Iraq at crossroads: Transforming the 'Resource Curse' to a 'Resource Blessing' - The Case for Gradual Privatization of the Iraqi Oil Industry

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TITLE: IRAQ AT CROSSROADS: TRANSFORMING THE 'RESOURCE CURSE' TO A 'RESOURCE BLESSING' - THE CASE FOR GRADUAL PRIVATISATION OF THE IRAQI OIL INDUSTRY

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Abstract

Talking about reconstruction and state-building of a country like Iraq holding the world’s largest reserves of conventional petroleum after Saudi Arabia is hard to envisage without focusing on the largest source of income and power: its oil industry. The controversial Draft Oil & Gas Law currently under review is an example of the inclination of the elected government to focus on short-term goals of fast profit and to drive Iraq into the world of full-frontal privatization and of open-market economy while scrupulously neglecting the security situation and the weak and vague legislative frameworks in place - both factors that reduce the bargaining power of Iraq against the colossal international oil companies (IOCs).

This article seeks to promote the idea of gradual privatization of the Iraqi oil industry. After stating the dangers of the ‘resource curse’ and scrutinizing the legacy of past actions by Saddam Hussein’s declining regime and the US-led occupying powers in this respect, the article explores the possible options for designing a country’s oil policy only to apply them to the current situation in Iraq. A more conservative approach to the restructuring of Iraq’s oil sector is being put forward consisting in the drafting of more balanced legislative frameworks and in the gradual privatization of the oil industry rather than full-privatization policies imposed by western tigers encircling the golden cage starving for a piece of oil profit.
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1. INTRODUCTION

Talking about reconstruction and state-building of a country like Iraq holding the world’s largest reserves of conventional petroleum after Saudi Arabia is hard to envisage without focusing on the largest source of income and power: its oil industry. With most of the oil reserves not too expensive to exploit yet amazingly profitable given the skyrocketing current world oil prices, it is expected that any new Iraqi government will be desperate for revenue and will seek ways to expand the country’s oil production right away.¹

However, the wetted appetite of the new democratic Iraqi leaders coupled with overly optimistic estimates of an Iraqi oil production contingent upon billions of dollars in foreign investment is leading the country in hasty and unwise political and economic decisions. The controversial Draft Oil & Gas Law currently under review is an example of the inclination of the elected government to focus on short-term goals of fast profit and to drive Iraq into the world of full-frontal privatization and of open-market economy while scrupulously neglecting the security situation and the weak and vague legislative frameworks in place - both factors that reduce the bargaining power of Iraq against the colossal international oil companies (IOCs). With demand for oil soaring due to the Asian economic boom, the need for Iraq's oil is more pressing than ever and a mistake now will be a mistake Iraq will be paying for several years to follow.

Starting with stating the dangers of the ‘resource curse’ and scrutinizing the legacy of past actions by Saddam Hussein’s declining regime and the US-led occupying powers bearing on the Iraqi oil sector, an effort to propose a viable future framework for the Iraqi oil industry will be made. Following the exploration of the possible options for designing a country’s oil policy and the assessment of the current events and proposed legal frameworks, a case will be made for a more conservative approach to the restructuring of the oil sector in Iraq, consisting in the gradual - rather than full - privatization of its oil industry, which is to come only after the consolidation of Iraqi control over its economy.

2. THE PHENOMENON OF THE ‘RESOURCE CURSE’

A country’s wealth in natural resources is a two-way street: it can lead a resource-dependent country to a flourishing economy and to increased development and growth or it can drop it into a trap, the so-called ‘resource curse’. Which path a country will follow

will depend on its specific history, economic and institutional development before and after resource exploitation, but also greatly on its leadership. “It’s fashionable to say that we are cursed by our mineral riches. That’s not true. We are cursed by our leaders.”\(^2\) This statement has indeed proven to be true in several cases, including in Saddam Hussein’s Iraq, albeit it places excessive weight on the individual responsibility of a leader when there are also other factors that determine the course of an oil-dependent country.

A pattern of slower economic growth, poor governance, high corruption, authoritarianism,\(^3\) armed conflict and extreme levels of ‘institutional conservatism and inertia’ has been observed in most resource-dependent countries, including Iraq, so much as a result as well as a cause of the ‘resource curse’ phenomenon. The concentration of power in the hands of factionalized ruling elites along with the poor governmental legitimacy and the foreign vested interests present severe challenges to political stability.\(^4\) They tend to impede the development of institutions and values critical to open, market-based economies and to curtail political freedom (civil liberties, rule of law, property rights, political participation).\(^5\) Moreover, they render the population a “hostage to an omnipotent state, source of both hope and frustration when facing conditions of poverty, inequalities and human rights abuses. Although the state may pursue populist policies by redistributing resource wealth, the state is ultimately insulated from the population through the independent tax base that the resource wealth provides.”\(^6\) Thus, resource dependence might be a blessing as well as a curse, if not handled in the right way; and that is where the current challenge for Iraqi reconstruction lies: to overturn its past misfortune and turn its oil wealth into real gold.

The questions that come to mind in the Iraqi context then are the following: is centralized control and management of the natural resources and their revenues at national level a policy to be avoided given the history of abuse of power in Iraq? Are the decades of nationalization of the Iraqi oil industry to be considered a mistake of the past not to be repeated? Is full privatization the way to go to develop the oil sector and avoid the pattern of authoritarianism and corruption?

\(^5\) Birdsall, *supra* n. 3, p. 1.
\(^6\) Le Billon, *supra* n. 2, p. 689.
3. ‘Baggage’ from the Past?

Before embarking in the analysis of a legislative framework for the systemization and revitalization of the oil industry in such an oil-rich as well as ethnically and politically complex country transitioning to democracy, it is imperative to first clarify the state of obligations in the oil sector - if any - inherited by the new government; that is to determine the legitimacy of a) the oil contracts signed by Saddam Hussein’s Ba’ath regime in the late 1990s, b) the service or other contracts awarded to major IOCs as well as the management of the oil revenues during the international administration of Iraq by the US-led occupying powers.

3.1 Oil contracts signed by Saddam’s regime

Following the gradual nationalizations of the Iraqi oil industry (1961 and 1972-1975) after a long period of relentless exploitation of its natural resources by the International Petroleum Company (IPC), Iraq commenced its course as a command, state-controlled economy, which lasted until the end of the 1990s. During that time, Iraq was functioning without structured legal, regulatory, political or economic institutions, ie. without elements essential for a functioning market economy. However - or arguably as a result - Iraq was one of the most prosperous and economically developed countries in the Arab world, boasting a sizeable middle class as well as an advanced technical capacity, with both oil and non-oil sectors growing rapidly. During the two oil booms of the 1970s, soaring world oil prices generated respectively soaring oil revenues, used by the Iraqi

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7 Law no. 80 of 1961 nationalizing reserves exploited by foreign powers, leaving the rest of the industry intact. In 1964, Iraq’s National Oil Company (INOC) was established and granted exclusive rights to develop the nationalized oil reserves. See Mahdi, K. (2007) “Iraq’s oil law: parsing the fine print”, *World Policy Journal* 11-23, p. 12.


government to reinstitute investment programs, albeit only outside the oil sector. Consequently, a non-oil economy was steadily developing on the side.\textsuperscript{12}

This fortune however was suddenly reversed a year after Saddam Hussein’s coming into power (September 1980), with the onset of the eight-year war with Iran in, followed closely by the 1990–1991 Persian Gulf War - the second major interruption of oil revenues. The consecutive wars along with the US-led allied attacks in Kuwait in January 1991 damaged the Iraqi infrastructure and caused oil production to reach levels close to zero, only for post-war crippling international sanctions imposed by the United Nations (1991-2003) to “provide the \textit{coup de grace} for the country’s beleaguered population”.\textsuperscript{13}

The UN embargo coupled with the effects of the war isolated Iraq’s economy, constraining oil exports. Iraqi national control of oil resources was then compromised even further by state policies to counteract the sanctions. Until 1996, oil production had only managed to recover enough to cover domestic consumption (about 500,000 bpd). That was when Iraq agreed to the notoriously corrupt Oil-for-Food program (1996-2003)\textsuperscript{14} and signed, in view of mustering support in the United Nations Security Council (UNSC), extensive “development and production” contracts for the development of important oil fields with foreign oil companies (China National Oil Company, partnered with China North Industries Corp, Russian Lukoil and French Total Fina Elf), from countries not supporting the US-led effort to oust the regime.\textsuperscript{15}

Thus, one of the major issues when it comes to rebuilding the oil sector is the validity of these oil contracts, made at the notable exclusion of US companies. Are these contracts

\textsuperscript{12} Ibid, pp. 2-4. However, most of the oil revenue was used by the Ba’ath party for massive arms build-up and for serving their private interests of the regime’s allies, consolidating the hegemony of the elite. See Le Billon, \textit{supra} n. 2, p. 691.


\textsuperscript{14} Under the Oil-for-Food program, Iraq could export a ceiling of 2 million bpd only in exchange for food and medicine, although the Iraqi government produced oil in contravention to sanctions. See Luft, G. (2005) “Bringing Iraq’s economy back online”, 25(8) \textit{Middle East Quarterly}, p. 2. For corruption practices during the imposition of this program, see the Independent Inquiry Committee (2005) “The Management of the United Nations Oil-for-Food Programme” in \url{http://www.unausa.org/site/pp.asp?c=fvKR18MPjF&p=b=387773}.

\textsuperscript{15} France’s largest oil company, Total Fina Elf, negotiated extensive oil contracts to develop the Majnoon and Nahr Umar oil fields in southern Iraq, estimated to contain as much as 25% of the country’s oil reserves, reaching an estimated 26 billion barrels of oil. Russia’s LUKoil negotiated a $4 billion, 23-year contract in 1997 to rehabilitate the 15 billion-barrel West Qurna field in southern Iraq. However, the deal is still on hold. China National Oil Company, partnered with China North Industries Corp., negotiated a 22-year-long deal for future oil exploration in the Al Ahdab field in southern Iraq. See Satterlee, C. (2003) “Facts on who benefits from keeping Saddam Hussein in power”, \textit{The Heritage Foundation} in \url{http://www.heritage.org/Research/Iraq/wm217.cfm}.
binding upon the new government, impeding the independent designing of the oil sector according to new (US-imposed?) policies?

The validity of these contracts has not been widely discussed in the literature on post-war Iraq. That might be because in modern international law it is doubtful that such contracts made with unrepresentative governments can be upheld after the formation of a new democratic government. Even if stabilization clauses had been included therein due to unequal bargaining powers at the time,\textsuperscript{16} international law has now moved away from the sanctity of the contract, allowing the amendment or repeal of a long-term contract due to a change in circumstances (principle \textit{clausula rebus sic standibus} as opposed to \textit{pacta sunt servanda}). Especially, in the extractive industry, given the consolidation of the doctrine on permanent sovereignty over natural resources in international law\textsuperscript{17} (some even view it as a principle of \textit{jus cogens}) and thus of the undisputed rule that sovereignty over natural resources belongs to the people, invalidity is even more easily upheld for contracts signed by unrepresentative governments that cannot be seen as acting on behalf of the people. Moreover, allegations of corruption in the making of the contracts\textsuperscript{18} (on the basis of the \textit{ultra vires} doctrine, i.e. an official not acting independently, or on the basis of a prohibition by law or by public policy) by the knowingly corrupt Ba’ath government or the latter’s contested legitimacy are other objective grounds to be invoked to rescind such contacts, especially when their terms are disadvantageous to the state.

Thus, since in international law there is no rule of succession of obligations assumed by states towards individuals, there seems to be no available remedy for these foreign contractors. In no way does it seem possible to uphold the validity of these contracts, except in one case: when the investment has been beneficial to the host state. Then, since the state is enjoying the benefits of an investment - even if the latter was made under ambiguous terms - it seems fairer to allow foreign companies to recover their costs. Thus, remedies might be validly sought under these circumstances on the basis of the commonly used legal principle of restitution under the provisions of unjust enrichment.\textsuperscript{19}

\textsuperscript{16} Stabilisation clauses are contractual devices which seek to freeze the law as is at the time of signing, avoiding thus negative effects of a change in law, policy or political regime. See Sornarajah, M., \textit{The International Law on Foreign Investment}, 2\textsuperscript{nd} edition, Cambridge University Press, Cambridge, 2004, p. 180.
\textsuperscript{17} UN General Assembly Resolution 1803 (1962), See Schriijer N., \textit{Sovereignty over natural resources: balancing rights and duties}, Cambridge University Press, Cambridge, 1997
\textsuperscript{18} See case Aminoil v. Kuwait, Fraport v. Philippines, Gas de Bordeaux, B.P. v Libya, Liamcov v. Libya mentioned in Sornarajah, supra n. 16.
\textsuperscript{19} Sornarajah, supra n. 16, pp. 42-3, 82-5.
3.2 Days of occupation

3.2.1 Reconstruction contracts signed by the occupation powers

“We're dealing with a country that can really finance its own reconstruction, and relatively soon” Deputy Secretary of Defense Paul Wolfowitz said on March 27, 2003 while Iraqi National Congress leader Ahmad Chalabi was promising that American oil companies would have a “big shot at Iraqi oil”. However, such optimism was unwarranted. When the United States invaded Iraq with grandiose plans to rebuild it and open up its economy, they had not taken into account that infrastructure was non-existent and the amount of devastation was tremendous, following decades of heavily controlled state-run economy, succession of wars and international sanctions. Thus, the US’ pre-war unsustainable calculations about the state of Iraq’s economy and infrastructure and their resulting failure to adequately prepare for the morning after the war in Iraq, cultivated mistrust and denial of the occupation powers in the hearts and minds of the Iraqis leading to violence and a rise in oil terrorism. The resulting rapid decline in oil production due to the sabotage activities prompted the stagnation of the Iraqi economy for months forcing Iraq to import half its gasoline and thousands of tons of oil.

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21 The Bush administration insisted that the invasion was an act of self-defense - and not an act of aggression, as the rest of the international community supported - in order to avoid the effects of a breach of international law. However, following the absence of WMDs or of operational ties of Saddam’s regime to al-Qaeda this allegation by the US seems difficult to sustain. See Zunes, S. (2007) “The United States in Iraq: the consequences of occupation”, 1(1) International Journal of Contemporary Iraqi Studies 57-75, p. 60.
22 Since the early 1980s, Iraq’s economic indicators had been steadily deteriorating. Even if the oil and non-oil sectors recovered somewhat in the late 1990s, they lagged far behind those of the glorious Iraq of the 1970s with oil plummeting from 3.5 million bpd in 1990, to 2.5 - 2.7 million b/d prior to the US invasion. See Foote, supra n. 11, pp. 3-4 and Crocker supra n. 10, pp. 73-5. See Myers, supra n. 8, p. 3.
23 That is for significant tasks such as restarting the power, supplying water, health care and basic services and creating jobs. See Crocker, supra n. 10, pp. 73-5.
24 Following the end of the hostilities in April 2003, well organized and technologically savvy insurgents have been targeting, with the passive, if not active, support by countries surrounding Iraq (Saudi Arabia, Iran) not only Iraq’s vital oil infrastructure (pipelines, pumping stations, wells, refineries and terminals) but also those who operate it. The resulting damages were costing Iraq’s economy $15-$18 billion per year (as measured according to oil prices in 2005 of roughly $55 per barrel). See Luft, supra n. 14, pp. 3-4) For a detailed analysis of the interests behind oil terrorism, see Crocker supra n. 10, pp. 73-5 and Zunes, supra n. 21, pp. 57-8.
25 The ensuing security situation, among others, transformed Iraq into the riskiest destination for foreign investment keeping away the world's largest international oil companies (Exxon Mobil, Royal Dutch/Shell, and ChevronTexaco), at times when the costly and risky task of developing Iraq's oil untapped reserves was urgent and imperative in order for Iraq to produce sufficient revenues to meet its growing needs for foreign exchange. See Luft, supra n. 14, pp. 3-4.
of other refined products, such as heating fuel and cooking gas, to accommodate the rise - more than 50% - in domestic oil consumption.\textsuperscript{26}

In this atmosphere of insecurity and violence and under the stress of restarting oil production, did the US and the UK form the Coalition Provisional Authority (CPA) to serve as the temporary government of occupied Iraq, within the framework of the international law of occupation (May/June 2003, UNSC Resolution 1483). During its term of 14 months,\textsuperscript{27} the CPA, with the motto “Iraq is open for business”,\textsuperscript{28} adopted the ‘shock therapy’ technique, in order to eradicate corruption and transform a state dominated economy to a privatized open market economy through institutional reconstruction.\textsuperscript{29} In this respect, the CPA arbitrarily, with minimal UN supervision and minimal Iraqi input,\textsuperscript{30} implemented major regulatory and legal reforms, whose continuation after the end of occupation was uncertain.\textsuperscript{31}

The status of these reforms along with any reconstructions contracts signed as part of this broad policy have been contested. The coalition authorities seem to have gone beyond the limits prescribed under the laws of occupation. As former U.S. ambassador-at-large for war crimes David Scheffer accentuated “occupation law was not designed to transform society. It permits tinkering at the edges of societal reform, but it is not a license to transform.”\textsuperscript{32}

\textsuperscript{26} \textit{Ibid}. This rise in domestic consumption was partly due to the increase in the number of private cars as well as the custom-free imports of modern power-hungry appliances (freezers, air-conditioners etc.) as a result of the occupation powers’ opening up of the Iraqi economy.

\textsuperscript{27} Sovereignty was transferred to an interim Iraqi government in June 28, 2004. See Iraq in transition, \textit{supra} n. 13, p. 5.

\textsuperscript{28} As Ambassador L. Paul Bremer III, the U.S. civilian administrator of Iraq, stated in May 2003. \textit{Ibid}, pp. 10, 14.

\textsuperscript{29} ‘Shock therapy’ constitutes a rapid transition process of re-regulation (the creation of new sets of rules) in economies moving rapidly from a state enterprise to a private enterprise-based economy, such as Iraq. It is said to eradicate corruption in the public sector by removing the regulatory controls upon individual economic actors and creating rules encouraging competition. In the absence of WMDs, this assumed anti-corruption function constituted one of the chief political justifications of the US in explaining the overnight transformation of Iraq. See Whyte, D. (2007) “The crimes of neo-liberal rule in occupied Iraq”, 47 \textit{British Journal of Criminology} 177-195, pp. 179-80.

\textsuperscript{30} The only Iraqis involved in the development of the CPA’s economic program were members of the Iraqi Governing Council, although in reality, they were just rubber-stamping the CPA’s decisions, accentuating the perception that the CPA’s reforms were US-imposed. See Crocker, \textit{supra} n. 10, pp. 86-7.

\textsuperscript{31} The CPA issued 100 legally binding administrative orders by decree for creating favourable terms of investment for private capital. See Whyte, \textit{supra} n. 29, pp. 181-3. Under Iraq’s Transitional Administrative Law (TAL) of March 2004, the CPA laws, regulations, and orders were to remain in force until a future duly enacted piece of legislation rescinded or amended them. See Crocker, \textit{supra} n., pp. 84-5. However, the Iraqi government has been unable to overturn them; that requires consensus of the president and other government officials and thus is difficult to achieve. See Zunes, \textit{supra} n. 21, p. 62.

\textsuperscript{32} Crocker, \textit{supra} n. 10, pp. 74, 84-7.
The legal authority of an occupying power and its duty to prevent waste of the occupied sovereignty’s assets stems mainly from articles 43 and 55 of the Hague Regulations of October 18, 1907, article 64 of the Fourth Geneva Convention of 1949 as well as articles 73-74 of the UN Charter. These articles mandate an occupier to adhere to a sacred trust in managing the affairs of the occupied sovereignty, promoting the utmost well being of inhabitants, restoring public order, safety and respect for human rights, while at the same time refraining from changing the status quo. They also require that he administers occupied state assets in so far as is necessary and according to the rules of usufruct. Thus, the gist of these rules clearly aims to establish a set of universal principles to protect the democratic sovereignty of populations under occupation, with the imposition of new sets of laws permitted only to the extent that they are essential for the orderly government of the occupied territory and for security purposes.

However, the economic rules imposed upon Iraq, with Order 39 of September 19, 2003 as the most contested one, were far from essential for maintaining orderly government and security. It is clear that there is nothing in the text of these conventions nor in any of the UNSC Resolutions, adopted before and during the occupation, - even if broadly interpreted, as done by the occupying powers - that grant authority to the CPA to fundamentally transform a country’s basic structures. The anti-democratic and...
emptive nature of CPA economic restructuring is undoubtedly in violation of international law and of the right to self-determination and sovereign decision making over economic, social and cultural development, as principles of international jus cogens.\textsuperscript{41}

Although, wisely enough, the oil sector and the distribution of Iraqi oil revenues was excluded from ‘Paul Bremer’s [illegitimate] sweeping privatizations’,\textsuperscript{42} omissions and violations have arisen from the CPA’s governance of Iraqi oil wealth. “The CPA attempted to control the oil industry without destroying it”. They mostly tried to ensure policy oversight via the placement of senior IOC executives (like Phillip Carroll, former CEO of Shell Oil USA) as advisors to the Ministry of Oil.\textsuperscript{43} However, the CPA inactivity in reversing the deterioration of Iraq’s refinery capacity, which cost Iraq millions of dollars in imports of refined petroleum products - possibly as a deliberate strategy to ensure Iraqi reliance on oil exports, a process known as ‘selling oil to the Iraqis’ - was harshly criticized.\textsuperscript{44} Moreover, the fact that the CPA did not manage to diversify the oil-based Iraqi economy through the development of other historically productive sectors of Iraq’s economy (ie. agriculture, light manufacturing) was also considered one of its downfalls. The lack of diversification during occupation left behind a reconstruction gap to be covered by the new Iraqi government on a vital issue for Iraq’s economic revival, given that diversification is key in avoiding class / economic divisions and addressing the resource curse.\textsuperscript{45}

Most importantly though, the mismanagement by the occupation powers of the oil sector was exhausted with the disbursal, under no mandate from the Iraqi people, of the oil revenues,\textsuperscript{46} which went far beyond what international law dictates. Article 49 of the Hague regulations stipulates that: ‘money contributions’ levied in the occupied territory ‘shall only be for the needs of the army or of the administration of the territory in question’. Thus, the Hague rules appear to explicitly forbid the accumulation of ‘money contributions’ for any other purposes than basic security and administration.\textsuperscript{47} However,

\textsuperscript{41}See Whyte, supra n. 29, pp. 181-3, 191 and Crocker, supra n. 10, pp. 84-5.
\textsuperscript{42}Muttitt, supra n. 9, p. 2. The exclusion of the oil sector from the reforms was a wise advisable move in view of discarding questionmarks for the US incentives for entering into the war with Iraq.
\textsuperscript{43}Mahdi, supra n. 7, p. 16.
\textsuperscript{44}Whyte, supra n. 29, pp. 182-3.
\textsuperscript{45}Crocker, supra n. 10, pp. 80-1.
\textsuperscript{46}The Iraqi oil revenues from post-invasion oil sales and exports was deposited to the Development Fund for Iraq (DFI) was established by UNSCR 1483(2003) and physically held in an account at the Federal Reserve Bank in New York. See Whyte, supra n. 29, pp. 182-3.
\textsuperscript{47}Ibid.
in the case of the Iraqi transition, “th[e] neo-liberal strategy of economic colonization…as facilitated by major violations of the international laws of conflict”\textsuperscript{48} was mostly serving the US (and UK) interests. “An unknown proportion of Iraqi oil revenue has disappeared into the pockets of [US] contractors and fixers in the form of bribery, over-charging, embezzlement, product substitution, bid rigging and false claims. During 14 months in office, the..CPA restructured the economy and spent over $20 billion in Iraqi oil revenue,\textsuperscript{49} most of which was disbursed to US corporations by the CPA directly or via Iraqi ministries. At least $12 billion of the revenue appropriated by the coalition regime has not been adequately accounted for.”\textsuperscript{50}

Reconstruction priorities were falsely exhausted on large infrastructure projects with lucrative no-bid contracts awarded to a handful of expensive US contractors rather than cheaper Iraqi companies employing local people and building local capacity.\textsuperscript{51} The US government, through its two US agencies (the United States Agency for International Development - USAID and the United States Army Corps of Engineers - USACE) and the CPA and in direct contravention of article III:1 (equal treatment of all parties) of WTO Agreement on Government Procurement, initially\textsuperscript{52} restricted investment and reconstruction efforts almost exclusively to countries that supported the US invasion, providing more than US$50 bn in contracts (equal to more than twice Iraq’s GDP) to 150 US companies. Most of them constituted service and construction contracts, while - at least - none of them was \textit{per se} extractive, as in the case of Saddam’s pre-invasion contracts.

The largest of these contracts - totaling over US$7 bn – was awarded to Kellogg, Brown and Root (KBR), a subsidiary of the Texas-based energy firm Halliburton, a firm for which US Vice-President Dick Cheney served as president (and is still a major

\textsuperscript{48} Ibid, p. 177.
\textsuperscript{49} Very small amounts of other reconstruction funds were spent. The US Congress allocated some $18.4 bn from which only $1.5 bn has been spent, $0.6 bn of which for security purposes and not for reconstruction projects. The UN and the World Bank have contributed $1.0 bn but less than half appears to have been spent. See “Iraq’s oil sector mired in problems despite successful election”, Oil and Energy Trends, 18 February 2005, pp. 3-6, p.3
\textsuperscript{50} Whyte, supra n. 29, pp. 177-8.
\textsuperscript{51} Le Billon, supra n. 2, p. 686 and Crocker, supra n. 10, p. 86.
\textsuperscript{52} This US stance was softened later when a White House spokesman, noting that “circumstances can change,” suggested that other countries could be added to the list of eligible contractors for competitively awarded contracts. Indeed, among the 260 companies, several non-force contributing nations, specifically France and Germany, have succeeded in winning some large reconstruction sub-contracts, with more than half (140) identified as Iraqi-owned firms. However, all 140 firms are sub-contractors, rather than primary contractors, and the total value of contracts awarded to Iraqi firms is uncertain. See Iraq in transition, supra n. 13, p. 61.
Although the legitimacy of this contract - which was replaced in January 2004 by two other competitively awarded contracts - has been fiercely contested, analyses by several authors of the legal procedure under which it was awarded have been supporting its legal validity. It is alleged that the KBR contract was awarded under a legitimate special procedure that allows the circumvention of the rules of full and open competition. Thus, it was not so much the overall amount of the contract that rose suspicions. KBR was rather accused by US Congress members of hugely overcharging the US authorities in Baghdad for supplying refined products to American forces in Iraq. The extent of price inflation was found to reach, for gasoline imported from Kuwait, a cost of 175% more than was being paid by the Iraqi State Oil Marketing Organization (SOMO) for petrol from the same source.

As for the rest of the reconstruction contracts, given the presumption of regularity favoring the agency, these were also said to have been legitimately awarded under the statutory exceptions provided in the Competition In Contracting Act (CICA) and the Federal Acquisition Regulations (FAR) allowing sole-source contracting, a procedure which unavoidably leads to higher prices and reduces public confidence to the system.

Thus, potential challenges to these contracts on procedural bases would most likely - rightly or wrongly - be dismissed by the General Accounting Office (GAO) or the United States Court of Federal Claims, unless inadequate monitoring, political motivations or

55 Rather it was awarded under the Logistic Civil Augmentation Program (LOGCAP), an ‘umbrella contract’, which allows the Army to hire a single contractor who they can employ anytime even on short notice. Moreover, it was characterised as an indefinite delivery/indefinite quantity (ID/IQ) contract which allows the government to purchase a minimum amount of services and more as necessary with a ceiling of costs of US$7 bn. (whereas the actual costs as of October 2003 were only reaching the amount of US$1.5 bn). See Obeidin, K. (2004-2005) “The Iraq reconstruction contracts: Limiting the sources for government contracts”, 29 The Journal of the Legal Profession 259-268, p. 259.
56 “Iraq’s oil sector mired in problems despite successful election”, Oil and Energy Trends, 18 February 2005, pp.4-5.
57 The justifications put forward for invoking the exceptions under the circumstances in Iraq have generally been upheld.
58 The specific exceptions invoked by those agencies were the following: a) ‘only one company has the ability to provide the necessary property or services to serve the need of the agency’ and b) ‘the agency is faced with an unusual and compelling urgency that could lead to serious injury for the government’.
59 More specifically under10 USC para. 2304 (regulating procurements for the military) and 41 USC para. 253 (provides the general agency requirements, although they are the same with the military requirements). Obeidin, supra n. 55, p. 259.
60 For another view on the validity of the justifications, the interpretation of the US law on bidding and the independent review of the reconstruction projects, see Bonheimer, supra n. 37, p. 684.
bribery and corruption were shown in awarding these contracts. And these grounds are not difficult to locate. The instances of alleged government overpaying for reconstruction contracts, of ordering of new work under existing contracts and of inadequately monitoring expenses and contract performance are to be found in all auditing reports and constitute strong grounds to challenge the legitimacy of these contracts funded by wasted Iraqi assets.

3.2.2 Remedies for the waste of assets during occupation: a gap in international law

Thus, there are more grounds than not for holding the US directly responsible for breaches by the CPA and the US agencies of their fiduciary capacity in administering the assets of the occupied sovereignty. The Draft articles on state responsibility provide a valid basis for these claims. However, views differ on the issue.

In several respects, the CPA appears to be an organ of the US under international law (article 4). Although an organ under international law is not necessarily the same as an agency under US law, the status of a body as an agency under domestic law suggests that the body is also an organ under international law. However, as it remains unclear whether the CPA constitutes an agency under US law, other articles can be used to hold the US responsible. It can validly be alleged that the CPA was created by exercise of elements of US governmental authority, which authority it carried out in Iraq (article 5), or that the CPA acted at the instruction of the US and under its ultimate direction and control (article 5).

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62 Iraq in transition, supra n. 13, p. 62.
64 Bonheimer, supra n. 37, p. 681.
65 Whereas the US Congress and the Executive Branch of the US Government has sometimes referred to the CPA as an entity of the US or claimed that the US False Claims Act, applying to US agencies, was applicable to the CPA, on other occasions, they have acted as if the CPA were not a US agency. Moreover, the GAO and a US district court declined to decide that the CPA was a federal agency. See Bonheimer, supra n. 37, p. 679.
66 The US President through its subordinate, created the CPA and asserted control over the Iraqi assets in exercise of his power as Commander-in-Chief. Moreover, the CPA was administered by a US official who reported to the Secretary of Defense. Ibid, p. 680.
8).\textsuperscript{67} Finally, the US has also acknowledged the approval of disbursements from the DFI as its own acts (article 11).\textsuperscript{68}

However, the shortcomings in redressing the proven waste or failure to prevent waste of Iraqi assets by the CPA is the lack of enforcement mechanisms, such as conciliation or submission of disputes to judicial bodies, in the occupation law treaties coupled with the political restraints of the UNSC to otherwise enforce compliance with occupation law. Moreover, it seems that there are insurmountable difficulties for Iraq accessing its national courts, since the CPA declared that it was not subject to local law or the jurisdiction of local Iraqi courts or even of the special tribunal created by the CPA to prosecute waste of Iraqi assets.\textsuperscript{69} Similarly, although the US has acknowledged the application of occupation law to its reconstruction activities in Iraq, US law does not appear to provide a direct or indirect remedy for Iraq in US courts. First, US courts ‘routinely dismiss’ direct claims for damages arising out of the occupation and second, one US Court has already ruled that the US False Claims Act does not apply to claims on the DFI.\textsuperscript{70}

Therefore, it seems that this is a case that would need the action of the International Court of Justice to address the question of compliance with occupation law in Iraq, as it has done in past occasions of exploitation of a country’s oil wealth by an occupier.\textsuperscript{71} However, given that the US has not consented to ICJ jurisdiction, the issue can only be addressed in the form of an Advisory Opinion if invoked by the UN body with audit oversight responsibility for the Iraqi reconstruction through its audit findings. Although unfortunately that will not result in directly remedying Iraq, that should not undermine the effect of such an Opinion, since it will give the opportunity to the ICJ to determine for future purposes when the duty to suppress waste is violated and what remedies should be available, contributing thus to the further development of the law on occupation and inducing the UN to use its legitimizing power to impose the duty on the occupier to consent before administering a territory to the jurisdiction of the ICJ.\textsuperscript{72}

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\textsuperscript{67} The CPA was the product of exercise of military command and control structures in Iraq overseen by the US; the CPA administrator, A US official, had ultimate authority over policies while US agencies administered contracts funded by Iraqi assets and awarded by the CPA. \textit{Ibid.}

\textsuperscript{68} See case \textit{DRC Inc. v. Custer Battels LLC} where the US acknowledged control over the DFI through the CPA.

\textsuperscript{69} The CPA drafted the jurisdictional grant to exclude claims of waste arising out of the US-led occupation.

\textsuperscript{70} See Memo of case \textit{DRC Inc. v. Custer Battels LLC supra} n. 68.


\textsuperscript{72} Bonheimer, \textit{supra} n. 37, p. 678-698.
However, before giving up all hope on remedies for Iraq, another option which has yet to be explored is worth mentioning. That is the possibility of a legitimate claim of the new Iraqi governments to the United Nations Compensation Commission for reparations and compensation accrued by the illegal policies of the CPA. This is the process that previously allowed major US corporations to claim compensation for Saddam’s breaches of international law.\textsuperscript{73}

4. **Step Forward: Restructuring the Iraqi Oil Industry**

After clarifying the ‘resource cursed’ past by determining the lack of binding legal obligations flowing from the commitments of the past regime as well as the possibilities - or the lack thereof - for obtaining compensation for the waste of huge amounts of Iraqi oil revenue by the CPA - it’s time to explore how the Iraqi government can pave the way for a glorious future, a ‘resource blessing’ for the Iraqi oil industry. That brings us to the following hot issues at the forefront of the reconstruction of the Iraqi oil industry, a sector at the heart of Iraq’s state-building process:

i. what kind of oil policy should be advocated for (nationalization vs privatization)

ii. who is to control the decisions for the development of the oil reserves and sign the respective contracts (centralized vs decentralized control) and

iii. who is to manage the oil revenue and how is it to be distributed (to the people or back to the government)\textsuperscript{74}

4.1 **Theoretical framework for the structuring of an oil industry**

Laying down the theoretical framework of restructuring a country’s oil industry is important in order to understand and keep in mind as a parameter the strategic choices available when assessing a legislative proposal or an oil policy in Iraq and beyond.

4.1.1 **Options for an oil policy: nationalization vs privatization**

Starting the oil policy options available to a country for structuring a legislative framework for its oil industry, these options\textsuperscript{75} consist in: the nationalization option and the privatization option, along with several possible combinations.

\textsuperscript{73} Whyte, *supra* n. 29, p. 191.

\textsuperscript{74} Mutttitt, *supra* n. 2, p. 3.

\textsuperscript{75} *Ibid*, p. 5.
The nationalization model, used throughout most of the Gulf regions as well as in Iraq back in the 1970s-1990s, the state amounts to the only decision-making power and manages all the revenue. Involvement of foreign private companies remains very limited and can be envisaged through: either technical services contracts, ie. contracts of a limited period of time for carrying out a well-defined piece of work in return for a fixed fee, or through their variants, the so-called buyback agreements that consist in the foreign company investing capital in a project, with payment foreseen at a fixed rate of return, as agreed in the agreements.

Under the privatization option, envisaged as private control of the extractive industry, the main tool consists in the so-called Production Sharing Agreements (PSAs) or their variants, the Joint Venture Agreements (JV). The PSAs,\textsuperscript{76} pioneered by the Indonesian state oil company Pertamina, came to replace the concession agreements\textsuperscript{77} and became the most favoured by large oil corporations. With the PSAs, the ultimate control over the oil belongs to the state while the foreign company extracts it under a contract. In practice however, the actions of the state are strictly constrained by the provisions in the contract, which depend in turn on the bargaining power of the parties at the time of signing. As Daniel Johnston, a recognized industry expert on PSAs stipulates: “At first [PSAs] and concessionary systems appear to be quite different. They have major symbolic and philosophical differences, but these serve more of a political function than anything else. The terminology is certainly distinct, but these systems are really not that different from a financial point of view”.\textsuperscript{78}

The Joint Venture Agreements (JV) structure is somewhat different: it constitutes a partnership with a foreign company where the state can participate in the contract as a commercial partner, providing a percentage share of capital investment and directly receiving the respective percentage share of profit.\textsuperscript{79} Thus, due to the direct involvement and close oversight by the state it seems to be a safer and more straightforward option compared to the PSAs.

\textsuperscript{76} The PSA works as follows: the foreign company provides the capital investment for exploration, drilling and construction of the infrastructure. Initially, the profits from the oil sales of the extracted oil are used to recover the costs and capital investment of the foreign company (‘cost oil’). After costs have been recovered, the ‘profit oil’ is divided between state and company in agreed proportions, while the company pays taxes and possibly royalties (a percentage of the total value of the oil). \textit{Ibid}, p. 3.

\textsuperscript{77} Sornarajah, \textit{supra} n. 16, p. 40. These agreements, valid in Iraq during colonization, transfer ownership and control over a country’s oil to foreign companies for a period of 75 years in return for the payment of taxes and royalties. The government influence in decision-making remains minimal. Muttitt, \textit{supra} n. 2, p. 3.

\textsuperscript{78} \textit{Ibid}, p. 5.

\textsuperscript{79} \textit{Ibid}, p. 5.
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4.1.2 Control over development of natural resources: centralization vs decentralization

A second step in scheming a legislative framework, regardless of which of the aforementioned options is chosen, is defining whether the decisions for the development of the oil resources should be made at national or regional level. To help answer this question, the following table compares both options.

<table>
<thead>
<tr>
<th>CONTROL OF DEVELOPMENT OF OIL RESOURCES AND SIGNING OF CONTRACTS</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Centralised Control</strong></td>
</tr>
<tr>
<td>More effective managerially, adding to the bargaining power with investors</td>
</tr>
<tr>
<td>Conducive to public participation</td>
</tr>
<tr>
<td>More transparency</td>
</tr>
</tbody>
</table>

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80 Ibid, pp. 6-14.
81 Myers, supra n. 8, p. 20.
82 Mahdi, supra n. 7, pp. 17-8.
The amount of investment needed on shared assets (pipelines, terminals, depots) and the shared environmental concerns will be better coordinated at the moment by a regulated state monopoly with a solid national plan. Opens the oil sector to unregulated international involvement and leads to weaker investment opportunities and incongruence between the resource development cycle, financial flows and investment requirements.

National oil policy needed to integrate the crude oil sector to the broader national economy. Hampers coordinated diversification of the economy.

Avoidance of local resource conflicts. Proliferation of local resource conflicts (excessive oil smuggling as revenue for warlords and militias) or conflicts over joint field management (oil & gas reserves are not neatly confined within provincial or regional boundaries).

Gradual development of currently utilized and unutilized reserves – more optimum for a country with 18 governorates and the largest unutilized reserves. Results in a rapid acceleration of exploration and production of all fields and feeds the competition between the regions for a larger market share.

4.1.3 Distribution of oil revenues: to the government vs to the people

The distribution of oil revenues is one of the most controversial issues especially with respect to people coming out of authoritarian regimes with a past of corrupt nationalized industries. Hungry for individual capital, they fight for direct access to oil revenues which they had forfeited for so long to the benefit of greedy authoritarian leaders. The following table examines the two possible options in this respect.

<table>
<thead>
<tr>
<th>DISTRIBUTION OF OIL REVENUES(^\text{83})</th>
<th>To the People</th>
<th>To the Central Gov’t</th>
</tr>
</thead>
<tbody>
<tr>
<td>Oil revenue sent back to the local economy</td>
<td>Promotes national unity and a federal government structure</td>
<td></td>
</tr>
<tr>
<td>Increased inflation and imports crowding out domestic production</td>
<td>Reinvestment through the government’s spending decisions</td>
<td></td>
</tr>
<tr>
<td>Limits power of central government and blocks authoritarian intentions</td>
<td>Creates a very strong central authority - good for coordination purposes but susceptible to abuse of power</td>
<td></td>
</tr>
<tr>
<td>Higher individual standard of living for local people</td>
<td>Higher chances for corrupt practices</td>
<td></td>
</tr>
</tbody>
</table>

\(^{83}\) Ibid, p. 20.
4.2 The currently proposed legislative frameworks

4.2.1 The draft legislative frameworks

In August 2004, the US-appointed interim Prime Minister, Ayad Allawi, and his government went on to establish the Supreme Council for Oil Policy (SCOP) and to propose a strategy of “assured but gradual privatization” of the industry following a centralized, business-oriented policy.\(^{84}\) This model seems to also be diffused in the controversial constitutional articles (articles 111-115), as adopted in 2005. However, the Constitution appears to be departing in the sense that it envisages a federalized system with oil policy responsibility spread across different levels of government in ways that remain in dispute. Yet still, the Constitution is drafted in such vague terms in order to be able to surpass political limitations,\(^{85}\) that its provisions (article 108,\(^{86}\) the meaning of ‘present’\(^{87}\) in article 109 and 112, the meaning of ‘owned’\(^{88}\) in article 111, the scope of article 115\(^{89}\)) can be interpreted in several different ways according to the interests of the interpreter. In the absence of effective constitutional courts, these open-ended provisions have been creating interpretation conflicts between the involved sectarian and ethnic factions (Sunni Arabs, Sunni Kurds and Shi’a Arabs) competing for leadership on oil related issues, especially given the Kurdish insistence for regional control of the resources in their (unsettled as yet) territory.\(^{90}\)

Thus, Iraq’s Cabinet,\(^{91}\) in an effort to settle some of the issues left unresolved by the Constitution including the distribution of oil revenues, approved behind closed doors, a

\(^{84}\) This strategy was partly imposed by the International Monetary Fund’s standby Agreement with Iraq in December 2005, according to which Iraq commits to “restructure oil sector operations toward putting oil sector enterprises on a full commercial basis and with the ministry of oil and industry regulator”. His plan was that all new reserves would be developed by IOCs; the INOC should be part-privatized; the domestic marketing and sale of petroleum products would be transferred to the private sector and the new refineries would be carried out by IOCs. See Muttitt, \textit{supra} n. 9, pp. 4, 14., 16.

\(^{85}\) The constitution was adopted quickly in a tense atmosphere by a national referendum held in October 2005. However, safeguards were given to Sunni Arabs for immediate revision of provisions therein to which the latter were opposed (especially those on federalism). That was done in view of assuring that the Sunnis wouldn’t block the process. For more details on the constitutional process see McGarry, J. and O’Leary B. (2007) “Iraq’s Constitution of 2005: Liberal consociation as political prescription”, Symposium, 5(4) \textit{I•CON} 670–698 and Brown, N. J. (2005) “Iraq’s Constitutional Process Plunges Ahead”, Policy Outlook Democracy and Rule of Law, \textit{Carnegie Endowment for International Peace} 1-15

\(^{86}\) This can be interpreted to imply that all oil policy falls under the jurisdiction of the central government. See Myers, \textit{supra} n. 8, p. 17.

\(^{87}\) Whether it means the fields that are known to exist, or fields that are in various stages of development, or fields in full production. See Mahdi, \textit{supra} n. 7, p. 16.

\(^{88}\) Whether it means equally owned by the Iraqi people or not. \textit{Ibid}.

\(^{89}\) Whether the regional authorities’ powers apply to oil and gas. \textit{Ibid}.

\(^{90}\) \textit{Ibid}.

\(^{91}\) The winner of the elections for a national assembly held in 30 January 2005 was the US-backed Shi’ite Islamist extremists’ United Iraqi Alliance winning 128 seats out of a total of 275. See Zunes, \textit{supra} n. 21, p. 68.
controversial Draft Oil & Gas Law\textsuperscript{92} (DOGL, March 2007). This law goes even further, envisaging full - as opposed to gradual - privatization and allowing regional governments to negotiate long-term contracts directly with IOCs, whereby IOCs control and manage Iraq’s oil resources for periods up to 25 years.\textsuperscript{93} However, the DOGL is yet to be adopted due to popular, technocratic and political resistance in the Iraqi Parliament.\textsuperscript{94} The delay in adopting a legislative framework has intensified the ambiance, with the Kurdish Regional Government’s (KRG) proceeding to the passage of a regional oil law - allegedly on the basis of Kurdistan’s ‘constitutional right’ (as interpreted by the KRG) to control petroleum development in its territory - as well as to the subsequent signing of contracts with IOCs (Norway’s DNO, Heritage Oil, Canada’s Western Oil Sands subsidiary – Western Zagros, Prime Natural Resources, Petroil of Turkey and Oil Search of Papua New Guinea).\textsuperscript{95} However, this move triggered the outrage of the government which recently decided to nullify the Kurdish oil deals, blacklisting the IOCs that participated and setting off turmoil and a heated debate.\textsuperscript{96}

In addition to the DOGL and as part of the package of legislative measures,\textsuperscript{97} another law governing the collection and geographical distribution of federal state oil revenue is being developed, only in slower terms. The law provides for the oil revenues to be collected centrally only to be distributed to individuals and households. The law also sets the question of a fiscal stability or a future fund.\textsuperscript{98}

\textsuperscript{92} The passage of this law is linked to the provision of foreign assistance to Iraq (including debt relief) under the International Compact for Iraq, a UN-led initiative for transforming Iraq. See Mahdi, supra n. 7, p. 16.

\textsuperscript{93} “Iraqi law opposed, worries about security and a petrol mystery”, Oil and Energy Trends, 16 March 2007, p. 6.

\textsuperscript{94} Opposition has been intense by the Iraqi Federation of Oil Unions, who request the consultation of the civil society to the drafting of the law. See Mahdi, supra n. 7, p. 11.

\textsuperscript{95} Myers, supra n. 8, p. 16-7.

\textsuperscript{96} Agence France-Presse: Iraq nullifies Kurdish oil deals, 24 November 2007 in http://afp.google.com/article/ALeqM5iux6SGhlkK7TYXlFIilVhVZPdmw.

\textsuperscript{97} Other laws drafted in secret and on the same tune include: a law which reconstitutes INOC as a company to absorb the current regional companies (North and South Oil Companies, Iraq Drilling Co. and Oil Exploration Company) and opens up the way to privatization and access of IOCs to the industry; a law removing strategic policy and planning function from the Oil Ministry to be undertaken by the Federal Oil and Gas Council, its regional counterparts or the private sector, and a law gradually opening up the downstream sector confirming the commercialization of all activities. See Mahdi, supra n. 7.

\textsuperscript{98} See Ibid, p. 20 and Myers, supra n. 8, p. 18.
4.2.2 Assessment and recommendations

Apparently the DOGL as well as the law on the distribution of the oil revenues, “both by design and by willful neglect”\(^9^9\) depart radically from the oil policies formed and supported during the last decades of the 20\(^{th}\) century in Iraq as well as in most major oil-exporting countries today. The DOGL creates the conditions for an immediate shift of resource control from national to foreign hands through ‘exploration and production contracts’ (article 9.b),\(^1^0^0\) as well as for the actual relinquishment of the national assets,\(^1^0^1\) while the law on the distribution of oil revenue diverts capital much-needed for the long-term rebirth of the national economy to the short-term replenishment of the pockets of individuals, with no strategic spending plans.

On the positive side, the draft laws seek to encourage investment in the Iraqi private sector; set up the Iraqi National Oil Company (INOC) with a mandate to rehabilitate Iraq’s currently-producing fields and aim at providing comfort to the deprived Iraqi population. On the long negative side though they create a legal framework that Iraq is not ready to sustain, since it: a) provides for full privatization at times when the Iraqi government, due to security concerns and to the lack of a stable and well-organized legislative framework, is found at a weak bargaining position to negotiate a beneficial contractual allocation of risks. This amounts to the greatest shortcoming since “‘the devil is in the detail’, ie. it is more the precise terms of any legal agreement or contract that determine the balance of control and revenues between the state and foreign companies”,\(^1^0^2\) b) threatens to unleash fast and uncontrolled development of oil production without a plan to diversify the economy or a solid program of how to distribute the oil revenues, c) places greater importance on new foreign investments rather than on established nationally-owned facilities; separates crude oil production from the downstream activities (refining, transportation, distribution) emphasizing crude-oil exports, which are driven mostly by foreign company profit maximization rather than optimal national wealth management and market stability, d) prevents the development of

\(^9^9\) Mahdi, supra n. 7, p. 18.
\(^1^0^0\) Something similar to PSAs only named differently.
\(^1^0^1\) Ibid and pp. 18-9. The division of fields into three categories (see law’s annex) restricts the exclusive rights of INOC to present ‘fully operating fields’ as implied in article 8.d. Moreover, the law does not state explicitly that foreign involvement will be restricted to service contracts, paving the way for PSAs as ‘exploration and production contracts’ (something similar to the contested term ‘PSAs’) are envisaged in article 9.b for IOCs. Joint management gives IOCs effective veto and guarantees profits while the terms of licenses render IOCs immune from Iraqi courts and bestow them equal status to that of the government for up to 12 years before and up to 25 years after production. Moreover, article 34 lays down royalty provisions that ensure excessive profits.
\(^1^0^2\) Muttitt, supra n. 9, p. 3.
an independent national oil production services industry and hinders the training of Iraqi skills, e) weakens the supervisory and regulatory role of the Oil Ministry, creating potential conflict between different regulatory standards at state and regional levels, e) is seen by many as US-imposed meant to ensure a say for US oil companies on the management of the Iraqi oil production, and f) finally, given the continuing occupation and the prevailing sectarian strife along ethnic and political lines, is likely to amount to a destabilizing factor due to its attributing regional powers to oil-rich regions such as Kurdistan and the Shi’a-dominated south.

Moreover, the law on the distribution of oil revenues also seems to be a politically motivated effort to limit the strength of the central government. By providing that the revenue is not to be reinvested back into the national economy, it undermines national businesses and production activities and is likely to lead to increased inflation and imports, crowding out domestic production already hampered by the catastrophic state of the infrastructure.

Thus, it is obvious that the shortcomings and estimated effects of both draft laws are too important to be surpassed. It would be an enormous mistake to jump into full privatization and decentralized structures which cannot be borne by the Iraqi state at this stage. Drawing on the tables above, the lack of a complete package of concrete and solid legislative frameworks for the different sectors of the oil industry along with the lack of an up-and-running local economy, the ensuing security situation that encroaches upon Iraq’s bargaining power to ensure good deals, the difficulty in abolishing subsidies raising thus domestic oil prices at times when the people are recovering economically, the urgency of avoiding local resource conflicts at times when the political upheaval is threatening the country’s cohesion, constitute some of the grounds against the idea of immediate full privatization and decentralized uncontrolled management. Of course there are reasons to support the opposite as well (rapid increase in production, reduction of oil dependence, satisfaction of the different needs and plans of the regional factions, thirst of people for direct access to capital) but the balance seems to tilt to the other side instead. That is not so say that privatization is to be dismissed altogether but rather that a framework for a longer-term gradual conservative privatization should be designed.

103 “Iraqi law opposed, worries about security and a petrol mystery”, supra n. 93.
104 The Bush administration has redefined the war in Iraq as a war on terror using as a justification for the continuing military presence in oil-rich Iraq the insurgencies and their effects on cultivating terrorism. See Zunes, supra n. 21, p. 60.
105 Mahdi, supra n. 7, p. 20.
Anyway, there seems to be no need yet to rush to relinquish national control, not even for unexplored oil fields where the national company is not operating anyway. According to the Centre for Global Energy Studies estimates, the Iraqi oil industry can - given the current oil prices - finance the estimated US$2.5 bn investment/year needed to achieve production of 6 million bpd by 2010, out of Iraq’s own oil revenues from proven oil fields without further exploration needed at the moment. This figure is even within the range of budget allocations to date already. Therefore, the current priorities would rather be exhausted on the further development of commercially risk-free resources, expanding and diversifying local economy and the Iraqi private sector and consolidating central, rather than regional, national management. Thus, it seems more viable for foreign involvement to be restricted to required service contracts until a stronger Iraqi economic system is in place, in order for the oil wealth to be preserved for the benefit of the Iraqi people.

5. Conclusion

Coming to an end of the assessment of the past and recent events determining Iraq’s state and preparedness to enter a new era of regulation of its oil sector, it flows naturally that Iraq owes a duty to its own people to adopt a more cautious stance, following a more conservative and balanced approach for the restructuring of its main source of power and hope. It is advisable to refrain, at least for the moment, from carrying out its currently proposed plans of an aggressive opening-up of its oil industry. The latter amounts to the most important asset of the Iraqi state-building process and Iraq surely cannot afford to experience more waste.

Reform has to take into consideration the long-term impact of current decision-making rather than the short-term quenching of the thirst of Iraqi people and the new government for capital. Given the history of the country’s course and its several misfortunes, it is essential that more thought is put into the process, opening-up not the oil industry but the drafting procedures of legislative frameworks affecting the sector. That will contribute to the drafting of more balanced legislative products that consider all aspects and impacts of any decision rather than following policies imposed by western tigers encircling the golden cage starving for a piece of oil profit. Maximization of the economic return to the Iraqi people is a valid aim which can only be reached through

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patience, coordination and responsibility. Keeping the country together is what needs to be ensured at this stage.

6. BIBLIOGRAPHY

Gradual Privatization of Iraqi Oil Industry
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**Official reports and legislative documents**


News Journals

- “Iraq struggles to pass new oil law”, Oil and Energy Trends, 21 September 2007, pp. 1-4.
- “Iraqi law opposed, worries about security and a petrol mystery”, Oil and Energy Trends, 16 March 2007, p. 6.
- “Iraq’s oil sector struggles for survival”, Oil and Energy Trends, 15 December 2006, pp. 3-5.
- “Iraq’s oil sector mired in problems despite successful election”, Oil and Energy Trends, 18 February 2005, pp. 3-6.