple price discount in commercial dealings, according to trade relations and services

[108] Ibid, art.112.
[109] Zuhair Al-Hassani, "A Study of the Iraqi Draft Oil and Gas Law" (*Saut Al-Huriya*, September 1, 2009), available at *http://www.baghdadtimes.net/Arabic/index.php?writerid=1575* [Accessed May 9, 2013] (in Arabic).
[110] Professor John Paterson, "Contemporary Issues. LLM Oil and Gas Law" (University of Aberdeen, November 29, 2011).
[111] Ibid.
[112] Christopher Clement-Davies, "Iraq's Oil and Gas Framework" (2009) 4 I.E.L.R. 138, 145.
[113] Mark Curtis, *The Legal Ambiguities of Power* (Zed Books, 1995), p.21.
[114] See fn.74 above, p.4.
[115] Lester Hunt and Joanne Evans, *International Handbook on the Economics of Energy*, Vol.140 (Edgwar Elgar Publishing, 2009), p. 414.
[116] See fn.13 above, p.11.
[117] See fn.74 above, p.13.
[118] John Fanchi and Christopher Fanchi, *Energy in the 21st Century* (World Scientific, 2011), p.91.
[119] DNO, *Annual Statement of Reserves 2011* (DNO International ASA, 2012), available at *https://www.dno.no/Documents/DNO%20Annual%20Statement%20of%20Reserves%202011.pdf* [Accessed May 9, 2013].
[120] "DNO Lifts Reserves Estimate on Iraqi Field" (Reuters, May 10, 2012), available at *http://www.reuters.com/article/2012/05/10/dno-iraq-idUSWEA121320120510* [Accessed May 9, 2013].
[121] Bob Wearing and Robert Wearing, *Cases in Corporate Governance* (Sage, 2005), p.148.
[122] See fn.74 above, pp.13, 14.
[123] See fn.13 above, p.11.
[124] FOGL art.16(b).
[125] FOGL Grounds ("Preamble").
[126] Fouad Al-Amir, *The Latest in the Iraq Oil Issue* (Al-Ghad, 2012), p.59 (in Arabic).

provided by the other party.[127] It is also possible to grant allowances, generally limited for production increases, quality improvements, or environmental improvements, amongst others.[128] Such a process is not considered a breach of the Constitution since it is a customary trade action and is a preferable alternative option.[129]

3.2.5. Risk Contracts in Iraq

In addition to the above, PSCs are not suitable when considering the Iraqi circumstances, not only for the above shortcomings and the constitutional issue, but also due to the nature of such contracts. With a view to advocate for the use of PSCs, IOCs incorrectly assert that such contracts are standard practice and that Iraq has no viable alternatives.[130]PSCs are "risk contracts" where the investor ventures into oil exploration related investments against the possibility of oil availability.[131] If oil is not found, then IOCs will lose their investment, otherwise, IOCs will be granted a share of oil as specified in the contract.[132]

The International Energy Agency states that PSCs are used for no more than 12 per cent of the world oil reserves, whereas 67 per cent of the reserves are developed by national oil companies.[133] In Iraq, there is insufficient risk to defend the use of PSCs. Iraqi fields hold high production levels and a low operating cost which is more common in onshore reserves than offshore reserves as they are larger and geologically less complicated.[134] Iraqi fields and reservoirs have been specified, determined and assessed.[135] This is even more evident when considering the geological structures with no exploratory wells, since the possibility of success to find oil in these structures is the highest in the world and has been given a percentage success rate of between 70–80 per cent.[136] Nevertheless, it may be argued that there are geographical lands where no seismic investigations have been implemented. However, the investment in such fields should not be justified due to the fact that there is an "enormous" amount of guaranteed reservoirs and fields.[137]

Neighbouring countries such as Saudi Arabia, amongst other gulf countries with high production levels and low operating costs (from reserves mostly located onshore or in shallow waters), do not contract with private IOCs and even in circumstances where they do, they do not use PSCs.[138] For instance, Saudi Arabia, Kuwait, Iran and the United Arab Emirates all pay IOCs a fixed rate for oil exploration and development rather than a share of the oil.[139] In fact, just like Iraq, the use of PSCs in these countries is unconstitutional and unnecessary.[140] This is primarily as oil exporters are generally more interested in the scale of income from their reserves rather on the scale of investment.[141] Even in some countries where PSCs are not unconstitutional, such as Russia, Venezuela, Georgia and Chad, PSCs were rushed into and consequently the shortcomings of these agreements were clear.[142]

In countries with large reserves, when oil is present it can be developed through Technical Service Contracts (TSCs).[143] In fact, the main reason for such use is to comply with constitutional and statutory restrains on foreign ownership of oil and gas.[144] In Iraq, apart from the PSCs concluded by the KRG, the MoO limits licensing auctions to TSCs.[145] In these agreements, the government contracts with an IOC to conduct a specific technical service regarding the exploitation of petroleum resources within a stipulated time period.[146]TSCs and PSCs are similar in nature but not identical;simplistically , the main distinction is that TSCs reimburse IOCs in cash rather than in kind.[147] Moreover, such agreements provide that the compensation of the contractor is made on a fixed-fee basis at defined periods, or upon completion.[148]

[127] An example is Iraq's use of Amman as a transit location and for other trade-related issues in return for crude oil at a discounted price of $18 per barrel: Ali Al-Rawshdeh, "Iraq-Jordan Trade Relations Boosted by Energy Sector" (*AL-Shorfa*, September 29, 2011), available at *http://al-shorfa.com/en_GB/articles/meii/features/main/2011/09/29/feature-03* [Accessed May 9, 2013].
[128] See fn.125 above, p.59.
[129] Ibid.
[130] See fn.74 above, p.4.
[131] Tengu Machmud, *The Indonesian Production Sharing Contract: An Investor's Perspective* (Kluwer Law International, 2000), p.37.
[132] Ibid.
[133] Dunia Chalabi, *Perspective Investment in the Middle East/North Africa Region* (presentation to the OECD, Istanbul, February 2004).
[134] Gawdar Bahgat, *Energy Security: An Interdisciplinary Approach* (John Willey & Sons, 2011), p.79; Abdul Hadi Al-Hassani, "Iraqi Oil and Gas Law: Between Theory and Facts" (2007) 4 I.J.E.R. 60, 63 (in Arabic).
[135] US Congress, *Congressional Record, V. 153, Pt.10, May 22, 2007 to June 5, 2007* (Government Printing Office, 2010), 13679.
[136] Tariq Shafiq, "Iraq's Oil Reserves Revisited & Implications" (Iraq Oil Forum Working Paper, 2009), pp.5–7, available at *http://www.iraqoilforum.com/wp-content/uploads/2011/09/Tariq-Shafiq-Iraqs-Oil-Reserves-Revisited.pdf* [Accessed May 9, 2013].
[137] See fn.125 above, p.12.
[138] See fn.133 above.
[139] See fn.134 above.
[140] Greg Muttitt, "Production Sharing Agreements: Oil Privatisation by Another Name?" (General Union of Oil Employees' Conference on Privatisation, Basra, May 2005), p.8, available at *http://platformlondon.org/carbonweb/documents/PSAs_privatisation.pdf* [Accessed May 9, 2013].
[141] Ibid.
[142] Ibid, p.9.
[143] See fn.133 above, p.66.
[144] Ernest Smith et al, *Materials on International Petroleum Transactions* (Rocky Mountain Mineral Law Foundation, 2000), p.507.
[145] See fn.1 above, p.12.
[146] See fn.105 above, p.50.
[147] Rex Zedalis, *Claims Against Iraqi Oil and Gas: Legal Considerations and Lessons Learned* (CUP, 2010), p.189.
[148] See fn.145 above, p.51.

Thus, in harmony with art.111 of the Constitution, TSCs do not require the state to transfer ownership at anytime: the title remains with the people of Iraq.[149]

The MoO has developed three variations of the conventional TSC, namely: (1) producing field technical service contracts; (2) production and development technical service contracts; and (3) a service-type framework for exploration in the fourth round.[150] These variations are more sophisticated and cover a wider range of activities than the conventional TSCs and stipulate cost recovery mechanisms which depend on whether the relevant field for which the contract was awarded is producing or not at the time of the agreement.[151] Many argue that the proposition that Iraq has a weak bargaining position is incorrect and that through TSCs favourable terms may be achieved. To exemplify, IOCs such as BP and CNPC were awarded TSCs for 20 years at a fixed fee of $2 per/barrel.[152] This fee was repulsive to IOCs which were offering their services at $20–$30 per/barrel.[153] At the time, Mr. Ali Al-Dabbagh has stated that if IOCs "want to have the oil fields they have to match the prices offered by the ministry of oil".[154] The awarded TSCs included a signing fee of $500m and were cited as spectacular deals for Iraq.[155] Nevertheless, Iraqi TSCs have been criticised to mirror PSCs as they adopt unrealistic high plateaus and are unusually long-term (20 years) and hence keep the control of the resources with private entities for much longer than the conventional TSCs.[156] Furthermore, BP has consequently negotiated significant changes to their TSC including the increase of the monetary cap on project costs from $50m to $100m, Platform has stated that this "could open the door to abuse".[157] Nevertheless, the detriments of PSCs remain more problematic of those of the TSCs and the fact remains that since 2007 only 11 TSCs were signed by the MoO whereas 49 PSCs have been signed by the KRG.[158]

All in all, it is apparent that one way or another the FOGL is "privatising" Iraqi resources without adequately protecting the sovereignty and interests of the State. PSCs clearly favour IOCs and deprive Iraq from the "democratic control of its most important industry".[159] The lengthy duration of such arrangements (25–40 years) make their shortcomings even more difficult to bear.[160] As noted earlier, establishing any law that permits PSCs shall be null and void. It is interesting that, despite five years of debate on the shortcomings of such contracts stipulated in the previous oil and gas draft laws, they are still permitted and included in the FOGL. This analysis suggests that a provision which explicitly prohibits PSCs must be included in the FOGL, as adding such an article may be seen as a constitutional need. Such a proposition is not far-fetched and is simply based on art.111 of the Constitution and art.2(1) of the FOGL itself. Moreover, in Iraq, onshore production is set at $2 per barrel and there is minimum risk undertaken.[161] For this reason, such oil fields should be developed by way of governmental funding and if funds are unavailable, the government may seek loans from banks or multilateral agencies while using oil as collateral.[162] However, when foreign expertise is necessary for complex offshore exploration, Iraq may employ IOCs under conventional TSCs which better safeguard Iraq's wealth and interests.

4. A weak Iraq

A crucial issue of contention is that the FOGL creates a "complex and convoluted" hierarchy for the management of oil and gas, in which the main powers are unclearly distributed amongst the Federal Oil and Gas Council (FOGC), MoO, Iraq National Oil Company (INOC) and regional governments.[163] Such lack of clarity may "dilute control and open the way for conflict and abuse".[164] This chapter will evaluate and outline the manner in which provisions of the FOGL related to the said bodies, topple or rather impede the Federal Government's effective control over the hydrocarbons of its people.

[149] See fn.145 above, p.10.
[150] Abbas Ghandi and Cynthia Lin, "Service Contract Around the World: A Review" (2013) 11, available at: *http://www.des.ucdavis.edu/faculty/Lin/service_contracts_review_paper.pdf* [Accessed May 21, 2013].
[151] Ibid.
[152] See fn.1 above, 1.
[153] AFO World News, "Iraq Rejects Most Foreign Oil Deals but Signs with BP and CNPC" (*The Economist*, July 2009). *www.eiu.com/index.asp?layout=ib3PrintArticle&article_id=564639441&printer=printer&rf=0* [Accessed May 20, 2013].
[154] Tamsin Carlisle, "Iraq seeks plan B after auction" (*The National*, July 2009), *www.thenational.ae/business/energy/iraq-seeks-plan-b-after-auction* [Accessed May 19, 2013].
[155] Terry Macalister, "BP Has Gained Stranglehold over Iraq After Oilfield Deal is written" (*The Guardian*, July 2011), *www.guardian.co.uk/business/2011/jul/31/bp-stranglehold-iraq-oilfield-contract* [Accessed May 22, 2013].
[156] Kamil Al-Adhadh, "An Assessment of Oil Production Policy in Iraq" (*Iraq Economist* January 11, 2013), *http://iraqieconomists.net/en/2013/01/11/an-assessment-of-oil-production-policy-in-iraq/* [Accessed May 20, 2013]; Tariq Shafiq, "Iraq's Petroleum Law: Problematic Issues & Its Fate" (*Iraq Economist*, April 5, 2013), *http://iraqieconomists.net/en/2013/04/05/iraqs-petroleum-law-problematic-issues-its-fate-by-tariq-shafiq/* [Accessed May 23, 2013].
[157] See fn.156.
[158] Bob Palmer, "Oil Regulation: Iraq" (*Getting the Deal Through*, 2011), p.80, *http://www.cms-cmck.com/Hubbard.FileSystem/files/Publication/7e7a336d-8d49-4893-9fae-2175c82a8eba/Presentation/PublicationAttachment/75cf3689-b360-45d8-b88c-2181a552492a/OR11%20Iraq.pdf* [Accessed May 21, 2013]; Munir chalabi, "A Critical Look at Iraq's Oil Contracts" (MEES 04.02.13), *http://www.mees.com/en/articles/6936-a-critical-lok-at-iraq-s-oil-contracts* [Accessed May 21, 2013].
[159] See fn.73 above.
[160] See fn.74 above, p.26.
[161] See fn.133 above, p.61.
[162] Ibid, at p.31.
[163] See fn.11 above, p.3.
[164] Ibid.

4.1 Federal Oil and Gas Council

Among the most important provisions of the FOGL is art.5, which establishes the Federal Oil and Gas Council (FOGC),[165] an executive body whose relation with the Council of Representatives is via the Prime Minister, who chairs the FOGC.[166] The objective of such a body is to "determine all national oil and gas sector policies and plans including those governing exploration, development, and transportation" and legislation.[167] The *CRS Report* provides that the FOGC, when established, will become the highest authority or rather the most powerful body in the oil and gas sector.[168] This council, which would naturally require Iraq to withdraw its membership from OPEC, would leave the Iraqi Parliament with little control over its own national oil reserves.[169]

First, in carrying out the functions of the Federal Government, the FOGC will be the "arm" of the Federal Government chaired by the Prime Minster and other unelected members such as the Ministers of Oil, Finance and Planning; the director of the central bank among other institutional leaders; representatives from producing governorates and regions; and three independent oil and gas experts.[170]Article 5 stipulates that the council comprises of the president of the council, his deputy and the three independent experts amongst others.[171] This grants the CoM a large degree of interference, overstepping the powers of the FOGC and hindering its independence.[172] The FOGC would benefit from allocating an expert General Secretariat to ensure the effectiveness and continuity of the FOGC's function, particularly as most of its members are assigned due to their official representation rather than their competency.[173] The main issue regarding structural and membership matters is the concern against the participation of foreign expert advisors on the "panel of independent advisors", as this may lead to interpretations and advice which could favour foreign interests.[174] The margin for such appointment should be eliminated through specifying in the FOGL that the independent experts must hold Iraqi nationality to avoid the shortcomings of regulatory capture and to enhance the credibility of the council.[175]

Secondly, an issue of disagreement is the excessive and inappropriate law-making role assigned to the FOGC. Under art.9 of the FOGL, the FOGC is entrusted with a wide scope of responsibilities and competencies which vitalises its role in the future development of the oil and gas sector, national economy, and the national control of the resources.[176] The FOGC's role of approving "petroleum industry policies", among other law-making competencies,[177] may be seen as unconstitutional, as the FOGC is assigned a function which is confined to the Parliament or rather the CoM in the area of development plannings.[178] In addition, the legitimacy of the FOGC stems from the FOGL, which does not deal with all aspect of the federal petroleum policy; for this reason, the FOGC is not legally eligible to address oil and gas matters which are not encompassed in the spectrum of the FOGL.[179] Moreover, post-production or rather downstream, activities do not fall within the scope of the FOGL. Thus, the law-making role assigned to FOGC, even if constitutional, would not consider the numerous macroeconomic aspects and complex sectoral interrelations when drafting policies. Consequently, this would lead to a "jurisdiction problem".[180] In addition, the FOGC decides the national petroleum production level,[181] which should be a function of the CoM. Instead, the FOGC should only submit assessments and accordingly recommend suitable national production levels and efficiency plans.[182] Further, the FOGC faces a competency problem and is not fit to prepare sound federal policy as, on an institutional, structural and composition level, it does not consist of representatives from all the entities which are related to or are knowledgeable in oil and gas matters.[183] This is based on the potential of the majority Shiite Arab community to control the composition of the Iraqi Cabinet which on specified terms would diminish Sunni Arab governorates to qualify for FOGC seats and so hinder the fair representation sought by the FOGC.[184]

Considering the shortcomings and the uncertainties found in the provisions related to the FOGC, the enactment of the FOGC would be more suitable under a separate distinct law rather than the FOGL. In such a law, it would be appropriate if the FOGC deals with petroleum policy on all levels, namely upstream, midstream and downstream. Moreover, laws, internal bylaws and modus operandi should ensure the consideration and inclusion of crucial provisions such as art.111, to maintain the attainment of national interests and objectives. Thus, it

[165] FOGL art.5.
[166] See fn.13 above, p.14.
[167] See fn.1 above, p.29.
[168] Ibid.
[169] Jerry Robinson, *Bankruptcy of Our Nation: 12 Key Strategies for Protecting Your Finances in These Uncertain Times* (New Leaf Publishing Group, 2009), p.33.
[170] See fn.11 above, p.3; FOGL art.5.
[171] FOGL art.5.
[172] See fn.13 above, p.14.
[173] See fn.7 above, p.4.
[174] Susan Sakmar, "The Status of the Draft Iraq Oil and Gas Law" (2008) 30(2) Hous. J. Int'l L. 289, 306.
[175] See fn.7 above, p4.
[176] FOGL art.9.
[177] FOGL art.9(1).
[178] See fn.7 above, p.5.
[179] See fn.10 above, p.46.
[180] Ibid; FOGL art.50.
[181] FOGL art.9(1)(h).
[182] See fn.7 above, p.5.
[183] See fn.10 above, p.36.
[184] See fn.1 above, p.26.

must be ensured that the members of the FOGC are of Iraqi nationality and that provisions to diminish regulatory capture must be included. The provisions related to membership and the competencies of the FOGC illustrate that the FOGL is weakening the position of the Federal Government and is hindering the collective interests of the nation and its people.

4.2. The Ministry of Oil

The MoO plays a fundamental role in regulation, implementation and supervision over petroleum policies and plans. The powers and competencies of the MoO must be safeguarded to avoid a weakly decentralised state, which would hinder the collective interests of Iraq and its people. Under art.11 of the FOGL, the responsibilities of the MoO include: supervising the adherence of petroleum operations in light of relevant legislations; verifying costs incurred by licence-holders; ensuring the collection of governmental revenues; setting development programmes; preparing draft regulations; and issuing instructions and statements for the implementation of federal petroleum policies, law and plans.[185] The FOGL, however, raises concerns by stipulating the establishment of specialised entities which carry out the responsibilities of the MoO in consultation with the regional governments and producing governorates.[186] Such entities would conduct most of the MoO's responsibilities leaving it with duties such as auditing, basic regulation and representation within OPEC.[187] Specialised expertise, or rather institutional and human capacity is required in every region and producing governorate to conduct the responsibilities of the MoO in an effective manner.[188] Ahmad Jiyad stresses not only that such level of decentralisation of power is harmful to Iraq as a whole but also that effective performance of the said competencies would be difficult to achieve and deal with on a macro-unified level.[189] The underlying reason of such diminishment of power is to decentralise the power of the Federal Government over the oil and gas sector, particularly to reduce interference with the KRG.[190]

In any case, even if this does not occur, the FOGL is already reducing the power of the MoO as it deals with it on an equal footing with the Regional Ministry of Oil (RMoO). [191] This is because the FOGL provides that the term "competent bodies" refers to the MoO, INOC or the Regional Body[192] and, under that term, the law assigns them a joint responsibility to deal with matters of licensing and contracting with NOCs and IOCs related to oil and gas exploration.[193] This means that the MoO which suggests, coordinates and cooperates with the other bodies has no executive power over them. This is clear when looking at art.115 of the Constitution, discussed earlier, as under this provision the competent bodies in the regions and governorates hold a higher status than the MoO in cases of conflict arising in the context of joint responsibilities.

4.3. INOC

Upon the enactment of the draft INOC will be reinstated under art.6 of the FOGL, and will be the operator which shall be "delegated to directly or indirectly enter into service contracts and marketing contracts" for the development of producing fields and adjacent undeveloped fields[194] The FOGL topples the INOC by creating a worrying situation regarding its capacity to explore and develop Iraqi fields. Concerns arise when dealing with oil fields allocated to INOC and the equal treatment it receives by the government when competing against IOCs for a petroleum licence.

4.3.1. Assigned fields

The assigned fields may be subject to implications caused by the different terminologies which are used in the FOGL, as the provisions either refer to "producing fields" or "currently producing fields".[195] Unlike "producing fields", which is a broad reference, the term "current" is restrictive and entails a "cut-off date" which is either the date of the FOGL's entry into force, or the date of a FOGC's decision regarding a specific field. As a result, this would exclude any fields which do not fall under "currently producing fields" from INOC's control.[196] Furthermore, art.13(2)(b) provides that INOC shall "develop, produce and operate discovered undeveloped fields near producing fields to be assigned thereto by the Council". Thus, such undeveloped fields have to be "near" producing fields in order to be managed by the INOC.[197] This raises uncertainties as to the applicability of the allocation of fields and reiterates the Annexes of the other versions of the FOGL; so to eliminate such uncertainties, provisions relating to INOC should be clarified and reconciled by lists which by name specify the fields allocated to INOC.[198]

[185] FOGL art.11.
[186] See fn.10 above, p.49.
[187] Shwan Zulal, "Time to Move on: Iraq's Oil and Gas Impasse Explained" (*Niqash*, December 1, 2012), available at *http://www.niqash.org/articles/?id=2948&lang=en* [Accessed May 9, 2013].
[188] See fn.10 above, p.49.
[189] Ibid.
[190] See fn.176 above.
[191] See fn.13 above, p.15.
[192] FOGL art.1(3).
[193] See, generally, FOGL arts 15, 17, 18, 21, 22, 35, 37, 38, and 43.
[194] FOGL art.13(1); fn.10 above, p.48.
[195] See art.13.
[196] FOGL art.13(1); fn.10 above, p.48.
[197] Article 9(1)(g).
[198] See fn.7 above, p.2.

4.3.2. Preferential treatment and competition

Moreover, the FOGL treats INOC and IOCs in an equal manner without any preferential treatment to the benefit of the national oil company. Generally, national oil companies like INOC are mostly owned by the states and acquire a large number of petroleum licences as they are usually assisted by preferential treatment.[199] The fact that INOC operates on the same competitive basis, is a disadvantage to INOC and Iraq as a whole. The main reason for this is that Iraq is recovering from a difficult economic and political situation; INOC has been left undeveloped when compared with the majors which apply at bidding rounds.[200] In fact, it is "strange" that IOCs enjoy the same privileges as INOC; the government should privilege INOC, which brings large returns to the country, with project flexibility permissions and preferable financing measures such as lower loan interests or so.[201] Without preferential treatment, INOC will not be able to technologically and fiscally develop, nor will it gain the experience which it requires to become a major global oil company.[202] Nevertheless, it is prudent that INOC enjoys such preferential treatment only on a temporary basis, in order to have the motivation and the right incentives to develop sustainable industrial growth.[203] Fouad Al-Amir, who advocates for such preferential treatment, agrees and recommends that a period of up to 10 years is adequate whilst ensuring that their performance is well supervised.[204] If the FOGL is not amended in a manner to provide for such treatment, then it constitutes a "recipe for weakening INOC and increase dependency on IOCs, which is strategically damaging to national interest and security".[205]

5. Conclusion

All in all, it is clear that there are a number of ambiguities arising from the incoherent constitution and the inadequate hydrocarbon regime under the FOGL. The draft neither supports the development of the Iraqi economy, nor does it protect the interests of the state and its people. The paper has shown that the framework allows the regions to incorrectly interpret the law in a manner which weakens the structure of the state and render it into a confederacy. This interpretation entitles the KRG to conclude PSCs with IOCs, a power which is confined to the state under the broad exclusive competencies found in art.110 of the Constitution. Daniel Yergin explains that privatisation permits foreign ownership and even foreign control and stressed that it is unusual for states to use contractual agreements which allow rights of ownership in the minerals.[206] In that sense, regardless of who negotiates and concludes PSCs, it is surprising that the FOGL does not prohibit the use of such agreements in the first place. Not only PSCs are illegal as they breach art.111 of the Constitution but they also surrender Iraqi revenues, as they are an inappropriate type of risk contract when considering the cost of production and the level of exploration risk in Iraq.

Moreover, the analysis has also shown that there are a number of provisions which require amendments particularly the ones regulating Iraq's main oil-related bodies. Whether assigning a law making role to the FOGC, diminishing the powers of the MoO or hindering INOCs field allocation and preferential rights, it is clear that the provisions of the FOGL are harming the efficient governance of oil and hindering the national development of technology and know-how in the oil and gas sector.

With so many problems revolving around the framework it is of no surprise that there has been a five-year delay in enacting a hydrocarbon regime. It is difficult to forecast a time in which such issues would be resolved, particularly when it seems that both the Federal Government and the KRG are not in a rush to promulgate the law. The conclusion of a number of TSCs and PSCs may indicate that both segments are benefiting from the current circumstances in the absence of a proper legal framework. The author, however, suggests that the FOGL certainly should not be enacted in its current form. The paper has outlined the main deficiencies of the FOGL, and has provided suggestions which should be considered when amending or redrafting the FOGL. Such task should ensure that the provisions are written in a smooth, well-phrased and consistent manner so as to eliminate the margin for the range of interpretations, as illustrated by this paper, which have lead to conflict and debate.

In most countries of this world, natural resources are owned by the public and are managed by the government; this sovereignty implies that resources will be developed in the public interest and for the benefit of its citizens.[207] So, why should not this be the case for Iraq? Why is the FOGL attempting to diminish such sovereignty, particularly when it is mandated by the Constitution, and supported both by historical experience and the harsh consequences followed by surrendering the control of its resources? The suggested new or amended draft law must warrant the collective ownership of the Iraqi resources, a principle which should lie as the heart of the Iraqi hydrocarbon legal framework.[208]

[199] Scott Gaille, "Allocation of International Petroleum Licenses to National Oil Companies: Insights from the Coase Theorem" (2010) 31(1) E.L.J. 111, 112.
[200] Ahmad Jiyad, "INOC Law: Shaky Premises and Doubtful Prospect" (2011) 54 (20) M.E.E.S. 1, 4.
[201] Muhammad Abed Mazeel, *Restructuring and Re-organization of the Iraq Oil and Ministry and State-owned oil Companies for Maximum Economic Growth and National Development* (Disserta-Verlag, 2012), p.59.
[202] See fn.13 above, p.16.
[203] Noora Arfaa, Brandon Tracy and Silvano Tordo, *National Oil Companies and Value Creation* (World Bank Publications, 2011), p.11.
[204] See fn.13 above, p.16.
[205] FOGL art.13(1); fn.10 above, p.49.
[206] Daniel Yergin and Joseph Stanislaw, *The Commanding Heights: the Battle for the World Economy* (Free Press, 1998), p.260.
[207] See fn.143 above, p.340.
[208] See fn.10 above, p.54.