

**The Authority of the
Kurdistan Regional Government
over Oil and Gas
under the Constitution of Iraq**

Professor James Crawford SC, FBA, LL.D

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29th January 2008



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H.E. Nechirvan Barzani
Prime Minister
Kurdistan Regional Government
Erbil
Kurdistan Region - Iraq
Republic of Iraq

Dear Prime Minister

I am pleased to enclose with this letter a formal legal Opinion on The Authority of the Kurdistan Regional Government over Oil and Gas under the Constitution of Iraq by Professor James Crawford, SC, FBA, LLD.

This Opinion confirms the constitutional authority of the KRG to manage the oil and gas resources of the Kurdistan Region as set out in the Oil and Gas Law of the Kurdistan Region - Iraq (Law no. 22 of 2007), which is in full conformity with the Constitution of Iraq.

Conversely, the Opinion makes clear that the draft Oil and Gas Law of the Republic of Iraq, proposed on 15 February 2007 but never enacted, departs significantly and in many respects from the Constitution, and would therefore by operation of the Constitution be void in that form, or in any similar terms that did not conform to the applicable provisions of Iraq's Constitution.

In accordance with your instructions, arrangements are being made to publish Professor Crawford's Legal Opinion.

Please accept the assurances of my highest regards.



Jeremy P Carver, CBE
Head of International Law



**The Authority of the
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Executive Summary

- (1) Article 112 of the Constitution of Iraq gives only a qualified right to the Federal Government to “undertake the management of oil and gas extracted from present fields”. This right is to be exercised “with the producing governorates and regional governments”, and is subject to a condition of fair distribution of revenue on a basis regulated by law. As to non-producing and future fields, there is under Article 112, Second, no federal right to manage, although regional management of such fields has to respect strategic policies to be formulated by the federal government “with” the KRG.
- (2) The enactment of an oil and gas revenue sharing law is not a condition precedent to the management of oil and gas, whether extracted from “present” fields or otherwise. The federal government has the right of initiative under Article 112, First, provided it acts “with the producing governorates and regional governments”. However the federal government must propose arrangements for management of oil and gas extracted from present fields which are constitutionally compliant: so far it has not done so.
- (3) The KRG is itself bound by Article 111: it is not open to it unilaterally and permanently to take over management of present (i.e. producing) fields in the absence of any arrangements for revenue sharing. As to fields other than present fields, the federal government has no unilateral rights under Article 112, Second, and in the absence of agreed strategic policies, the KRG is entitled to proceed in the exercise of its own constitutional authority and in compliance with its own constitutional duties.
- (4) The Kurdistan Region Oil and Gas Law is consistent with the Constitution of Iraq and is effective to govern the development of oil and gas in the Kurdistan Region. In the continuing absence of agreement pursuant to Article 112, Second, on the “necessary strategic policies”, the KRG is entitled to manage its oil and gas resources, and should do so openly in a manner which gives effect to the principles set out in that Article.
- (5) Existing contracts entered into by the KRG for oil and gas exploration and exploitation since 1992 are valid unless they conflict with the Constitution. Pending agreement between the KRG and the federal government on strategic policies, the authority of the KRG to authorise the conclusion and implementation of new contracts is unqualified.



Opinion

The Authority of the Kurdistan Regional Government over Oil and Gas under the Constitution of Iraq

James Crawford*

A. Introduction

1. I am asked to advise the Kurdistan Regional Government-Iraq (KRG) on the extent of its competence with respect to oil and gas matters under the Constitution of Iraq. I do this on the basis that there are no relevant differences between the English-language version of the text and the version in the authentic Arabic and Kurdish texts.¹

B. The Constitutional Provisions

2. The Constitution of Iraq was negotiated in 2005. The Iraqi people approved it by referendum on 15 October 2005 and it entered into force in 2006.²

3. Article 142 provides for the Council of Representatives to create a constitutional review committee, operating within a strict time scale, to consider recommendations for amendments that could be made to the Constitution. If proposed, such amendments would be voted on by the Council, and then submitted to a referendum. In fact, the Committee has so far failed to agree recommendations, and its present preliminary report has no legal standing or effect.³ This opinion is based on the text of the Constitution as it stands.

4. First among the fundamental principles of the Constitution is the proposition that Iraq is a “single, federal, independent and fully sovereign State” (Section One, Article 1). Within that federation, special recognition is given to the Kurdistan Region (Article 4, Third). Although other regions are intended to be recognised as components of the federation, only the Federal Region of Kurdistan is actually recognised in the Constitution itself (Article 117, First). The Kurdish language is one of the two official languages (Article 4, First). In areas where there is no recognised regional government, the governorates perform largely the same function (Article 122).

¹ Of particular importance is Article 112 of the Constitution. Attached as Appendix 1 is a letter from a qualified Arabic-English translator certifying to the accuracy and sense of the English translation of Article 112.

² For an account of the drafting, see AS Deeks & MD Burton, “Iraq’s Constitution: A Drafting History” (2007) 40 *Cornell ILJ* 1.

³ The Committee was formed, late, on 25 September 2006 and started work on 15 November 2006. On 23 May 2007, it presented a preliminary Report, proposing, *inter alia*, significant changes to federal powers and to the provisions concerning oil. The members representing Kurdistan parties have rejected these proposals, as has the Kurdistan Parliament. The Committee’s final report has been repeatedly postponed, most recently to end-March 2008.

(i) ***The Status of the Kurdistan Region***

5. Iraqi Kurdistan gained autonomy from Iraq in 1970, but the autonomy agreement collapsed five years later. After the 1991 Gulf War, Iraqi Kurdistan became *de facto* autonomous in October 1991 and this situation continues. On 30 June 2004, the Transitional Administrative Law recognised the autonomy of the Kurdistan Region and this status was reaffirmed by Article 117, First, of the Constitution, which provides:

“First: This Constitution, upon coming into force, shall recognize the region of Kurdistan, along with its existing authorities, as a federal region.

Second: This Constitution shall affirm new regions established in accordance with its provisions.”

6. Not only is the KRG at present the only recognised regional government; that recognition goes back to 1992. Article 117, First, of the Constitution specifically recognises an *existing* autonomy. Article 141 provides:

“Legislation enacted in the region of Kurdistan since 1992 shall remain in force, and decisions issued by the government of the region of Kurdistan, including court decisions and contracts, shall be considered valid unless they are amended or annulled pursuant to the laws of the region of Kurdistan by the competent entity in the region, provided that they do not contradict with the Constitution.”

7. The Kurdistan Region is currently comprised of the Governorates of As Sulaymaniyah, Erbil and Dahuk and parts of the Governorates of Diyala, Kirkuk and Ninawa. A referendum, required by Article 140, Second, of the Constitution, will determine whether additional parts of these last three governorates (and other “disputed territories”) will become part of the Kurdistan Region.⁴

(ii) ***The general constitutional framework***

8. Not surprisingly, the Constitution proclaims its own supremacy. Article 13 provides:

“First: This Constitution is the preeminent and supreme law in Iraq and shall be binding in all parts of Iraq without exception.

Second: No law that contradicts this Constitution shall be enacted. Any text in any regional constitutions or any other legal text that contradicts this Constitution shall be considered void.”⁵

⁴ Article 140, Second, provides that a referendum should be held before the end of 2007. No referendum has yet been held, but I understand that it has been agreed to hold a referendum by end-June 2008.

⁵ There is a Federal Supreme Court with the task, *inter alia*, of constitutional review and interpretation (Article 93, First, Second), and of resolving disputes between components of the federation (Article 93, Fourth, Fifth).

9. The distribution of power under the federation follows a distinctive pattern. Leaving to one side for the moment oil and gas matters (discussed from paragraph 18 below) the position is as follows.

10. Article 110 gives the federal government exclusive authority in relation to nine categories of matter: foreign policy; national security and defence policy; fiscal and customs policy; standards, weights and measures; citizenship and immigration; broadcasting and postal policies; budget; planning of waters flowing to Iraq; census and statistics. In some cases the power is expressed in terms of “formulating policies”; in others the term used is “regulating”, either by reference to “issues” or “policies”.

11. Under Article 114, there are seven categories of matters where power is shared between the federal and regional authorities: these are management of customs; generation and distribution of electric energy; environmental policy; development and planning policy; public health policy; educational policy; internal water resources policy. The repeated references in Articles 110 and 114 to the term “policy” suggest that the implementation of policy, as opposed to policy formulation, is a matter for the regional governments.

12. The regional governments have residual powers and these are entrenched. Article 121 provides:

“First: The regional powers shall have the right to exercise executive, legislative, and judicial powers in accordance with this Constitution, except for those authorities stipulated in the exclusive authorities of the federal government.

...

Third: Regions and governorates shall be allocated an equitable share of the national revenues sufficient to discharge their responsibilities and duties, but having regard to their resources, needs, and the percentage of their population.

...

Fifth: The regional government shall be responsible for all the administrative requirements of the region, particularly the establishment and organization of the internal security forces for the region such as police, security forces, and guards of the region.”

13. Entrenchment is achieved by Article 126, which deals with constitutional amendment. Article 126, Fourth, provides:

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

Thus, no change diminishing the powers of the Kurdistan Region as set out in the Constitution may occur without the approval by the Parliament of the Kurdistan Region and by a popular referendum within the Kurdistan Region.

14. Two provisions explicitly give priority to the law of the regions, except in relation to matters of exclusive federal authority under Article 110. These are Article 115 and Article 121, Second.

15. Article 115 provides:

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

16. Article 121, Second, provides:

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

17. Thus on a matter within the exclusive authority of the federal government, federal law prevails. On all other matters, including both shared matters under Article 114 and residual matters under Article 115 and Article 121, First, regional law prevails.

(iii) Competence over Oil and Gas Matters under the Constitution

18. It is against this background that the specific provisions of the Constitution dealing with oil and gas must be read. These provide as follows:

“Article 111:

Oil and gas are owned by all the people of Iraq in all the regions and governorates.

Article 112:

First: The federal government, with the producing governorates and regional governments, shall undertake the management of oil and gas extracted from present fields, provided that it distributes its revenues in a fair manner in proportion to the population distribution in all parts of the country, specifying an allotment for a specified period for the damaged regions which were unjustly deprived of them by the former regime, and the regions that were damaged afterwards in a way that ensures balanced development in different areas of the country, and this shall be regulated by a law.

Second: The federal government, with the producing regional and governorate governments, shall together formulate the necessary strategic policies to develop the oil and gas wealth in a way that achieves the highest benefit to the Iraqi people using the most advanced techniques of the market principles and encouraging investment.”

19. Article 112, First, regulates oil and gas “extracted from present fields”. It gives the federal government management powers in relation to that oil and gas, subject to three important qualifications. First, the management is to be undertaken “with the producing governorates and regional governments”, which I take to mean jointly and in cooperation with those governorates or governments or at least with their approval.⁶ Secondly, the joint management appears to be limited to oil and gas *after* it has been extracted,⁷ on which basis the management of the extraction and production process itself falls outside the federal joint management power. Joint federal power in respect of such oil and gas will be limited, presumably, to processing, transportation and export. Thirdly, revenues from present fields must be distributed in a fair manner, as stipulated in the Article.

20. On its ordinary interpretation, the term “present fields” means fields already under production. This is indicated by the word “extracted” and by the reference to “producing” governorates. The clear inference is that Article 112, First, covers oil and gas extracted from fields presently in production.⁸ By contrast, areas merely being explored, e.g. by seismic survey, are not “present fields”; indeed they are not fields at all but large tracts of territory, most or all of which will never produce any hydrocarbons. On this basis, fields not producing, developed or even discovered – and the oil and gas yet to be extracted from them – fall outside Article 112, First. They fall under the Constitution to be managed by the relevant regional government alone.

21. The time for determining whether a field is “present” or otherwise is the date of the entry into force of the Constitution (*viz*, 2006). I am instructed that at that date there were no producing fields in the present territory of the Kurdistan Region, i.e. no “present fields” in the sense indicated above. It follows that the provision for joint management under Article 112, First, has no application. On the other hand there are oil and gas contracts with the KRG entered into prior to the coming into force of the Constitution and providing for future exploration, appraisal and, potentially, production. Under Article 141 all such contracts, entered into by Kurdistan since 1992, are considered valid in accordance with their terms (save and to the extent that they contradict some express provision of the Constitution).

22. The question then is what constraints the Constitution imposes on regions in terms of the exploration and exploitation of new oil and gas fields? There are two.

23. First, there is the stipulation of Article 111, that “Oil and gas are owned by all the people of Iraq in all the regions and governorates”. This must be read in the context of Article 112: the “ownership” of the people of Iraq is without prejudice to the “management” of oil and gas, either by the federal government “with” the relevant producing region in the case of oil and gas extracted from “present fields”, or by the

⁶ According to the sworn translator (Appendix 1) the word translated as “with” in the English translation has the sense “together with”.

⁷ According to the sworn translator (Appendix 1) the English phrase “extracted from” is an accurate rendering of the Arabic text, which means “that the management is to be undertaken only in respect of the oil and gas that has been – now or in the future – extracted from ‘present fields’.”

⁸ Oil and gas extracted from fields which, though not yet producing, are under active development with a view to production (with, for instance, a clear development plan) might fall within the scope of the provision; but I understand there to have been no such fields in Kurdistan in 2005.

producing regional government in the case of oil and gas, pre- or post-extraction, from all other fields, including those currently (i.e., at the time of the entry into force of the Constitution) not producing. Moreover the elaborate redistributive arrangements for oil and gas revenues provided for in Article 112, First, only apply to “present fields”. It is for the producing regional government, in the first place, to decide on distribution of the revenues of new production from that region, subject to policies formulated under Article 112, Second.⁹

24. Article 112, Second, provides for the joint formulation of “the necessary strategic policies to develop the oil and gas wealth in a way that achieves the highest benefit to the Iraqi people using the most advanced techniques of the market principles and encouraging investment”. Again the emphasis is not on “management”, but on “policies”, this time policies jointly formulated. But it should be stressed that Article 112, Second, does not confer any legislative authority on the federal government, still less exclusive federal authority. Nor does it stipulate that no contracts are to be concluded for the management by a region of present or future fields until the strategic policies are agreed. Such a stipulation would give the federal government a veto over regional authority which the Constitution nowhere gives, outside the enumerated list of exclusive powers in Article 110. Even in respect of present fields, oil is not an exclusive power; *a fortiori* with new fields and projects.

25. Against this view, Deeks and Burton argue that:

*“Once the Kurds and Shia had agreed on this finely parsed oil and gas language [viz, in Article 112], it changed no further. The drafters ultimately placed these compromise provisions between the two articles listing exclusive authorities and joint authorities, thereby implying that the joint competency in regulating oil and gas were to be treated differently than the other list of joint competencies.”*¹⁰

But Article 112 contains two provisions, one dealing with oil and gas extracted from “present fields”, the other dealing with future developments, and the involvement of the federal government in the latter is limited to formulating strategic policies for hydrocarbon development together with the producing regional governments. That is not a general competence, still less an exclusive one. Moreover a key point is that the priority provision in Article 115 applies to “[a]ll powers not stipulated in the exclusive powers of the federal government”. It is obvious that oil and gas development is not an exclusive federal power. Article 115 accordingly applies to it.

26. For these reasons, in my opinion, it is a matter for the KRG to decide, subject to any strategic policies jointly agreed with the federal government under Article 112, Second, on the terms and conditions for new oil exploration and exploitation. From a

⁹ The Constitutional Review Committee’s preliminary Report proposed to delete the words “in all the regions and governorates”. The aim seems clear: to change the Constitution in order to “centralise” oil and gas matters within the federal government. By contrast, the existing language of Article 111 affirms that there is a regional dimension to ownership oil and gas. Indeed, it might even support the view that the people of that unit own its oil and gas. But that denies effect to the term “all the people of Iraq”. The better view is that Article 111 vests ownership of oil and gas in all Iraq’s people, but that the distribution of the revenues of that ownership must take account of Article 112. Thus, the Constitution – an instrument of “all the people” – authorises the respective federal and regional elements in revenue distribution and management according to the carefully balanced language of Article 112.

¹⁰ Deeks & Burton, 58.

legislative point of view, such matters fall within the first sentence of Article 115 (paragraph 15 above), as supported by Article 121, Second.

C. The Draft Federal Oil and Gas Law (2007) and the KRG Oil and Gas Law

27. In the purported exercise of their respective authorities, the federal Oil and Energy Committee of the Council of Ministers has proposed a Draft Oil and Gas Law, which has not yet been enacted.¹¹ By contrast, the KRG has actually enacted its own such Law for Kurdistan. Something should be said about each.

(i) *The Draft Federal Oil and Gas Law*

28. The Draft Federal Law seeks to maximise federal control over oil and gas activities, with little regard to the actual provisions of the Constitution. It places heavy reliance on Article 111, treating other relevant provisions – Articles 110, 112, 114 and 115 are mentioned – as to be “seen in the light of Article 111” (Preambular para 3; see also Article 1). It seeks to establish “the regime for the management of Petroleum Operations in the Republic of Iraq” (Article 3; also Article 2), with little reference to any distinction between “present fields” and those not producing and not-yet-discovered. In respect of “present fields”, it makes no reference to any distinction between oil and gas pre-extraction and post-extraction. “Petroleum Operations” are widely defined to include

“all or any of the activities related to Exploration, Development, Production, separation and treatment, storage, transportation and sale or delivery of Petroleum at the Delivery Point, Export Point or to the agreed Supply Point inside or outside Iraq, and includes Natural Gas treatment operations and the closure of all concluded activities;” (Article 4(19)).

29. The Draft Federal Law would establish a Federal Oil and Gas Council, with regional representation (Article 5(C)), which would be responsible for “putting [*sic*] Federal Petroleum policies, Exploration plans, Development of Fields and main pipeline plans inside Iraq, and ... has the right to approve any major changes in such plans and policies”.¹² The federal Ministry of Oil would moreover undertake “the necessary monitoring and supervisory actions in coordination with the Regional Authorities and Producing Governorates, to ensure their proper, coordinated, and uniform implementation throughout Iraq” (Article 5(D), Third). And there would be an independent Iraq National Oil Company (INOC) which would manage and operate “existing producing Fields mentioned in Annex No. 1”¹³ and participate in the development and production of “discovered and yet not developed Fields mentioned in Annex No. 2” (Article 6).

¹¹ Republic of Iraq, Oil and Energy Committee, Council of Ministers, Draft Oil and Gas Law (15 February 2007). I rely on an English translation provided by the KRG.

¹² Article 5(C), Second. By “putting” is presumably meant “implementing” or “putting into effect”.

¹³ I understand that the Annexes referred to in the draft Law were a later addition after 15 February 2007 and have not been approved by the federal Council of Ministers. The Annexes have been categorically rejected by the KRG.

30. Against this background the Draft Federal Law defines the competencies of regional authorities in far narrower terms. These are confined to undertaking “preparations” and proposals for inclusion in federal plans; and carrying out licensing on the basis of federally regulated procedures and conditions. Although the Draft Federal Law would make regional authorities responsible for licensing “discovered but undeveloped Fields mentioned in Annex No. 3”, they would do so subject to the substantial control of the Federal Oil and Gas Council: see also Article 9. In particular, all contracts are subject to a non-objection procedure from the Federal Oil and Gas Council (Article 10). There would be no role for a regional authority to manage oil and gas in present fields prior to extraction. Ignoring the right of regions to receive revenues from future fields, all petroleum revenues would be paid into a central account, to be distributed equitably according to the Constitution (Article 11).

31. Specific provision is contemplated for existing contracts entered into by KRG. Article 40(A) provides:

“The Designated Authority in the Kurdistan Region will take responsibility to review all existing Exploration and Production contracts with any entity before this law enters into force to ensure harmony with the objectives and general provisions of this law to obtain maximum economic returns to the people of Iraq, taking into consideration the prevailing circumstances at the time at which those contracts were agreed, and in a period not exceeding three (3) months from the date of entry into force of this law. The Panel of Independent Advisors will take responsibility to assess the contracts referred to in this Article, and their opinion shall be binding in relation to these contracts.”

This would give the last word on the consistency of these contracts to a federally-appointed advisory panel.

32. To summarise, although the KRG could be a “Designated Authority” with responsibility for contracting in respect of Annex 3 fields, under the Draft Law it would lack virtually any independent authority over oil operations in the Kurdistan region, whether in present or future fields, and would lack any authority over, or direct benefit from, revenue flows from those fields. Except for “municipal and local taxes due” (Article 33(A)(3)), all revenue would flow initially to the federal authorities, subject to subsequent redistribution nationally. The careful balance struck by Articles 110-115 of the Constitution is to a significant extent ignored by the proposed Law. In these circumstances it is difficult to see how an investor could rely on the proposed Law to protect investments.

33. Whether or not these proposals could have been amended so as to be made acceptable to the Kurdistan Region and consistent with the Constitution, any prospect of agreement seems to have been dashed by the subsequent publication (in April 2007) of Annexes to the Draft Law which allocated almost all proven reserves to federal control (i.e. in Annexes 1 and 2), leaving only a small number of marginal fields in Annex 3.¹⁴ The KRG subsequently passed its own legislation, to which I now turn.

¹⁴ See Tactical Report, *Baghdad, KRG and the Differences over Draft Oil Law*, 6 June 2007 (http://iraq.tacticalreport.com/index.php?option=com_content&task=view&id=460&Itemid=42) and the various items collected at <http://www.iraqog.com/>.

(ii) **The Kurdistan Region Oil and Gas Law**

34. The Oil and Gas Law of the Kurdistan Region was enacted in August 2007.¹⁵ It makes a series of claims which stand in high relief to the provisions of the Draft Federal Law. The Oil and Gas Law of the Kurdistan Region applies to petroleum operations and all related activities in the Region (Article 2, First). It asserts power under Articles 115 and 121 of the federal Constitution to take priority over federal authority. Article 2, Second, provides:

“Pursuant to Article 115 and paragraphs (1) and (2) of Article 121 of the Federal Constitution, no federal legislation, and no agreement, contract, memorandum of understanding or other federal instrument that relates to Petroleum Operations shall have application except with the express agreement of the relevant authority of the Region.”

35. Article 3 deals with ownership, regulation and revenue. It provides in relevant part that:

“First: Petroleum in the Region is owned in a manner consistent with Article 111 of the Federal Constitution. The Regional Government is entitled to a share from the revenues from producing fields, consistent with the share of all Iraqi people, in accordance with this law and Article 112 of the Federal Constitution.

Second: The Regional Government is entitled to a share from the revenues obtained from fields producing after 15 August 2005 in accordance with provisions of this law.

Third: The Regional Government, together with the Federal Government, jointly manage Petroleum Operations relating to producing fields according to the provisions of Article 112(1) of the Federal Constitution.

Fourth: The Regional Government shall oversee and regulate all Petroleum Operations, pursuant to Article 115 of the Federal Constitution and in a manner consistent with Article 112 of the Federal Constitution. The Minister may, after obtaining the approval of the Regional Council licence Petroleum Operations to third parties to maximise timely returns from the Petroleum resources of the Region.

...”

36. Chapter Seven of the Law deals with cooperation with the Federal Government. Article 18 lays down a program of eventual cooperation, including revenue sharing. The program involves four elements:

“First: agree with the Federal Government in the joint management of oil and gas extracted from Current Fields in the Region;

Second: cooperate with the Federal Government in formulating strategic policies to develop the Petroleum resources of the Region in a balanced manner compared with the other Petroleum activities throughout the

¹⁵ Law No (22) - 2007.

country, and in a way that achieves the highest benefit to the Iraqi people using the most advanced techniques of market principles and encouraging investment, consistent with the provisions of Article 112 of the Federal Constitution;

Third: cooperate with an intergovernmental federal oil and gas council ('the Federal Oil and Gas Council'), the composition of which is to be agreed with the Regional Government, to establish the standards, model contracts, and commercial terms for negotiations and contract award procedures in Iraq; and

Fourth: agree that all the Revenues obtained by the Region from Petroleum Operations to be deposited to a general petroleum revenue fund for Iraq."

This cooperative program is subject to a series of conditions laid down in Article 19: these concern the conditions for holding and distribution of revenues from oil on a national basis, the role of the yet-to-be-constituted INOC, and various other matters. Article 20 then provides:

"Until the conditions set out in Article 19 are met in full, the Regional Government shall proceed with its rights on the basis of Articles 112, 115, and 121(3) of the Constitution of Iraq, with Revenues received by [Kurdistan Oil Trust Organisation] pursuant to Article 135 of this Law."

37. Article 40 deals with taxation, providing *inter alia* that:

"Third: Applicable taxes of the Regional Government shall be the only taxes that apply to Petroleum Operations."

38. At first glance, the KRG Law may raise constitutional issues. For example, Article 49 deals with unitisation of reservoirs across international borders; but it provides that such reservoirs "shall be unitised in coordination with the Federal Government according to the provisions of the Federal Constitution". Thus the exclusive power of the Federal Government under Article 110, First, is not infringed. More problematic, perhaps, is Article 40, Third. The KRG can in principle, under Articles 112 and 115 of the Constitution, exclude any federal taxation power in respect of fields other than "present fields", and in respect of pre-extraction oil and gas operations in present fields themselves. If there were present fields in the Kurdistan Region in which there is post-extraction federal involvement pursuant to Article 112, First (which I understand is not the case), it would not be clear how a regional government could exclude any concurrent federal powers of taxation that may exist. I note however that the exclusive power of the federal authorities in respect of fiscal and customs *policy* under Article 110, Third, does not include a power to levy taxation, a curious omission.

39. But these are peripheral points. The KRG Law pays much closer regard to the federal Constitution than does the federal Draft Oil and Gas Law. The following points may be made:

- (a) The KRG Law proceeds on the basis that Article 111 of the Federal Constitution applies to oil and gas resources in Iraq generally for the benefit

of the people of Iraq as a whole. Ownership of reserves under the Law is expressly stated to be “in a manner consistent with Article 111”.

- (b) The KRG Law asserts a right of joint involvement with the Federal Government under both limbs of Article 112 of the Iraq Constitution. This is a defensible interpretation of Article 112.
- (c) In particular, the KRG Law does not assert a monopoly control over “present fields”: rather the claim is to joint management of extracted oil and gas from present fields on the basis of agreement: see Article 18, First.
- (d) In my opinion it is open to a regional legislature under Article 115 of the Constitution to lay down the conditions on which a constitutionally envisaged agreement will be reached. No doubt such conditions may not all be acceptable to the federal government, and to the extent that eventual agreement is reached, further legislation may be necessary. But for the most part the KRG Law allows for federal cooperation based on agreement, and is thus fully consistent with the Constitution.

40. From a constitutional point of view, three points are of particular significance. First, the right of the Federal Government under Article 112, First, to “undertake the management of oil and gas extracted from present fields” is not unconditional but is subject to the condition of fair distribution as set out in that provision: there is at present no legislative basis for such distribution. Secondly, as noted, the right is limited to oil and gas extracted from present fields. Thirdly, that right is not a unilateral one but is expressly one to be exercised “with the producing governorates and regional governments”. In marked contrast, federal statements assert exclusivity not based on any law or agreement and are unsupported by the Constitution. Indeed, they are inconsistent with the Constitution in which, as noted already, authority over oil and gas is “not stipulated in the exclusive powers of the federal government”.

D. CONCLUSIONS

41. For these reasons, in my opinion, the Constitution of Iraq does not give exclusive authority over oil and gas to the Federal Government. Article 112 of the Constitution gives only a qualified right to the Federal Government to “undertake the management of oil and gas extracted from present fields”. But even this is not an exclusive or unconditional right: it is to be exercised “with the producing governorates and regional governments”, and it is subject to a condition of fair distribution of revenue on a basis regulated by law. On the footing that there is a dispute between the federal and regional authorities (of which there can be no doubt), Article 115 provides that priority is to be given to the law of the region – subject only to the Constitution itself. As to non-producing and future fields, there is under Article 112, Second, no federal right to manage, although regional management has to respect strategic policies, which have still to be formulated by the federal government “with” the KRG.

42. The enactment of an oil and gas revenue sharing law is not a condition precedent to the management of oil and gas, whether extracted from “present” fields or otherwise. The stipulation in Article 111 is itself unconditional. The federal government is constitutionally required to enact such a law in terms of its continuing right to undertake the management of post-extraction oil and gas from present fields: it cannot rely on Article 112, First, only as concerns those parts which suit it. The federal government

has the right of initiative under Article 112, First, provided it acts “with the producing governorates and regional governments”. However if the federal government does not propose arrangements for management of oil and gas extracted from present fields which are constitutionally compliant – and it has so far not done so – a regional government is entitled to withhold consent; otherwise the provisions of Article 112, First, would be nugatory.

43. As to oil and gas extracted from present fields, the onus is on the federal government to comply with the conditions for the management of such oil and gas, acting with the producing regional government, in accordance with the Constitution. If it fails to do so, constitutional remedies are available to the KRG. The KRG would, in any case, be entitled to manage any present fields in the Region up to the point of extraction, if such fields existed. But the KRG is itself bound by Article 111: it is not open to it unilaterally and permanently to take over present fields in the absence of any arrangements for revenue sharing. As to fields other than present fields, the federal government has no unilateral rights under Article 112, Second, and in the absence of agreed strategic policies, in my opinion, the KRG is entitled to proceed in the exercise of its own constitutional authority and in compliance with its own constitutional duties.

44. Turning to existing or proposed legislation, an obvious point, but one which seems to be routinely ignored by federal spokesmen, is that the Draft Iraq Oil and Gas Law has no effect prior to its enactment. Its language merely indicates the thinking of those proposing it. In terms of its legal effect on existing arrangements for oil and gas development in the Kurdistan Region, the Draft Law has no effect.

45. By contrast, the KRG Oil and Gas Law is drafted with careful attention to the Constitution of Iraq. Assuming its due enactment according to the regional procedures, the KRG Law is effective to govern the development of oil and gas in the Kurdistan Region. If, as I am instructed, there are no “present fields” in that region for the purpose of Article 112, First, there is no requirement for joint management of post-extraction oil and gas from such fields. In the continuing absence of agreement pursuant to Article 112, Second, on the “necessary strategic policies”, the KRG is entitled to manage its oil and gas resources, and should do so openly in a manner which gives effect to the principles set out in that Article.

46. As to contracts entered into by the Kurdistan Region authorities for oil and gas development since 1992, if and to the extent that their provisions are not inconsistent with the Constitution, I see no reason to question their validity or legal effect. In particular, and pending agreement between the KRG and federal authorities on strategic policies, the authority of the KRG to authorise the conclusion and implementation of such contracts is, in my opinion, unqualified. When such policies are agreed, they will need to take account of existing legal commitments binding at that time.



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29 January 2008

From: N.J. Dawood

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Attention: Mr Jeremy Carver, CBE

Clifford Chance LLP
10 Upper Bank Street
London E14 5JJ

28th January 2008

Dear Sirs,

The Constitution of Iraq

You have provided me the authentic Arabic text of the Constitution of Iraq together with an unofficial English translation of the Constitution, and have asked me as an expert translator to review the English translation for consistency with the Arabic original in certain respects.

My qualifications as a translator relevant for this purpose are:

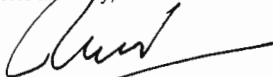
I hold an Hons degree in English (London) and another degree in Classical Arabic (London), and have been a Fellow of the Institute of Linguists since 1960.
My published work includes the Penguin translation of *The Koran* and *The Thousand and One Nights*; the Princeton University Press edition of *Ibn Khaldun*; two Puffins.
I have for a number of years reviewed books of Middle Eastern interest for *The Times*.

I have reviewed both the Arabic text and the English translation, and can answer your questions, as follows:

The English translation of Article 112 is very accurate by comparison with the original Arabic text. Had I been asked to undertake a new translation, I would not have changed a word. Specifically, with regard to the first paragraph of Article 112:

- The word "مع" translated as "with" in the opening line implies a conjunction between "the federal government" and "the producing governorates and regional governments", i.e. **together with**.
- The phrase "النفط والغاز المستخرج من" translated as 'of oil and gas extracted from' is an integral part of the Arabic text, which means that the management is to be undertaken only in respect of the oil and gas that has been – now or in the future – extracted from 'present fields'. In Arabic, as in English, it cannot mean that the management is of the fields themselves.
- The word "الحالية" translated as 'present' has the English sense of **existing** fields.

Yours faithfully,


N.J. Dawood

