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The Energy and Environment Dilemma: Sustainably Developing Iraqi Oil and Gas in International Law and Policy - Prospects and Challenges

by A.F.M. Maniruzzaman and K. Al-Saleem

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The Energy and Environment Dilemma: Sustainably Developing Iraqi Oil and Gas in International Law and Policy – Prospects and Challenges

by Professor Dr A F M Maniruzzaman* and Dr. Khalid Al-Saleem**

*‘Energy is the golden thread that connects economic growth, increased social equity, and an environment that allows the world to thrive’. - Ban Ki-moon****

Abstract

The dilemma of energy and environment is a matter of great concern for any resource-rich developing country, let alone for Iraq having the fifth largest proven oil reserves in the world. Waking up from the past four decades of war and conflicts, and faced with the continuing acute political tensions, sectarian divides and violence, and future uncertainties, Iraq has thus a tremendous challenge in hand for the sustainable development of its such vast reserves of oil and gas along the lines of international law standards and norms. This is more so at a time when the reconstruction of its war-torn economy for its social and economic development and prosperities is in process. The study examines the current Iraqi legal framework (both domestic and international) and policies concerning investment in the oil and gas sector and its development in the wider context of geopolitics, and tensions between the federal and regional governments (especially the KRG) in Iraq, and appraises how it falls short of the standards and norms of international sustainable development law as it is evolving at the global stage. It has been observed that for Iraq the road to sustainable development is not a plain one, and there are many bumpy rides ahead. It is important that with the ever-increasing pressure for sustainable development of fossil fuel as on the global agenda of the international community, Iraq as a major producer must respond to it. As it stands at present, Iraq’s shortcomings in this respect are alarming and staggering, and it has to go a long way to remedy that politically, legally and policy wise. The approach followed in this paper is interdisciplinary which along with law and policy looks into relevant political, social, economic, geo-political aspects in order to get a better perspective of sustainable development issues concerning oil and gas in the Iraqi context. This is what this study has explored and put forward some suggestions for a better future of Iraq as a resource-rich developing country. This study facilitates the understanding of Iraqi politicians, policy makers, legislators, international oil companies, development-partner countries, interested international organizations and non-governmental organizations in respect of sustainable development issues of Iraqi oil and gas and suggests some ways forward to fix them.

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List of Acronyms

AFL	- CIO- American Federation of Labor and Congress of Industrial Organizations
BGC	- Basrah Gas Company
BITs	- Bilateral Investment Treaties
CDM	- Clean Development Mechanism
CETA	- EU-Canada Free Trade Agreement
CNPC	- China National Petroleum Corporation
CoM	- Council of Ministers
CoR	- Council of Representatives
CSR	- Corporate Social Responsibility
DPSC	- Development and Production Service Contract
DR	- CAFTA or CAFTA-Dominican Republic-Central American Free Trade Agreement
EITI	- Extractive Industries Transparency Initiative
EU	- European Union
EU ETS	- European Union Emissions Trading Scheme
FDI	- Foreign Direct Investment
FTA	- Free Trade Agreements
GDP	- Gross Domestic Product
IET	- International Emissions Trading
IEA	- International Energy Agency
IMF	- International Monetary Fund
IOC	- International Oil Companies
INES	- Integrated National Energy Strategy
IPCC	- Intergovernmental Panel on Climate Change
ISIS	- Islamic State of Iraq and Syria or Islamic State of Iraq and al - Sham
ISDS	- Investor-State Dispute Settlement
ITL	- Iraq-Turkey Line
IUCN	- International Union for Conservation of Nature
JI	- Joint Implementation
KRG	- Kurdistan Regional Government
KP	- Kyoto Protocol
LTSC	- Long Term Service Contract
MDGs	- Millennium Development Goals
MNR	- Ministry of Natural Resources
MoA	- Ministry of Agriculture
MoO	- Ministry of Oil
NGO	- Non - Governmental Organisation
NOC	- National Oil Company
OECD	- Organisation for Economic Co-operation and Development
PFTSC	- producing Field Technical Service Contract
RBC	- Responsible Business Conduct
RSC	- Risk Service Contract
TIFA	- Trade and Investment Framework Agreement
TSC	- Technical Service Contracts
TPP	- Trans-Pacific Partnership
TTIP	- Transatlantic Trade and Investment Partnership
UN	- United Nations
UNCC	- United Nations Compensation Commission

UNCT - United Nations Country Team
UNCTAD - United Nations Conference on Trade and Development
UNEP - United Nations Environment Programme
UNFCCC - United Nations Framework Convention on Climate Change
UN SDGs - United Nations Sustainable Development Goals
USA - United States of America
USTR - United States Trade Representative
WWF - World Wide Fund for Nature

Keywords: *Energy, Environment, Sustainable development, Iraqi oil & gas, Human rights, Geopolitics, Political economy, Iraqi constitution, Investment, Kurdistan, International oil companies*

1.0 Introduction

This article focuses on the prospects and challenges of sustainable development of Iraqi oil and gas in light of international law and policy with special reference to environmental and human rights perspectives (with an emphasis on the Kurdistan region). Iraq is the second-largest oil producing nation and exporter in OPEC after Saudi Arabia.¹ Iraq is wholly dependent upon oil to finance its state budget² and it has resources, prospects and plans to increase its oil and natural gas production alongside its recovering after four decades of conflicts and instability. However, sustainable development of its oil and gas poses a great challenge for Iraq as a resource-rich country whilst striving for its social and economic development. According to various reports, Iraq has proven oil reserves of at least 144 billion barrels and gas reserves of around 112 – 126.7 trillion cubic feet (Tcf). This estimate thus places Iraq's proven oil reserves as the fifth largest in the world (9%³ - 10%⁴ of the world reserve), and its proven gas reserves between 11th and 13th (1.7 per cent of the world reserve).⁵ Such vast oil reserves are, however, well dispersed in the country - a fact that makes investments in their development attractive. This oil-producing nation has ambition to increase its oil production extensively because there are readily available resources and competitively cheaper to produce. It has to be appreciated that Iraq's energy sector holds the key not only to the country's future prosperity but also to making a significant contribution to the stability and security of the global energy market.⁶

¹OPEC: 'Which countries are the largest oil producers and exporters?' (09 November 2016) <<https://globalconnections.hsbc.com/uae/en/articles/opec-which-countries-are-largest-oil-producers-and-exporters>> accessed 9 May 2017. Malcolm Russell, *The Middle East & South Asia 2012* (Stryker Post Publications 2012) 89.

²See Iraq: Oil and Gas Report (Q4 2016), available at: <www.bmiresearch.com> accessed 10 May 2017; United Nations, and International Conference on Financing for Development (2002, Monterrey), *Financing for Development: Building on Monterrey* (New York United Nations 2002) 83.

³US-EIA, Country Analysis Brief: Iraq (2016), available at <<https://www.eia.gov/>> accessed 11 May 2017

⁴Meghan L. O'Sullivan, *Iraqi Politics and Implications for Oil and Energy* (July 2011), Geopolitics on Energy Project: Harvard Kennedy School, Belfer Center for Science and International Affairs. Cf. Iraq Oil & Gas Report (BMI Research, Q4 2016), available at: <www.bmiresearch.com> accessed 10 May 2017.

⁵Basel Nashat Asmar, *Fossil Fuels in the Arab World: Facts and Fiction: Global and Arab Insights of Oil, Natural Gas & Coal*. (London: 2050 Consulting 2010) 102; Rex J. Zedalis, *Legal Dimensions of Oil and Gas in Iraq: Current Reality and Future Prospects* (Cambridge: Cambridge University Press, 2009), pp. xvii – xxiii; EIA Statistics 2013, and BP Statistical Report 2012 and the MOO (2012). World Energy Outlook, IEA, 2012; EIA Statistics 2013, and BP Statistical Report 2012; Luay J. Al-Khatteeb, 'Natural Gas in the Republic of Iraq', Harvard University's Belfer Center and Rice University's Institute Center for Energy Studies (November 2013), available at: <http://www.belfercenter.org/publication/natural-gas-republic-iraq>, accessed 27 October 2016.

⁶Ibid. See also Meghan L. O'Sullivan (n 4).

This study briefly highlights the current state and the future prospect of Iraq, the framework for relations between international oil companies (IOCs) and Iraq in relation to the transformation via the horizontal and vertical structural diversification. The licensing rounds of Iraq and objectives for this move with various nations are addressed in this paper, so are the aspects of the contractual issues that portray the reason IOCs have lost interest in Iraqi contracts as evident from the fourth licensing round. There has been a struggle to control this resource between Iraq and international companies underpinning the country's myriad political fault lines.⁷ The reason that the MoO has offered TSCs instead of PSCs can be attributed to the MoO's interpretation of the Iraqi constitution. It is to be realised that there are differences in interpretations, views and considerations regarding various relevant Iraqi constitutional provisions which need to be resolved by future constitutional amendments.⁸ The legal and institutional framework for the oil market in Iraq is controlled by the Iraqi constitution of 2005, which was implemented in 2006.⁹ Article 111 of the Iraqi Constitution of 2005 states: "*Oil and gas are owned by all the people of Iraq in all the regions and governorates*".¹⁰ Thus, the constitution protects oil and gas resources of the country in consideration of the social and economic development of the nation. However, the management of oil and gas are beyond the supremacy of the federal government according to the Iraqi constitution.

The KRG government prefers the PSC model as it permits IOCs an interest in the oil produced and a right to the revenue accrued as agreed by the parties. The Federal Government has, however, awarded TSCs, as constrained by its understanding of the country's constitution, in four bidding rounds.¹¹ This may have prompted the IOCs to fix their attention towards the Kurdistan region as the PSC model there is more financially profitable to them.¹²

In order to understand the contextual background for sustainable development in Iraq, various pertinent aspects such as political, economic, social, environmental, and legal issues related to this development have been critically examined in this study. It is noteworthy that the research into the sustainable development of Iraqi oil reveals that a great degree of discrepancy in the horizontal and vertical diversifications in the last ten years or so has destabilized the sustainable development plan of the country, pushing its economy into a maze of confusion. Iraq's vision to obtain long-term beneficial gain from its hydrocarbon wealth is blocked with political, logistic, legal, economic, regulatory and financial issues.¹³ The planned development of Iraqi

⁷Robert E Ebel, *Geopolitics and Energy in Iraq: Where Politics Rules*. (Center for Strategic and International Studies, 2010) 21; David Brent Grantham, 'Caveat investor: Assessing the risks and rewards of IOCs entry into Iraq', (2010)3 JWELB 304.

⁸See < <http://www.alraqeeb.org/english/listingdetails> > accessed 1 May 2017.

⁹Rex J Zedalis, *Oil and gas in the disputed Kurdish territories: jurisprudence, regional minorities, and natural resources in a federal system*. (Routledge 2012) 140; Rex J. Zedalis, 'The role provincial governmental units can play regarding oil and gas development agreements in the Kurdish North: allocation of Iraqi constitutional power', (2013) 4 JWELB 314.

¹⁰Iraqi Constitution of 2005, available at < http://www.iraqinationality.gov.iq/attach/iraqi_constitution.pdf > accessed 2 June 2016.

¹¹TSCs favour the Iraq government as per the contractual terms, failure has been noted in securing better contractual terms.

¹²See Production Sharing Contract [Model] Block Kurdistan Region, available at <http://www.krg.org/pdf/3_krg_model_psc.pdf > accessed 28 April 2016. See also Peter Wells, 'Iraq's Technical Service Contracts – A Good Deal For Iraq?', available at <www.Iraqoilforum.com> Accessed 28 April 2016.

¹³Iraq Energy Outlook - International Energy Agency <www.iea.org/publications/.../WEO_2012_Iraq_Energy_Outlook-1.pdf > accessed 10 October 2016; Ahmed Mousa Jiyad, 'Oil, Sustainable Development and the Management of the Transformation in Iraq', available at: <<http://www.iraq-businessnews.com/2013/08/07/oil-sustainable-development-and-the-transformation-of-iraq/>>

oil has slowed significantly for the reason of officially permitted validity of particular regional oil and gas PSCs, and unfair provisions that the contracts aim to impose on the IOCs. A detailed analysis of Iraq's economic, environmental, and social aspects in the context of oil and gas development will be discussed in light of international law and policy bearing on political economy of sustainable development of oil and gas in Iraq.

1.1. The issues relating to the oil and gas sector in Iraq and sustainable development

Before embarking on the study of sustainable development of Iraqi oil and gas it is necessary to highlight certain issues which bear on the matter. The burning issues in relation to the Iraqi oil production and the distribution of its revenues, a core aspect of sustainable development, include:¹⁴

1. What are Iraq's production ambitions and possible scenarios for the next decade or so?
2. How fast does Iraq want to develop its hydrocarbon wealth?
3. What is the level of investment needed to achieve the goals?
4. What role will international oil companies play in such a partnership with Iraq?
5. How can international oil companies' involvement ensure that Iraqi government's control and sovereignty over its oil and gas resources are respected and are free from external influences?
6. What framework should Iraq adopt in developing the best regulatory and fiscal framework for the necessary expansion of its oil and gas production?

Thus, the critical issues that revolve around the production of oil and gas in Iraq include the legality of the finalized contracts; the position of international oil companies which concluded contracts, reduction of production plateau targets, petroleum law and relevant provisions, government take and payment to and privileges of international oil companies and renegotiation of contracts.¹⁵ The legal and regulatory frameworks governing the petroleum industry in Iraq is multi-layered in terms of their formulation and execution, each having distinctive legal authority and vehicle for that purpose.¹⁶ As a prelude it should be noted that the foregoing matters bring to bear on the issues of sustainable development which will be explored in the pages that follow.

The approach followed in this paper is interdisciplinary which along with law and policy looks into relevant political, social, economic, geo-political aspects in order to get a better perspective of sustainable development issues. The result is to have a panoramic forest view of sustainable development of oil and gas in the Iraqi context, however without completely losing the tree view that comes with it.

See also Iraq Oil & Gas Report (BMI Research, Q4 2016), available at: <www.bmiresearch.com> accessed 10 May 2017.

¹⁴Carole Nakhle, *Iraq's Oil Future: Finding the Right Framework* <<http://www.seec.surrey.ac.uk/research/Publications/SEECIraqReportByCaroleNakhleNov2008English.pdf>> accessed 3 November 2016.

¹⁵P van Meurs, 'Comparative Analysis of Ministry of Oil and Kurdistan fiscal terms as applied to the Kurdistan Region' (2008) 3 Oil Gas & Energy Law <www.ogel.org/article.asp?key=2794> accessed 11 September 2016.

¹⁶See Ahmed Mousa Jiyad, 'Iraq Extractive Industry: Legal, Fiscal, Revenue Allocation and Management Issues' (5 August 2015), available at <<http://www.iraq-businessnews.com/reports/iraq-extractive-industry-legal-fiscal-and-revenue-allocation-and-management-issues/>>. Accessed 12 September 2016. See also <<http://www.alraqeeb.org/english/listingdetails>>

The paper is organized into five parts. Part I highlights the perspectives of sustainable development in the UN prescription and sketches the concept of sustainable development in the context of the oil and gas industry and infrastructure in today's Iraq. Part II examines the policy and framework of relations between IOCs and Iraq as the partnership vehicle for sustainable development of oil and gas. Part III focuses the legal framework as it relates to Iraq – international contractual and treaty regime – to critically appraise how Iraq is faring in observing its international responsibility for sustainable development at least in the energy sector. Part IV examines the current political and economic and other ancillary factors and forces which pose as a great challenge to sustainable development of oil and gas in Iraq and the concerned law and policy. Part V draws some conclusions and makes some remarks.

Part I: Conceptual Framework of Sustainable Development and Iraqi Oil and Gas Sector

In Part I the conceptual framework of sustainable development as established by the UN will be highlighted and in this light the sustainable development issues of Iraqi oil and gas industry will be explored throughout this paper.

2.0. Sustainable Development - The Conceptual Paradigm

In 1987, the World Commission on Environment and Development sought to address the issue on conflicts between development goals and the environment through the formulation of a working definition of the concept of sustainable development,¹⁷ however imperfect.¹⁸ In the so-called Brundtland Report (1987) sustainable development was thus defined as '*development that meets present needs without compromising future generations and their ability to meet their needs*'.¹⁹ Since then, the concept of sustainable development has received its three-pronged shape in UN prescriptions²⁰ and beyond. First, sustainable development concerns ecological sustainability, *i.e.* any non-renewable natural resource (such as fossil fuel) development is environmentally sustainable by avoiding its over-exploitation²¹ and maintaining a stable resource base with the attempt to deplete to the extent that the posterity will not be deprived of such resources in the future or to invest adequately in substitutes²² or renewables.

¹⁷Cathrin Zengerling, 'Sustainable development and international (environmental) law: integration vs. Fragmentation' (2010) 8 (4) *Zeitschrift für Europäisches Umwelt und Planungsrecht* 175, 180; P Schwarz, 'Sustainable Development in International Law', (2005) 5 *Non-State Actors and International Law*, 127.

¹⁸Navroz K. Dubash, and Ann Florini, 'Mapping Global Energy Governance' (2011) 2 *Global Policy Special Issue* 6, 10; John C. Dernbach and Federico Cheever, "Sustainable Development and Its Discontents", (2015) 4 (2) *Transnational Environmental Law*, 247.

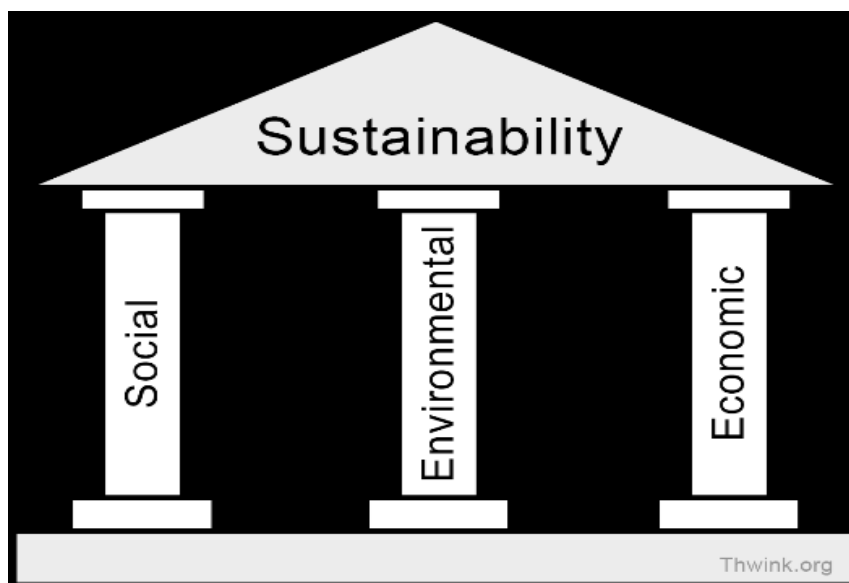
¹⁹Report of the World Commission on Environment and Development: Our Common Future, Chapter 2: Towards Sustainable Development, available at <<http://www.un-documents.net/our-common-future.pdf>> accessed 20 April 2016.

²⁰ See the Johannesburg Declaration on Sustainable Development at para. 5 in 'Report of the World Summit on Sustainable Development', UN World Summit on Sustainable Development, 17th Mtg., UN Doc. A/CONF.199/20 (2002) 1; Plan of Implementation of the World Summit on Sustainable Development at para. 162(b) in Report of the World Summit on Sustainable Development, UN World Summit on Sustainable Development, 17th Mtg., UN Doc. A/CONF.199/20 (2002) 8 [JPOI]. See also Jorge E. Viñuales (ed.), *The Rio Declaration on Environment and Development: A Commentary* (OUP, 2015). Dubava, Ilze, 'The Future We Want: Sustainable Development as an Inherent Aim of Foreign Investment Protection' (January 31, 2017). European Society of International Law (ESIL) 2016 Annual Conference (Riga), available at SSRN:<<https://ssrn.com/abstract=2911995>> accessed 22 May 2016.

²¹Michael Carley, and Ian Christie, *Managing sustainable development* (3rd edn, Earthscan, 2011) 35; Michael Decleris, *The Law of Sustainable Development: General Principles* (Luxembourg, 2000).

²²Neil Middleton, and Phil O'Keefe, *Redefining sustainable development* (3rd edn, Pluto Press, 2012) 43.

It is thus noteworthy that the notion of sustainable development is basically environment-centric, but it is often extrapolated beyond that remit. Second, sustainable development aims at achieving a socially sustainable system by adopting equity in resource distribution with adequate provision for social services and social accountability.²³ Third, sustainable development aspires a sustainable economic system which is able to produce goods and services continuously and is not obstructed by any negative factors including economic imbalances.²⁴ Thus, sustainable development is a three-pillared concept, and the pillars are thus: social, environmental and economic. It has to be appreciated that for economic development to be sustainable, pertinent environmental and social issues are to be given due weight which means that the latter should act as the controlling factors for the former. In a way, the trio thus should operate on the hypothetical axis on mutual checks and balances.



[Source: *thwink.org*]

Economic growth is attained when there is an increase in real output over time where it is measured at constant prices by gross domestic product, in which case the effect of rises in price

²³Viginie Barral, 'Sustainable development in international law: nature and operation of an evolutive legal norm' (2012) 23 (2) EJIL 377, 379; see also, 'The Road to Dignity by 2030: Ending Poverty, Transforming All Lives and Protecting the Planet', *Synthesis Report of the Secretary-General On the Post-2015 Agenda* (New York, December 2014): UN Secretary-General's Synthesis Report Proposes 6 Elements for Post-2015 Agenda, available at <<http://sd.iisd.org/news/un-secretary-generals-cs-for-post-2015-agenda/>> accessed 22 September 2016; 'World Investment Report 2014: Investing in the SDGs: An Action Plan' (2014, UN Pub.), available at: <http://unctad.org/en/publicationslibrary/wir2014_en.pdf> accessed 22 September 2016.

See also Vid Prislán and Ruben Zandvliet, 'Labor Provisions in International Investment Agreements: Prospects for Sustainable Development', available at: <<http://ssrn.com/abstract=2171716>> accessed 25 September 2016.

²⁴Jhon Blewitt, *Understanding sustainable development* (2nd edn, Routledge, 2015) 69. See 'The Three Pillars of Sustainability', available at: <http://www.thwink.org/sustain/glossary/ThreePillarsOfSustainability.htm> accessed 23 December 2016. In a recent study (Mexico Center at Rice University's Baker Institute for Public Policy, USA) on Mexico's energy reform it has been observed (Feb. 16, 2017): "For the new energy sector in Mexico to spearhead the economic development of the country, it must follow the best international practices of sustainability." See <<http://www.pressreleasepoint.com/paper-mexicos-energy-reform-must-follow-best-sustainability-practices>> accessed 20 February 2017; Also see for the study at: www.bakerinstitute.org/media/files/files/15963eed/MEX-pub-<RuleofLaw_Serra-020917.pdf> accessed 20 February 2017.

to national output value is removed.²⁵ In this case, sustainable economic development is defined as a growth or development rate that can be maintained without leading to other significant economic issues, particularly concerning the posterity.²⁶ There is evidence of trade-offs today between rapid economic development and future growth.²⁷ Rapid economic development today could result in exhaustion and depletion of resources like oil and gas while also resulting in environmental problems for the posterity.²⁸ Usually, periods of economic development are caused by an increase in aggregate demand, for example, heightened consumer spending, although such sustained economic development requires that there be an increase in output.²⁹ Failing to increase output may push up the price levels. Real output can be enhanced by international trade, which can either frustrate or foster sustainable development.³⁰

Generally, economics refers to the study of how scarce resources are used in society³¹ and, although emphasis has traditionally been on the allocation of these resources, there is an increasing emphasis on the equity of resource distribution, as well as the overall scale or extent of economic development and activity.³² In large part, this has been as a result of concerns about the social and environmental effects of economic decisions. On the other hand, a country's choices in the social and environmental spheres also portend significant economic impacts.³³ Therefore, the challenge of sustainable economic development is to understand and anticipate how economic decisions affect environmental and social spheres.³⁴ In order to meet this challenge, it is critical for national economic programs to include social and environmental inquiry.³⁵ Such an endeavour, as highlighted in this paper, requires multiple analytical tools and methods, most of which are provided for in the field of economics.³⁶ In addition, economics is being increasingly informed by numerous fields of inquiry, which provide a conducive environment for research into how social and environmental issues are influenced by a country's economic choices.³⁷ As such, the starting point of sustainable economic

²⁵ Neil E Harrison, *Constructing sustainable development* (4th edn, State University of New York Press, 2005) 29.

²⁶ Grazia Borgna, 'ECI - New deal 4 Europe: for a European special plan for sustainable development and employment' (2014) *The Federalist Debate*, 49, 50.

²⁷ Susan Baker, *Sustainable development* (3rd ed., Routledge 2012) 55.

²⁸ Joaachim H Spangenberg, 'A European methodology for sustainable development strategy reviews' (2010) 20 *Environmental Policy and Governance* 123, 126. See also David W Pearce, *The Economics of Natural Resource Depletion* (The Macmillan Press Ltd., 1975).

²⁹ Sisay Asefa, *The economics of sustainable development* (4ed edn, W.E. Upjohn Institute for Employment Research, Kalamazoo, 2011) 44.

³⁰ Adrain J Bradbrook, 'Sustainable energy law: the past and the future' (2012) 30 *Journal of Energy & Natural Resources Law* 511, 513, available at <<http://www.ibanet.org/Article/Detail.aspx?ArticleUid=E6A42A47-9AF1-46F5-A362-A90E381D3F9E#Bradbrook>> accessed 23 June 2016.

³¹ Herman E Daly, *Beyond growth: the economics of sustainable development* (3rd edn, Beacon Press 2013) 54.

³² Jennifer A Elliot, *An introduction to sustainable development* (4th edn, Routledge 2013) 49.

³³ Maruša Nučič, 'Is sustainability science becoming more interdisciplinary over time?' (2012) *Acta geographica Slovenica*, 215, 217 available at <<http://ojs.zrc-sazu.si/ags/article/view/1345>> accessed 27 June 2016.

³⁴ Clive Gifford, *Sustainable development* (3rd edn, Heinemann Library 2013) 28; Michael Decleris, *The Law of Sustainable Development: General Principles* (Luxembourg, 2000).

³⁵ Jude Fernando, *Rethinking sustainable development* (3rd edn, Sage, Thousand Oaks, 2013) 55.

³⁶ Simone Vannuccini, 'Desirable effects of a European plan for sustainable development', (2012) *The Federalist Debate*, 14, 15.

³⁷ Guofan Shao, Fulong Li & Lina Tang, 'Multidisciplinary perspectives on sustainable development', (2011) 18 (3) *International Journal of Sustainable Development & World Ecology*, 187. See for most recent developments: 'Open Working Group proposal for Sustainable Development Goals', available at <<https://sustainabledevelopment.un.org/sdgsproposal>> accessed 25 March 2016.

development is based on how intra- and inter-generational equity changes or shapes international development and national economies.³⁸

Aligned with the concept of sustainable development is international energy security. As a recent report notes:

“....., a common concept of international energy security should be principally based on stable energy flows at a price that reflects the true value of the products to satisfy energy demand and enable future investment on energy projects, *all in a socially and environmentally sustainable manner.*”³⁹

The concept of sustainable development has been extrapolated of late to a great extent in the literature as well as on various platforms.⁴⁰ The idea of ecological sustainability, as opposed to

³⁸ See Catherine Redgwell, ‘Principles and Emerging Norms in International Law: Intra- and Inter-Generational Equity’, in Cinnamon P. Carlarne, Kavin R. Gray and Richard G. Tarasofsky (eds.), *The Oxford Handbook of International Climate Change Law* (OUP, Oxford, 2016), 185; IISD, ‘Economics and SD, Bringing economic insight to environmental and social issues’ <<http://www.iisd.org/economics/>> accessed 24 November 2016; Hanna Lakkala and Jarmo Vehmas (ed), ‘Trends and Future of Sustainable Development’, Proceedings, 9-10 June 2011, Tampere, Finland. FFRC eBooks 15/2011, 458-467.

³⁹ [Emphasis added]. ‘*International Energy Security*’ (Energy Charter Secretariat, 2015), 20, available at: <<http://www.encharter.org/index.php?id=690&L=0>> accessed 26 November 2016.

⁴⁰ Philippe Sands identifies four elements within the concept of sustainable development: inter-generational equity; sustainable use; intra-generational equity; and integration of environmental protection and development. See P. Sands, *Principles of International Environmental Law* (Manchester, 1995), i. 199–208.

See also generally, A F M Maniruzzaman, *et al* (eds), *International Sustainable Development Law* (3 volumes) (UNESCO-EOLSS, 2010, available at:

<http://www.eolss.net/ebooklib/ViewEbookDetail_1.aspx?catid=13&fileid=E6-67>; accessed 29 June 2016

Khalid I. Al-Saleem, ‘Legal Framework for the Sustainable Development of Iraqi Oil and Gas: A Study in Particular Reference to the Kurdistan Region with Special Emphasis on the New Delhi Declaration’ (PhD thesis, University of Portsmouth 2015); Volker Mauerhofer (ed.), *Legal Aspects of Sustainable Development: Horizontal and Sectoral Policy Issues* (Springer International Publishing, 2016, Switzerland); A. Boyle and D. Freestone, *International Law and Sustainable Development: Past Achievements and Future Challenges* (New York: Oxford University Press, 1999 at 8-9); Priscilla Schwarz, ‘Sustainable Development in International Law’, (2015) 5 *Non-State Actors and International Law*, 127. Gail E. Henderson, ‘Rawls & Sustainable Development’, (2011) 7 (1) *JSDLP*; Jennifer Elliot, *An Introduction to Sustainable Development* (Routledge, 2013); Oluf Langhelle, ‘Sustainable Development and Social Justice: Expanding the Rawlsian Framework of Global Justice’, (2000) 9 (3) *Environmental Values*, 296; John C. Dernbach and Federico Cheever, ‘Sustainable Development and Its Discontents’, (2015) 4 *Transnational Environmental Law*, 247-287; Marie-Claire Cordonier Segger and Judge C.G. Weeramantry (eds.), *Sustainable Development Principles in the Decisions of International Courts and Tribunals: 1992-2012* (Routledge 2017).

ILA Committee on the Legal Aspects of Sustainable Development, Fifth Report on the Principles of International Law Relating to Sustainable Development (London: ILA, 2002); An Action Agenda for Sustainable Development: Report for the United Nations Secretary-General. Sustainable Development Solutions Network. 2013 (report updated on May 5, 2014), available at <<http://unsdsn.org/resources/publications/action-agenda-for-sustainable-development/>> accessed 26 November 2016; See also *Gabcíkovo-Nagymaros Projects (Hungary v Slovakia)* 37 *International Legal materials* 61. (Separate Opinion of Vice-President Weeramantry, pp 88 ff., see also <<http://www.icj-cij.org/docket/index.php?p1=3&p2=3&case=92&code=hs&p3=4>> accessed 28 November 2016.; for commentaries on the case see: <http://haguejusticeportal.net/index.php?id=6221> accessed 20 May 2017;

Vaughan Lowe, ‘Sustainable Development and Unsustainable Arguments’ in Alan Boyle and David Freestone (eds.), *International Law and Sustainable Development: Past Achievements and Future Challenges* (OUP, 1999) 19, 21, also available at Oxford Scholarship Online: <http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780198298076.001.0001/acprof-9780198298076-chapter-2>

Tim O’Riordan & Heather Voisey, ‘The political economy of sustainable development’, (1997) 6 (1) *Environmental Politics*, 1-23.

Tim O’Riordan & Heather Voisey, ‘The political economy of sustainable development’, (1997) 6 (1) *Environmental Politics*, 1-23.

sustainable development, as a pointed approach has been debated by some scholars passionately.⁴¹ Bosselmann notes, “in the concept of sustainable development, ‘sustainability’ is what conditions ‘development’ not *vice versa*.”⁴² His understanding of ecological sustainability is refined to mean ‘ecological integrity’ as a grundnorm of international law that applies to this field concerned.⁴³ Such a restrictive notion of ‘sustainability’ could attract controversy. As a report jointly published by IUCN, WWF and UNEP as far back as in 1991 noted as follows:

“The term [sustainability] has been criticized as ambiguous and open to a wide range of interpretations, many of which are contradictory. The confusion has been caused because ‘sustainable development’, ‘sustainable growth’ and ‘sustainable use’ have been used interchangeably, as if their meanings were the same. They are not. ‘Sustainable growth’ is a contradiction in terms; nothing physical can grow indefinitely. ‘Sustainable use’ is applicable only to renewable resources: it means using them at rates within their capacity for renewable.... ‘Sustainable development’ is used in this strategy to mean: *improving the quality of human life while living within the carrying capacity of supporting ecosystems.*”⁴⁴

There are also views reconciling the term ‘sustainability’ with ‘sustainable development. As Pamela Matson, *et al* note in their recent book:⁴⁵

“While the terms *sustainability* and *sustainable development* are often used by different communities of people, the vast majority of these uses have something very important in common: a realization that our ability to prosper now and in the future requires increased attention not just to economic and social progress but also to conserving Earth’s life support systems: the fundamental environmental processes and natural resources on which our hopes for prosperity depend. Because of that commonality, we use the terms interchangeably...”⁴⁶

The purpose of this article is to stick to the UN prescription of the three-pronged notion of sustainable development⁴⁷ (as mentioned above and which is considered as the comprehensive

⁴¹Klaus Bosselmann, *The Principle of Sustainability: Transforming Law and Governance* (Aldershot: Ashgate, 2008); Cf. Pamela Matson, William C. Clark & Krister Andersson, *Pursuing Sustainability: A Guide to the Science and Practice* (Princeton University Press, 2016) 2:

“While the terms *sustainability* and *sustainable development* are often used by different communities of people, the vast majority of these uses have something very important in common: a realization that our ability to prosper now and in the future requires increased attention not just to economic and social progress but also to conserving Earth’s life support systems: the fundamental environmental processes and natural resources on which our hopes for prosperity depend. Because of that commonality, we use the terms interchangeably.”

⁴² Bosselmann, (n 41) 53.

⁴³ Rakhyum K. Kim and K. Bosselmann, ‘Operationalizing Sustainable Development: Ecological Integrity as a Grundnorm of International Law’, (2015) 24 (2) RECIEL 194.

⁴⁴ Quoted by J. Porritt in B. Cartledge (ed), *Energy and the Environment* (1993) 27-28.

⁴⁵ Matson, Clark and Anderson, (n 41).

⁴⁶ *Ibid.* 2

⁴⁷ See World Commission on Environment and Development ‘Our Common Future’ (1987), UN Doc. GA/42/427 [the *Brundtland Report*]; ‘Rio Declaration on Environment and Development’ (1992), UN Doc. A/CONF.151/26 (Vol. I); *Johannesburg Plan*; and *Investing in Development: A Practical Plan to Achieve the Millennium Development Goals* (Earthscan, London, 2005).

and centrist interpretation of sustainable development⁴⁸) to focus on Iraq's oil and gas sector, however, with special reference to its environmental, social and human rights perspectives.

2.1. Sustainable development of oil and gas in Iraq

Sustainable development⁴⁹ is a continuous process to improve the living conditions of the present generation without compromising the ability of the future generations to do so. Sustainable development, therefore, refers to a process of harmonization of the discovery of resources, the direction of investments, orientation of technological advancement and institutional change for enhancement of both the current and the future potential towards meeting the human needs and aspirations. It can, therefore, be summarized as a legal term referring to the processes, principles and objectives to a large body of international agreements touching on the environment, economics, and civil, as well as political rights.⁵⁰ Following much review of the treaty law and international jurisprudence on sustainable development, it can be concluded that sustainable development has been recognized as an established objective of the international community and as a concept with a particular status in the international law.⁵¹ As the ICJ Judge Weeramantry famously concluded that “(t)he principle of sustainable development is thus a part of modern international law by reason not only of its inescapable logical necessity, but also by reason of its wide and general acceptable by the global community.”⁵² This ensures a harmonious integration of the environmental, social and economic dimensions of development. Sustainable development is becoming increasingly significant to the Iraqi national context.⁵³ As defined by the Iraqi government's national development plan (2010-2014) and the UN development assistance framework (UNDAF) for 2011 to 2014, attaining this objective would require reframing strategies of national development as well as implementing policies towards environmental as well as long-term economic development.

Sustainable development itself remains as an objective of the international community that may influence the development and interpretation of international law. However, this concept suffers from internal tension. This is because sustainable development is an international policy or a legal concept, and then there is a clear implication of a measure of international

⁴⁸ J Anthony VanDuzer, Penelope Simons and Graham Mayeda, *Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Countries* (Commonwealth Secretariat, London, 2013), available at <<http://books.thecommonwealth.org/integrating-sustainable-development-international-investment-agreements-hardback>> accessed 25 April 2016.

⁴⁹For the evolution of the concept of Sustainable Development in international law, see Nico Schrijver, *The Evolution of Sustainable Development in International Law: Inception, Meaning and Status*. (Martinus Nijhoff, 2008).

⁵⁰Alistair Rieu-Clarke, *International law and sustainable development: lessons from the law of international watercourses* (IWA Pub, 2005) 54.

⁵¹Ibid. See also the Separate Opinion of Judge Weeramantry in *Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia), ICJ (Judgment of 25 September 1997), available at <<http://www.icj-cij.org/docket/index.php?p1=3&p2=3&case=92&code=hs&p3=4>> accessed 28 November 2016. Cf. Vaughan Lowe, ‘Sustainable Development and Unsustainable Arguments’ in Alan Boyle and David Freestone (eds.), *International Law and Sustainable Development: Past Achievements and Future Challenges* (OUP, 1999) 19, 21, also available at Oxford Scholarship Online: <http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780198298076.001.0001/acprof-9780198298076-chapter-2>

⁵² Ibid.; See generally, Marie-Clarie Cordonier Segger, Markus W Gehring and Andrew Newcombe (eds), *Sustainable Development in World Investment Law* (Wolters Kluwer, 2011).

⁵³Iraq's oil as well as gas sector is a major factor in Iraq's sustainable development. Anticipated to become one of the largest in the world, Iraq's energy sector has already dominated the national economy.

accountability.⁵⁴ Accompanying this is a disclaimer of any intended encroachment of the state's permanent sovereignty over its natural resources.⁵⁵ This brings the initial challenge of reaching a clear international understanding based on ways to sustainable development, as well as an agreement on the specific markers leading to that particular goal.

As indicated above about the tension of the concept of international law on sustainable development, the Iraqi central government itself is a victim of this tension as a result of its expression of displeasure with the oil exports by the KRG.⁵⁶ This has been exacerbated by the disagreement between Iraq and Turkey regarding the Kurdish oil. On May 25, 2014, Iraq's oil ministry threatened to request arbitration from the International Chamber of Commerce, so as to seek legal redress against Turkey for its continued oil business relationship with Kurdistan.⁵⁷ The main dilemma is that Iraq's federal government cannot just cut down funding to Kurdistan as a form of punishment since this will deeply affect Kurdistan's economic conditions, which depends on funding from Baghdad (95% of Kurdistan's annual budget depends on revenues from Baghdad⁵⁸). As Iraq should be respectful for the UN 2030 Agenda on Sustainable Development Goals, it could be perplexed while contemplating the idea whether to cut its resources for Kurdistan and encumber its economic development by suppressing its oil wealth as politics might commend or to allow Kurdistan to continue to export the hydrocarbon while risking the federal government's loss of control over the oil export. Apart from this Iraq's internal order risk, the geopolitical-risk triangle between Iraq, Kurdistan and Turkey has overshadowed the sustainable development of Iraqi oil.⁵⁹

⁵⁴See G. Handl, 'Environmental Security and Global Change: The Challenge to International Law', (1991) 1(1) *Y.B.Int'l Env'tl L.*, 3, 25-26.

⁵⁵ Ibid. See Right to Exploit Freely Natural Wealth and Resources, UNGA Res. 626 (VII), UN Doc. A/2361 (21 December 1952); Declaration on Permanent Sovereignty over Natural Resources, GA Res. 1803 (XVII), UN Doc. A/5217 (14 December 1962); International Covenant on Economic, Social, and Cultural Rights, art. 1, 16 December 1966, 993 UNTS 3; International Covenant on Civil and Political Rights, art. 1, 16 December 1966, 999 UNTS 171; Declaration on the Establishment of a New International Economic Order, para. 4, GA Res. 3201 (S-VI), UN Doc. A/Res/S-6/3201 (1 May 1974); Programme of Action on the Establishment of a New International Economic Order, GA Res. 3202 (S-VI), UN Doc. A/Res/S-6/3202 (1 May 1974); Charter of Economic Rights and Duties of States, arts. 2, 3, GA Res. 3281 (XXIX), UN Doc. A/Res/29/3281 (12 December 1974). See N. Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge: Cambridge University Press, 1997); PJIM de Waart, 'Permanent Sovereignty over Natural Resources as a Cornerstone for International Economic Rights and Duties', (1977) 24 *Netherlands International Law Review* 304.

⁵⁶'Iraq Contemplates Its Kurdish Oil Dilemma', in The Jerusalem Review, available at: <<http://thejerusalemreview.com/2014/05/26/iraq-contemplates-its-kurdish-oil-dilemma/>> accessed 28 September 2016.

'Iraq, Kurds, Turks and oil - A tortuous triangle: The governments of Turkey, Iraq and Iraqi Kurdistan play a dangerous game' (The Economist, Dec 22nd 2012):< <http://www.economist.com/news/middle-east-and-africa/21568760-governments-turkey-iraq-and-iraqi-kurdistan-play-dangerous-game>> accessed 29 September 2016.

⁵⁷'Iraq Contemplates Its Kurdish Oil Dilemma', in The Jerusalem Review, available at: <<http://thejerusalemreview.com/2014/05/26/iraq-contemplates-its-kurdish-oil-dilemma/>> accessed 29 September 2016.

⁵⁸ Ibid.

⁵⁹ James Burgess, 'Iraqi Kurds Boost Oil Exports to Turkey' (May 11, 2016), <<http://oilprice.com/Latest-Energy-News/World-News/Iraqi-Kurds-Boost-Oil-Exports-to-Turkey.html>> accessed 29 September 2016.



Source: *The Economist*

In 2011, Iraq's oil revenues reached roughly 83 billion US dollars and the oil as well as gas accounted for an estimated 60% of GDP, 90% of government revenue and 99% of exports. This revenue rose to \$94.02 billion in 2012 and then dipped in the following years for political uncertainties and further conflicts.⁶⁰ For this reason, governance priorities were focused on management of oil as well as gas resources and resultant revenues in a strategic as well as sustainable manner. The modern understanding of the sustainable development concept and its recognition at the international community level prove to be the result of the UN-led promotional operation. The process started in 1972 with the Stockholm Conference on the Human Environment.⁶¹ The legal nature of sustainable development depends on its scope and its penetration into both national and international law.⁶²

A procedural approach to sustainable development may be taken and as such it may be regarded at par with international law on sustainable development. The law aims at strengthening the governance of sustainable development and laying the foundation for implementing it. The law binds the investors in the various sectors of production to ensure that there are no violations of human rights or environmental damage in the process of production.⁶³ In its production of oil and gas, Iraq is bound by international law on sustainable development. However, the ongoing disagreements between the federal government and the KRG on the issue of licensing foreign corporations to explore oil and gas, leaves the KRG authorities undecided on how well to manage the situation.⁶⁴ This is because the political influence is largely interfering with the

⁶⁰ See <<http://www.iraq-businessnews.com/2014/01/22/iraq-oil-revenues-decline/>> accessed 29 September 2016.

⁶¹ Barral (n 23) 379.

⁶² Ibid 383; See also a recent study: 'Doing Justice to Sustainable Development: Integrating the Rule of Law into the Post 2015 Development' (IDLO, Rome, 2014), available at < <http://idlo.int/publications/doing-justice-sustainable-development>> accessed 2 January 2016.

⁶³ See generally, Ben Boer (ed), *Environmental Law Dimensions of Human Rights* (OUP, 2015); Oran R. Young, *On Environmental Governance: Sustainability, Efficiency, and Equity* (Routledge, London, 2013); Paul Martin, Ben Boer and Lydia Slobodian (eds.), *Framework for Assessing and Improving Law for Sustainability* (IUCN, Gland, Switzerland, 2016), available at: <https://portals.iucn.org/library/node/46120>, accessed 27 February 2017.

⁶⁴ See Michael J. Kelly, 'The Kurdish Regional Constitution within the Framework of the Iraqi Federal Constitution: A Struggle for Sovereignty, Oil, Ethnic Identity, and the Prospects for a Reverse Supremacy Clause',

implementation of the international law requirements of sustainable development. The authorities are for this reason left with a dilemma on whether to agree to the demands of the protesting political leaders or ignore them and invite foreign investors in the oil and gas business.

Iraq's economy is dependent on the petroleum sector as its economic vehicle for recovery from three decades of war.⁶⁵ Oil and gas development in Iraq is the key to the reconstruction, social, and economic development in Iraq. Iraq's ambition to expand its oil and gas output is not limited by the size of its hydrocarbon resources, or by the production costs. IOCs are the vehicles for Iraq's sustainable development.⁶⁶ It is worth restating that sustainable development is an objective that the International Community must strive to achieve. In addition, environmental protection, economic and social development falls under objectives to achieve, as they are the means by which sustainable development will be achieved.⁶⁷ The UN three-pronged formula may be taken to aim at developing democracy, providing security, and reviving the economy in Iraq. The United States is working extensively with Iraqi leaders to make progress on all three tracks of the strategy.⁶⁸ This is by restoring the country's neglected and damaged infrastructure with an aim of restoring and expanding the essential services. Moreover, other goals include the establishment of market-based economic reforms and greater transparency and accountability in the public sector.⁶⁹ The international community has been

(2009-2010) 114 Penn St. L. Rev. 707; Sabah Al-Bawi, 'Influences of Ambiguity of Constitutional Provisions on the Administrative System of Iraq' (2012) 32(5) U Pa J Int'l L 1325.

⁶⁵See Oil Regulation in 32 Jurisdictions worldwide (2011), available at <<http://www.cms-cmck.com/Hubbard.FileSystem/files/Publication/0cc80dee-6e32-4bd9-81b1-6646ccfa75f0/Presentation/PublicationAttachment/b2915789-bc85-4b0e-92f7-67977e9955c1/OR2013%20Iraq.pdf>> accessed 5 October 2016.

"The Iraqi oil industry had been plagued by instability, wars and conflict, including the Iraq-Iran war, the first and second Gulf Wars and international sanctions such as the UN embargo following the invasion of Kuwait, but is now in a period of new exploration, redevelopment and improvement."

⁶⁶ For example, Eni SPA, BP PLC, and ExxonMobil Corp are to invest \$100 billion in the improvement of three oil fields in Iraq. These three oil fields include Rumaila, West Qurna phase 1, and Zubair. ExxonMobil planned half of the investment in the upgrade of West Qurna Phase 1 field, whilst BP PLC and Eni SPA on Rumaila and Zubair fields respectively would use the other share. The reason as to why West Qurna Phase 1 field is estimated to take up most of the investment is that it is not well advanced as compared to Zubair and Rumaila fields. The term well advanced implies that it lacks essential infrastructure in its development i.e. oil field facilities and number of wells. The three oil fields produce 2 million b/d but with the investment implementation, the output is estimated to reach 6.8 million b/d or more by the year 2017.

⁶⁷Barral (n 23) 377-400.

⁶⁸Anthony H Cordesman, Adam Mausner and Elena Derby, *Iraq and the United States: Creating a Strategic Partnership* (Washington DC: Center for Strategic and International Studies 2010) 363, available at: <http://csis.org/files/publication/100622_Cordesman_IraqUSStrategicPartner_WEB.pdf> accessed 7 October 2016.

Christopher M. Blandchard, 'Iraq: Oil and Gas Legislation, Revenue Sharing, and U.S. Policy', November 3, 2009 (Congressional Research Service, 7-5700, <www.crs.gov> RL34064, accessed 7 October 2016.

See also *Strategic Framework Agreement for a Relationship of Friendship and Cooperation between the United States of America and the Republic of Iraq* (17 November 2008). See column on this Framework Agreement by Meghan L O'Sullivan (one of the architects of the Framework Agreement) entitled 'Trump's Ban Undermines Iraqi Cooperation Against Islamic State' published in *Bloomberg View* (31 January 2017), available at: <<https://www.bloomberg.com/view/articles/2017-01-31/trump-s-immigration-ban-undermines-iraqi-cooperation-against-islamic-state>> accessed 3 February 2017. Where the writer states: "We ended up with an eight-page document that lays out a vision for and the specifics of a bilateral relationship between Iraq and the U.S. It discusses in detail cooperation in the political, diplomatic, cultural, economic, energy, health, environment, judicial and other realms."

See also Meghan L. O'Sullivan, 'Iraqi Politics and Implications for Oil and Energy' (July 2011), Geopolitics on Energy Project: Harvard Kennedy School, Belfer Center for Science and International Affairs.

⁶⁹ Robert Looney, 'Can Iraq Overcome the Oil Curse?' (January-March 2006) 7(1) world Economics 21,22.

a major help in these efforts. However, there is still more that needs to be done by the international community.⁷⁰ This includes foreign direct investment, which will play a significant role in fuelling Iraq's economic growth.

Over 60 percent of oil reserves is located in the south of Iraq. Over three-fourths of Iraq's natural gas resources are linked with oil.⁷¹ Most of the non-associated reserves are intensive in several fields in the North, including Bai Hassan, Ajil, Chemchemical, Jambur, Kor Mor, Al-Mansuriyah.⁷²



There had been a drop in living conditions from 1980 to 2011, because of a decline in the GDP. Translating growth in oil receipts into prosperity for the people of Iraq is a promise as well as a challenge. Legal, regulatory, logistic, political, institutional reform, security, and workforce

⁷⁰ National Strategy for Victory in Iraq (Washington: National Security Council, November 2005) 22.

⁷¹ Ibid.

⁷² Charles Wolf Jr., *Looking Backward and Forward: Policy Issues in the Twenty-First Century* (Hoover Institution Press 2008) 72, available at <<http://www.hooverpress.org/productdetails.cfm?PC=1329>> accessed 5 November 2016.

are formidable aspects that challenge Iraq. A significant challenge facing Iraq is the need to increase investment funds to promote sustainable development in the developing nation.⁷³ In regard to this matter, the state has partnered with IOCs in a manner that can bring long term developments. It has been observed in a sector study:

“The enforcement of laws and regulations specifying the terms and conditions on which foreign participation in the hydrocarbon sector is permitted, and the use of a “corporatized” structure for government-owned entities involved in the development and management of the country’s oil and gas resources can provide a level of transparency that will facilitate public scrutiny and accountability in the sector.”⁷⁴

More than 70% of Iraq’s oil production comes from the fields that are being operated by IOCs under TSCs. As has been observed that if all these contracts deliver on their oil plateau production commitments, the result will be a dramatic increase in Iraq’s productive capacity in the coming years; with potential output of more than 12mb/d from these projects by the end of the decade.⁷⁵ Response to these developments has led to the promotion of trade and investment treaties with substantive provisions in achieving the set objectives.⁷⁶ The lingering questions regarding the sustainable development of Iraqi oil in international law include:

1. Will Iraq’s ambitions be realized?
2. What would the consequences be for Iraq’s economy and the global oil market?

The Iraqi dilemma, therefore, focuses on how the issues faced by Kurdistan Iraq pertaining to oil and gas exportation, are being dealt with by the central government as well as the international factors and forces. The dilemma is also focusing on the prospects of Kurdistan and Iraq’s political and economic future. For sustainable development of oil and gas, Iraq has to find a solution out of this current condition without infringing on any international law requirements.

2.2. Sustainable development of oil and gas infrastructure in Iraq

Oil and gas infrastructure is also linked to the success of sustainable development in Iraq. This implies that poverty, unemployment, and human conditions that the populace have faced since the 1990s can be redressed by prudent development of oil and gas. And this will be possible by the government utilising oil revenues with an aim of improving the nation’s poor infrastructure. For the success of the sustainable development of oil and gas infrastructure at all the three stages of oil and gas operations such as the upstream (crude oil production), the midstream (oil transportation) and the downstream (refining and marketing of products), as shown in the diagram below, in Iraq, plans to evaluate the pipelines and refineries have to be put in place given their poor conditions. To develop sustainably oil and gas projects public

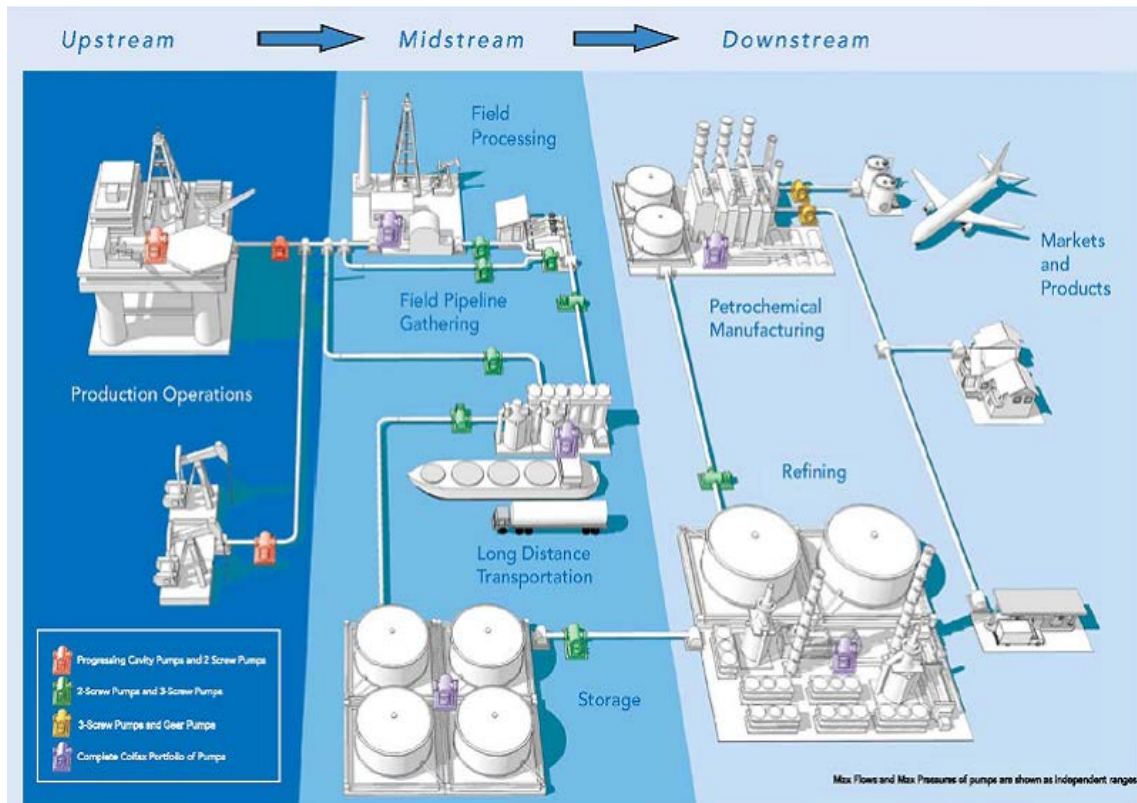
⁷³See ‘Iraq Energy Outlook’ (IEA: World Energy Outlook Special Report: 9 October 2012), available at: <http://www.worldenergyoutlook.org/iraq/>, accessed September 23 2016.

⁷⁴Sector study presented by Bearing Point, ‘Option for Developing a Long Term Sustainable Iraqi oil Industry’, <http://carbonweb.org/ocuments/Bearing_Point_Iraq_oil.pdf> accessed 10 October 2014. AFM Maniruzzaman, ‘The Issue of Resource Nationalism: Risk Engineering and Dispute Management in the Oil and Gas Industry’ (2009-2010) 5 (1) *Texas Journal of Oil, Gas and Energy Law*, 79-108.

⁷⁵As forecast in ‘Iraq Energy Outlook’ (n.73).

⁷⁶Markus W. Gehring and Avidan Kent, ‘International Investment Agreements and the Emerging Green Economy: Rising up to the Challenge’, in Freya Baetens (ed), *Investment Law Within International Law: Integrationist Perspectives* (Cambridge University Press 2013) 187.

consultation cannot be ignored. A perfect example of such a sustainable project may be drawn from Quebec.⁷⁷ The government of Quebec's plan involves consultation and consent from the community, environmental protection, safety standards applied, high-quality standards to be met by the pipeline that must be regularly checked. The IOCs involved ought to show that the pipeline is profitable and can generate economic benefits. With this knowledge at hand, the Iraqi government may borrow this plan so as to ensure the success of the pipeline infrastructure.⁷⁸



OIL & GAS OPERATION STAGES

In one estimate it is found that approximately 81% of the total Iraqi gas reserves is in an associated form with oil, besides 2% as associated (cap gas) along with 17% as non-associated gas.⁷⁹ It suggests that there will be less operational costs as oil and gas could be extracted around the same operation and time. Currently, Iraqi pipeline infrastructure is not that extensive as could be reasonably expected given its vast gas reserves. It has about 1775 km gas pipeline network extending north-south, *i.e.* from Mosul to Basra, in addition to 1400km LPG pipeline.⁸⁰ With more demand in the world market when Iraq will attract investment in the infrastructure sector, the issue of its sustainable development will increasingly come to the fore.

With oil and gas being the economy's driving force the Iraqi government has an impetus to make the necessary changes and to sign agreements with various nations, thus contributing to

⁷⁷ Erik Richer La Flèche, 'Energy East Pipeline: Quebec Has Had Enough and Takes Control of the Process', (Stikeman Elliott LLP) November 21, 2014) available at: <<http://futureimperfect.ca/energy-east-pipeline-quebec-has-had-enough-and-takes-control-of-the-process/>> accessed 20 January 2017.

⁷⁸ Ibid.

⁷⁹ BP statistical report and the MOO (2012).

⁸⁰ Luay J. AL-Khatteeb, 'Natural Gas in the Republic of Iraq' (2013) (n.5).

Iraq's reconstruction. An excellent example of the crude oil pipeline agreement may be that between Turkey and Iraq.⁸¹ This crude oil pipeline agreement, governed by one Intergovernmental Agreement (Kirkuk- Ceyhan IGA), has strengthened the economy of Iraq, improved political stability and brought about the development of international pipelines.⁸² Construction, operation, maintenance, management and the finance are governmental obligations. The government of Turkey also benefits from this agreement by strengthening its economy. This 1973 Turkey- Iraq agreement on crude oil is still valid.⁸³ In addition, these agreements aid in the financing of the petroleum sector investments. Moreover, support from IOCs has resulted in sustainable living standards for the population (*i.e.* IOCs' investments in education, sanitation, health, telecommunications, and infrastructure as part of CSR initiatives).

Although the development of the petroleum sector may be beneficial to the nation of Iraq, this also could be met with dire consequences for violations of human rights and the environment caused by petroleum operations. This implies that a mutual understanding and agreement has to be there, and cooperation has to be implemented for environmental protection including the reduction of venting and gas flaring at all costs (more on this later on). The International Energy Charter (signed in the Hague II Ministerial in May 2015⁸⁴) under the auspices of the Energy Charter Secretariat advocates for the principle of non-discrimination in various respects of investment and business operations and strongly endorses the notion of sustainable development in all energy related activities.⁸⁵ In regard to joining an energy market, the signatories of the agreements ought to comply with the requirement of the full access to adequate dispute settlement mechanisms and follow the set objectives of the International Energy Charter.⁸⁶

⁸¹ Crude Oil Pipeline Agreement between the Government of the Turkish Republic and the Government of the Iraqi Republic, 27 August 1973, T.C. Resmi Gazete (Official Journal of the Republic of Turkey), 17 June 1975.

⁸² This is the transit of crude oil from Iraqi- Kirkuk via the Ceyhan pipelines to the Mediterranean shore across Turkey. This agreement has therefore compelled Iraq to export oil via pipeline to Turkey and handle oil revenues.

⁸³ See Ugur Becerikli, '1973 agreement on crude oil with Iraq still valid, energy minister says', Daily Sabah (Ankara, 18 July 2014) <<http://www.dailysabah.com/energy/2014/07/19/1973-agreement-on-crude-oil-with-iraq-still-valid-energy-minister-says>> accessed 7 January 2017.

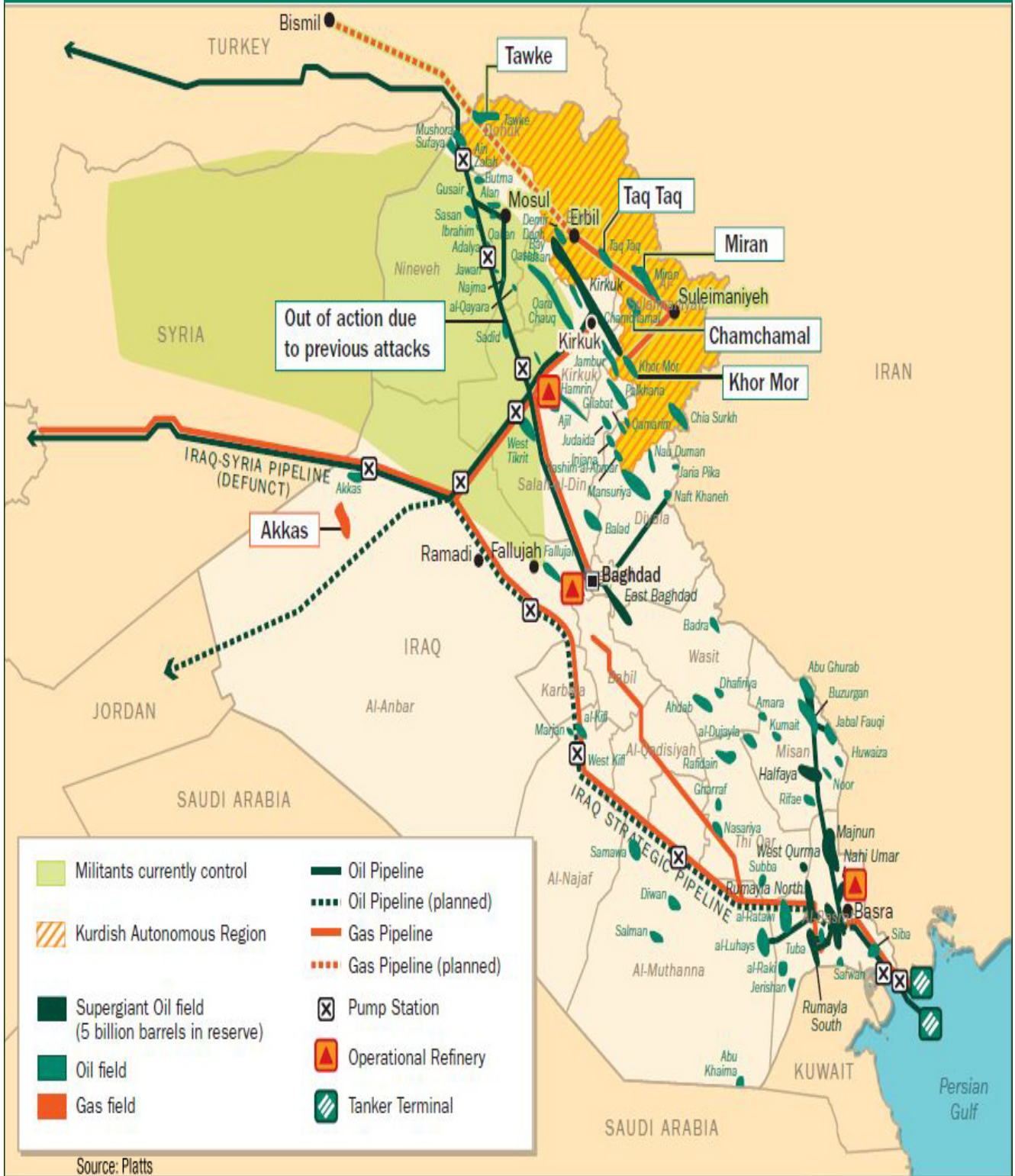
See also Amendment to the Crude Oil Pipeline Agreement dated 27 August 1973 and Subsequent relevant Agreements, Protocols, Minutes of Meetings and Addendum between the Government of the Republic of Turkey and the Government of the Republic of Iraq (Kirkuk-Ceyhan Amendment), signed September 2010.

⁸⁴ <<http://international.energycharter.org/>> accessed 2 January 2017

⁸⁵ Concluding Document Of The Ministerial ("The Hague II") Conference On The International Energy , available at: <http://www.encharter.org/fileadmin/user_upload/document/IEC_ENG.pdf> accessed 27 June 2015. A F M Maniruzzaman, 'International Energy Charter as a milestone for global energy co-operation in the 21st century' available at: <http://kluwerarbitrationblog.com/2015/08/30/international-energy-charter-as-a-milestone-for-global-energy-co-operation-in-the-21st-century/>, accessed 14 December 2016.

⁸⁶ Ibid.

Iraq's oil and gas infrastructure



Iraq's Oil & Gas Infrastructure – Source: Platts

Part II: Policy Framework of Partnership Between IOCs and Iraq for Sustainable Development

Iraq needs foreign capital and technical know-how to develop and explore its vast oil and gas reserves. In order to sustainably develop and explore such resources as well as to restore its war-torn and age-old energy infrastructure Iraq's partnership with international oil companies is an absolute essential for their cooperation, given its current state of affairs for its economic survival. The policy and objectives of Iraq's partnerships with IOCs will be explored in this part.

3.0. Framework for Relations Between International Oil Companies (IOCs) and Iraq

Iraq has used the nationalized industry framework of its oil industry since the early 1970s.⁸⁷ The framework for relations between IOCs and Iraq is according to the principles preserved in the Iraqi constitution of 2005, which, in article 111, states that oil and gas is the property of the populace of the state of Iraq in all governorates and the state makes all the decisions and takes all the revenue according to article 112 of the Iraqi constitution.⁸⁸

There have been concerns as to which aspect of hydrocarbon regime may be managed and approved by the regional governments; the proposed hydrocarbon law is expected to solve these issues when it is enacted. In the absence of hydrocarbon laws, the MoO relies on its interpretation of the Iraqi constitution declaring that PSCs are opposing the interpretation of Article 111 of the Iraqi constitution, and that the contracts must be approved of by the federal government as it attributes to Article 112 as needing the federal government's attention in oil and gas management. The understanding of the MoO preserves a stringent domination of petroleum development via national oil companies.

The Kurdistan region achieved self-governance in 2005, enabling it to pass the oil and gas law of the Kurdistan region, *i.e.* the law no. 22 of 2007. Article 115 of the Iraqi constitution allows the laws of the Kurdistan constituency above federal laws in certain respects.⁸⁹ As the article

⁸⁷*International Petroleum Encyclopedia*, (PennWell Publishing Tulsa Oklahoma 2002) 99.

⁸⁸Article 112 states: “*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.*”

⁸⁹Article 115 of the Iraqi constitution 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.*”. See Michael J. Kelly, (n.64), pp.748-760; James Crawford, ‘The Authority of the Kurdistan Regional Government over Oil and Gas Under the Constitution of Iraq’ at 6 (Jan. 29, 2008) [LEGAL OPINION: CLIFFORD CHANCE, LONDON][on file with the authors], republished (2008) 3 Oil, Gas & Energy Law. See also Michael Kavanagh, ‘Iraq: Baghdad eases Kurdistan grip’, *Financial Times* (London, 8 October 2012,), available at <<http://www.ft.com/cms/s/0/7a20dab4-0bd2-11e2-8e06-00144feabdc0.html#axzz3UOzDo7MJ>> accessed 10 January 2017.

is being written no consensus seems to have been reached in regard to oil and gas revenue distribution and management. The Kurdistan oil and gas law (2007) governs oil and gas exploration in Kurdistan⁹⁰ and under this law the KRG government has signed over 50 contracts in total with IOCs from various countries.⁹¹ In order to ensure that oil and gas contracts support sustainable development, improvements are required in four different respects at least⁹²:

1. The processes through which contracts are negotiated;
2. The terms of the contracts themselves;
3. Arrangements for resolving disputes between foreign investors and the state / public authorities;
4. Alignment of wider environmental policy with sustainable development principles for oil and gas exploration and exploitation.

The quintessence of Iraq's oil and gas development is restricted within the frameworks of national developmental plans. The frameworks ensure sustainable development in Iraq, which is a natural resource (oil and gas) dependent economy. This consists of two necessary steps pertaining to the production and revenue allocation. Iraq's oil development is expected to bring vast transformation, regarded as structural diversification. This core transformation from depleteability to renewability known as structural diversification,⁹³ which consists of horizontal and vertical diversifications.⁹⁴ Horizontal macro-economic structural diversification manifests itself in all zones of the national economy across its geographical area. Budgetary analysis is a relevant tool for assessing horizontal sustainable development.⁹⁵ Four parameters are considered. They include investment vs consumption allocation, allocation vs implementation, sectorial allocation, and oil dependency.⁹⁶ Three subsectors, viz., the upstream, the midstream and the downstream, represent the value chain of the petroleum sector. Concerning the upstream sub-sector, Iraq adopted a plan known as 'the Big-Push Strategy'.⁹⁷

⁹⁰Brendan O'Leary, Jhon McGarry and Khalid Şalih (eds), *The Future of Kurdistan in Iraq* (University of Pennsylvania Press, 2006) 25.

⁹¹<<http://cabinet.gov.krd/p/p.aspx?l=12&r=296&p=1>> accessed 12 January 2017.

⁹²Halina Ward, 'Oil and Gas Contracts for Sustainable Development in Kazakhstan Background Note on Context and Key Issues' (IIED, London, April 2007) < <http://pubs.iied.org/pdfs/G02250.pdf>> David Brent Grantham, 'Calculated risk: The advance of IOCs and NOCs into the Iraqi investment theatre' (2010) 3 *Journal of World Energy Law & Business* 315.

⁹³Ahmed Mousa Jiyad, 'Oil, Sustainable Development and the Management of the Transformation in Iraq', available at: <<http://www.iraq-businessnews.com/wp-content/uploads/2013/08/Ahmed-Mousa-Jiyad-Oil-sustainable-development-in-Iraq-July-2013-v2.pdf>> accessed 12 January 2017.

⁹⁴Vertical diversification is related to specific sectors along the value chain (the sectors - upstream, midstream, and downstream development in the petroleum sector), whereas horizontal diversification deals with the national economy- sectorial and spatial along the value chain. This means that horizontal diversification is seen in all sectors of the national economy across the region.

⁹⁵Dries Lesage, Thijs van de Graaf, and Kirsten Westphal, *Global Energy Governance in a Multipolar World* (Ashgate, 2010) 57.

⁹⁶Marin Marinov, and Svetla Trifonova Marinova, *Impacts of Emerging Economies and Firms on International Business* (Palgrave Macmillan, 2012) 201.

⁹⁷Ibid. 5

3.1. Iraqi licensing rounds

IOCs' involvement in Iraq began through successful meetings with the China National Petroleum Corporation (CNPC) for the purposes of converting the agreed production-sharing contract for Alahdab (concluded in 1997 during the Saddam regime) into a long term service contract (LTSC), which was finalized in November 2008. This is the single oilfield awarded through direct negotiation.⁹⁸ The other oil and gas fields were awarded to IOCs in the course of four bid rounds between June 2009 and October 2010.⁹⁹ Fifteen contracts were signed covering 17 fields counting three gas fields and 14 oil fields.¹⁰⁰ The conception of 'field operating divisions' in the initial bid round gave a prominent role to the IOCs in the decision-making, management and procedure of all the giant oil fields. Twelve oil technical service contracts granted in the initial two rounds and three non-associated natural gas technical service contracts were awarded in the third round.¹⁰¹ The fourth round held in May 2012 consisted of 12 exploration projects. Out of the 12 fields with awarded service contracts in the initial two rounds, six fields were considered very large.¹⁰² Producing Field Technical Service Contract (PFTSC) was awarded by the Iraqi government for three of the very large fields based on the fact that were already in production before the signing of contracts, and the contracts' scope involving an increase in the production levels.¹⁰³ These three fields include Rumalia, West Qurna 1, and Zubair surplus associated was to be utilized under the BGC joint venture. The remaining nine service contracts use a framework called development and production technical service contract.¹⁰⁴ The summary of Iraq's four licensing rounds is provided in Table 1:¹⁰⁵

⁹⁸Muhammed Abed Mazeel, 'Iraq Oil and Gas Papers 2011' (Disserta-Verl 2012) 37; Daniel Behn, 'Sharing Iraq's Oil: Analyzing Production-Sharing Contracts Under the Final Draft Petroleum Law' (September 17, 2007), available at SSRN: <<http://ssrn.com/abstract=976407>> or <<http://dx.doi.org/10.2139/ssrn.976407>> accessed 28 June 2016.

⁹⁹Ebel (n 7) 39.

¹⁰⁰Muhammed Abed Mazeel, *Iraq Constitution Petroleum Resources Legislation and International Policy* (Disserta-Verl, 2010) 57.

¹⁰¹Jiyad (n 93) 5.

¹⁰²Abbas Ghandi and C.Y. Cynthia Lin, "Economic efficiency and Optimal Contractual of Iraq's Oil Service contracts" (2014) USAEE Research Paper Series 14-160, available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2416871> accessed 2 October 2016.

¹⁰³Tareq Y Ismael and Jacqueline S Ismael, *Government and Politics of the Contemporary Middle East Continuity and Change*. (Routledge 2012) 214.

¹⁰⁴Munir Chalabi, 'A Critical Look at Iraq's Oil Contracts', available at <<http://iraqieconomists.net/en/2013/02/15/a-critical-look-at-iraqs-oil-contracts-by-munir-chalabi/>> accessed 2 October 2016; see also Rex J. Zedalis, *The Legal Dimensions of Oil and Gas in Iraq: Current Reality and Future Prospects*. (Cambridge University Press, 2009)108.

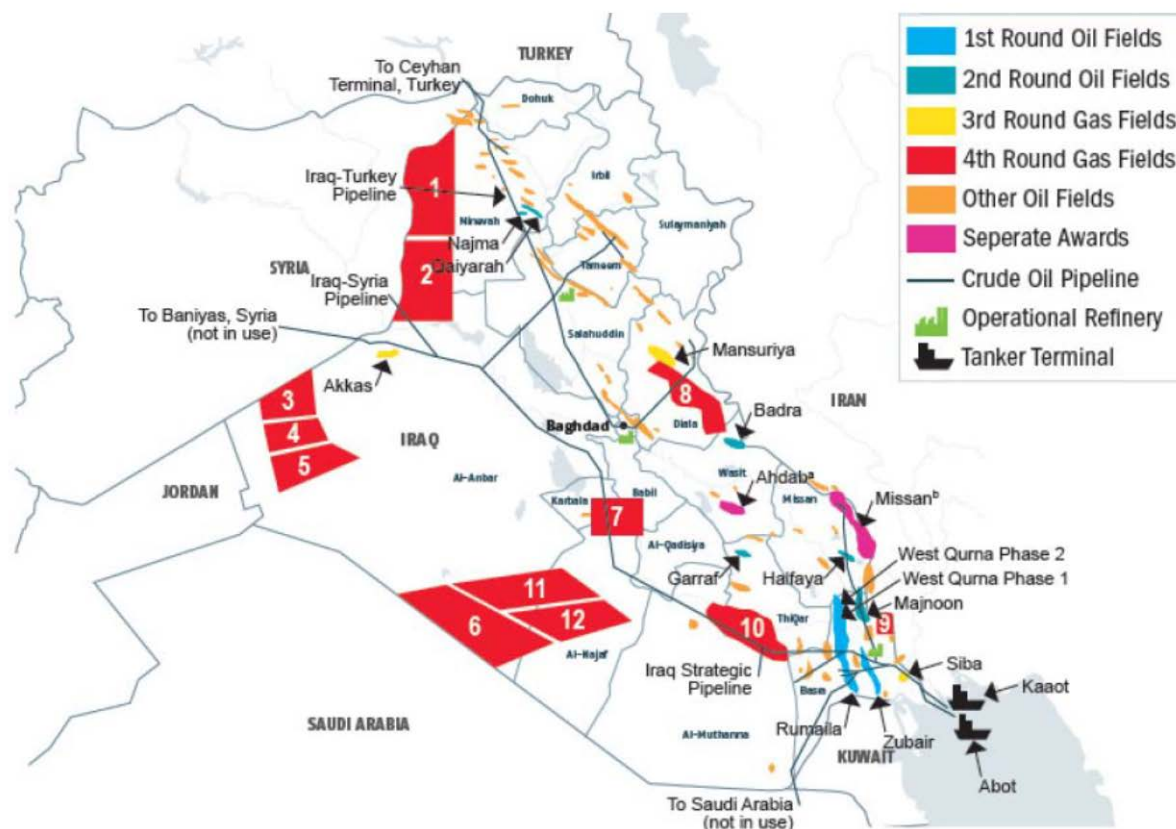
¹⁰⁵All the bidding events were held in Baghdad with full publicity, TV coverage and the bids are made, opened and announced in public with full competitiveness. In addition, each contract had to be approved by the CoM. See <<http://www.alraqeab.org/english/listingdetails>> accessed 2 October 2016.

Table 1: Iraq's four licensing rounds:¹⁰⁶

Round	Prequalified bidders no.	Important dates	Bid projects' scope	Outcome
1	35	June 30, 2009 results announced	To develop 6 oil and 2 non-associated natural gas fields	One contract was awarded to Rumaila field. Three other oil contracts were signed later.
2	9	December 12, 2009 results announced	To develop 10 oil fields	7 contracts were awarded. 3 contracts did not have any bidders.
3	13	October 20, 2010 results announced.	To develop 3 non-associated natural gas fields including two from the first round.	3 fields were awarded to 2 international consortia
4	46	Promotional conference: August 2011. Final tender: November 2011 Bidding event: May 2012	To explore 12 oil and natural gas blocks	Not yet determined

¹⁰⁶Susan L. Sakmar, *Energy for the 21st Century Opportunities and Challenges for Liquefied Natural Gas (LNG)* (Edward Elgar, 2013) 58. For results of bidding rounds see also: Iraq Oil. *Country Analysis Briefs*. US Energy Information Administration. April 2013 full report <<http://www.eia.gov/countries/analysisbriefs/Iraq/iraq.pdf>> accessed 2 October 2016.

For the list of the IOCs holding oil contracts with Iraq up to 2013, see < <http://www.iraqoilforum.com/wp-content/uploads/2013/03/companies-holding-oil-contracts-with-Iraq1.pdf>> accessed 10 October 2016.



Source: Ministry of Oil

Major Oil and Gas Fields Controlled by the Ministry of Oil

3.2. General objectives for cooperation with Iraq

The petroleum industry operations pose a number of challenges ranging from social, human rights, environmental, economic and corruption¹⁰⁷. The businesses should have social licence to do business in the community where they operate.¹⁰⁸ Thus, businesses should adopt a human face and maximise the natural and human resources to accomplish its economic objectives in a sustainable manner respecting their social, environmental and human rights obligations. Iraq, in collaboration with the World Bank (with a partial financing from it), commissioned in 2011 an international consulting company, known as Booz & Co.¹⁰⁹ to conduct an extensive study of the energy sector (petroleum and electricity generation). Iraq's Integrated National Energy Strategy (INES) was launched on 12 June 2013 with an objective to, “Develop the Energy sector in a coherent, sustainable and environment-friendly manner to meet domestic energy

¹⁰⁷See a recent report on massive corruption in the Iraqi oil industry: ‘World’s Biggest Bribe Scandal: UNAOIL: How the West Bought Iraq’ (Part I) - A Fairfax Media and Huffington Post investigation has uncovered an extraordinary case of bribery and corruption in the oil industry, centred on Monaco-based company Unaoil. This is how the West carved up Iraq. Available at <<http://www.theage.com.au/interactive/2016/the-bribe-factory/day-1/iraq-feature.html>> accessed 21 January 2017.

¹⁰⁸See generally, John G. Ruggie, *Just Business: Multinational Corporations and Human Rights* (W.W. Norton & Company, NY, London, 2013).

¹⁰⁹Mohammad A Ramady (ed.), *The GCC Economies Stepping Up to Future Challenges* (Springer Science Business Media, 2012) 89.

needs, foster the growth of a diversified national economy, improve the standard of living of Iraqi citizens, create employment, and position Iraq as a major player in regional and global energy markets”.¹¹⁰

International oil companies do not seek to export an Iraqi model for governance in the petroleum sector; the chosen solutions and policies were tailored to the benefit of Iraq.¹¹¹ Energy security need drives IOCs; thus, they aggressively pursue global oil and gas resources.¹¹² IOCs have adopted CSR operations which are essential to strengthen domestic capabilities, contractual arrangements, and public-private partnerships.¹¹³ This has led to IOCs’ response to optimistic contributions to the monetary and social progress in the Kurdistan area. Large IOCs in Kurdistan have come up with CSR initiatives, which focus on long-term projects beneficial to the community. These companies include Gazprom, ExxonMobil, and Chevron. This is beneficial to particular themes of importance such as poverty reduction and job creation; these are the main CSR initiatives in Iraq. Iraq as a developing country is interested in CSR due to a defensive and proactive jurisdiction, relevant in international resource development. The role of the Iraqi government is to create an environment in which CSR is encouraged and expected from companies.¹¹⁴ CSR engagement helps develop the capacity of public policy and regulatory institutions, with an aim to release existing resources, and to leverage additional resources via partnership.¹¹⁵ A notable CSR contribution in Kurdistan was a \$40 million made by Oryx Petroleum Corporation Limited for the support of the Kurdistan Children’s Hospital.¹¹⁶ Another company inspired by CSR initiatives in the Kurdistan region is Western Zagros, which assists the community in sustaining sound health and life improvement.¹¹⁷

In contrast, not all regions in Kurdistan receive help in the form of CSR from IOCs. This is evident from the recommendations made by a conference organized by a Norwegian NGO and

¹¹⁰ Jiyad, (n.93). See also Summarized Final Report of the Iraq's Integrated National Energy Strategy”, available at: <<http://iraqieconomists.net/en/2013/06/21/summarized-final-report-of-the-iraqs-integrated-national-energy-strategy/>> accessed 21 January 2017.

¹¹¹Hugh Dyer and Maria Julia Trombetta, *International Handbook of Energy Security* (Edward Elgar Pub 2013), 264.

¹¹²Greg Muttitt, *Fuel on the Fire Oil and Politics in Occupied Iraq* (Vintage 2012) 50.

¹¹³See generally, Jędrzej G. Frynas, *Beyond Corporate Social Responsibility: Oil Multinationals and Social Challenges* (CUP, 2009).

¹¹⁴Michael J Watts, ‘Righteous oil? Human rights, the oil complex, and corporate social responsibility’ (2005) 30 *Annual Review of Environment and Resources* 373-407.

“In the IKR (Iraqi Kurdistan Region), oil companies are mandated in their production sharing contracts with the Kurdistan Regional Government to give back to the communities in which they work. Agreements require yearly payments, from which the KRG Ministry of Natural Resources then allocates funds for capacity-building projects.” (US Department of State: 2014 Investment Climate Statement – Iraq, available at: <<http://www.state.gov/e/eb/rls/othr/ics/2014/228872.htm>> accessed 22 January 2017.

In a recent survey conducted by the Economist Intelligence Unit (a global online survey of 853 senior corporate executives from a range of industries, as well as in-depth interviews with nine corporate leaders and experts in this area conducted in November and December 2014) it was found that 83% of respondents agree (74% of whom do so strongly) that human rights are a matter for business as well as governments. See for the report ‘The road from principle to practice: Today’s challenges for business in respecting human rights’ (16 March 2015), p.4, in this link: <<http://news.dlapiper.com/Press-releases/Human-rights-is-a-matter-for-businesses-but-many-do-not-know-where-to-start-a7c.aspx>> accessed 23 January 2017.

¹¹⁵Nick J Freeman, ‘Promoting Sustainable and Responsible Business in Asia and the Pacific: The Role of Government’ 16< <http://www.unescap.org/sites/default/files/P3-government.pdf>> accessed 21 January 2014; see also Maniruzzaman, *The Issue of Resource Nationalism* (n 74)79-108.

¹¹⁶K.Walker, ‘Investing in the Future: Corporate Social Responsibility in Kurdistan's Oil and Gas Industry’< <http://mnr.krg.org/index.php/en/press-releases/310-investing-in-the-future-corporate-social-responsibility-in-kurdistan-s-oil-and-gas-industry>> accessed 24 January 2017.

¹¹⁷*Ibid.*

Almasalh for Development and Human Resources NGO in December 2013. Recommendations from this conference revealed the extent of the distress that the most populace and the environment are under. The oil production operations undertaken by IOCs are usually situated in villages that lack basic amenities.¹¹⁸ Despite the publicized CSR initiatives by IOCs, not all villages receive this help. The recommendations pointed fingers at some of the IOCs for deceiving the villages by distributing basic needs to the community rather than proper CSR initiatives. According to the recommendations of the conference, the Kurdish government should pass legislation on IOCs' affairs (as have India¹¹⁹ and China¹²⁰, for example), whereby the environment and the community will be taken care of in regard to social matters.¹²¹ In addition, the government is to monitor the work of the IOCs ensuring that all the laws and legal regulations are followed.¹²² It is noteworthy that although CSR is still being practised in the voluntarism fashion in most countries, there is a pressing demand from some quarters for its legal bindingness¹²³, or at least there appears to be a trend of creeping legitimacy of CSR across the board.¹²⁴

¹¹⁸Muhammed Abed Mazeel, *Restructuring and Re-organization of the Iraqi Oil Ministry and State-owned Oil Companies for Maximum Economic Growth and National Development* (disserta Verlag, 2012) 42.

¹¹⁹Dharmika Dharmapala and Vikramaditya S. Khanna, 'The Impact of Mandated Corporate Social Responsibility: Evidence from India's Companies Act of 2013' (October 30, 2016). U of Chicago, Public Law Working Paper No. 601; University of Chicago Coase-Sandor Institute for Law & Economics Research Paper No. 783; U of Michigan Law & Econ Research Paper No. 16-025; U of Michigan Public Law Research Paper No. 526. Available at SSRN: <<https://ssrn.com/abstract=2862714>> accessed 23 January 2017; Jingchen Zhao, 'Promoting More Socially Responsible Corporations through a Corporate Law Regulatory Framework', (2017) 37 (1) Legal Studies 103; Gopalan, Sandeep and Kamalnath, Akshaya, 'Mandatory Corporate Social Responsibility as a Vehicle for Reducing Inequality: An Indian Solution for Piketty and the Millennials', (2015) 10(1) Northwestern Journal of Law and Social Policy; Deakin Law School Research Paper No. 16-23. Available at SSRN:< <https://ssrn.com/abstract=2492923> or <http://dx.doi.org/10.2139/ssrn.2492923>> accessed 25 January 2017.

"As per regulations of the Companies Act 2013 (India), companies having a net worth of Rs 500 crore or more or a turnover in excess of Rs 1000 crore or net profits of Rs 5 crore or more or net profits of Rs 5 crore or more are required to mandatorily spend 2% of their profits on CSR programmes." The Economic Times (India), February 14, 2017, available at: <<http://economictimes.indiatimes.com/news/company/corporate-trends/india-inc-spent-more-on-csr-in-2016-says-kpmg-study/articleshow/57135847.cms>> accessed 20 February 2017.

It's reported: "Actual spends on CSR activities by Nifty 100 Companies that KPMG survey included were more than Rs 6,500 crore for financial year 2016 versus a little over Rs 5,000 crore a year ago." – *Ibid*.

¹²⁰J. Zhao, *Corporate Social Responsibility in Contemporary China* (Cheltenham: Edward Elgar, 2014); Afra Afsharipour and Shruti Rana, 'The Emergence of New Corporate Social Responsibility Regimes in China and India', available at <<http://ssrn.com/abstract=2472146>> accessed 25 January 2017.

¹²¹See, 'Kurdish Activists are demanding obliging oil companies to bear the Social responsibility towards the areas in which it operates', *Sotaliraq e-newspaper*(in Arabic) <<http://sotaliraq.com/mobile-news.php?id=128427#axzz2oLPI9ogs>> accessed 13 March 2014. See also India's new Companies Act to change CSR, available at <<http://www.iflr.com>. <http://www.iflr.com/Article/3281069/Indias-new-Companies-A-t-to-change-CSR.html>>

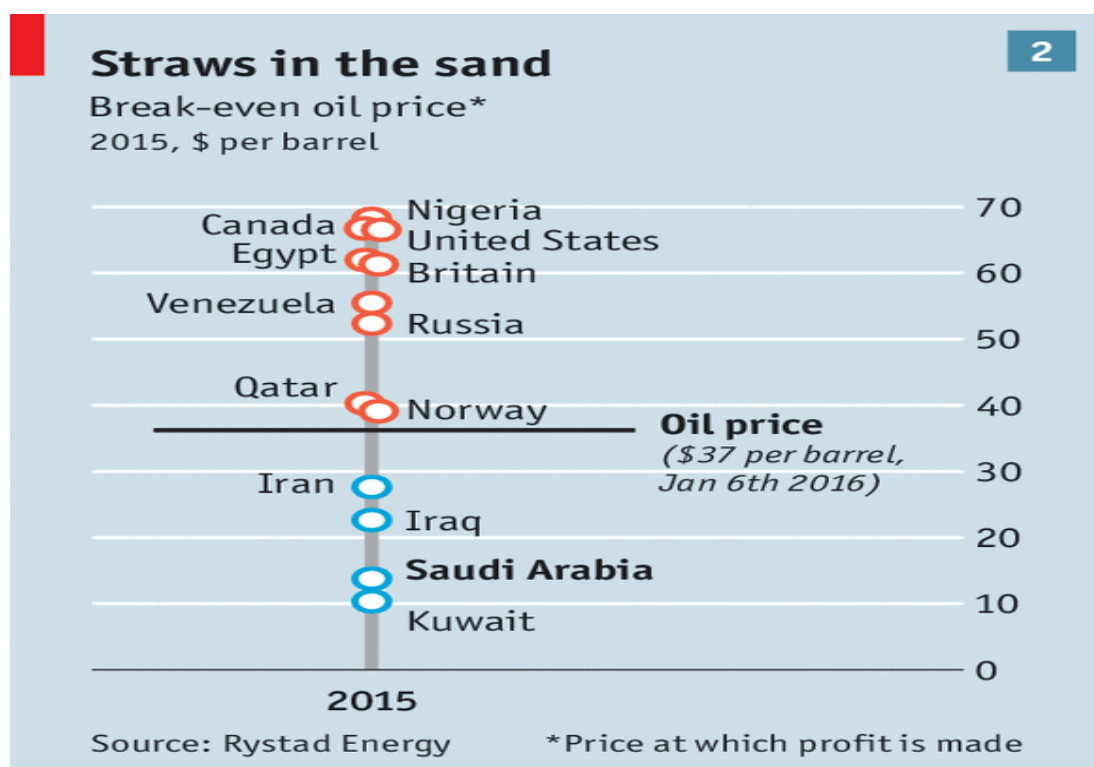
¹²²See U.S. Department of State: '2014 Investment Climate Statement – Iraq', available at: <<http://www.state.gov/e/eb/rls/othr/ics/2014/228872.htm>> accessed 25 February 2017.

¹²³Jingchen Zhao, 'Promoting More Socially Responsible Corporations through a Corporate Law Regulatory Framework, (2017) 37(1) Legal Studies 103; P. Utting and J.C. Marques (eds.), *Corporate Social Responsibility and Regulatory Governance: Towards Inclusive Development?* (Basingstoke: Palgrave Macmillian, 2010); John Gerard Ruggie, 'Multinationals as global institution: Power, authority and relative autonomy' (8 June 2017), available at <http://onlinelibrary.wiley.com/doi/10.1111/rego.12154/full#references> accessed 30 June 2017.

¹²⁴A. F. M. Maniruzzaman, 'Creeping Legitimacy of Corporate Social Responsibility', Editorial for *Amicus Curiae* (London 2011) Spring issue Journal of the Society for Advanced Legal Studies, 1.

3.3. Strategic objectives for cooperation with Iraq

IOCs' cooperation with Iraq in developing its oil and gas resources is very strategic for the latter as it includes access to oil and gas reserves for exploration, access to oil and gas markets, long-term strategic partnership,¹²⁵ risks diversification,¹²⁶ access to capital, managing local government and regulatory environment, and opportunities across the value chain. Iraq's benefits include energy security and access to oil and gas resources,¹²⁷ development of domestic resource, access to technology, access to global project management expertise and production of oil at the third lowest break-even cost after Kuwait and Saudi Arabia (shown in the following chart). This means that even in the current volatile global energy marketplace and oil price slump IOCs can still see the competitiveness of Iraq as a low-cost oil producer compared to many oil-rich countries (given Iraq's 81 percent gas reserves being linked to oil, hence cost effectiveness) and the prospective profitable return from their investment.



Economist.com

SOURCE: Economist.com

¹²⁵Cordesman, Mausner and Derby(n 68) 64.

¹²⁶Mark Pilisuk and Jennifer Achord Rountree, *Who Benefits from Global Violence and War: Uncovering a Destructive System* (Praeger Security International 2008) 153.

¹²⁷See 'Oil Regulation in 32 Jurisdictions worldwide' (2011), available at <<http://www.cms-cmck.com/Hubbard.FileSystem/files/Publication/0cc80dee-6e32-4bd9-81b1-6646ccfa75f0/Presentation/PublicationAttachment/b2915789-bc85-4b0e-92f7-67977e9955c1/OR2013%20Iraq.pdf>> accessed 13 January 2017.

To achieve this goal of rising consumption and demand for energy within the international market of Iraq and to be able to generate a sufficient amount of revenue for the government budget, the improvement of infrastructure, investments in new technologies, and increasing production capabilities, the Ministry of Oil has attracted investment from IOCs and foreign NOCs and will require further investment to be made by more companies in the oil and gas sector.

The INES vision makes up the backbone for future national development projects up to the year 2030. Concerning the upstream oil subsector, the INES proposes three states of affairs of 13 mbd, 9 mbd and 6 mbd with different development and plateau production periods. The strategic objective aimed at increasing oil production by the end of 2014 at a rate amid the medium and high production profiles. A minimum target production level was estimated to be at 4.5mbd. Afterwards, production was expected to occur at the level of the medium production profile to generate a significant influx of petroleum export revenues. However, due to the depressed oil prices in the world market and other security reasons in the troubled regions in the country, Iraq could produce no more than an average of 3.905 mbd of oil in 2015.¹²⁸

Part III: Legal Framework for Sustainable Development of Iraqi Oil and Gas

In this part the current state of affairs concerning sustainable development of oil and gas in Iraq will be examined in the context of the legal framework as it exists today. The international contract regimes between Iraq and IOCs and international investment treaties to which Iraq is a party will be examined to appraise the nature of legal safeguards for sustainable development and Iraq's response to international obligations on the matter.

3.4. Iraq's oil contracts

Iraq has a range of probable arrangements to choose from when dealing with IOCs. This includes Technical Service Contracts (TSC)¹²⁹ and Risk Service Contracts (RSC) (adopted by the federal government), and Production Sharing Contracts (PSC) (adopted by the Kurdistan Regional Government).¹³⁰ The TSCs represent even more the elevating importance of the adaptation of service contracts¹³¹ because of the scale of the venture, the production plans and the disputes ahead of the IOCs and the Iraqi regime and number of the IOCs involved.¹³² Technical Service contracts framework has the potential to alter the scenery of the geopolitics of energy globally; on the other hand, these contracts cover previously vast untapped resources that are unavailable in the country, favouring Iraq's oil production forecast.¹³³

¹²⁸See Iraq Oil & Gas Report (BMI Research, Q4 2016), available at: <www.bmiresearch.com> accessed 27 January 2017.

¹²⁹Ahmed Mousa Jiyad, 'Oil in Iraq: basic issues, development and discourse', (2010)1-2 International Journal of Contemporary Iraqi Studies 155-195; Abbas Ghandi, C.-Y. Cynthia Lin, 'Oil and gas service contracts around the world: A review', (2014) 3 Energy Strategy Reviews, 63-71; Ghandi, and Cynthia (n 102) accessed 2 October 2016.

¹³⁰Peter D Cameron, 'Contracts and Constitution: the Kurdish factor in the development of oil in Iraq' <<http://www.eisourcebook.org/cms/Jan%202013/Iraq,%20Kurdistan,%20Contracts%20&%20Constitutions.pdf>> accessed 1 March 2017; Peter D Cameron, 'Managing the politics of oil reforms: Lessons from Iraq' (on the authors' files); Peter Wells, 'Iraq's Technical Service Contracts – A Good Deal For Iraq?' , available at: <<http://www.mees.com>> accessed 5 March 2017.

¹³¹Service contracts signed with IOCs, including foreign national oil companies, by the ministry of oil include a state partner in each case with an interest holding of 25% in such service contracts. Current IOCs with service contracts in Iraq include BP, CNPC, Lukoil, Eni, Occidental, Kogas, Shell, ExxonMobil, Statoil, Petronas, Sonangol and Total. Republic of Iraq, Ministry of Oil. *Technical Service Contract* , available at<http://www.oil.gov.iq/Technical_Service_Contract.pdf> accessed 20 November 2016.

See 'Oil Regulation in 32 Jurisdictions worldwide' (n 127) accessed 13 January 2017.

¹³²Jiyad (n 93) 155-195.

¹³³Ghandi and Lin (n 102) 2.

3.4.1. Iraq's Technical Service Contracts (TSCs)

Iraq's technical service contracts represent a financial and legal framework that host governments of an oil-producing nation use to engage with IOCs with a long-term oil and natural gas development goal. The TSC framework restricts the handing over of reserves and extracted natural resources to the IOCs.¹³⁴ This framework also controls the profit gained by the IOCs by an agreement upon the signing of the contract. TSCs offer the host governments a means of having IOCs in the country but restricting their mode of participation in resource development. Iraq's development plans in the petroleum sector via the recent TSCs with IOCs demonstrate the increasing dependence of oil producing nations on service contracts.¹³⁵ The service contracts permit the IOCs to have more control over the oil supply. TSC agreements signed with the IOCs will provide command of 94% of Iraq's producing oil fields to the IOCs for 20-25 years in the course of their management of the "field operating divisions."¹³⁶ The MoO has built NOCs through which the government controls the operations and oil production. IOCs function as contractors; in addition, the compensation (remuneration) is per barrel production as determined in a bidding procedure.¹³⁷ Profit gained other than remuneration fee per barrel goes to the NOC. As per the framework of service contracts, gigantic untapped natural resources are covered with the service contracts that might otherwise have been unavailable in Iraq. This could result in an unprecedented increase in the global supply of conventional oil in both short term and long. In regard to the near future, Iraq's increase in oil production via the TSC framework had aided in alleviating the potential global adverse effects of Iran oil export decline because of the EU-US sanctions and embargos ever since July 2012 until it's lifting.¹³⁸ Although service contracts have been adopted, it is uncertain if they are economically efficient and if these contracts provide the right incentives for international oil companies to invest in Iraq.¹³⁹ However, it has been reported lately that the Iraqi government is thinking of favouring PSCs to replace TSCs. In response to such report one expert commentator observes that:

"The current collapse in oil prices and resulting sharp decline in oil export revenues push Iraq deep into a more serious fiscal crisis of the state. Instead of adopting relevant policy by properly phasing oilfields development and reducing significantly state expenditures, the Minister of Oil expressed views contemplating or advocating changing the federal long-term service contracts into production/ revenue sharing

¹³⁴Rex.J. Zedalis, 'Distribution of Oil and Gas Earnings Under the Proposed Iraqi Revenue Sharing Law: Legal Complications and the Kurdistan Region, (2008) 3 OGEL < www.ogel.org/article.asp?key=2796> accessed 2 March 2017; Zedalis, *The Legal Dimensions of Oil and Gas in Iraq* (n 104)107; Muhammed Mazeel al-Aboudi, 'Iraq's TSC and PSC Agreements – A Good Deal for Iraq', (2010) LIII (3) *Middle East Economic Survey*, 26.

¹³⁵Ghandi and Lin (n 102) 2.

¹³⁶Chalabi (n 104).

¹³⁷Mazeel (n 100) 25.

¹³⁸Ghandi and Lin (n 102) 2; The US Department of State – Iran Sanctions:

<<http://www.state.gov/e/eb/tfs/spi/iran/index.htm>> accessed 2 October 2016; 'EU, US lift Iran sanctions as UN watchdog says Tehran 'has kept nuclear promises'', available at: <https://www.rt.com/news/329205-iran-sanctions-relief-deal/> accessed 2 October 2016.

¹³⁹ For more details see Nakhle (n 14) 38. See generally Ana Teresa Tavares-Lehmann, Perrine Toledano, Lise Johnson, and Lisa Sachs (eds.), *Rethinking Investment Incentives: Trends and Policy Options* (Columbia University Press, July 2016).

contracts. Such thinking could make the situation even worse and introduce a high degree of uncertainty.”¹⁴⁰

3.4.2 Risk Service Contract (RSCs)

Risk service contracts entail a situation whereby Iraq as the host country seeks to exert greater control over the oil production by using private companies to risk cases of exploration and exploitation of its resources. The host country possesses the exclusive rights to the produced crude oil.¹⁴¹ Moreover, the contracted IOCs provide the required funds and technical services in the process of exploration, development and production. If resources are discovered at a certain level, the company receives a cash payment for its efforts; if not, the company is not remunerated. In cases of finding resources, the foreign private company does not share in the revenue produced.¹⁴² This contractual type might favour the host country only if the county has the necessary technological knowledge and access to capital.¹⁴³ These contracts may not prove favourable because of their rigorous fiscal terms and significant potential risks as they are likely to challenge optimizing oil production.¹⁴⁴ The impending jeopardy and remuneration for IOCs may turn out to be disproportionate under risk service contracts because the rigorous fiscal terms, service fee ceilings, high bonuses, government participation, and service charges may hinder the income level and excess return to the IOCs caused by increases in output and oil price.¹⁴⁵

3.4.3 Kurdistan Region's PSAs /PSCs

The Kurdistan oil production is organised under production sharing contracts (PSCs) governed by the Kurdish Oil and Gas Law, enacted by the Kurdish legislature on 6 August 2007.¹⁴⁶ The KRG has signed PSCs for oil and gas production under the Kurdistan oil and gas law.¹⁴⁷ The first PSC was signed with an all Canadian group led by Niko Resources for the Qara Dagh (Black Mountain) Block in Sulaymaniyah.¹⁴⁸ Since 2006 the KRG has signed over 50 oil and gas Production Sharing Contracts with IOCs,¹⁴⁹ in favour of sustainable development - stating that the title to the oil and gas remains vested with Iraq via the NOC.

¹⁴⁰Ahmed Mousa Jiyad, 'Iraq Extractive Industry Legal, Fiscal and Revenue Allocation and Management Issues' (n 16). Further on this matter see Ahmed Mousa Jiyad, 'PSCs – wrong idea, wrong time', (2015)102/April, *Energy Economist - Platts* <www.platts.com> accessed 1 March 2017.

¹⁴¹A F M Maniruzzaman, 'The New Generation of Energy and Natural Resource developments: Some Reflections', (1993) 11 (4) *Journal of Energy and Natural Resources* 215.

¹⁴²*Ibid.*

¹⁴³Elijah Ezendu, 'Production Agreements, Oil service Contracts, and Joint Ventures', <<http://www.slideshare.net/ezendu/production-agreements-oil-service-contracts-joint-venture>> accessed 15 March 2017.

¹⁴⁴ 'What are Risk Service Contracts (RSCs)?' <http://worldvest-ap.com/index.php/marginal-field-investment-opportunities/what-are-risk-service-contracts-rsc/> accessed 20 March 2107.

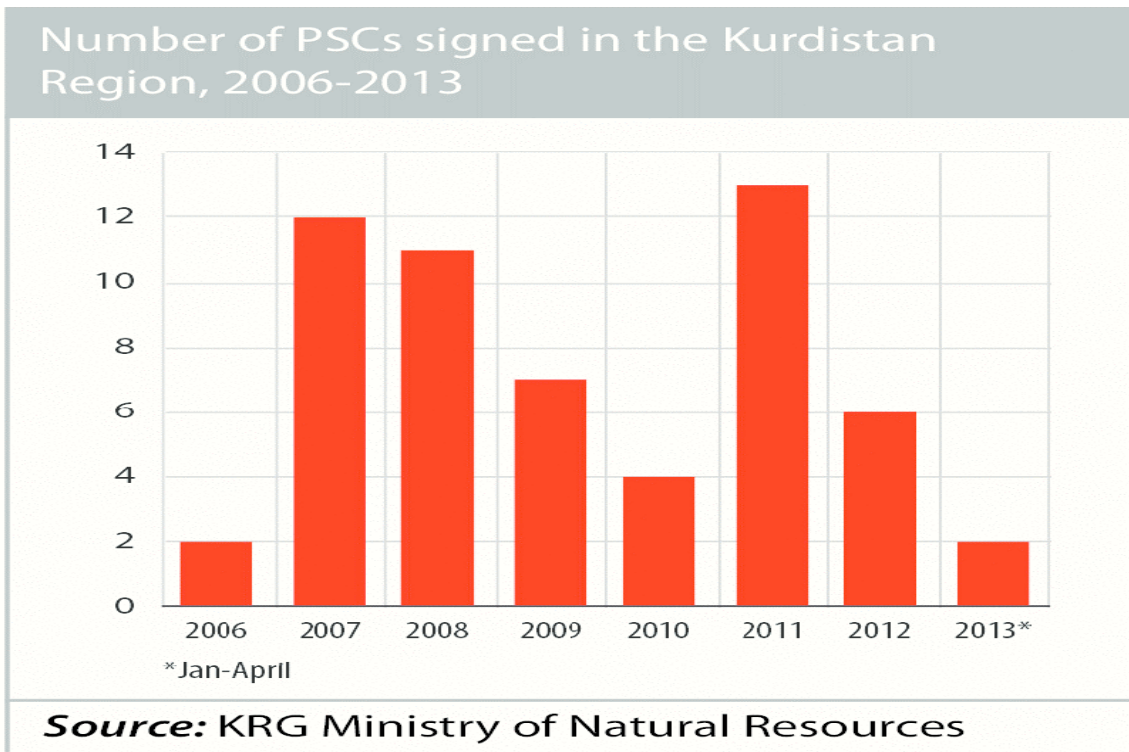
¹⁴⁵Wood Mackenzie: *The Growth of Asian NOCs in the Middle East* (Wood Mackenzie, 2010) 120.

¹⁴⁶The KRG moved from a regime of PSAs to a PSCs after the adoption of its Oil and Gas law in 2007. However the difference is not significant. see Cameron(n 130) 84.

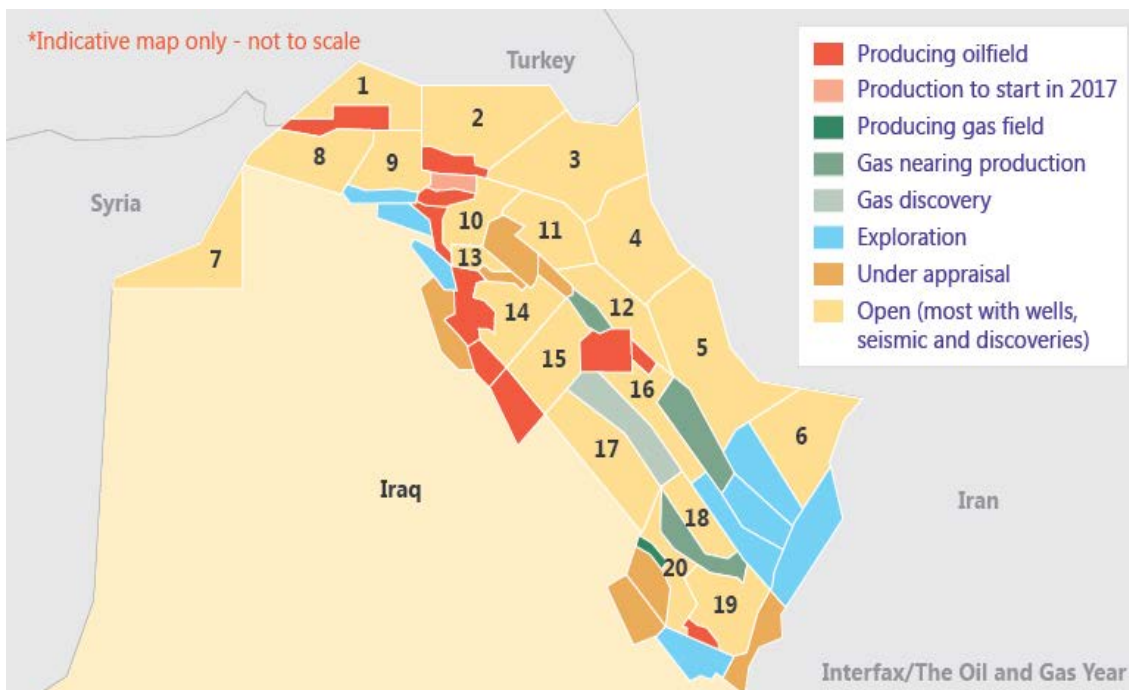
¹⁴⁷KRG's Ministry of Natural Resources model PSAs have terms ranging from five to 37 years, depending on the stage that the field is at and the number of extensions sought. See Oil Regulation in 32 Jurisdictions worldwide (n 127) accessed 13 January 2017

¹⁴⁸See: <<http://www.upstreamonline.com/live/article1157552.ece>> accessed 13 January 2017.

¹⁴⁹List of contracts available at: <<http://mnr.krg.org/index.php/en/the-ministry/contracts/new-psc>> accessed 13 January 2017.

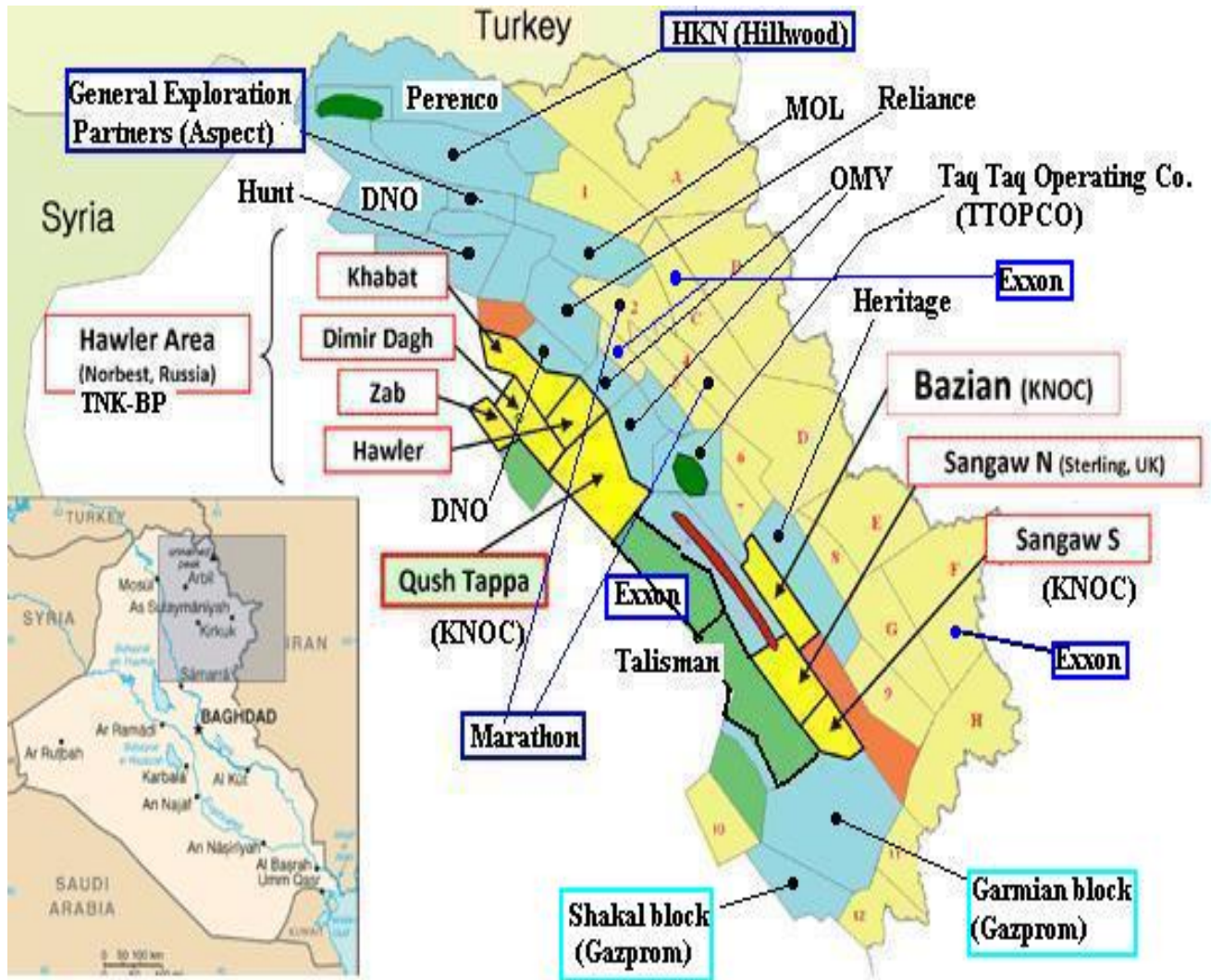


Recent low oil price has spurred the KRG government to boost its oil production and it has announced twenty blocks, old and new, for offer in the 2017 licensing round as shown in the following map.¹⁵⁰



¹⁵⁰ 'Kurdistan to offer 20 blocks in licensing round' (6 December 2016): <http://interfaxenergy.com/gasdaily/article/23086/kurdistan-to-offer-20-blocks-in-licensing-round> accessed 20 January 2017.

IOCs favoured PSCs as they can obtain a right of recovery of the costs from the petroleum reserves found, enhancing the value of the shares.¹⁵¹ In the production sharing contracts, the questions of who gets the revenue from the oil, and who manages the manner in which oil is developed are the primary concerns.¹⁵²

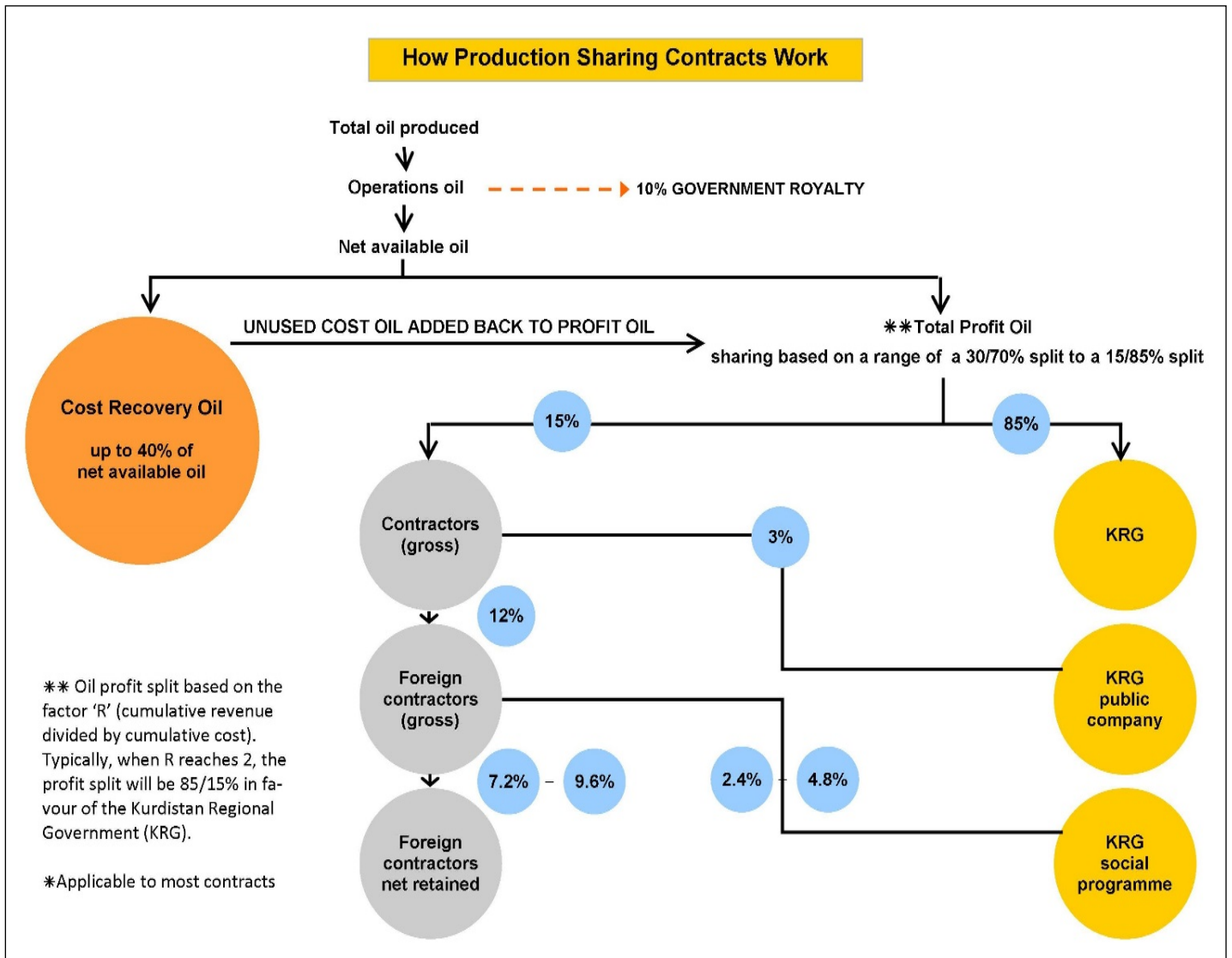


OIL-FIELD OPERATORS (IOCs) IN KRG - mnr.krg.org/index.php/en/the-ministry/contracts/pscs-signed

¹⁵¹Cameron (n 130) 84.

¹⁵²John Ehrenberg, *The Iraq Papers* (Oxford University Press 2010) 386.

IOCs are permitted in their production sharing contracts to help the community around the area where they are located. The Terms and conditions for annual payments to the KRG are agreed by the IOCs in such contracts.¹⁵³ From the payments, MNR apportions finances for capacity building projects. The PSCs also include various economic development provisions for the benefit of Iraqi people. Though the control of the oil and gas resources is retained by the state, it is bound by the contractual restrictions as agreed by the contracting parties.¹⁵⁴ Factors affecting the implementation of such contracts for IOCs include optimal maximum production capacity¹⁵⁵, well drilling, capital cost ceilings, and potential sources of economically inefficient outcomes - feasibility constraint between the production levels of two consecutive periods. The following diagram shows how the KRG's production sharing contracts work.¹⁵⁶



¹⁵³Walker (n 116) accessed 24 January 2017.

¹⁵⁴Ibid.

¹⁵⁵However, as noted: "A report by Dr Pedro van Meurs, a world expert on petroleum fiscal regimes, concluded that the KRG's production-sharing contracts encourage oil companies to perform optimally and serve Iraq's national interests better than the Iraqi Ministry of Oil's risk service contracts." <<http://mnr.krg.org/index.php/en/the-ministry/contracts/new-psc>> accessed 2 February 2017.

¹⁵⁶Ibid

Many of these contracts, like TSCs and RSCs, include an international arbitration clause for the purpose of dispute resolution between the parties concerned. However, it is often claimed that the international arbitral tribunals tend to favour the investment moderately than matters of national interest or sovereignty.¹⁵⁷ There are also other alternative options including mediation / conciliation for certain investment disputes,¹⁵⁸ or a combination of several options of dispute resolution as in a multi-tiered dispute resolution clause.¹⁵⁹

3.5. Contractual clauses and sustainable development

Many contracts signed by both the Iraqi federal and the Kurdistan regional governments contain stabilization clauses.¹⁶⁰ Problems that may arise with the PSCs are the possible

¹⁵⁷A letter circulated by the Alliance for Justice: available at <http://www.affj.org/wp-content/uploads/2015/03/ISDS-Letter-3.11.pdf> accessed 5 January 2017; 'UN calls for suspension of TTIP talks over fears of human rights abuses', *The Guardian* (London, 4 May 2015), available at <http://www.theguardian.com/global/2015/may/04/ttip-united-nations-human-right-secret-courts-multinationals> accessed 5 January 2017; 'IISD Responds to European Commission's Proposed International Investment Court', available at <http://www.iisd.org/media/iisd-responds-european-commission%E2%80%99s-proposed-international-investment-court> accessed 5 January 2017.

Cf. 'An open letter about investor-state dispute settlement' (April 2015), available at <https://www.mcgill.ca/fortier-chair/isds-open-letter> accessed 7 January 2017;

See also John G. Murphy, and Sean Heather, '13 Myths about Investor-State Arbitration' (April 13, 2015) (U.S. Chamber of Commerce, available at: <https://www.uschamber.com/blog/13-myths-about-investor-state-arbitration>) accessed 10 February 2017; 'A response to the criticism against ISDS by European Federation for Investment Law and Arbitration (EFILA)', Final Draft (17 April 2015), available at:

<http://www.transnational-dispute-management.com/news/EFILA-201504-1.doc> accessed 12 February 2017; Gloria Maria Alvarez, Blazej Blasikiewicz, Tabe van Hoolwerff, Kleopatra Koutouzi, Nikos Lavranos, Mary Mitsi, Emma Spiteri-Gonzi, Adrian Verdegay Mena, Piotr Willinski, 'A Response to the Criticism against ISDS by EFILA' (2016) 33(1) *Journal of International Arbitration*, 1–36.

¹⁵⁸A F M Maniruzzaman, 'A Rethink of Investor-State Dispute Settlement', available at <http://kluwerarbitrationblog.com/blog/2013/05/30/a-rethink-of-investor-state-dispute-settlement/> accessed 15 February 2017.

In 2016, the Energy Charter Conference endorsed the Guide on Investment Mediation and encouraged Contracting Parties to consider to use mediation on voluntary basis as one of the options at any stage of the dispute to facilitate its amicable solution and to consider the good offices of the Energy Charter Secretariat: <http://www.energycharter.org/what-we-do/dispute-settlement/amicable-resolution-of-disputes/> accessed 15 February 2017. See also, Kovick David, and Caroline Rees, 'International Support for Effective Dispute Resolution Between Companies and Their Stakeholders: Assessing Needs, Interests, and Models' (2011) Corporate Social Responsibility Initiative Working Paper No. 63. Cambridge, MA: John F. Kennedy School of Government, Harvard University), available at: <http://www.hks.harvard.edu/centers/mrcbg/programs/csri/research-publications/working-papers> accessed 20 February 2017; Caroline Rees, 'Mediation in Business-Related Human Rights Disputes: Objections, Opportunities and Challenges', (2010) Corporate Social Responsibility Initiative Working Paper No. 56. Cambridge, MA: John F. Kennedy School of Government, Harvard University), available at: <http://www.hks.harvard.edu/centers/mrcbg/programs/csri/research-publications/working-papers> accessed 20 February 2017.

¹⁵⁹Ewelina Kajkowska, *Enforceability of Multi-tiered Dispute Resolution Clauses* (Hart Publishing, Oxford and Portland, Oregon, 2017); Craig Tevendale, Hannah Ambrose and Vanessa Naish, 'Multi-Tier Dispute Resolution Clauses and Arbitration' (2015)1 *Turkish Commercial Law Review*, available at <http://the-tclr.org/multi-tier-dispute-resolution-clauses-arbitration/> accessed 1 March 2017.

On the EU level there appears to be a trend to increasingly support for the establishment of a permanent court for investment disputes, see Cecilia Malmström, 'Investments in TTIP and beyond - towards an International Investment Court', (5 May 2015), available at https://ec.europa.eu/commission/2014-2019/malmstrom/blog/investments-ttip-and-beyond-towards-international-investment-court_en accessed 7 March 2017.

¹⁶⁰See, for instance, Art 29.4 of Iraq's TSC and DPSC Models, and Art.43.3 of Kurdistan Region's PSC Model. For the emerging trends of stabilization in view of the current state of international law, see also A F M

incorporation of a mix of royalties, taxes, local content obligations on the IOC and stabilization clauses. The disadvantage with TSCs lies in the general inability to book found reserves, depending on the legal structure, and where reimbursements of costs and payments for services made in cash only, no booking of reserves can be made. A dispute rooted in 'constitutional' interpretations could cause significant instability both contractually (for IOCs currently working under the KRG-PSC model) and politically (for the entire country). The stipulated stabilization clauses can prevent future laws or tax policies from applying to the oil development project at hand which may stand in the way of its sustainable development. The issue may be exacerbated due to the different interpretations of certain contractual clauses, which have generated a rift between the legislative and executive branches in respect of petroleum development. The most obvious and perennial issue is the legal status of the concluded contracts.¹⁶¹ The executive branch, CoM, and MoO view these contracts within its authorization, despite the fact that the Iraqi CoR, legal, and professional bodies see the concluded contracts as illegal intrusion of legislative rights of the state of Iraq.¹⁶²

3.5.1. Environmental standard clauses

The Governments of Iraq and Kurdistan have different and varying strands concerning the environmental standards set in the oil fields. The clauses put in place are mainly to control the extent and prevent unnecessary damage in the fields and surrounding areas. For instance, the Kurdistan Regional Government contractual clauses are less binding as the contractors are offered freedom to use natural resources found within and even outside the contract area as may be noticed in such contractual terms (or its equivalent): "freely use sand, water, electricity, and any other natural resources located inside or outside the Contract Area for the Petroleum Operations."¹⁶³ This may be seen as a bit damaging to the environment as little regard is paid to the physical environment and the result of economic gain is seen to take precedence over the sustainability of a healthy ecological environment.¹⁶⁴ The Iraqi government (federal), on the other hand, seeks to protect the public and the environment during the oil exploration and exploitation processes in Iraq in reference to the Law No. 27 of 2009.¹⁶⁵ After such processes, the contract area should be left in good condition for beneficial use later.¹⁶⁶ Most of the contract

Maniruzzaman, 'The Pursuit of Stability in International Energy Investment Contracts: A Critical Appraisal of the Emerging Trends', ((2008) 1(2) Journal of World Energy Law and Business (OUP), 121-157, available at: <<http://jwelb.oxfordjournals.org/cgi/content/extract/1/2/121>> accessed 8 March 2017; J. Nna Emeka, 'Anchoring stabilization clauses in international petroleum contracts', (2008) 42 The International Lawyer 1317-1338.

¹⁶¹ See Rex J. Zedalis, 'The role provincial governmental units can play regarding oil and gas development agreements in the Kurdish North: allocation of Iraqi constitutional power', (n 9) 314; Rex J Zedalis, 'Foundations of Baghdad's Argument that Regions Lack Constitutional Authority Over Oil and Gas Development Agreements', (2008) 26 (2) Journal of Energy & Natural Resources, 303; Peter D. Cameron, 'Contracts and constitutions: The Kurdish factor in the development of oil in Iraq' (n 130) 81-99.

¹⁶² Jiyad, 'Oil in Iraq: basic issues ..' (n 129) 155-195.

¹⁶³ Kyla Tienhaara, 'Foreign Investment Contracts in the Oil & Gas Sector: A Survey of Environmentally Relevant Clauses', (2011) 11(3) Sustainable Development Law & Policy, 15-20.

¹⁶⁴ *The oil excavation process is seen to be harsh on the environment generally, see UNEP: 'Environmental management in oil and gas exploration and production' (1997), available at: <<http://www.ogp.org.uk/pubs/254.pdf>> accessed 25 April 2017. See the World Bank study: 'Environmental Governance in Oil-Producing Developing Countries: Findings from a Survey of 32 Countries' (July 2010), available at: <https://openknowledge.worldbank.org/handle/10986/18285?show=full>, accessed 10 June 2017.*

¹⁶⁵ This law was enacted to protect and improve the environment via eliminating and working on the damages that may happen. This evidently saves the natural resources, biological diversity, and public health. This is in line with the vision of Iraq's sustainable growth. To have a comprehensive layout of Law No. 27 of 2009. see <<http://www.mooiraq.com/en/index.php?name=News&file=article&sid=265>> accessed 26 April 2017.

¹⁶⁶ During the abandonment of the oil field, Iraqi government has a "remove all equipment and installations from the relinquished area or former Contract Area in a manner agreed with ROC pursuant to an abandonment plan".

plans seek to leave the oil field area in such a state that is beneficial to future generations of Iraq, the hallmark of sustainable development. This shows that Iraq has an initiative to legislate and implement international environmental rules and standards within its territory. Thus, the aspect of sustainable development in achieving international and territorial cooperation in regard to environmental protection is encouraged. However, due to the lack of political will of the government, their corruption and the lack of their implementation of these measures hinder the progress of this legislative measure.

Most Iraqi TSCs and KRG PSCs signed contain a reference to both domestic environmental law and international standards. These contracts, however, do not provide as to how the two standards would be reconciled in the event of a conflict.¹⁶⁷ The terms “*good oil field practices*”, “*reasonable and prudent operator*”¹⁶⁸ and or “*good production practices*”, are used in environmental standard clauses.¹⁶⁹ These terms can be interpreted as the standards and practices as per the degree of skill, prudence, and foresight that would be expected of IOCs’ operations, and adherence to the accepted standards of the international petroleum industry; this is inclusive of a clear set of environmental protection principles. It is worth pointing out that an objective meaning of these phrases could be found in the wider context of the contract concerned as the UK Supreme Court has pronounced in a recent case¹⁷⁰, which could be instructive, as follows:

“The court’s task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a phrasing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, given more or less weight to elements of the wider context in reaching its view as to that objective meaning.”¹⁷¹

See Peter D. Cameron, "Decommissioning of Oil & Gas Installations: The Legal & Contractual Issues" (AIPN Research Paper), available at <<https://www.aipn.org/mcvisitors.aspx?type=v>> accessed 26 April 2017.

¹⁶⁷Ismaila P Jalo, ‘The Rights To Explore For And Exploit Petroleum. What Manner Of Award Of Rights Is Best Suited For The Iraqi Petroleum Industry?’ (2013)16 CEPMLP Annual Review - CAR, available at: <<http://www.dundee.ac.uk/cepmlp/gateway/?news=32374>> accessed 27 April 2017.

¹⁶⁸ See case law in the UK. For example, in a recent case (*Scottish Power UK Plc v BP Exploration Operating Company Ltd*), [2015] EWHC 2658 (Comm). the Commercial Court (UK) decided a number of preliminary issues in the context of long-term agreements for the sale of natural gas, including the interpretation of the definition of 'reasonable and prudent operator'. The first-instance decision provides operators with guidance as to the issues that they should contemplate when agreeing to act as reasonable and prudent operators, not least because the definition in question in the case follows a common formulation. See <<http://www.internationallawoffice.com/Newsletters/Energy-Natural-Resources/United-Kingdom/Bracewell-Giuliani-UK-LLP/What-constitutes-a-reasonable-and-prudent-operator>> accessed 28 April 2017.

¹⁶⁹See William M. Laurin, ‘The Role of Emergency Preparedness in “Good Oilfield Practice” (2012): <<http://www.lexology.com/library/detail.aspx?g=58e26180-f4c2-4b36-b7ee-c503600d1552>> accessed 28 April 2017 ; Alastair Young, Darren Spalding, Aoife Keane, ‘What Constitutes a Reasonable and Prudent Operator?’, (2015), <<http://www.energylegalblog.com/blog/2015/11/13/what-constitutes-reasonable-and-prudent-operator>> accessed 28 April 2017.

¹⁷⁰ *Wood (Respondent) v. Capita Insurance Series Limited (Appellant)*, 29 March 2017 [2017] UKSC, 24, available at: <<https://www.supremecourt.uk/cases/uksc-2015-0212.html>> accessed 28 April 2017.

¹⁷¹ Ibid, para.10; See a commentary on the case: ‘Cara Dowling and Aimee Denholm, “Literal or Contextual? What is the Correct Approach to Contractual Interpretation?” OBLB, 26 April 2017, available at: <<https://www.law.ox.ac.uk/business-law-blog/blog/2017/04/literal-or-contextual-what-correct-approach-contractual>> accessed 28 April 2017.

The court also added that:

“There may often ... be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type. ...”¹⁷²

The environmental protection is of concern in relation to the petroleum industry regulations.¹⁷³ It is noteworthy that the contracts containing such provisions imply domestic environmental law, international environmental agreements and international industry standards as part of the wider context. There are lessons to be learnt from innovative good industry practices for environmental protection (including matters concerning climate change), decommissioning of oil and gas infrastructures from other countries.¹⁷⁴ The decommissioning issue according to the internationally agreed standard needs to be sorted out with IOCs,¹⁷⁵ otherwise the Iraqi government has to bear the burden at the expense of the development budget or the taxpayers’ money as has often happened to be the case elsewhere.¹⁷⁶

3.5.2. *Legal and Fiscal Stabilization clauses*

Stabilization clauses in oil contracts freeze the law that applies to the investment (oil production) at the time of signing the contracts.¹⁷⁷ Such clauses compromise the sovereignty of the state as well as imposing a “chilling effect”, according to the UN high commissioner for human rights¹⁷⁸; this discourages Iraqi government from passing a new legislation, for which they would have to pay lost revenues supposed to be accrued to IOCs. There could thus be a

¹⁷² Ibid. (*per* Lord Hodge).

¹⁷³ See generally, Jędrzej G. Frynas, *Beyond Corporate Social Responsibility: Oil Multinationals and Social Challenges* (CUP, 2009), Chapter 4.

¹⁷⁴ ‘Netherlands masterplan for decommissioning and re-use’ (EBN, 25 January 2017), available at: <<https://www.ebn.nl/publicatie/masterplan-decommissioning-re-use/?lang=en>> accessed 29 April 2017. See also generally, Theodore L Garrett (ed.), *The Environment and Climate Change Law Review* (Law Business Research Ltd., London, 2017), available at: <http://thelawreviews.co.uk/edition/1000995/the-environment-and-climate-change-law-review-edition-1> accessed 7 July 2017; Tina Hunter, ‘Legal Regulatory Framework for the Sustainable Extraction of Australian Offshore Petroleum Resources’ (PhD thesis, University of Bergen, 2010).

¹⁷⁵ ‘Environmental groups reject Shell’s Brent oil field decommissioning plans’ (10 April, 2017), available at: <<https://www.holyrood.com/articles/news/environmental-groups-reject-shells-brent-oil-field-decommissioning-plans>> accessed 29 April 2017.

¹⁷⁶ ‘Government (NZ) faces multi-million dollar bill to decommission oil rigs’ (29 March, 2017), see <<http://www.stuff.co.nz/taranaki-daily-news/news/90952440/government-faces-multimillion-dollar-bill-to-decommission-oil-rigs>> accessed 29 April 2017; Tim Haïdar, ‘Price woes have created a decommissioning maelstrom in the North Sea’ (14 July 2017) - “Of the 545 fixed installations in the North Sea, 80 per cent will have to be dismantled by 2030 at a cost of £47bn”, available at: <https://www.oilandgasiq.com/strategy-management-and-information/white-papers/decommissioning-oil-gas-north-sea?smile=1> accessed 20 July 2017.

¹⁷⁷ A F M Maniruzzaman, ‘The Pursuit of Stability in International Energy Investment Contracts’ (n 160)121-157; See also Lorenzo Cotula, ‘Reconciling regulatory stability and evolution of environmental standards in investment contracts: Towards a rethink of stabilization clauses’, (2008) 1(2) *Journal of World Energy Law and Business* 158-179; Mario Mansour and Carole Nakhle, ‘Fiscal Stabilization in Oil and Gas Contracts: Evidence and Implications’ (January 2016: Oxford Institute for Energy Studies), available at: <<https://www.oxfordenergy.org/publications/fiscal-stabilization-in-oil-and-gas-contracts-evidence-and-implications/>> accessed 29 April 2017.

¹⁷⁸ UN Economic and Social Council “Human Rights, Trade and Investment” – Report of the High Commissioner for Human Rights (2003) <[http://www.unhcr.ch/Huridocda/Huridoca.nsf/e06a5300f90fa0238025668700518ca4/9b2b4fed82c88ee2c1256d7b002e47da/\\$FILE/G0314847.pdf](http://www.unhcr.ch/Huridocda/Huridoca.nsf/e06a5300f90fa0238025668700518ca4/9b2b4fed82c88ee2c1256d7b002e47da/$FILE/G0314847.pdf)> accessed 29 April 2017

chilling effect on the Iraqi authority's passing of labour laws and environment laws or formulating economic policies which may somehow affect IOCs' interests. Stabilization clauses conflict with the state's obligation to progressively realize human rights for this reason,¹⁷⁹ hence its sustainable development. For instance, Law no.150¹⁸⁰ introduced in 1987, is still in force in Iraq. This law treats all public zone employees as civil servants segregating them from trade union membership; making it inconsistent with Iraq's constitution as well as Iraq's duty to protect human rights under international law. Occasionally, the stipulation of the clause may directly prevent expropriation by the host government or expressly permits expropriation but provide for adequate compensation in such an event. Such clauses throttle any future law that might be seen as a threat to the profitability of the investment. For example, the PSC model under the KRG contains sections involving the period of contract, cost and profit provisions, national interests, work requirements, and relinquishment.¹⁸¹ Both the contracting parties are tied to these for the life of the contract.

3.5.3. Clauses on access to water and other natural resources

Iraq is willing to give away any valuable natural resource under the terms of oil and gas contracts. Iraq does not have any clauses relating to usage of water and other natural resources during the exploration of oil and gas. However, a broader right given to the contractor may be found in a contract from the KRG which allows it to "freely use sand, water, electricity, and any other natural resources located inside or outside the Contract Area for the Petroleum Operations".¹⁸² This mirrors flaws in policy formulations to deal with the limitations. A prolongation of such a situation could lead to the situation such as the fast depletion of natural resources, which compromises the well-being of future generations, hence contrary to the sustainable development of natural resources. Large quantities of water and other natural resources taken from the system - thus straining the capacity and reducing the amount available for the inhabitants of Kurdistan - leads to investors' demands for natural resources being prioritized over the needs and rights of the populace. This is because of the legal regime established in the agreement. In the long run, the populace suffers from the deprivation of their authority to exercise rights over these vital resources.

¹⁷⁹ The application of this clause can best be illustrated by Alahdab contract, which has 15 % tax rate. If the new ITL applies to this contract and CNPC pays the extra 20% but invoke the stabilization clause, it could then ask the NOC for reimbursement:< <http://www.alraqeeb.org/english/listingdetails>> accessed 29 April 2017.

See also Audley Sheppard & Antony Crockett, 'Are Stabilization Clauses a Threat to Sustainable Development?' in Segger, Gehring and Newcombe (eds), *Sustainable Development in World Investment Law* (n 52) 333. See also K. Tienhaara, 'Environmental Aspects of Investor-State Contracts in the Upstream Oil & Gas Sector', Climate and Environmental Governance Network Working Paper No. 07 (2010), Regulatory Institutions Network, ANU; K. Tienhaara, 'Unilateral Commitments to Investment Protection: Does the Promise of Stability Restrict Environmental Policy Development?', (2006) 17 Yearbook of International Environmental Law, 139; L. Cotula, 'Stabilization Clauses and the Evolution of Environmental Standards in Foreign Investment Contracts', (2006) 17 Yearbook of International Environmental Law, 111.

¹⁸⁰The English version of this law is published in the Official Gazette of the Republic of Iraq (1987) 30 (17) 6-7.

¹⁸¹Concerning the cost provision, the PSC contract Model article (25.3) states: "from the First Production in the Contract Area, the CONTRACTOR shall at all times be entitled to recover all petroleum costs incurred under this Contract..." The profit provision article(26.2) states: "From first production and as and when Petroleum is being produced, the CONTRACTOR shall be entitled to take a percentage share of Profit Crude Oil and/or Profit Natural Gas....." these provisions are evident that the benefits of the IOCs are clearly stated.

¹⁸²Production Sharing Contract for TAQ TAQ and Kewa Chirmila areas in the Kurdistan region, Kurdistan regional govt. of Iraq-Genel energy International limited-ADDAX Petroleum International Limited, art 2.8 (Feb. 26, 2008) (Iraq)< http://www.krg.org/uploads/documents/02_Genel_Contract.pdf> accessed 5 October 2016.

3.5.4. Clauses on gas flaring

It is not surprising that Iraq vents and flares around 16 bcm a year (making it the second-largest gas flaring country in the world¹⁸³) with an estimated annual economic loss of about \$2.5 billion, and 55% of Iraq's gas production is flared due to lack of appropriate infrastructure facilities.¹⁸⁴ Gas flaring in oil producing countries is a major concern to the World Bank as it results in drastic climatic change by carbon emissions. Iraq has now joined the World Bank initiated Global Gas Flaring Reduction Partnership (GGFR)¹⁸⁵ which includes major oil producing nations and IOCs. The World Bank endeavours to halt wasteful gas flaring by urging nations and companies to cut down flaring by 30% in the next five years.¹⁸⁶ Although the implementation of this action is difficult, it has shown to make financial and developmental sense by turning the waste gas into profitable developmental investments. Iraq restricts flaring to cases of an emergency or for safety reasons (Art 10.5 of Iraq's TSC Model, Art.10.5 of Iraq's DPSC Model, and Art14.12 of Kurdistan region's PSC Model). To reduce flaring, Iraq signed an agreement with Royal Dutch Shell to create a novel joint venture, Basrah Gas Company, to incarcerate flared gas in Basrah Province.¹⁸⁷ This agreement is regarded as utilization of flared gas from Rumaila, West Qurna 1, and Zubair.¹⁸⁸ The agreement was signed and executed in September 2008.¹⁸⁹ The 25-year project, which costs \$17 billion, has a planned fabrication capacity of up to 2 Bcf per day. Under the agreement, the processed gas would go to the state-owned South Gas company for domestic use. The data (June 2013) reveals that the confinement

¹⁸³ 'Amid ongoing conflict, Iraq to Begin Snuffing Out Flares' (May 9, 2017), available at: <<http://www.worldbank.org/en/news/feature/2017/05/09/amid-ongoing-conflict-iraq-to-begin-snuffing-out-flares>> accessed 29 April 2017.

¹⁸⁴ See Iraq Oil & Gas Report (BMI Research, Q4 2016) (n.13).

¹⁸⁵ See <<http://www.worldbank.org/en/programs/gasflaringreduction#4>> accessed 1 May 2017.

¹⁸⁶ John Vidal, 'World Bank urges nations to end 'wasteful' gas flaring' <<http://www.theguardian.com/environment/2012/oct/24/world-bank-gas-flaring>> accessed 15 October 2016; See also 'The World Bank: Zero Routine Flaring by 2030': It is noted, "thousands of gas flares at oil production sites around the globe burn approximately 140 billion cubic meters of natural gas annually, causing more than 300 million tons of CO₂ to be emitted to the atmosphere. This "Zero Routine Flaring by 2030" initiative (the Initiative), introduced by the World Bank, brings together governments, oil companies, and development institutions who recognize the flaring situation described above is unsustainable from a resource management and environmental perspective, and who agree to cooperate to eliminate routine flaring no later than 2030". Available at: <<http://www.worldbank.org/en/programs/zero-routine-flaring-by-2030>> accessed 1 May 2017.

See also Samuel Iyiola Oni and Mark Abioye Oyewo, 'Gas Flaring, Transportation and Sustainable Energy Development in the Niger-Delta, Nigeria', (2011) 33(1) Journal of Human Ecology 21-28.

It has been estimated that "due to the lack of infrastructure facilities, 55% of current gas production is flared, leaving very little to feed the deprived national grid and industry" (World Bank, Global Gas Flaring Reduction (2010), and Ministry of Oil (2012-2013) data), noted in Lucy J. Al-Khatteeb, 'Natural Gas in the Republic of Iraq' (n. 5) 7; Alibek Nurbekov and Alexander Van de Putte, 'An ambitious yet realistic roadmap to virtually eliminate gas flaring and venting in Kazakhstan' (2014) 7(6) JWELB 499.

¹⁸⁷ Iraq launches a major step in energy supply and the world's largest flare reduction project. - Shell Global. <<http://www.shell.com/global/aboutshell/media/news-and-media-releases/2013/commencement-operations-basrah-gas-company-01052013.html>> accessed 3 May 2017.

John Lee 'Iraq has Lost Billions from Gas Flaring' *Iraq Business News* (16 February 2015): <<http://www.iraq-businessnews.com/2015/02/16/iraq-has-lost-billions-from-gas-flaring/>> accessed 5 May 2017

¹⁸⁸ See 'Basra Gas Company', *Iraq Business News* <<http://www.iraq-businessnews.com/tag/basra-gas-company/>> accessed 5 May 2017.

¹⁸⁹ The agreement was concluded through direct negotiation leading to establishing BGC as joint venture with participation interests of Iraqi South Gas Company, Shell and Mitsubishi of 51%, 44% and 5% respectively. See <http://www.alraqeeb.org/english/listingdetails>> accessed 6 May 2017.

of natural gas has increased from 250 million standard cubic feet per day (scf/d) to nearly 450 million scf/d.¹⁹⁰



Source: Bloomberg View

3.5.5. Clauses on liability, indemnity, and insurance¹⁹¹

The TSC issued by Iraq include provisions on liability that cover environmental damage. The IOCs are liable except in instances where fault can be attributed to the state (Art.24 of Iraqi TSC Model, Art.24 of Iraqi DPSC Model, and Art.35 of KRG PSC Model). Under the indemnity clauses, IOCs are obligated to compensate states for any costs resulted from a third-party liability suit. Terms like “*environmental damage*” and “*pollution*” are matters of contention if not clearly defined in the contract.¹⁹² Development arguments are concerned with who is liable for the environmental pollution and damage. As appropriate, such matters have to be included in the contracts so that the liable party can acknowledge the loss.¹⁹³ As the idea is well articulated in another context: “Oil pollution results in negative environmental, social and economic consequences. The effects of a particular oil spill may depend on many factors, including the volume and the type of oil spilled, the season and the location of the spill in relation to the nature and geography of the site.”¹⁹⁴ Matters of liability for environmental damage and pollution in the case of oil development in Iraq involve IOCs and the state. Therefore, contracts should specify which party is liable for any action that may result in environmental damage and or pollution. The essence of indemnity clauses is IOCs’ commitment to reimburse states for any costs resulted from a third-party liability suit. Liability/

¹⁹⁰ Ahmed Mousa Jiyad, ‘Oil, Sustainable Development and the Management of the Transformation in Iraq’ (n 93) accessed 4 May 2017.

¹⁹¹ See generally, the report: ‘Oil Regulation in 32 Jurisdictions worldwide’ (2011), available at <<http://www.cms-cmck.com/Hubbard.FileSystem/files/Publication/0cc80dee-6e32-4bd9-81b1-6646ccfa75f0/Presentation/PublicationAttachment/b2915789-bc85-4b0e-92f7-67977e9955c1/OR2013%20Iraq.pdf>> accessed 13 January 2017. This section heavily draws on this report.

¹⁹² Don Greenfield and Jay Todesco, ‘Fundamental Aspects of Oil and Gas Revisited’, (2004) 42(1) *Alberta Law*, 75.

¹⁹³ A F M Maniruzzaman, ‘Environment and Sustainable Energy Development in the Asia-Pacific Region’ (2003) 2 *I.E.L.T.R.*, 37, 44; see also, generally, Diane A Desierto, ‘Deciding International Investment Agreement Applicability: The Development Argument in Investment’, in Freya Baetens, (ed.), *Investment Law Within International Law: Integrationist Perspectives* (CUP, 2013).

¹⁹⁴ Inho Kim, ‘Ten years after the enactment of the Oil Pollution Act of 1990: a success or a failure’ (2002) 26(3) *Marine Policy*, 197.

Indemnity clauses require contractors to have insurance cover, thus taking care of pollution and or environmental damage.¹⁹⁵ In addition, many fatal oil pollution cases have resulted in various protocols and amendments. Oil pollution harm to collective ecological interests symbolizes a fundamental challenge to the liability framework. Environmental clearance in Iraq is necessary before any new petroleum operation can take place.¹⁹⁶ According to Art.33 of Iraqi law of environmental protection and improvement (Law no. 27 of 2009), any organization found to be polluting the environment will face sanctions which may vary from forced closure of the offending facility, fines up to 10 million Iraqi dinars, imprisonment or a combination of all three sanctions. In addition, the government must provide approval for the operator's unforeseen event for dealing with any crude oil spills, fires, accidents, and emergencies before conducting any drilling activities. For instance, Iraqi Drilling Company contracted with the Kuwait Energy and Dragon Oil to drill a well at Block 9 in Basra province. Iraqi drilling company has hired environmental insurance providers to the environmental baseline survey and environmental impact assessment. In addition, contractors have been hired to perform de-mining duties.¹⁹⁷ Under the KRG Law of Environmental Protection and Improvement (Law No. 8 of 2008), all organisations performing an activity that affects the environment must produce an environmental impact study and report it to the KRG Ministry of Environment prior to commencing such an activity.¹⁹⁸ The law has provisions to incentivize the development of ideas in environmental improvement;¹⁹⁹ there are also sanctions available to the Ministry when organizations breach the law including fines of up to 200 million Iraqi dinars, imprisonment, forced closure of the facility, or a combination of the three.²⁰⁰

¹⁹⁵ See in other jurisdictions for an example of such provision in Article 10.19 of the Bangladesh Model Production Sharing Contract (2012), available at <<http://www.ogel.org/legal-and-regulatory-detail.asp?key=9416>> accessed 6 May 2017; Brouse McDowell, 'Insurance Coverage for Emerging Environmental and Energy Risks' (February 5, 2016), available at: <<http://www.lexology.com/library/detail.aspx?g=489c1078-f4ec-40af-9b3b-6016c99875b6>> accessed 6 May 2017.

See Maniruzzaman, 'Environment and Sustainable Energy Development in the Asia-Pacific Region' (n 193).

¹⁹⁶This is under the Iraqi law of environmental protection and improvement (Law no. 27 of 2009), before any activity is carried out that may affect the environment, consent must be obtained from the Ministry of Environment. See 'Oil Regulation in 32 Jurisdictions worldwide' (2011), available at <<http://www.cms-cmck.com/Hubbard.FileSystem/files/Publication/0cc80dee-6e32-4bd9-81b1-6646ccfa75f0/Presentation/PublicationAttachment/b2915789-bc85-4b0e-92f7-67977e9955c1/OR2013%20Iraq.pdf>> accessed 6 May 2017.

¹⁹⁷John Lee, 'Drilling to Start at Block 9', *Iraq Business News* <<http://www.iraq-businessnews.com/2013/11/06/drilling-to-start-at-block-9/>> accessed 9 May 2017.

¹⁹⁸See Article 12.

¹⁹⁹ See Article 20.

²⁰⁰ See Articles 41 and 42

4. Transparency in Oil and Gas Contracts as an Ingredient of Sustainable Development

Iraq is an EITI member state.²⁰¹ Transparency in oil and gas contracts is a component of sustainable development in Iraq as its economy is based on its oil and gas development and its revenue management.²⁰² In Iraq (being an EITI-compliant country)²⁰³ oil, gas, and mining companies are expected to make public what they pay to the government or governmental authority. Also, governments are required to publish what they receive from companies.²⁰⁴ Thus, government officials, parliamentarians, civil society organisations and media agencies must take part in transparency of contracts.²⁰⁵ Investment from other nations is considered to contribute to the sustainable development of the host state. For this reason, attaining the best possible deal is important in the maximisation of the contributions made by the outside investors to sustainable development, *i.e.* environmental sustainability, and poverty eradication.²⁰⁶ Situations of investment contracts trigger concern to both investors and the host governments. For instance, investors may be concerned about competition issues due to the publicity of sensitive data, host governments may be concerned that future investors may invoke favourable treatment granted in past contracts so as to get better terms that the government may fail to offer.²⁰⁷ To solve these concerns, a specific confidentiality agreement

²⁰¹ See <<https://eiti.org/Iraq>> accessed 5 March 2017. Peter D. Cameron and Michael C. Stanley, *Oil, Gas, and Mining: A Sourcebook for Understanding the Extractive Industries* (Washington, DC: World Bank., 2017), available at: <https://openknowledge.worldbank.org/handle/10986/26130> License: CC BY 3.0 IGO, accessed 20 June 2017.

²⁰²Miles Litvinoff, 'Extractive companies publish worldwide payments under UK Law' (PWYP UK, January 3), 2017, available at: <<http://www.publishwhatyoupay.org/extractive-companies-publish-worldwide-payments-under-uk-law/>> accessed 10 May 2017.

According to Jiyad, "Iraq has done well by joining the EITI. Nevertheless, the impacts, effectiveness and sustainability of transparency are what still really matter", see his article: 'Transparency Governance in Iraq's Extractive Industry at a Crossroads' <<http://www.iraq-businessnews.com/wp-content/uploads/2014/10/Ahmed-Mousa-Jiyad-Transparency-Governance-in-Iraq-Oct2014.pdf>> accessed 16 October 2016. See also IEITI New Annual Report 2013: Again, Modest Progress but More Improvement Still Needed, available: <<http://www.iraq-businessnews.com/2016/02/15/ieiti-annual-report-2013-again-modest-progress-but-more-improvement-still-needed/>> accessed 10 May 2017.

²⁰³ See: <<http://www.adamsmithinternational.com/case-study/the-validation-of-iraqs-extractive-industries-transparency-initiative>> accessed 10 May 2017.

²⁰⁴ EITI, Revenue Watch Institute <<http://www.revenuwatch.org/issues/eiti>> accessed 5 March 2017.

To comply with the EITI requirement and for the third year in a row (2009,2010 and 2011) the National Secretariat of the Iraqi Extractive Industry Transparency Initiative-(IEITI) succeeded in releasing its annual report on time, reports available at <<http://ieiti.org.iq/>> accessed 1May 2017

For assessment of last report see Ahmed Mousa Jiyad, 'Iraq EITI Report 2011: Initial Assessment', January 2014, available at: <<http://www.iraq-businessnews.com/wp-content/uploads/2014/01/Ahmed-Mousa-Jiyad-Iraq-EITI-Report-2011-AMJ-Assessment.pdf>> accessed 1May 2017.

²⁰⁵ For this research, an interview was conducted in 2012 with the coordinator of *Iraqi Transparency Alliance for Extractive Industries* ,which represent group of several Iraqi civil societies, revealed insufficient role of civil society in preparing first report as, according to the coordinator observations, there were no broad participation of Iraqi civil society organizations in the initiative and civil society representatives in the council of stakeholders where chosen by government in selective basis not according to their experiences and skills.

²⁰⁶See 'United Nations Summit to adopt the post-2015 development agenda' - 25 Sep 2015 - 27 Sep 2015: New York, available at <<https://sustainabledevelopment.un.org/?page=view&nr=1064&type=13&menu=1300>> accessed 12March 2017; see also Lorenzo Cotula, 'Investment Contracts and Sustainable Development How to Make Contracts for Fairer and More Sustainable Natural Resource Investments' (2010) 20 *Natural resource issues*, available at: <<http://www.iied.org/pubs/display.php?o=17507IIED>> accessed 16 March 2017

²⁰⁷ Ibid. (Cotula) 85; L. Cotula and K. Tienhaara, 'Reconfiguring Investment Contracts to Promote Sustainable Development' in Karl P. Sauvant (ed.), *Yearbook on International Investment Law and Policy 2011 - 2012*, Oxford University Press, Oxford, p. 281, at p. 287; see also OECD (2004), 'Most-Favoured-Nation Treatment in International Investment Law', OECD Working Papers on International Investment (2004/02, OECD Publishing),

may be signed during the early stages of negotiation. This will protect the confidentiality of any financial, technical, and or any commercially valuable information exchanged during the negotiation process.²⁰⁸

The principal laws and regulations that make up the general legal framework regulating oil activities in Iraq include Law no. 80 of 1961,²⁰⁹ Law no. 97 of 1967,²¹⁰ Law no. 123 of 1967²¹¹ and resolution no. 864 of September 1980.²¹² Iraqi NOCs operate the oil and gas industry. There are no royalty provisions under the current Iraqi legislation or the Ministry of Oil's TSCs and DPSCs. However, the royalty provisions under the KRG's model PSC are set at 10% for export crude oil and natural gas; it is possible for individual PSCs to provide different terms. The corporate tax rate for an oil and gas company in Iraq is set at 35%; this rate also applies to subcontractors and supporting companies working in the oil and gas sector of Iraq.²¹³ Other applicable taxes include: capital gains at 15%; interest charged at the applicable income tax rate – 35% for oil and gas companies; stamp fees imposed on any contract – 0.2% of the contract value; and social security contribution for employers in the oil and gas sector – 25%.²¹⁴ In addition, there are specified depreciation rates for various assets of oil and gas companies. This includes electrical systems technology, high-pressure vessels, equipment, liquid gas tanks, bulldozers, and precision equipment.²¹⁵ Loss relief is present, which can offset against future profits for a period of five years. Nevertheless, no losses can be offset against previous income receipts. In the Kurdistan region, KRG's model PSC provides for a corporation tax rate, not above 40%, in line with the KRG's Law of Taxation.²¹⁶ KRG's Oil and Gas law provides for a number of other tax charges, which include surface tax; personal income tax; corporate

available at: <<http://dx.doi.org/10.1787/518757021651>> accessed 16 March 2017; Steffen Hindelang and Markus Krajewski (eds.), *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (Oxford University Press, 2016).

²⁰⁸Ibid. (Cotula) 86.

²⁰⁹Initiated the nationalisation of Iraq's petroleum.

²¹⁰Assigned areas of hydrocarbon development for INOC.

²¹¹Restructured INOC.

²¹²Created the Supreme Technical Board.

²¹³Article (1) of The Law of Income Taxation on Foreign Oil Companies Working in Iraq No. (19) of 2010 states: (An Income tax at a percentage of (35%) shall be put on the income earned in Iraq from the contracts signed with the Foreign Oil Companies, their subsidiaries, branches or offices and their subcontractors working in Iraq in the field of oil and gas extraction and production and the relevant industries.), available at: <http://www.oil.gov.iq/moo/feeds.php?lang=en&page_name=rules&id=250> accessed 4 March 2017.

See 'Oil Regulation in 32 Jurisdictions worldwide' (2011), available at: <<http://www.cms-cmck.com/Hubbard.FileSystem/files/Publication/0cc80dee-6e32-4bd9-81b1-6646ccfa75f0/Presentation/PublicationAttachment/b2915789-bc85-4b0e-92f7-67977e9955c1/OR2013%20Iraq.pdf>> accessed 16 March 2017.

²¹⁴ Iraq – top tax issues facing foreign investors. <<http://www.kpmg.com/global/en/issuesandinsights/articlespublications/mesa-tax-update/pages/iraq-top-tax-issues.aspx>> accessed 4 March 2017.

²¹⁵ Ibid.

²¹⁶ This is according to Law No. 5 of 1999. Even though, surprisingly, the IOC DNO in its Annual Report and Accounts of 2012 stated that, (Currently, deferred tax is not calculated for the activities in the Kurdistan region of Iraq, as there is uncertainty related to the tax laws of the Kurdistan region of Iraq and yet no well-established tax regime for this region. As such, it has not been possible to measure the corporate tax paid on behalf of the group, and it is the judgment of the management that until a well-established tax regime is in place, the group will not record a deferred tax liability...) DNO INTERNATIONAL ASA ANNUAL REPORT AND ACCOUNTS (2012) 26, available at: <http://hugin.info/36/R/1698196/581202.pdf> accessed 14 March 2014; see also: <<http://mnr.krg.org/index.php/en/the-ministry/contracts/new-psc>> accessed 16 March 2017.

And once again in its interim report 2013 provided that (.. No tax is applicable to the operations in the Kurdistan region of Iraq as there is currently no established tax regime...). DNO Interim Report 2013 Fourth Quarter and Full Year available at <<http://hugin.info/36/R/1763263/600508.pdf>> accessed 16 March 2017.

income tax; customs duties and any other similar taxes; windfall profits or additional profits tax; and any other tax or levy or charge expressly provided for in a petroleum contract.²¹⁷

5.0. Iraqi Investment Treaties and Other Partnership Agreements

Iraq is a party to ‘some form of investor protection agreement or memorandum of understanding with 35 bilateral partners and 9 multilateral groupings.’²¹⁸ Iraq is a signatory to multilateral agreements, consisting of (Facilitation) “*Taysir*” agreements with Arab nations²¹⁹ and to TIFA (2012) with the USA, as a strategy to increase trade and investment cooperation.²²⁰ In addition, Iraq is a member of the OPEC, but it has not been subject to the organisation’s production and export quota for a while (lately) for its much needed cash to fight Islamic State militants²²¹ until January 1, 2017 when it agreed in principle to curb output.²²²

Iraq collaborated with international organizations to come up with multilateral agreements. These agreements provide for financial contributions to general funds and global programs. The bilateral agreements aim to preserve the strategic, political, and economic stability of Iraq and IOCs’ partnership in the changing Iraq. Bilateral and multilateral agreements have been presented in the accord of friendship, partnership, and cooperation between various states and Iraq. This sets out a framework for the project concerning Iraq’s wider international economy.

Oil contracts ought not to be confused with or substituted for investment treaties, which are concluded between two or more states to regulate establishment and treatment of all

²¹⁷ See Article 40 of the oil and gas law of the KRG-Iraq, law No. 22 of 2007; see also generally, ‘Oil Regulation in 32 Jurisdictions Worldwide’ (IRAQ) (2011), available at <http://www.cms-cmck.com/Hubbard.FileSystem/files/Publication/0cc80dee-6e32-4bd9-81b1-6646ccfa75f0/Presentation/PublicationAttachment/b2915789-bc85-4b0e-92f7-67977e9955c1/OR2013%20Iraq.pdf> accessed 16 March 2017.

²¹⁸ U.S. Department of State: ‘2016 Investment Climate Statements – IRAQ’ at: <http://www.state.gov/e/eb/rls/othr/ics/2016/nea/254441.htm> accessed 23 March 2017.

²¹⁹ Richard Weitz, ‘Iraqi Economic Challenges: Beyond Hydrocarbons’ <http://www.sldinfo.com/iraqi-economic-challenges-beyond-hydrocarbons> accessed 23 March 2017.

²²⁰ Office of the United State Trade Representative: ‘United States of America and the Republic of Iraq Announce Progress on Entry into Force of Trade and Investment Framework Agreement’ <http://www.ustr.gov/about-us/press-office/press-releases/2013/march/US-Iraq-TIFA-progress> accessed 23 March 2017.

²²¹ It was reported: “Iraq’s ambition of reaching a 12 million bpd production target may prove to be a sticking point during negotiation with the OPEC if Iraq is to become part of the OPEC production quota system. Iraq is also a member of the following organisations, which may affect regulatory policy: Arab League, Arab Monetary Fund, Council of Arab Economic Unity, International Atomic Energy Agency, International Monetary Fund, and Organisation of Arab Petroleum Exporting Countries.” See *Oil Regulation in 32 Jurisdictions Worldwide* (IRAQ) (2011), available at <http://www.cms-cmck.com/Hubbard.FileSystem/files/Publication/0cc80dee-6e32-4bd9-81b1-6646ccfa75f0/Presentation/PublicationAttachment/b2915789-bc85-4b0e-92f7-67977e9955c1/OR2013%20Iraq.pdf> accessed 25 March 2017.

But see the latest in Brian Wingfield, Samuel Dodge and Hayley Warren, ‘Oil Producers Promised Output Cuts. Here’s the Reality’ (February 14, 2017), available at: <https://www.bloomberg.com/graphics/2017-opec-production-targets/?terminal=true> accessed 25 March 2017.

²²² ‘Iraq’s oil exports fall so far in April amid port work, OPEC cut’ (20 April 2017), Reuters: http://www.dailymail.co.uk/wires/reuters/article-4429332/Iraqs-oil-exports-fall-far-April-amid-port-work-OPEC-cut.html?ITO=1490&ns_mchannel=rss&ns_campaign=1490 accessed 16 March 2017.

But see Roslan Khasawneh, ‘Iraq’s fuel oil exports soar despite OPEC supply cut’ (3 May, 2017): “Iraqi fuel oil exports have soared since January despite a reduction in the country’s crude production in line with OPEC supply cuts, industry sources said, in what could be a way to boost output of refined products and maintain oil revenues.” <http://uk.reuters.com/article/uk-iraq-opec-fueloil-idUKKBN17Z0NM> accessed 16 March 2017.

investments by nationals of one state in the territory of the other state(s).²²³ BITs aim to preserve the strategic, political, and economic stability of the partnership in the changing Middle East region and promote governance of foreign investment.²²⁴ The main objectives of this Partnership (for example between Iraq and Italy), developed to support priorities outlined in the Government of Iraq's National Development Strategy and the International Compact with Iraq are²²⁵:

- To provide an appropriate framework for political dialogue
- Respect for democratic principles, the rule of law and human rights
- To promote trade and investment, and harmonious economic relations in order to foster sustainable economic development
- To provide a basis for legislative, economic, social, financial and cultural cooperation

In addition, international law binds all the participating countries, regardless of the ruling governments. The intent is to ensure that there is proper exploitation of the resources so as to achieve sustainable development.²²⁶ The law mainly entails keeping a close check on the adherence to human rights as well as eco-friendly use of the environment. To realize sustainable development, there are three pillars, as mentioned earlier, that have to work together harmoniously. They are economic development, social development and environmental protection, which mutually reinforce each other in an integrated manner (not in the sense of subordination of one to the other though).²²⁷ When the corresponding investment

²²³Cotula (n 206) 4; David Collins, 'Investment contracts are not a substitute for investment treaties' (No. 193 - FDI Perspectives: 13 February 2017), available at <<http://ccsi.columbia.edu/publications/columbia-fdi-perspectives/>> accessed 26 March 2017.

²²⁴BITs between Iraq and other countries include Japan, Kuwait. These agreements have the desire to strengthen the ties of economic co-operation between two countries on the achievement of best conditions for flourishing economic condition for each country.

²²⁵ See Quadro Paese "Stream" 2013-2015, available at: <[²²⁶ For some outlines of the history of international investment law, see M Sornarajah, *The International Law on Foreign Investment* \(3rd edn. 2010\); Andrew Newcombe and L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* \(Kluwer Law International 2009\)19; Jose E. Alvarez, Karl P. Sauvant, Kamil Girard Ahmed, and Gabriela P. Vizcamno, *The Evolving International Investment Regime. Expectations, Realities, Options* \(Oxford University Press 2011\).](http://r.search.yahoo.com/_ylt=A7x9Uk_hEu9Y32QAI7x3Bwx.;_ylu=X3oDMTByaW11dnNvBGNvbG8DaXIyBHBvcwMxBHZ0aWQDBHNIYwNzcg/RV=2/RE=1492091746/RO=10/RU=http%3a%2f%2fwww.cooperazioneeallosviluppo.esteri.it%2fdgcs%2fDocumentazione%2fReport%2fPaesiStream%2f2013-10-08_IRAQ.pdf/RK=0/RS=ftJHxyf2voBhOelPIR4FrQDHHxA-> accessed 26 March 2017.</p></div><div data-bbox=)

²²⁷See Åsa Romson, 'Environmental Policy Space and International Investment Law' (Doctoral thesis, Stockholm University 2012) 335, available at:

<<http://su.diva-portal.org/smash/record.jsf?pid=diva2%3A510323&dswid=-7036>> accessed 26 March 2017; Lise Johnson and Lisa Sachs, 'International Investment Agreements, 2011-2012: A Review of Trends and New Approaches', in 2012/2013 The Yearbook on International Investment Law and Policy (Chapter 3), 219.

See also on recent BITs practice in a recent OECD study by Kathryn Gordon, Joachim Pohl, Marie Bouchard, 'Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact Finding Survey' (July 22, 2014) 10 OECD Working Papers on International Investment (OECD Publishing 2014), available at: <<http://dx.doi.org/10.1787/5jz0xvngx1zlt-en>>; Roland Kläger, 'Fair and equitable treatment' and Sustainable development, in Segger, Gehring and Newcombe (eds.), (n 52) chapter 11; Segger, Marie-Claire & Kent, Avidan, 'Promoting sustainable investment through international law', in Segger, Gehring and Newcombe (eds.), (n 52) 771-792; J Anthony Van Duzer, Penelope Simons and Graham Mayeda, *Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Country Negotiators* (Commonwealth Secretariat, 2013); *IISD Model International Agreement on Investment for Sustainable Development - Negotiators' Handbook* (2005), available at <<http://www.iisd.org/publications/iisd-model-international-agreement-investment-sustainable-development-negotiators>> accessed 27 March 2017; Howard Mann, Konrad von Moltke, Luke Eric Peterson and Aaron Cosbey, 'IISD Model International Agreement on Investment for

parties work together as a team and embrace the three pillars, sustainable development is realizable.²²⁸

Thus such provisions on the environmental protection, anti-corruption and labor rights are thus found in the model BITs of Canada, Finland, Japan, Mexico, Netherlands and the United States.²²⁹

Iraq has signed a number of BITs with various states namely, Armenia, France, Germany, Japan, Kuwait, Morocco and the Syrian Arab Republic.²³⁰ Being a major oil and gas producing country, Iraq has entered into BITs with the home countries of the oil corporations in the oil business in Iraq. It lately concluded BITs with Jordan and Kuwait in 2013.²³¹ At its reconstruction stage followed by many years of conflicts and devastations of war, Iraq will enormously benefit from such BITs as it needs extensive investments in its infrastructure

Sustainable Development' (2005), available at <<http://www.iisd.org/publications/iisd-model-international-agreement-investment-sustainable-development>> accessed 27 March 2017; Konard von Moltke and Howard Mann, 'Towards A Southern Agenda on International Investment: Discussion Paper on the Role of International Investment Agreements' (2004), available at: <<http://www.iisd.org/publications/towards-southern-agenda-international-investment-discussion-paper-role-international>> accessed 28 March 2017; Hugh Wilkins, 'The Integration of the Pillars of Sustainable Development: A Work in Progress', (2008) 4(2) JSDLP, 163; Steffen Hindelang and Markus Krajewski (eds.), *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (Oxford University Press, 2016).

²²⁸ Ibid, Wilkins,163.

²²⁹ The United Nations Conference on Trade and Development. "Full list of Bilateral Investment Agreements concluded, 1 June 2013, available at <http://unctad.org/Sections/dite_pccb/docs/bits_iraq.pdf> accessed 17 September 2014. Many of the more recent treaties were not available in the database and therefore could not be included. Model BITs were obtained from the governments or found online see also "Sustainable Development and Mega-regionals included. See also Sustainable Development and Megal-regionals: the TTIP and TPP" in Rafael Leal-Arcas, Andrew Filis, and Ehab S. Abu Gos, *International Energy Governance: Selected Legal Issues* (Edward Elgar, 2014) (Chapter 9) 489; Chester Brown (ed), *Commentaries on Selected Model Investment Treaties* (Oxford University Press, 2013); Roel Nieuwenkamp and Kimmo Sinivuori, 'The road to responsible investment treaties' (November 10, 2014) 134 Columbia FDI Perspectives available at <<http://ccsi.columbia.edu/publications/columbia-fdi-perspectives/>> accessed 29 March 2017.

See also Government of India, Ministry of Finance, 'Model Text for the Indian Bilateral Investment Treaty' http://finmin.nic.in/the_ministry/dept_eco_affairs/investment_division/ModelBIT_Annex.pdf accessed 25 October 2016 (Final Model BIT).

available at <<https://mygov.in/group-issue/draft-indian-model-bilateral-investment-treaty-text/>> accessed 29 March 2017.

²³⁰ United Nations Conference on Trade and Development. "Full list of Bilateral Investment Agreements concluded, available at <<http://unctad.org>. http://unctad.org/Sections/dite_pccb/docs/bits_iraq.pdf>

²³¹ U.S. Department of State - 2016 Investment Climate Statements - IRAQ at: <<http://www.state.gov/e/eb/rls/othr/ics/2016/nea/254441.htm>> accessed 29 March 2017.

The current state of affairs has been reviewed by Noor Kadhim in her blog 'Iraq May Have Energy, But Can It Meet Agility with Resilience?' (April 12, 2017),

available at: <<http://kluwerarbitrationblog.com/2017/04/12/booked-iraq-energy-forum-2017/>> (accessed 30 March 2017):

"As far as I am aware, there are two bilateral investment treaties in force between third states and Iraq: with Kuwait and Japan. Possibly also Jordan; the status is unclear..... In relation to the German BIT, upon enquiry, the German Ministry of Justice earlier this week confirmed that "*the treaty did not come into force after the responsibilities for all trade and investment agreements were taken over by the European Commission*". The government communication also confirmed that while Germany was re-authorized to ratify the treaty by the European Commission (as the negotiations pre-dated the Lisbon treaty), the ball was now in Iraq's court to decide whether certain amended clauses (which needed to be brought in line with EU requirements) were acceptable. The same is likely to be true of the other BITs that Iraq has signed with European countries, including France, Italy, Belgium and others, according to the Chairman of Iraq's National Investment Commission (NIC), who is the delegate of the Iraqi cabinet in this area. We shall have to wait and see."

rebuilding and exploitation of the full potential of its oil and gas resources for its economic progress in the days ahead. These BITs can provide an effective vehicle for that.

Attaining sustainable development is an international concern. Therefore, the Organisation for Economic Co-operation and Development (OECD) guidelines on MNEs²³² address issues as they offer standards and principles for the success of international investment agreements.²³³ Iraq being a capital importing country *vis-à-vis* the capital exporting OECD countries, this can inspire sustainable development principles for Iraqi BITs which should ensure that the oil investment protects the environment and human rights.²³⁴ Thus, Iraq, being a major oil producing country, might like to weigh the prospect of including some such actionable clauses in its new treaties so as to protect its public interests as per the OECD guidelines. These guidelines protect not only Iraq's interests but also other nations' that may want to invest in its oil sector. This will, therefore, be a win-win scenario. It is noteworthy that the recent EU-Canada Free Trade Agreement (CETA) gives all EU investors an equal ground as well as protects their investment. In addition, the CETA protects the rights of EU and Canada in pursuing transparent legal issues. Drawing on this as a lesson, Iraq might like to clearly state in its BITs with the EU or any other country that certain regulatory acts do not constitute indirect expropriation so as to avoid legal problems with EU investors.²³⁵ The good side of the CETA is that it upholds the health, safety and environmental protection – the aspects of the sustainable development concept.²³⁶ Similar trends are also found elsewhere in respect of

²³² OECD Guidelines for Multinational Enterprises (2011), available at: <http://mneguidelines.oecd.org/text/>> And 'OECD Guidelines for Multinational Enterprises - Responsible Business Conduct Matters' available at <<http://mneguidelines.oecd.org/responsible-business-conduct-matters.htm>> accessed 30 March 2017.

²³³Nieuwenkamp and Sinivuori(n 229).

²³⁴Ibid ; see also Patrick Dumberry and Gabrielle Dumas-Aubin, 'A Few Pragmatic Observations on How BITs should be Modified to Incorporate Human Rights Obligations' (2014) 11(1) Transnational Dispute Management, available at: <www.transnational-dispute-management.com> accessed 30 March 2017; Kathryn Gordon, Joachim Pohl, 'Environmental Concerns in International Investment Agreements: A Survey' (OECD Publishing 2011)1 OECD Working Papers on International Investment < <http://dx.doi.org/10.1787/5kg9mq7scrjh-en>> accessed 30March 2017.

²³⁵ See also the relevant provisions in The EU-Singapore FTA (EUSFTA), available at: <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=961>> accessed 30 March 2017.

The agreement contains appropriate guidance on what constitutes "indirect expropriation":

- Legitimate public policy measures taken to protect health, safety or the environment do not constitute expropriation, except in the rare cases where they are manifestly excessive in light of their objective.
- Indirect expropriation can only occur when the investor is substantially deprived of the fundamental attributes of property such as the right to use, enjoy and dispose of its investment;
- A detailed case-by-case analysis is introduced to determine whether an indirect expropriation has taken place;
- The sole fact that a measure increases costs for investors does not give rise to a finding of expropriation.

The issuance of compulsory licences in accordance with WTO provisions guaranteeing access to medicines cannot be considered an expropriation.

Relevant EUSFTA provisions: Annex 9-A Expropriation and Annex 9-C Expropriation and intellectual property rights.

See generally, W Michael Reisman & Robert D Sloane, 'Indirect Expropriation and Its Valuation in the BIT Generation', (2004) 74 The British Yearbook of International Law, 115; Vera Korzun, 'The Right to Regulate in Investor-State Arbitration: Slicing and Dicing Regulatory Carve-Outs' (2017) 50 (2) Vanderbilt Journal of Transnational Law, 355, also available at SSRN: <<https://ssrn.com/abstract=2950939>> accessed 1 April 2017.

²³⁶European, Commission. Investment Provisions In The EU-Canada Free Trade Agreement (CETA), available at:<http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf> accessed 1 April 2017. The recent Model Text for the Indian Bilateral Investment Treaty (2015) provides in Art. 12 for some specific sustainable development principles relating to the environment, conservation of natural resources, protection of human rights, etc. The Indian Model BIT can be found at this link: <<https://mygov.in/group-issue/draft-indian-model-bilateral-investment-treaty-text/>> accessed in 4 April 2017.

international investment law from which Iraq can learn a lesson for its future strategy in negotiating with capital exporting countries.²³⁷

As expected in international investment law, the government of Iraq is required to develop a domestic policy that includes regulation, fiscal policy and law enforcement.²³⁸ It meant to create appropriate incentives so that the oil producing firms and the others in any agreement contribute to sustainable development and responsible business conduct. It is also meant to discourage business actions that violate the regulations. The policies are transparent and efficient in achieving the stated goals so as to avoid any disruption of the economic activity.²³⁹ In its implementation, it should be entirely free from human rights violation or environmental damage.²⁴⁰ The Iraqi government has been trying to adhere to the policy in order to achieve sustainable development of its oil and gas. Iraq has participated in international cooperation efforts aimed at developing common regional and global goals on issues relevant to the sustainable development. This includes the UN agenda directly related to the protection of the environment and human rights.²⁴¹ To protect the environment from damage, international investment law increasingly favours a provision for environment providing the right to deny permits to any corporations whose operations may cause pollution of the environment in one way or the other or where there is lack of transparency.²⁴² In line with this, the government of Iraq could establish a domestic tribunal with appropriately qualified judges in the fields concerned to regulate responsible business conduct and the environment in Iraq itself.²⁴³ This would prove a boon for the safeguard of sustainable development efforts of Iraq in the energy sector.²⁴⁴ Lately, Iraq has signed and ratified the ICSID convention²⁴⁵ and also signed the UN

²³⁷See UNCTAD - Investment Policy Monitor No. 17 (March 16, 2017), available at: <<http://investmentpolicyhub.unctad.org/Publications/Details/170>> accessed 4 April 2017.

See also UNCTAD – IIA Issues Notes: Taking Stock of IIA Reform (no.1, March 2016), available at: <<http://investmentpolicyhub.unctad.org/Publications/Details/142>> accessed 4 April 2017.

²³⁸Sornarajah (n 226); Newcomb and Paradell (n 226) 8.

²³⁹IPIECA advances good practice on human rights<<http://www.ipieca.org/news/20121130/ipieca-advances-good-practice-human-rights>> accessed 11 April 2017.

²⁴⁰For a discussion of the major environmental instruments posted in the UN site, see United Nations Environment Programme (UNEP) - Home page < <http://www.unep.org>> accessed 11 April 2017.

²⁴¹Ibid.

²⁴²See Kathryn Gordon, ‘International Investment Law: Understanding Concepts and Tracking Innovations’ (OECD Publishing, 2008). 135-240; Governments will want to be mindful of the need to craft treaties that not only advance their objectives in relation to SD/RBC but that also include ISDS provisions that provide appropriate interpretive guidance to those charged with interpreting and applying the treaties.” Gordon, Pohl and Bouchard (n.227) 6.

²⁴³ See generally, George (Rock) Pring & Catherine (Kitty) Pring, *Environmental Courts & Tribunals: A Guide for Policy Makers* (UNEP, 2016); George (Rock) Pring, & Catherine (Kitty) Pring, ‘Twenty-first century environmental dispute resolution – is there an ‘ECT’ in your future?’ (2015)33(1) *Journal of Energy & Natural Resources Law* 10-33, available at: <<http://www.tandfonline.com/toc/rnrl20/33/1#.VQf5JI4syZN>> accessed 17 March 2017; George (Rock) Pring, and Catherine (Kitty) Pring, ‘Greening Justice: Creating and Improving Environmental Courts and Tribunals’ (The Access Initiative/World Resources Institute 2009), available at: <www.law.du.edu/ectstudy>accessed 17 March 2017; Gitanjali Nain Gill, ‘Environmental Justice in India: The National Green Tribunal and Expert Members’, (2016) 5 *Transnational Environmental Law*, 175, available at: <http://journals.cambridge.org/action/displayAbstract?aid=10230135&next=true&volumeId=5&issueId=01> accessed 30 November 2016; Brian J. Preston, ‘Characteristics of Successful Environmental Courts and Tribunals’ (2014) 26 (3) *J Environmental Law*, 365.

²⁴⁴See George (Rock) Pring and Catherine (Kitty) Pring, ‘Rights of Access to Information, Public Participation, and Access to Justice – What Can Environmental Courts and Tribunals Contribute?’, available at: <http://www.law.du.edu/index.php/ect-study>

²⁴⁵The ICSID Convention came into force for Iraq on December 17, 2015. See <http://www.iraq-businessnews.com/2015/11/23/iraq-signs-convention-on-settlement-of-investment-disputes/>, accessed 27 July

Convention on Transparency in Treaty-based Investor-State Arbitration,²⁴⁶ which is a good news for IOCs and a boost to their confidence building.

In compliance with the investment treaty, Iraq would have to communicate directly to the involved firms about their role in supporting sustainable development and responsible business conduct.²⁴⁷ To improve the effectiveness of the treaty, the Iraqi government would need to clarify its positions and expectations regarding sustainable development and perhaps follow the OECD initiated responsible business conduct (RBC) approaches as regards the investors from OECD countries at least.²⁴⁸ This should be done using instruments of RBC at the national and international levels.²⁴⁹ The labour law and principles in the prospective BITs should be directly related to the internationally related labour rights which advocate the right of association for all the employees.²⁵⁰ It should also offer the employees the right to organize and bargain collectively as is prescribed in the UN Guiding Principles on Business and Human Rights.²⁵¹ This can be enforced through formation of labour unions to bargain for the rights of the employees. Iraq is still far away from it as its parliament discarded the draft trade union law when the new Iraqi labour law was adopted in 2015 to replace its old labour Law No.71 of 1987. The new Iraqi labour law (2016) prohibits the use of any form of forced or compulsory labour.²⁵² To further implement the law, it clearly dictates the minimum age for employment

2016, also <https://icsid.worldbank.org/apps/ICSIDWEB/Pages/News.aspx?CID=172&ListID=74f1e8b5-96d0-4f0a-8f0c-2f3a92d84773&variation=en_us> accessed 12 April 2017.

²⁴⁶ UNCTAD Press Release (13 February 2017), available at: <<http://www.unis.unvienna.org/unis/en/pressrels/2017/unisl241.html>> accessed 12 April 2017.

²⁴⁷ Nieuwenkamp and Sinivuori (n 229) accessed 13 April 2017; Karl P. Sauvant, 'The Challenge: How can foreign direct investment fulfil its development potential?' in *Development Co-operation Report 2016 – The Sustainable Development Goals as Business Opportunities* (OECD, 2016), available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2814143> accessed 15 April 2017.

Mike Scott, 'Business Strategy Integral to SDG Success' (Ethical Corporation, January 2017), available at: <<https://business-humanrights.org/en/experts-from-johnson-johnson-ing-walgreens-boots-alliance-advise-on-how-to-integrate-un-sustainable-development-goals-into-business-strategy>> accessed 15 April 2017.

²⁴⁸ Ibid. Lessons can be learnt from the OECD initiated Responsible Business Conduct. Chapter 7 of the Policy Framework for Investment addresses promoting responsible business conduct:

<<http://www.oecd.org/investment/toolkit/policyareas/responsiblebusinessconduct/>> accessed 16 April 2017.

²⁴⁹ Gordon, Pohl and Bouchard (n227).

²⁵⁰ See the new Iraqi Labour Law no.37 of 2015 (entered into force on 7 February 2016). It has been observed that "The new law aims to organise legally and constitutionally the industrial relationship between the state, business and workers – but only for workers in the private and cooperative sectors. *The law denies legal trade union representation and membership to millions of blue collar public sector workers, including those employed by the state in the oil and gas, port and railway, public road transportation and communication industries and state municipalities.* The law also denies trade union pluralism: Iraqi state recognises only one national trade union centre, only one teachers' union and only one union for each sector. Pluralism is prohibited, despite being guaranteed by Iraq's 2005 democratic constitution." [Emphasis added]. See Abdullah Muhsin, 'Iraq's new labour law: positive but 'clipped'', available at:

<http://strongerunions.org/2015/08/19/iraqs-new-labour-law-positive-but-clipped/> accessed 10 June 2017; see also Hayder Jawad & Mustafa Muayad, 'An Insight into the New Iraqi Labour Law', available at: <http://www.tamimi.com/en/magazine/law-update/section-14/april-9/an-insight-into-the-new-iraqi-labour-law.html> accessed 10 June 2017.

Kathryn Gordon, *International Investment Law: Understanding Concepts and Tracking Innovations*, OECD Publishing, 2008. See a recent example along the lines: Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria (3 December, 2016), Art. 15.

²⁵¹ Available here: <<https://www.business-humanrights.org/en/un-guiding-principles>> accessed 17 April 2017.

²⁵² Ibid. See the new Iraqi Labour Law No.37 of 2015 (entered into force on 7 February 2016).

See on the international scenario: Rafael Tamayo-Álvarez, Maria Alejandra Gonzalez-Perez and Juan David Rodriguez-Rios, 'How to enhance labor provisions in IIAs', *Columbia FDI Perspectives* (No. 124 June 23, 2014), available at: <<http://ccsi.columbia.edu/publications/columbia-fdi-perspectives/>> accessed 18 April 2017.

and prohibits child labour. Acceptable conditions of work in the workplace are clearly defined in the new law. This should ensure that there is a given minimum wage, the maximum number of working hours, prohibition of discrimination or harassment (direct or indirect) and occupational safety and health for the workers. Iraq needs to ensure that businesses comply with its improved new labour law in order for it to achieve its sustainable development.²⁵³ Businesses should be aware of their responsibilities in this respect.²⁵⁴

It is regrettable that Iraq has not yet enacted the federal investment law in the oil and gas sector, *i.e.* the federal hydrocarbon law. Instead, officials in Iraq have been working on a separate bill that is intended to regulate investment in the sector. The negotiations on this investment law have, however, been hampered by disputes as to whether the regions or the central government will have the authority to sign contracts. With time, Iraqi officials and politicians should come to some positive understanding of the country's needs for economic development and its sustainability and learn from the other countries' BITs and FTAs (especially the modern ones)²⁵⁵ and embrace the provisions on sustainable development on oil and gas which form Iraq's primary sector, thought to offer the most attractive opportunities for foreign investment in Iraq on mutual rights and obligations of Iraq and foreign investors.

Part IV: Political Economy of Sustainable Development of Iraqi Oil and Gas

In order to understand the prospect of sustainable development of oil and gas in Iraq it is necessary to appreciate various political and economic factors and forces that may impact and shape the law and policy concerning the matter. Iraq is a war-ravaged country and is constantly exposed to various conflicts of religious sects, ISIS / Da'esh and other political feuds. Along with political factors there has been the confluence of other ancillary ones such as economic, social, security, human rights and environmental factors and legal challenges that impact the issue of sustainable development of Iraq's oil industry. It cannot be ignored that political and

Vid Prislán and Ruben Zandvliet, 'Labor Provisions in International Investment Agreements: Prospects for Sustainable Development' (2012/2013) Yearbook of International Investment Law and Policy, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2171716> accessed 18 April 2017; Gordon, Pohl and Bouchard (n 227).

²⁵³ See Vid Prislán and Ruben Zandvliet, 'Labor Provisions in International Investment Agreements: Prospects for Sustainable Development', available at: <<http://ssrn.com/abstract=2171716>> accessed 19 April 2017.

²⁵⁴ ILO Tripartite declaration of principles concerning multinational enterprises and social policy (MNE Declaration) - 5th Edition (March 2017), available at: <http://www.ilo.org/empent/Publications/WCMS_094386/lang--en/index.htm> accessed 19 April 2017.

²⁵⁵ For example, **1. Affirmation of the regulatory power of host state:** Morocco-Nigeria BIT 2016 article 23; Ex: USA- Chile FTA 2003 article 10.18(1); Malaysia-New Zealand FTA 2009 art.10.15; **2. Carve out clauses and general exemptions: for environmental measures:** Morocco-Nigeria BIT 2016 articles 13 & 14; Ex: Canada – Peru BIT article 10; Russia – Sweden 1995 BIT art. 3(3); **3. Safeguarding or enhancing the implementation of international environmental agreements:** Morocco-Nigeria BIT 2016 articles 13 & 14; Ex: Peru – US FTA 2006 Annex 18.2; CARIFORUM – EU FTA 2008 art. 72(c); **4. Non-lowering of environmental standards:** Morocco-Nigeria BIT 2016 article 13; Ex: NAFTA article 1114 (2); Japan – Switzerland FTA 2009, article 101; **5. Increased environmental protection and diligence in enforcing environmental law (E+);** Morocco-Nigeria BIT 2016 article 13; Ex: Peru – US FTA 2006 Annex 18.2; Canada-Peru FTA 2008 environmental side agreement art.2.1; **6. Enforcement mechanisms of environmental IIA obligations:** Morocco-Nigeria BIT 2016 article 13; Ex: NAAEC art. 22(1); CAFTA 2004 (see note 798); **7. Enhanced environmental cooperation:** Ex: Agreement on Environment, side agreement to Canada – Peru FTA 2008; Environmental cooperation agreement within the trans-pacific strategic partnership (New Zealand, Brunei, Singapore and Chile); **Investment, labour and human rights:** Morocco-Nigeria BIT 2016 articles 15. See Romson (n 227) 304. For more examples, see: Gordon, Pohl and Bouchard (n 227).

economic factors and forces impact the law.²⁵⁶ Viewed from this angle thus the political economy of sustainable development needs to be appreciated in order to assess the challenges and prospects for a way forward for decision makers and legislators.

6.0. General Outlook of Iraqi Oil and Gas

Over the last quarter of a century, the economic involvement of Iraq in the world marketplace has declined dramatically.²⁵⁷ These fluctuations were brought about by the damage of the oil and gas infrastructure during the Iran-Iraq war of the 1980s, followed by a multinational military response and multilateral economic sanctions because of the 1990 invasion of Kuwait.²⁵⁸

The task of building Iraq by the Coalition Provisional Authority after the 2003 US invasion required the rebuilding of its infrastructure, economic, and social institutions by the privatization of Iraq's economy and allowing foreign investment. According to the Coalition Provisional Authority order number 39,²⁵⁹ under the title foreign investment, the economy of Iraq changed after 2003 allowing free-flow of foreign investment without any restrictions. These policies are in accord with the current international law principles on foreign direct investment as is reflected in the federal Iraqi Investment Law of 2006 (as amended) the purpose of which is to attract foreign investment to assist Iraq's development. Years of war as well as excesses of the Saddam Hussein regime, Iraq's oil potential has been largely unexplored.²⁶⁰ There is a strong alignment connecting the requirements of the global market for growth in Iraq's production, and the needs of Iraq for revenue to build the base of a modern, prosperous economy.²⁶¹

Iraqi oil and gas production is expected to increase due to the government's ever-increasing contracting with international oil companies²⁶² and economic pressure. The predicted production trend is as shown in the graphs below for the period 2014-2025.

²⁵⁶ See generally, David Kennedy, 'Law and the Political Economy of the World', (2013) 26 *Leiden Journal of International Law*, p.7; Mark J. Roe and Massimiliano Vatiello, 'Corporate Governance and Its Political Economy' (April 2, 2015), available at <<http://ssrn.com/abstract=2588760>> accessed 2 May 2017; Alberta Fabbicotti (ed.), *The Political Economy of International Law: A European Perspective* (Edward Elgar, 2016); Paul A. Haslam and Pablo Heidrich (eds.), *The Political Economy of Natural Resources and Development: From neoliberalism to resource nationalism* (Routledge, 2016).

²⁵⁷ Vivian C Jones, 'Iraq's Trade with the World: Data and Analysis', available at: <<http://fas.org/man/crs/RL32025.pdf>> accessed 2 May 2017; Gawdat Bahgat, *Energy Security An Interdisciplinary Approach*. (Wiley, 2011)177.

²⁵⁸ Anoushiravan Ehteshami, 'Iran-Iraq relations after Saddam', (2003) 26(4) *Washington Quarterly* 115-129.

²⁵⁹ CPA/ORD/19 September 2003/39 <http://govinfo.library.unt.edu/cpa/iraq/regulations/20031220_CPAORD_39_Foreign_Investment_.pdf> accessed 2 May 2017.

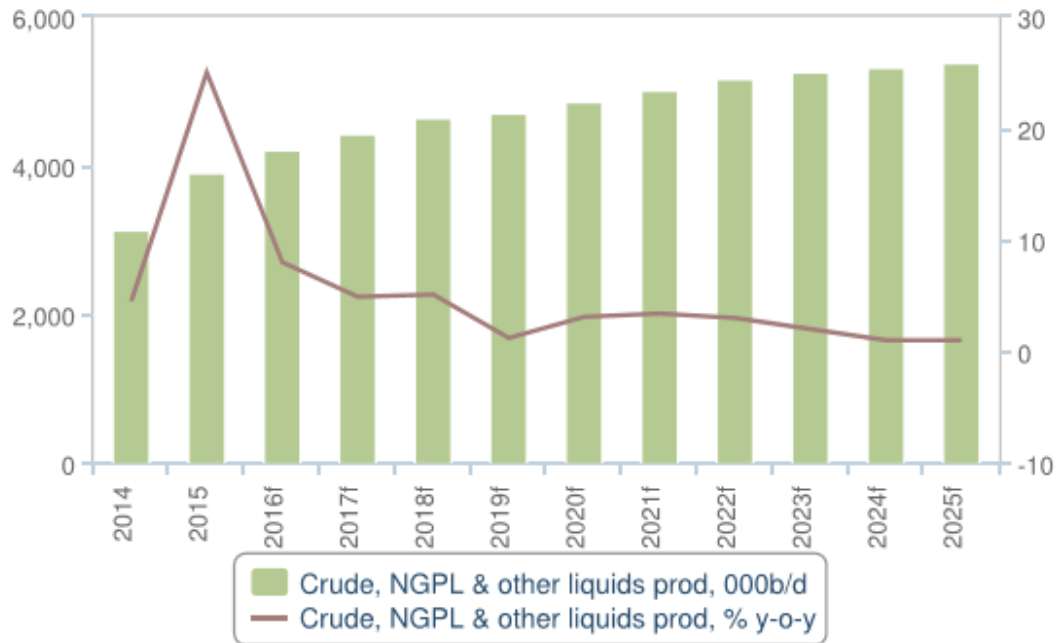
²⁶⁰ Karen Ellicott, *Countries of the World and Their Leaders Yearbook 2008* (Thomson Gale, 2007),1900.

²⁶¹ Iraq Energy Outlook (IEA:World Energy Outlook Special Report: 9 October 2012).

²⁶² James L Smith, 'World oil: market or mayhem?' (2009) *The journal of economic perspectives*, 145.

Oil Production Forecast

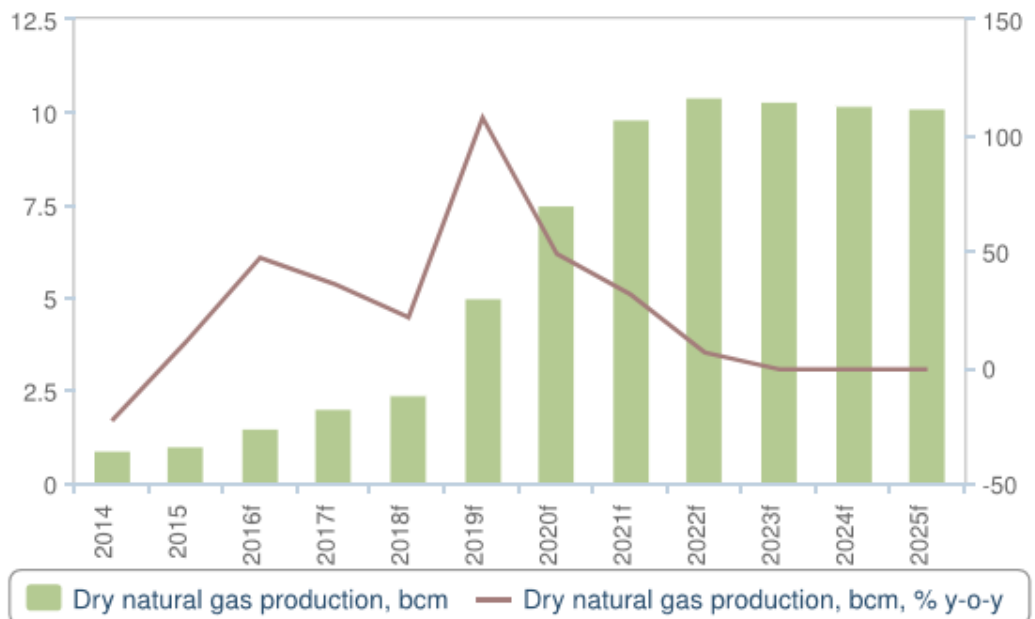
(2014-2025)



Source: Q4 2016 - www.bmiresearch.com

Gas Production Forecast

(2014-2025)



Source: Q4 2016 - www.bmiresearch.com

It is noticeable that oil and gas production in Iraq will steadily rise in the next decade or so despite all uncertainties and political chaos. The fluctuations in energy prices in the world market will not affect that significantly as has been predicted in some quarters. The main reason for this upward trajectories could be the resilience of Iraq despite being a conflict-prone oil producing country but blessed with its cost effectiveness and better profit margin prospects for IOCs as indicated earlier. One cannot, of course, lose sight of the fact that many energy hungry emerging Asian economies, in addition to China and India, will be after Iraqi oil and gas to meet their increasing demand in the years to come.

6.1. A Brief look at political, economic, social, legal infrastructure and environmental situation in Iraq and international perspective

Since the 1990s Iraq has gone through a trail of events that have impacted its political, economic, and social situations that are a grim reminder for many years to come. Catastrophic environmental damage stands out to be a prominent one which has had an overreaching impact in such different dimensions. The UN Security Council in reaction to the Iraqi destruction, during the Gulf War in 1991, passed a resolution (No 687), created a fund for compensation payment and imposed that a portion of the export sales of Iraqi oil be put into the fund.²⁶³ The UNCC was established to administer this fund, charged with the mandate to provide compensation with respect to environmental damage and the depletion of natural reserves.²⁶⁴

The oil crisis was triggered by armed conflicts in Iraq during the Gulf War in 1991 which caused significant harms to the environment through intentionally caused oil fires for weeks and months at a stretch and further destructions of oil infrastructures.²⁶⁵ In the last three decades Iraq has suffered greatly from economic sanctions, drought and the lack of any workable biodiversity policy and legal framework. In a recent World Bank Report (2017) on Iraq three elements are identified as the underlying constraints to Iraq's development: (i) oil dependence; (ii) ethnic and geographic fragmentation and disparities, and (iii) governance and security failure.²⁶⁶

6.1.1. Political and security situation

The U.S military reports note cases of smuggling due to inadequate metering, re-injection, corruption, theft and sabotage through warring groups and rebels as other potential threats to sustainable development. This is compounded by the now (at the time of writing the article) ISIS threat.²⁶⁷ There had been a clear lack of political will of the Iraqi authorities through their warfare activities to protect the environment. This was evident in the effects of oil contamination of water and in the absence of initiatives in addressing liability for environmental damage. The Gulf War raised questions about the applicable law to the

²⁶³Oscar Schachter, 'United Nations law in the Gulf conflict', (1991) 85 American Journal of International Law 452-473.

²⁶⁴See UNCC .< <http://www.uncc.ch/>> accessed 6 May 2017. See Mojtaba Kazazi, 'Environmental Damage in the Practice of the UN Compensation Commission' in Michael Bowman and Alan Boyle (eds), *Environmental Damage in International and Comparative Law: Problems of Definition and Valuation* (OUP, 2002).

²⁶⁵Carlos Pascual and Jonathan Elkind, 'Energy Security Economics, Politics, Strategies, and Implications' (Brookings Institution Press, 2010) 86.

²⁶⁶ See World Bank: 'Iraq: Systematic Country Diagnostic' (February 3, 2017: Report No. 112333-IQ), available at: <<http://documents.worldbank.org/curated/en/54281148727729890/Iraq-Systematic-Country-Diagnostic>> accessed 6 May 2017.

²⁶⁷See 'Three ways that oil matters for the crisis in Iraq' (Friday, April 10, 2015), <<http://www.vox.com/2014/8/11/5988377/kurdistan-oil>> accessed 12 May 2017

environmental protection in times of armed conflict.²⁶⁸ The Rio Declaration affirms that warfare is destructive to sustainable development.²⁶⁹ When Iraqi military detonated over 700 Kuwaiti oil wells, smoke and oil spilled into the desert affecting many countries including Iran, Turkey, Jordan and Saudi Arabia.²⁷⁰

The years 2008 and 2009 were signified by the improvement of the security situation and reduced violence in Iraq²⁷¹ perhaps as a direct consequence of the 2008 Security Agreement between Iraq and the United States (due to possibly expire at the end of 2011) which provided the legal framework for the presence and conduct of U.S. troops in Iraq.²⁷²

Despite this, Iraq faces a complex mixture of political and security issues due to the consolidation of democracy, stability, and lasting reconciliation. Political issues are mainly due to the internal structure of this nation; this includes confusing federalism, delineation of internal boundaries, sharing of resources and the status of Kirkuk.²⁷³

6.1.2. Socio-economic and legal infrastructure situations

The Iraqi economy is heavily dependent on its oil and gas sector which currently generates about half of its GDP. The most recent World Bank report states that Iraq's dependence on its oil revenues amounts to 58 percent of its GDP, 99 percent of its exports, and more than 90 percent of its central government revenue in 2015.²⁷⁴ This implies that Iraq's economic development is dependent on the prevailing conditions in the global oil market and the forces of geopolitical factors that have influenced the market lately. Economic growth is expected to increase with the oil production. It is well stated in a EU-Iraq Strategy Paper that Iraq's principal economic challenges include: i) investment in the energy field to gain full potential; ii) economic diversification, including development of the agricultural sector; iii) creating a conducive environment for the private sector development, including Small and Medium-sized Enterprises (SMEs); and iv) Job creation with particular focus on the young population.²⁷⁵ The increase in the growth rate and revenue from the oil sector is an obvious prospect, locally and internationally. According to the reliable data Iraq's GDP annual growth rate averaged

²⁶⁸Barbie Zelizer, 'CNN, the Gulf War, and journalistic practice' (1992) 42(1) *Journal of Communication* 66-81.

²⁶⁹Principle 24 of Rio Declaration stipulates (Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary) <<http://www.un.org/documents/ga/conf151/aconf15126-Iannex1.htm>> accessed 10 October 2014. For more details, see Jhon C Dernbach, 'Achieving Sustainable Development: The Centrality and Multiple Facets of Integrated Decisionmaking', (2003)10(1) *Indiana Journal of Global Legal Studies* 247-285. See also generally, Jorge E Viñuales(ed), *The Rio Declaration on Environment and Development: A Commentary* (OUP, 2015).

²⁷⁰Ian Lee and Andy Haines, 'Health costs of the Gulf war' (1991) 303 (3) *BMJ: British Medical Journal* 303, available at: <http://www.bmj.com/content/303/6797/303> access 28 December 2016.

²⁷¹Frank R Gunter, *The Political Economy of Iraq Restoring Balance in a Post-Conflict Society*. (Cheltenham: Edward Elgar Publishing, 2013), 99.

²⁷²O'Sullivan, n. 68, *Bloomberg View* (31 January 2017).

²⁷³John Ehrenberg (ed), *The Iraq Papers* (Oxford University Press, 2010) 545; Vivienne Walt, 'Iraq's big Kurdish oil deal' available at <<http://fortune.com/2014/12/03/iraqs-big-kurdish-oil-deal/>> accessed December 2014; 'Iraq Situation Report' - Part II: Political and economic developments (reported by Kenneth M. Pollack), (Brookings, March 29, 2016, available at <<http://www.brookings.edu/blogs/markaz/posts/2016/03/29-iraq-situation-report-politics-economics-pollack>> accessed 12 May 2017.

²⁷⁴ See World Bank: 'Iraq: Systematic Country Diagnostic' (February 3, 2017: Report No. 112333-IQ), available at: <<http://documents.worldbank.org/curated/en/54281148727729890/Iraq-Systematic-Country-Diagnostic>> accessed 12 May 2017.

²⁷⁵ Cooperation Between The European Union And Iraq: Joint Strategy Paper 2011-2013 (based on the Economist Intelligence Unit Limited, Country Report January 2010).

7.78 per cent from 1991 to 2016, with 13.9 per cent in 2012 fluctuating to 11 per cent in 2016 (which is even promising and much higher than many Middle Eastern oil-rich economies) due to volatile oil prices during this period.²⁷⁶ With this consideration in mind, the economic growth of Iraq in the face of the ever-increasing demand from the energy-hungry-rapidly-growing Asian countries (including China and India) for oil and gas will go in an upward trajectory in the years to come. The interest in Iraq's economy and resources has drawn international attention as such that economic reforms were introduced and laws have been revised.²⁷⁷ The nation has opportunities in the retail sector following legal frameworks that have been established to foster business ownership, which have extended to most areas of businesses except for oil and mineral extraction.²⁷⁸ This does pose a hindrance to international oil and gas exploration in Iraq, but the retail sector encompasses the exportation potential following the nation's heavy import-reliance. Foreign investors have been offered contracts, yet interested parties such as the United States have acknowledged the need for friendly terms with Iraq. The international investment treaties with Iraq may be expected to incorporate obligations on sustainable development in the petroleum industry, especially in respect of the exploration and exploitation of its natural resources.²⁷⁹ An underdeveloped arbitration law in Iraq may often be a hindrance to non-Iraqi entrepreneurs in their investment decision making in Iraq. International business and investment in Iraq and prospective disputes arising out of these activities underscore the need for developing an international arbitration law in Iraq.²⁸⁰ It is noteworthy that Iraq is still neither a party to the New York Convention (1958)²⁸¹, nor has it yet adopted the UNCITRAL Model Law on International Commercial Arbitration (1985)²⁸² despite the Iraqi authorities' aspiration for them²⁸³ and recent judicial notice of them.²⁸⁴ The laws of the oil and gas sector also engage in environmental protection, habitat conservation, and safety and health of the occupation, to meet international standards for oil and gas mining. The issues of failure of transparency, corruption, and intellectual, personal rights enforcement

²⁷⁶ Trading Economics: <<http://www.tradingeconomics.com/iraq/gdp-growth-annual>> accessed 20 May 2017.

²⁷⁷ Ibid.

²⁷⁸ The federal Iraq Investment Law 2006 (as amended in 2010) regulates foreign investment in everything except the petroleum and banking and insurance sectors in Iraq, available at <www.webuildiraq.org/.../The-Investment-Law-No-13-of-2006.pdf> accessed 20 May 2017

For second amendment 2015, available at: <<http://taxinsights.ey.com/archive/archive-news/iraq--second-amendment-to-investment-law-13-for-2006---approved-by-parliament.aspx>> accessed 21 May 2017. See S. Shubber, *The Law of Investment in Iraq* (Brill, 2009).

²⁷⁹ See generally, Van Duzer, Simons and Mayeda (n 227); Mann, Moltke, Peterson and Cosbey (n 227). See a recent example of BIT - Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria (3 December, 2016) which includes many sustainable development provisions unlike many others.

²⁸⁰ N. Jansen Calamita, and Adam Al-Sarraf, 'International Commercial Arbitration in Iraq: Commercial Law Reform in the Face of Violence', (2015) 32 (1) *Journal of International Arbitration*, 37, available at SSRN: <<http://ssrn.com/abstract=2598355>> accessed 24 May 2017; Sinan Abdulhamza Al-Bidery, 'Modernising Iraq: A Vision for a Comprehensive Petroleum Arbitration Regime in Iraq' (PhD thesis, September 2014, Bangor University, U.K.).

²⁸¹ See the status at: <<http://www.newyorkconvention.org/contracting-states/list-of-contracting-states>> accessed 24 May 2017.

²⁸² See the status at: <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html> accessed 24 May 2017

²⁸³ N. Jansen Calamita, and Adam Al-Sarraf (n 280).

²⁸⁴ The Iraqi Court of Cassation (Tamiez), Iraq's highest court: *Mahkamat al Tamiez*, Decision No. 52/B of 2012, cited in N. Jansen Calamita and A. Al-Sarraf, *Ibid.* See also '2014 Investment Climate Statement' (Bureau of Economic and Business Affairs, June 2014) Report available at <<https://www.state.gov/e/eb/rls/othr/ics/2014/228872.htm>> accessed 26 May 2017.

further complicate this challenge in the context of international arbitration²⁸⁵ as is the present state of affairs in respect of investor-state dispute resolution.²⁸⁶

Oil and gas exploration has a tendency to attract violence, as it proves to be the case with several other OPEC countries.²⁸⁷ Foreign investors have to assess the risk of violence and insecurity associated with the resource development. Disputes that occur internally over the oil rights such as between the Iraqi government and the Kurdistan Regional Government (KRG) influence the decisions by foreigners in financing oil-based projects. Iraq is responding to the IOCs flow and complying with international norms by addressing concerns of the international parties by redrafting the nation's law to encourage foreign involvement in the sector. Foreigners anticipate the early finalization of the hydrocarbon law and the resolution of the internal wrangles in order to be able to contribute to the oil industry.²⁸⁸

In regard to the social situation, sustainable development in Iraq is not only dependent on oil development, but also the job creation, poverty eradication, education, and environmental management as is well presented in the Sustainable Development Goals of the UN 2030 Agenda for Sustainable Development.²⁸⁹ The government, NGOs, and academic institutions are prone to this conviction and this has also influenced IOCs. IOCs make this effort through CSR initiatives that are at par with national development objectives in areas such as housing, education, health, and sanitation. CSR encompasses the IOCs' friendly relationship with various stakeholders such as employees, partners, shareholders, and the local community. CSR

²⁸⁵See generally, Saverio Di Benedetto, *International Investment Law and the Environment* (Edward Elgar, 2013); Pierre-Marie Dupuy, Ernst-Ulrich Petersmann, and Francesco Francioni (eds), *Human Rights in International Investment Law and Arbitration* (OUP, 2009); Jorge E Viñuales, 'Foreign Investment and the Environment in International Law: An Ambiguous Relationship' (2009) 80 *British Yearbook of International Law* 244; Jorge Viñuales, *Foreign Investment and the Environment in International Law* (Cambridge University Press, 2012); Waibel, M, Kaushal, A. Chung, K-H Liz and Blachin, C. (eds.), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer Law, The Hague, 2010); José María de la Jara and Eduardo Iñiguez, 'The Case Against the Corruption Defense', available at: <<https://efilablog.org/2017/05/16/the-case-against-the-corruption-defense/>> accessed 25 May 2017; Bruno Simma, 'From Bilateralism to Community Interest in International Law' (1994) 250 (vi) *Recueil des Cours*, 217–384; Michael D Ramsey, 'International Law Limits on Investor Liability in Human Rights Litigation' (2009) 50(2) *Harvard International Law Journal*, 271; Sinan Abdulhamza Al-Bidery (n 280).

²⁸⁶ See on recent debates on ISDS at Stockholm Chamber of Commerce – ISDS Blog at: <<http://isdsblog.com/>> accessed 25 May 2017.

²⁸⁷Dobie R. Langenkamp, *What Happens To The Oil: International Law And The Occupation Of Iraq* (University of Tulsa College of Law, 2003) 10.

²⁸⁸Mishkat Al Moumin, 'The legal framework for managing oil in post-conflict Iraq: A pattern of abuse and violence over natural resources', in P Lujala and S ARustad (eds), *High-Value Natural Resources and Peacebuilding* (Earthscan, 2012) 14.

²⁸⁹ See at <<https://sustainabledevelopment.un.org/sdgs>> accessed 27 May 2017.

See also 'United Nations Summit to Adopt the Post-2015 Development Agenda', 25 Sep 2015 - 27 Sep 2015, New York, available

at:<<https://sustainabledevelopment.un.org/?page=view&nr=1064&type=13&menu=1300>> accessed 10 April, 2017; see also 'Open Working Group proposal for Sustainable Development Goals', available at

<<https://sustainabledevelopment.un.org/sdgsproposal>> accessed 27 May 2017. See for the recent parallel concerns in the EU context in 'Opinion of the European Economic and Social Committee on 'Sustainable development: a mapping of the EU's internal and external policies'' (exploratory opinion) (2016/C 487/06), 28 December 2016. See also a World Bank study on the effective environmental and social management of oil and gas development: Eleodoro Mayorga Alba, 'Environmental governance in oil-producing developing countries: findings from a survey of 32 countries' (The World Bank, 2010), available at: <http://documents.worldbank.org/curated/en/284551468163738491/Environmental-governance-in-oil-producing-developing-countries-findings-from-a-survey-of-32-countries> accessed 27 January 2017.

initiatives aim to make a difference to the society and the environment.²⁹⁰ It is noteworthy that the new generation of BITs and FTAs elsewhere are increasingly including CSR provisions to require foreign investors to address social issues, perhaps in partnership with host states,²⁹¹ but Iraq is yet to keep pace with this development. What IOCs are currently doing in Iraq in the name of CSR are mostly voluntary and out of good will.

CSR implementation in Kurdistan has contributed to social changes at the community level. Initially, the community members were sceptical that the revenues obtained were used towards their oppression. So far, this attitude has changed with the community members having had their expectations realised from the IOCs for their economic and social well-being. Evidently, CSR has proven to integrate sustainable development in the Kurdistan region of Iraq. A good example may be drawn from WesternZagros Limited, a Canadian based company. This IOC regards the sustainability of the community around its business operations; the concentration areas include poor and remote areas.²⁹² This company has integrated information on the socioeconomic position of communities situated within a 10-kilometre radius of its working area. The data obtained is used in the management of petroleum operations in local development assistance to avoid local life interruptions. WesternZagros and its partners' CSR joint venture initiatives lead to the redevelopment and growth in Kurdistan; with agriculture and environment conservation being the backbone factors.²⁹³ In addition, CSR implementation in the Kurdistan region has been the sole provider of long-term projects in the community, for instance Kurdistan Children's Hospital by Oryx Petroleum Corporation, professional training of local employees by Gulf Keystone, medical outreach programs to rural communities by GardaWorld Iraq, and Kurdish Merit Scholarship Program by Marathon Oil and Total. So far, 75% of Kurdish employees are staff in the IOCs operating in the region, the aim of the IOCs is

²⁹⁰Dima Jamali, 'Corporate Social Responsibility (CSR) for Social Development in Arab States' <<http://tinyurl.com/beaajsf>> accessed 12 October 2016. See also A F M Maniruzzaman, 'Creeping Legitimacy of Corporate Social Responsibility' (2011) 85 *Amicus Curiae Journal of the Society for Advanced Legal Studies at the Institute of Advanced Legal Studies* 1; A. F. M. Maniruzzaman, (n 74) 79-108; MJedrzej G Frynas, *Beyond Corporate Social Responsibility: Oil Multinationals and Social Challenges* (CUP, 2009); Frynas, Jędrzej G., 'Corporate social responsibility in the oil and gas sector' (2009) 2(3) *Journal of World Energy Law & Business* 178; Klaus Schwab, 'Global Corporate Citizenship: Working With Governments and Civil Society', (January / February 2008), *Foreign Affairs* 107; Jarrod Hepburn and Vuyelwa Kuuya, 'Corporate Social Responsibility and Investment Treaties' in Segger, Gehring Newcombe (eds) (n 52); Brayn Horrigan, *Corporate Social Responsibility in the 21st Century* (Cheltenham: Edward Elgar, 2010); Brad L. Smith, Edward C. Luck, Gordon M. Goldstein, Kenneth Berlin, Nina Luzzatto Gardner, Robert A. Kushen, Susan D. Maples, 'Environment, Energy, Human Rights and Corporate Responsibility' (2012) 50(3) *Columbia Journal Transnational Law* 682; Michael E Porter and Mark R Kramer, 'Strategy and Society: The Link Between Competitive Advantage and Corporate Social Responsibility' (2006) *Harvard Business Review*, 78; Bjørn-Tore Blindheim, 'Corporate Social Responsibility: the Economic and Institutional Responsibility of Business in Society', in Aslaug Mikkelsen, and Oluf Sandvik Langhelle (eds.), *Arctic Oil and Gas: Sustainability at Risk?* (Routledge, 2008), 57. See also Ethical Corporation's 'State of Sustainability 2015' report, available at: <<http://events.ethicalcorp.com/cms-assets/documents/205883-47177.ecsos15.pdf>> accessed 28 May 2017.

²⁹¹ See UNCTAD - Investment Policy Monitor No. 17 (March 16, 2017), available at: <<http://investmentpolicyhub.unctad.org/Publications/Details/170>> accessed 29 May 2017.

See also UNCTAD - IIA Issues Notes: Taking Stock of IIA Reform (no.1, March 2016), available at: <<http://investmentpolicyhub.unctad.org/Publications/Details/142>> accessed 29 May 2017.

Tarcisio Gazzini, 'Nigeria and Morocco Move Towards a "New Generation" of Bilateral Investment Treaties', available at: <<https://www.ejiltalk.org/nigeria-and-morocco-move-towards-a-new-generation-of-bilateral-investment-treaties/>> accessed 29 May 2017.

²⁹²See Canada's initiative in Savoie, Pierre-Olivier, 'Reservations, Corporate Social Responsibility, and Other Mechanisms in Support of Sustainable Development in Canada's Model Foreign Investment Promotion and Protection Agreement (FIPA)', in Baetens (ed) (n 193).

²⁹³WesternZagros Resources Ltd. 2013 First Quarter Report <<http://www.westernzagros.com/wp-content/uploads/2013/05/2013FirstQuarter.pdf>> accessed 25 May 2017.

to increase the number by 5% - the so-called local content initiative.²⁹⁴ Such local content elements in IOC's and other economic actors' activities can enormously contribute to the sustainable development of a country, especially Iraq as an oil-rich developing country.²⁹⁵

6.1.3. Environmental situation

The international environmental dimension of oil and gas production is critical to Iraq's sustainable development and prospective green economy. A small share of the gas produced is utilized efficiently while a bigger share is lost or vented into the atmosphere²⁹⁶, leading to pollution on human beings, wildlife and disrupting the ecosystem. Environmental laws and national laws in Iraq exclude the military from their scope, yet military action in war threatens to contaminate air, water, ecological processes that expose the civilian human population to radiation, toxins and environmental degradation. Article 33 of the Iraqi constitution obliges the State to protect and preserve the environment and its biodiversity.²⁹⁷ In addition, Article 114 asserts the shared competencies of the federal and regional authorities, "*To formulate environmental policy to ensure the protection of the environment from pollution and to preserve its cleanliness, in cooperation with the regions and governorates that are not organized in a region*". Furthermore, Article 14 of the federal Iraq Investment Law 2006 (as amended) enumerates amongst investors' obligation as follows: "Fifth: To protect the safety of the environment and to adhere to the valid quality control systems in Iraq and international regulations accredited in this field, also the laws related to security, health, public order and values of the Iraqi society."²⁹⁸

²⁹⁴Gulf

Keystone

Petroleum

<<http://www.iii.co.uk/investment/detail?code=cotn%3AGKP.L&display=discussion&threshold=0&action=detail&id=10968776>> accessed 25 May 2017.

See also Ana Maria Esteves, Bruce Coyne and Ana Moreno, 'Local Content Initiatives: Enhancing the Subnational Benefits of the Oil, Gas and Mining Sectors' (22 July 2013), *Revenue Watch Briefing* (available at: <www.revenuewatch.org> accessed 25 May 2017).

"Local content policies aim at extending or expanding the benefits of oil, gas and mining activities for the national economy. These policies attempt to give local stakeholders access to economic opportunities, whether they are related to employment, participation in supply chains or the provision of other related support services. These policies can be further strengthened through mechanisms such as targets for local employees or suppliers, preference schemes for local businesses, industry or human capital development support from the government, or giving local businesses greater access to finance." (page 2). See also Space for Local Content Policies and Strategies (Columbia Center on Sustainable Investment), available at <<http://ccsi.columbia.edu/2016/10/03/space-for-local-content-policies-and-strategies/>> accessed 25 May 2017.

²⁹⁵See 'Space for Local Content Policies and Strategies', available at <<http://ccsi.columbia.edu/2016/10/03/space-for-local-content-policies-and-strategies/>> accessed 26 March 2017; Theophilus Acheampong, Marcia Ashong, and Victoria Crystal Svanikier, 'An Assessment of Local-Content Policies in Oil and Gas Producing Countries' (AIPN, 2015), available at: <https://www.aipn.org/forms/store/ProductFormPublic/an-assessment-of-local-content-policies-in-oil-and-gas-producing-countries>, accessed 20 June 2017.

Cf. Barton Legum & Ioana Petculescu, 'Performance Requirements – Mobil v. Canada, ICSID Case No. ARB (AF)/07/4', in Meg Kinnear, *et al* (eds.), *Building International Investment Law: The First 50 Years of ICSID* (Walters Kluwer, 2016) 415; David Collins, *Performance Requirements and Investment Incentives Under International Economic Law* (Edward Elgar Publishing 2015). It is noteworthy that Iraq is not yet a member of the WTO, hence no WTO restrictions on performance requirements applying to it. See <https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm> accessed 29 May 2017.

²⁹⁶ It is noted that due to the available poor infrastructure or lack of adequate facilities, 55 % of current gas production is wasted in flaring whilst very little feeds the deprived national grids. See World Bank, *Global Gas Flaring Reduction* (2010), and Ministry of Oil (2012-2013) data.

²⁹⁷The Ministry of Environment is responsible for the proper implementation and follow-up of the Law for Protection and Improvement of the Environment (No. 27 of 2009).

²⁹⁸ Available at <www.webuildiraq.org/.../The-Investment-Law-No-13-of-2006.pdf> accessed 29 May 2017.

The environmental challenges include desertification, gas flaring, pipeline operations, oil spillage, industrial pollution and emissions, war waste, air quality, destruction of bio-diversity, decommissioning, water usages and droughts, etc. Gas flaring and lack of adequate water supplies are the most pressing challenges as they have a significant impact on the global climate.

6.1.4. Iraq – An international perspective in the context of sustainable development

Foreign investment is considered to be a contributing factor to sustainable development in Iraq. The concept of international law developed in the context of sustainable development informs the subject of investment law.²⁹⁹ International investment law includes international investment treaties which regulate foreign investments in a state. BITs and FTAs make available international law protection and solutions to many problems to IOCs. These treaties permit foreign investors the right to initiate arbitral proceedings against host states for violation of the international standards of treatment and protection of investment.³⁰⁰

Iraq faced challenges of oil dependence in the form of export revenues coupled with the volatility of international oil prices as witnessed since 2009, which has led to an unusual financing need and infrastructure adjustment. The problem will persist with the current continuing oil price fluctuations. Other confronting issues include refining capacity development, sustainable development in natural resource management, energy sector reforms comprising petroleum and electricity generation.³⁰¹ The World Bank came in to help Iraq improve its fiscal sustainability prospects through the development policy lending operations, financial sector reforms and restructuring activities in favour of Iraq's public expenditure program.³⁰²

On the other hand, Iraq is a signatory to international treaties concerned with such issues as climate change, desertification, and loss of biodiversity, ozone depletion, and water degradation.³⁰³ These reasons enable the development of conferences whereby scientific knowledge is reflected on, as well as economic analysis in the advancement of the desired outcome, and legal arrangements that enable optimum opportunities for innovation in sustainable development of oil and gas. Such conferences include RAMSAR convention,³⁰⁴ Desertification Combat Convention,³⁰⁵ and Climate Change Convention³⁰⁶ - Kyoto protocol,³⁰⁷ and the Paris Climate Change Agreement (2015).³⁰⁸ These conventions integrate Iraq into the international community as a sustainable development partner. They establish a framework of commitments that will enable Iraq to realize its national vision of oil and gas development and investment, rebuilding state institutions and healing the war-torn society,

²⁹⁹ See generally, Segger, Gehring and Newcombe (eds), *Sustainable Development in World Investment Law* (n 52).

³⁰⁰ Ibid. See generally, recent studies in Baetens (n 193).

³⁰¹ *Rebuilding Iraq: Restoring Iraq's Oil & Electricity Sectors* (G.A.O: Hauppauge N.Y.: Nova Science 2008).

³⁰² Bureau of Near Eastern Affairs, U.S. Department of State Iraq Status Report (August 11, 2010), 6.

³⁰³ *Rebuilding Iraq Restoring Iraq's Oil & Electricity Sectors* (n 301).

³⁰⁴ See <<http://www.ramsar.org/>> accessed 25 March 2017.

³⁰⁵ United Nations Convention to Combat Desertification (UNCCD) <<http://www.greeningtheblue.org/what-the-un-is-doing/united-nations-convention-combat-desertification-unccd>>

³⁰⁶ United Nations Framework Convention on Climate Change.<<https://unfccc.int/2860.php>> accessed 27 March 2107.

³⁰⁷ Kyoto Protocol.< https://unfccc.int/kyoto_protocol/items/2830.php> accessed 27 March 2017.

³⁰⁸ See <<http://www.cop21.gouv.fr/en/a-record-over-160-countries-expected-to-sign-the-paris-agreement-in-new-york-on-22-april-2016/>> accessed 25 May 2017.

supported by the international community in a spirit of partnership. IPCC established in 1991 positioned the structure for global climate negotiations. Since 1994, IPCC's approach was largely influenced by the neo-liberal market triggered by KP, IET, JI, and CDM. Sustainable development for Iraqi oil and gas has been identified as the bridging mechanism for integrating energy security and climate change,³⁰⁹ and above all development policies.³¹⁰ As a member of the international community Iraq also needs to align its social, economic, political affairs with the UN 2030 Agenda for sustainable development to realise its 17 SDGs across the board.³¹¹ Such a move will bear significance in the years to come as SDGs are not bereft of any legal value and the role of energy in the context of SDGs will be ever so pressing for a country's policy directions.³¹² In fact, these goals have normative values. As one observes the matter as expressed in the following words:

“The 17 Sustainable Development Goals (SDGs) and 169 targets did not emerge from, and were not inserted into, a normative vacuum. They are grounded in international law and made consistent with existing commitments expressed in various international legal instruments. Naturally, a nexus exists between international law and these global priorities.”³¹³

6.2. Iraq's strategy for development

International trade and incoming foreign investment are paramount to Iraq's recuperation from the adverse effects of war, decades of misrule, corruption and international sanctions on its economy. Because of the limitations in its intellectual property law and environmental challenges, Iraq is now looking at international law and bodies of authority to develop its legal

³⁰⁹Javier de Cendra de Larragán, 'Tying the Knot of Energy Security and Climate Change Mitigation: A Tale of Solidarity' (2011) 22(1) Yearbook of International Environment Law 76; Javier de Cendra de Larragán, 'Achieving Deep Integration between the Climate Change and Energy Agendas: Some Reflections on the EU Approach' (2012) 3 George Washington Journal of Energy and Environmental Law 240; Jonatan Pinkse & Ans Kolk, 'Addressing the Climate Change—Sustainable Development Nexus', 51 Business & Society (no.1, March 2012), 176-210.

³¹⁰ 'Overview of Climate Change Financing Mechanisms in Iran, Iraq, Jordan, Lebanon, the occupied Palestinian' <http://global_mechanism.org/edocman/download.php?fname=CC_Fin_MechWestAsia_final_221112.pdf> accessed 6 March 2014. See also Partnership and Co-operation Agreement between the EU and Iraq (2012) (Article 93), available at <<http://ec.europa.eu/trade/policy/countries-and-regions/countries/iraq/>> accessed 25 May 2017.

See also 'Achieving Justice and Human Rights in an Era of Climate Disruption' (International Bar Association Climate Change Justice and Human Rights Task Force Report, July 2014), available at: <<http://www.ibanet.org/PresidentialTaskForceClimateChangeJustice2014Report.aspx>> accessed 25 May 2017.

³¹¹ See <http://www.cop21.gouv.fr/en/a-record-over-160-countries-expected-to-sign-the-paris-agreement-in-new-york-on-22-april-2016/>

'World Economic Forum: Which countries are achieving the UN Sustainable Development Goals fastest?' (20 March 2017), see <<https://www.weforum.org/agenda/2017/03/countries-achieving-un-sustainable-development-goals-fastest/>> accessed 25 May 2017.

³¹² 'Vienna Energy Forum participants formulate key messages reflecting role of energy in implementing Sustainable Development Goals and Paris climate agreement' (15 May 2017), see at: <<http://www.unis.unvienna.org/unis/en/pressrels/2017/unisous374.html>> accessed 28 May 2017.

“Key message 1 - The role of energy in the 2030 Development Agenda for Sustainable Development
Much of the capital investments we make today have a very long replacement time, therefore the energy choices we make today will lock us into a development path for decades to come. Long term integrated strategies are imperative to cover all SDGs. The deadline set for the SDGs highlights the urgency of advancing forward now if we are to achieve these goals by 2030, show substantial progress by 2020 and gather momentum for the future 2050 development targets. The vision for 2050 for sustainable development must shape the decisions made today.”

³¹³ Rakhyun E. Kim, 'The Nexus between International Law and the Sustainable Development Goals' (2016) 25(1) RECIEL 15.

and institutional capacities.³¹⁴ The development strategy of Iraq is to increase its oil production. The primary goal of Iraqi development strategy is the alleviation of poverty as is reflected in goal no.1 of the UN 2030 Agenda for Sustainable Development.

6.2.1. The UN and Iraqi Government response

Current developments in the United Nations target its member states' sustainable development goals (SDGs) as a follow-up of the Millennium Development Goals (MDGs).³¹⁵ It has been observed that "unlike the MDGs, the SDGs are not merely about development. The SDGs are intended to promote sustainable development in its three dimensions – economic, social and environmental."³¹⁶ The UN conference on sustainable development was held on June 20-22, 2012 in Rio de Janeiro, Brazil. It focused on building a desirable future open to all stakeholders. It decided that the establishment of the development goals based on a transparent and cooperative process among governments would work together towards sustainable development. Iraq is pursuing economic sustainable development via oil exploration and exploitation; thus Rio+20 Conference and outcomes are inspiring and aiding Iraq in its development plan.³¹⁷

As a matter of fact, the 10 Principles of *UN Global Compact* address the major CSR issues, which are Human Rights, Labour, Environment, and Anti-Corruption, and the UN "Protect, Respect and Remedy" framework and the Guiding Principles on Business and Human Rights impose the duty on States to promote and protect human rights principles, and ensure that Transnational Corporations obey them.³¹⁸ As per the guidelines of the UN development assistance framework's *Priority 2: Inclusive, more equitable and sustainable economic growth*, this organization is undertaking several programs targeting economic structural reform and

³¹⁴Muhammed Abed Mazeel, 'Restructuring and Re-Organization of the Iraqi Oil Ministry and State-Owned Oil Companies for Maximum Economic Growth and National Development' (Hamburg: Disserta- Verl, 2012). A recent major development is: Partnership and Co-operation Agreement between the EU and Iraq (2012) (Article 93), available at <<http://ec.europa.eu/trade/policy/countries-and-regions/countries/iraq/>> accessed 25 May 2017.

³¹⁵ See <<http://www.sdgfund.org/mdgs-sdgs>> accessed 27 May 2017.

³¹⁶ Kim (n 313) 15-19. JPW Scharlemann, RC Mant, N Balfour, C Brown, ND Burgess, M Guth, DJ Ingram, R Lane, J Martin, S Wicander, V Kapos, 'Global Goals Mapping: The Environment-human Landscape. A contribution towards the NERC, The Rockefeller Foundation and ESRC initiative, Towards a Sustainable Earth: Environment-human Systems and the UN Global Goals' (Sussex Sustainability Research Programme, University of Sussex, Brighton, UK and UN Environment World Conservation Monitoring Centre, Cambridge, UK, 2016), available at: <http://www.nerc.ac.uk/research/partnerships/international/overseas/tase/mapping/> accessed 18 July 2017. This report finds that 'the resilience of our ecosystems, the security of natural resources, and the stability of Earth's life-support systems are essential for human response and adaptation to the global changes we face, and for any prospect of sustainable development. The report demonstrates that environment-human interactions underpin each of the Global Goals, and that understanding how these interactions apply across the Goals is critical to achieving them.' [quoted from the ESRC site: <http://www.esrc.ac.uk/news-events-and-publications/news/news-items/the-environment-is-central-to-achieving-the-un-global-goals-the-first-joint-rockefeller-foundation-nerc-esrc-report-finds/> accessed 18 July 2017.

³¹⁷'Sustainable Development Knowledge Platform. Sustainable development goals' <<https://sustainabledevelopment.un.org/sdgsproposal>> accessed 25 May 2017; see also <<https://sustainabledevelopment.un.org/rio20>> accessed 25 May 2017

³¹⁸ The United Nations Global Compact: <https://www.unglobalcompact.org/>

The United Nations "Protect, Respect, Remedy" Framework for Business and Human Rights and the United Nations Guiding Principles for Business and Human Rights <http://www.ituc-csi.org/IMG/pdf/12-04-23_ruggie_background_fd.pdf> accessed 15 October 2016; see John G. Ruggie, *Just Business: Multinational Corporations and Human Rights* (W.W. Norton & Co., N.Y., London, 2013); Robert C. Bird, Daniel R. Cahoy and Jamie Darin Prenekert (eds), *Law, Business and Human Rights: Bridging the Gap* (Edward Elgar, 2014).

diversification.³¹⁹ The UN aims to strengthen international cooperation for social development, by eliciting the support of governments and policy makers towards the eradication of poverty, employment generation and social integration. The main project areas include job creation, technical assistance, investments, and entrepreneurship. Iraqi government and the UNCT have collaborated to implement the private sector development program in Iraq. The aim of this program is to create and affect a comprehensive structure for individual regional development in Iraq at the governorate and national levels.³²⁰ In its investment policy making and thereby designing its domestic investment laws, reviewing or negotiating with other countries international investment agreements for sustainable development Iraq should draw upon the recent UNCTAD studies and reports which are very instructive for the purpose.³²¹ Iraq also needs to be mindful of the fact the UN Committee on Economic, Social, Cultural Rights is currently in the process of designing a practical tool to help States ensure that legislation and policies are in place to protect people whose economic, social and cultural rights are negatively affected by business activities.³²² The UN bodies such as the UNDP and the UNEP were jointly involved in supporting the Ministry of Environment in the establishment of a national authority for clean development mechanisms.³²³ In addition, the UNDP has worked with the Ministry of Electricity in developing a framework for introducing renewable energy projects. The UN has been progressively influencing countries, especially developed countries, to formulate their national regulations covering CSR policies and ordain their corporations doing

³¹⁹ ‘Sustainable Development, Green Economy and Oil and Gas in Iraq’ <<http://iq.one.un.org/documents/469/Sustainable%20Development%20-%20English.pdf>> accessed 28 May 2017

³²⁰This program is targeted at: I) sustainable employment opportunities; II) poverty eradication; III) implementation of legal and regulatory framework. UN and the government of Iraq are working on the development of industrial areas via the implementation of regional best practices, improvement of legal and institutional frameworks, and management models.

³²¹ See World Investment Report: ‘Towards a New Generation of Investment Policies’ (UNCTAD, 2012), esp. Chapter IV, available at: <<http://investmentpolicyhub.unctad.org/Publications/Details/63>> accessed 25 May 2017; ‘UNCTAD Investment Policy Framework for Sustainable Development’ (Jul 28, 2015), available at: <<http://investmentpolicyhub.unctad.org/Publications/Details/149>> accessed 29 May 2017.

³²² See the draft General Comment on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities (2017): <<http://www.ohchr.org/EN/HRBodies/CESCR/Pages/Discussion2017.aspx>> accessed 20 May, 2017.

“This General Comment aims to provide guidance on the international law obligations under the Covenant in the context of business activities. As such, it seeks to assist States parties, including parliaments, domestic courts and national human rights institutions, in fulfilling their Covenant duties. It is also the Committee’s intention that the present General Comment will support business entities’ and civil society on taking into account Covenant obligations in their activities.”

Also see the written submissions on the draft General Comment on State obligations under the ICESCR in the context of business activities: < <http://www.ohchr.org/EN/HRBodies/CESCR/Pages/Submissions2017.aspx> > accessed 20 May, 2017. See especially, the Columbia Center on Sustainable Investment (CCSI) submission on the draft General Comment on “State obligations under the ICESCR in the Context of Business Activities” which is focused on international investment and its impacts on sustainable development. Available at: <<http://ccsi.columbia.edu/2017/01/23/submission-on-the-draft-general-comment-on-state-obligations-under-the-icescr-in-the-context-of-business-activities/>> accessed 25 May 2017. ‘UN Global Compact Provides Platform for Business Leaders to Take Action on the SDGs’ (20 July 2017), available at: <https://www.unglobalcompact.org/news/4101-07-20-2017>, accessed 20 July 2017.

³²³Governing Council of the UN Environment Programme, Implementation of Governing Council decision 22/1 IV on post-conflict environmental assessment ,<www.unep.org/GC/GC23/documents/GC23-INF20.doc>

business abroad to abide by those.³²⁴ In course of time, Iraq is expected to benefit from such stances of the home countries of transnational corporations doing business in Iraq.

It is advisable that in the same vein the Iraqi government can monitor the corporate CSR policies, if any, mandated by their home countries and make them answerable for it. Thus, the approach here can be a two-way traffic which would benefit Iraq in the long run toward its sustainable development goals. On a pleasing note, one can point to the fact that examples abound with growing corporate culture to respect human rights in the extractive industry on the global level as are evidenced in corporate PR stunts.³²⁵

Part V: Challenges Facing Sustainable Development of Oil and Gas in Iraq

The forward-looking perspective of sustainable development of the Iraqi oil and gas industry is fraught with various challenges such as short-term to medium-term policy options, proposed legal regime for hydrocarbons in Iraq, issues concerning dealing with human rights and environmental protections in the contractual framework as well as occasional legal actions concerning oil and gas in Iraq denting on investor's confidence as a natural resource development partner. This section will briefly appraise these aspects which stand in the way for sustainable development.

6.3. Prospects of current policies and foreseeable challenges - an analytical perspective

According to policies put in place by the authorities in Iraq, there are no limitations on business and investment transactions riveting foreign exchange, as long as the fundamental transactions are supported by legal documents. According to the expected provisions of the prospective federal hydrocarbon law, IOCs will be given an opportunity to maintain Iraqi bank accounts and relocate funds in or out of Iraq. This will make the transfer policy favourable to IOCs.³²⁶

Since 2003 Iraq's monetary policy has paid attention to the maintenance of price stability.³²⁷ This is by valuing the Dinar alongside the US dollar, to sustain exchange rate predictability. Banks are allowed to execute spot dealings in any exchange rate but are permitted to engage in forward transactions in Iraqi currency. No taxes or grants are imposed on the procurement or auctions of foreign exchange currency.

³²⁴ See 'Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad', available at: <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse.aspx?lang=eng>> accessed 25 May 2017.

'An Analysis of Policy References made by large EU Companies to Internationally Recognised CSR Guidelines and Principles' (March 2013), available at <<https://business-humanrights.org/en/pdf-an-analysis-of-policy-references-made-by-large-eu-companies-to-internationally-recognised-csr-guidelines-and-principles>> accessed 2 May 2017.

United Nations Global Compact - Corporate Social Responsibility News, Reports and Events: <<http://www.csrwire.com/members/12044-united-nations-global-compact>> accessed 2 May 2017.

³²⁵ See BP's initiatives at: <<http://www.bp.com/en/global/corporate/sustainability/respecting-human-rights/bp-and-human-rights.html>> accessed 20 May 2017; Shell Global's, at: <<http://www.shell.com/sustainability/transparency/human-rights.html>> accessed 20 May 2017 ExxonMobil's at: <<http://corporate.exxonmobil.com/en/community/human-rights/respecting-rights>> accessed 20 May 2017.

³²⁶ U.S. Department of State, 2016, *Investment Climate Statement – Iraq* (n 218).

³²⁷ 'Dinar News Trade Bank of Iraq and Central Bank of Iraq' <<http://dinarvets.com/forums/index.php?/topic/484-dinar-news-trade-bank-of-iraq-and-central-bank-of-iraq/>> accessed 6 March 2017.

Currently, Iraq's economic future is dependent on its ability to draw on its vast oil reserves as mentioned earlier. However, Iraq's planned economic activities are being obstructed by the continued sabotage of oil pipelines and the poor and destabilized state of Iraq's oil and gas infrastructure, increasingly more so with intermittent disruptive activities of the ISIS fighters in recent days as the paper is being written.

6.3.1. Proposed law for governing resources in Iraq

Iraq is not likely to pass a federal hydrocarbon law any time soon. This is because the federal government is less interested (for various practical as well as political reasons) in pushing the hydrocarbon draft law through parliament and thus creates a legal vacuum to some extent in respect of regulation of relationships between IOCs and the federal as well regional governments. A hydrocarbon draft law has been debated in parliament ever since 2007. However, complaints from the international campaigners and labour unions have interfered with the passing of this legislation (as presented in its various versions) for various concerns.³²⁸ In addition, some Iraqi parliamentarians, oil technocrats and ex-ministers insisted that the Baghdad parliament should decline to pass the proposed hydrocarbon law dreading that the legislation would split the nation faced with the bitter contentious issue of control over oil and gas. In addition, fights among Shi'ite, Sunni, and Kurdish political groups (now further fuelled by the recent ISIS threat along the way) over the segregated oil lands / zones have disillusioned endeavours to pass the legislation.

6.3.2. Human rights and environmental issues

Civil and political rights offer the populace access to environmental data, judicial remedies, and political processes. These rights offer empowerment, thus enable public participation in environmental decision-making.³²⁹ The 1966 UN Covenant on Economic Social and Cultural Rights promoted the treatment of a sound environment as an economic or social right.³³⁰ Contractual relations in the petroleum sector may impact environmental, human rights, and social policies in a nation. Contrary to the European Convention on Human Rights³³¹ and the International Covenant on Civil and Political Rights, some main human rights treaties make explicit reference to the environment, but do so only in narrow aspects pertaining to human

³²⁸Labour unions and international campaigners claim that oil production ought to be controlled by Iraqis; as the new oil law submitted in May 2007, is regarded as a cover for privatization. See Yanal Abul Failat, 'The Iraqi Federal Oil and Gas Law 2011: Exploration, Exploitation and Expropriation' (2013, no.4) IELR, 141. The author concludes: "... despite the best of intentions, the (proposed) FOGL (Federal Oil and Gas Law 2011) is an inadequate piece of legislation to meet its stated objectives and also does not function within the correctly stated context of politics, economics, physicality and technicality. Its provisions do not only hinder the stability of the Iraqi economy but also weaken and expropriate the ownership of oil and gas, entitled collectively to the people of Iraq in all regions and governorates." See also Ahmad Jiyad, 'Brief Review of the Federal Oil and Gas Law Proposed by the Ministry of Oil' (Iraq Development and Consultancy Research Paper, 2011), p.1, available at <http://www.iraq-businessnews.com/wp-content/uploads/2011/08/Ahmed-Mousa-Jiyad-Review-of-FOGL-MoO-version-July-2011.doc?d9c344> accessed 20 October 2016; Susan L. Sakmar, 'The Status of the Draft Iraq Oil and Gas Law' (2008) 30(2) Hous. J. Int'l L. 289.

³²⁹ See generally, Donald Zillman, A. Lucas and G. Pring (eds.), *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (OUP, 2002).

³³⁰Alan Boyle, 'Human Rights or Environmental Rights-A Reassessment' (2006) 18 Fordham Environmental Law Review 471; Alan Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23 (3) European Journal of International Law, 613.

³³¹Convention for the Protection of Human Rights and Fundamental Freedoms (1950) <http://www.echr.coe.int/Documents/Convention_ENG.pdf> accessed 25 May 2017.

health.³³² This situation is different from that found with the 1998 Aarhus Convention (although a European Convention but may have normative influence far beyond Europe in course of time) on access to information, public participation in decision-making and access to justice in environmental matters.³³³ This convention asserts that humankind has the right to reside in a healthy environment for the benefit of the current and future generations.³³⁴ The Aarhus Convention has an essential influence on the jurisprudence of the European Court of Human Rights giving peoples the right to live in a decent environment. Generally, the public should be directly involved in the setting of public policies and legislation; but foreign investment contracts in Iraq are rarely publicly consulted with the interested stateholders before or during the negotiation process, hence no public say in their formulation and execution, a practice not unusual though in other developing countries.³³⁵ Efforts to reorganization of foreign investment contracts are becoming an issue in order to support *i.e.* sustainable development involving human rights, labour rights, anti-corruption, environmental protection, and stakeholders' participatory role.³³⁶ In the context of sustainable development, environmental issues have common characteristics with human rights in some respects.³³⁷

³³²See, for example, International Covenant on Economic, Social, and Cultural Rights, UNGA. Res. 2200A (XXI), Art. 12 (Dec. 16, 1966); European Social Charter art. 11, Oct. 18, 1961, E.T.S. No. 035, 529 U.N.T.S. 89 (1961); Additional Protocol to the American Convention on Human Rights art. 11, Nov. 17, 1988, O.A.S.T.S. No. 69, 28 I.L.M. 156; Convention on the Rights of the Child, G.A. Res. 44/25, Annex, 44 U.N. GAOR Supp, U.N. Doc. A/44/49 (Nov. 20, 1989); see also Robin Churchill, 'Environmental Rights in Existing Human Rights Treaties', in Alan E Boyle and Michael R Anderson (eds.), *Human Rights Approaches to Environmental Protection* (OUP, 1996) 89-108; Susana Borràs, 'New Transitions from Human Rights to the Environment to the Rights of Nature', (2016) 1(1) *Transnational Environmental Law*, 1-31, available at: <http://journals.cambridge.org/abstract_S204710251500028X> accessed 25 May 2017.

³³³ Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) June 25 1998 UN Doc. ECE/CEP/43, 38 I.L.M. 517 <<http://www.unece.org/env/pp/treatytext.html>> accessed 15 October 2014; For the three 'access rights' of Principle 10 of the Rio Declaration on Environment and Development [(3-14 June 1992, UN Doc A/CONF.151/26/Rev.1 (vol 1), Annex 1 (12 August 1992))] – the public's right of access to information, access to public participation and access to justice in environmental matters – available at: <www.un.org/documents/ga/conf151/aconf15126-1annex1.htm> accessed 29 May 2017.

See also the roles of the ever-growing environmental courts and tribunals (ECTs) world-wide in

George (Rock) Pring, & Catherine (Kitty) Pring, 'Twenty-first century environmental dispute resolution – is there an 'ECT' in your future?' (n 243) accessed 17 March 2017.

George (Rock) Pring and Catherine (Kitty) Pring, 'Greening Justice: Creating and Improving Environmental Courts and Tribunals' (n 243) accessed 17 March 2017.

³³⁴ Ibid (Aarhus Convention) art1.

³³⁵ See L. Cotula and K. Tienhaara, 'Reconfiguring Investment Contracts to Promote Sustainable Development', (2011 – 2012) *Yearbook on International Investment Law and Policy*, 281, 286.

³³⁶ Michael Likosky, 'Contracting and regulatory issues in the oil and gas and metallic minerals industries' <http://unctad.org/en/docs/diaeia20097a1_en.pdf> accessed 28 May 2017.

³³⁷See Ben Boer (ed), *Environmental Law Dimensions of Human Rights* (OUP, 2015). See also Alan Boyle, 'Human Rights and the Environment: Where Next?' (n 330) 613; Elisa Morgera, 'Human Rights Dimension of Corporate Accountability' in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann, and Francesco Francioni (eds), *Human Rights in International Investment Law and Arbitration* (OUP, 2009) 511; Elisa Morgera, 'Significant Trends in Corporate Environmental Accountability: The New Performance Standards of the International Finance Corporate' (2006) 18 *Colorado Journal of International Environmental Law and Policy*, 147; Loukis Loucaides, 'Environmental Protection through the Jurisprudence of the European Convention on Human Rights' (2004) 75(1) *British Yearbook of International Law*, 249; Richard Desgagné, 'Integrating Environmental Values into the ECHR' (1995) 89 *American Journal of International Law*, 263; Gudmundur Alfredsson, 'Human Rights and the Environment', in David Leary and B. Pisupati (eds), *The Future of International Environmental Law* (United Nations University Press, 2010) 127; Donald k Anton and Dinah L Shelton, *Environmental Protection and Human Rights* (Cambridge University Press 2011); Francesco Francioni, 'International Human Rights in an Environmental Horizon' (2010) 21(1) *The European Journal of International Law* 41; Boyle and Anderson (eds), *Human Rights Approaches to Environmental Protection* (n 246); Boyle "Human Rights or Environmental Rights? A Reassessment" (n 330) 471; Conor Gearty, 'Do human rights help or hinder environmental protection?' (2010)

Clauses such as stabilization, equilibrium, indemnity, and international arbitration contained in foreign investment contracts limit the risk for investors, thus creating a balance of rights between the populace, governments and IOCs.³³⁸ Foreign investment contracts may (depending on the terms used in them) adversely affect the constitutional rights and abilities of people in host states while increasing the rights and protection of the companies involved.³³⁹

As firms continue their operations nationally and internationally, there may be a flip side of their operations violating human rights. To remedy human rights violations, there is a clarion call for holding companies legally accountable for serious human rights abuses and violations. It is for this reason that judicial institutions such as the International Criminal Court and similar international tribunals have been formed to prosecute the organizations and individuals for violation of human rights. The Rome Statute of the International Criminal Court lists four actionable international core crimes, *viz.*, aggression, genocide, war crimes, and crimes against humanity.³⁴⁰ Despite the formation of such bodies there are still some setbacks in the implementation of justice for human rights violations as neither the Rome Statute nor the constitutive documents of other international criminal tribunals provide for corporate criminal liability.³⁴¹ Similar tendency in respect of corporate civil liability is reflected in the recent U.S Supreme Court decision in *Kiobel vs. Royal Dutch Petroleum* under the Alien Torts Claims Act (ATCA) as the Court unanimously upheld the Second Circuit's dismissal of the complaint.³⁴² This decision thus breaks away from the previous contention for corporate civil

1 (1) *Journal of Human Rights and the Environment* 7–22; Romina Picolotti; Jorge Daniel Taillant (eds), *Linking Human Rights and the Environment* (University of Arizona Press, 2003); IBA 'Achieving Justice and Human Rights in an Era of Climate Disruption' International Bar Association Climate Change Justice and Human Rights Task Force Report (IBA, 2014), available at: <<http://www.ibanet.org/PresidentialTaskForceClimateChangeJustice2014Report.aspx>> accessed 29 May 2017.

³³⁸Ibid; see also Maniruzzaman (n 74), 79-108.

³³⁹ See an Israeli SC case on the issues of constitutionality of stabilization clauses: *The Movement for Quality Government v. The Prime Minister of Israel*, High Court of Justice 4374/15, 7588/15, 8747/15, 262/16, An English summary is available at: <http://elyon1.court.gov.il/files_eng/15/740/043/t63/15043740.t63.pdf> accessed 29 May 2017; See also Arie Reich, 'Israel's Foreign Investment Protection Regime in View of Developments in its Energy Sector', (2017), available at <<https://ssrn.com/abstract=2906274>> or <<http://dx.doi.org/10.2139/ssrn.2906274>> accessed 25 May 2017.

³⁴⁰ See Philipp Ambach, 'International Criminal Responsibility of International Corporate Actors Doing Business in Zones of Armed Conflict', in Freya Baetens (ed.), *Investment Law within International Law: Integrationist Perspectives* (CUP, 2013) 51, 57-64.

³⁴¹ See Philipp Ambach *ibid*; Norman Farrell, 'Attributing Criminal Liability to Corporate Actors: Some Lessons from the International Tribunals' (2010) 8 *Journal of International Criminal Justice*, 875.

³⁴² Eric Engle, 'Corporate Criminal Liability & the Alien Tort Statute: *Kiobel v. Royal Dutch Petroleum*' (2012) 34 *Houston Journal of International Law* 499; John Gerard Ruggie, 'Kiobel and Corporate Social Responsibility: An Issue Brief' (September 4, 2012, available at: <[www.hks.harvard.edu/mrceb/Csri/KIOBEL_AND_CORPORATE_SOCIAL_RESPONSIBILITY%20\(3\).pdf](http://www.hks.harvard.edu/mrceb/Csri/KIOBEL_AND_CORPORATE_SOCIAL_RESPONSIBILITY%20(3).pdf)> accessed 18 May 2017; Simon Baughen, 'Customary International Law and Its Horizontal Effect? Human Rights Litigation between Non-State Actors' (2015) 67(1) *Rutgers Law Review* 89; Claes Cronstedt, Robert C. Thompson, Rachel Chambers, Adrienne Margolis, David Rønnegard and Katherine Tyler, 'An international arbitration tribunal on business & human rights – reshaping the judiciary' <http://business-humanrights.org/sites/default/files/media/documents/international_arbitration_tribunal_on_business_and_human_rights.pdf> ; Claes Cronstedt and Robert C. Thompson, 'An International Arbitration Tribunal of Business and Human Rights-version 5' (April 13, 2015), available at: <<http://business-humanrights.org/en/pdf-an-international-arbitration-tribunal-on-business-human-rights-version-five>> accessed 2 May 2017.

For a discussion of the principal obstacles at length, see Gwynne Skinner, Robert McCorquodale and Olivier de Schutter, with case studies: Andie Lamb, 'The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business', (ICAR, CORE and ECCJ, 2013), available at <<http://accountabilityroundtable.org/wp-content/uploads/2013/02/The-Third-Pillar-Access-to-Judicial-Remedies-for-Human-Rights-Violation-by-Transnational-Business.pdf>> accessed 7 May 2017.

liability under customary international law through ACTA suits in the U.S. federal courts.³⁴³ Baughen notes, “(a)s corporations have never been the subject of international criminal liability, it follows that they cannot incur civil liability under customary international law.”³⁴⁴ However, it is expected that all stakeholders in all sectors, be it oil and gas or any other business, should adhere to the UN Guiding Principles and observe responsible business conduct as drafted by John Ruggie.³⁴⁵ Unfortunately, there are still some TNCs and businesses that do not seem to live up to the responsibilities stipulated as such by the UN, and this is more evident in Iraq at present.

To ensure the effectiveness of implementation of international law, there is a need for the creation of a more effective mechanism to assist in enforcing the law of human rights in a business context. It is for this reason that some jurists have proposed the idea of a tribunal for the purpose of dealing with business and human rights disputes.³⁴⁶ The tribunal is proposed to act in a fair and impartial manner by going to the extent of addressing the provisions contained in the International Convention on Civil and Political Rights and several international labor conventions. The proposed tribunal, just like the ISDS, would stand at the crossroads of private and public interests. However, there may be problems for attracting financiers for such tribunals as concerns have been expressed in some quarters.³⁴⁷

Unlike international criminal courts as mentioned above, the advantages of this tribunal could be many, it proposes for compensation for the victims of human rights violations or abuses by

See also Roger P. Alford, ‘Arbitrating Human Rights’ (2008) 83 *Notre Dame L. Rev.* 505, 507, available at: <<http://scholarship.law.nd.edu/ndlr/vol83/iss2/2>> accessed 25 May 2017.

³⁴³ William S. Dodge, ‘Corporate Liability Under Customary International Law’ (2012) 43 *Geo. J. Int’l L.*, 1045; see also *Joseph Jesner et al v. Arab Bank PLC*, US SC - Brief of International Law Scholars as *Amici Curiae* in support of the petition for writ of certiorari to the United States Court of Appeals for the Second Circuit (Brief: November 14, 2016), available at: < <http://www.scotusblog.com/case-files/cases/jesner-v-arab-bank-plc/>> accessed 25 May 2017.

³⁴⁴ Baughen (n 342), 89, 106.

³⁴⁵ John Gerard Ruggie, ‘Guiding Principles on Business and Human Rights: Implementing the UN Protect, Respect and Remedy Framework’. (Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (2011); Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, ‘Principles for responsible contracts: integrating the management of human rights risks into State-investor contract negotiations: guidance for negotiators’, 25 May 2011, available at <<http://www.business-humanrights.org/media/documents/ruggie/report-principles-for-responsible-contracts-25-may-2011.pdf>> accessed 25 May 2017. Rae Lindsay, Robert McCorquodale, Lara Blecher, Jonathan Bonnitcha, Antony Crockett and Audley Sheppard, ‘Human Rights Responsibilities in the Oil and Gas Sector: Applying the UN Guiding Principles’ (2013) 6 (1) *Journal of World Energy Law and Business* 2, available at <<http://jwelb.oxfordjournals.org/content/6/1/2.full>> accessed 20 May 2017.

See also ‘Oil and Gas Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights’ (European Commission), available at <<http://business-humanrights.org/en/european-commission-publishes-human-rights-guidance-consistent-with-un-guiding-principles-for-3-business-sectors#c73572>> accessed 15 May 2017.

³⁴⁶ Cronstedt, Thompson, Chambers, Margolis, Rönnegard and Tyler (n 342) 3; Claes Cronstedt and R. Thompson, ‘A Proposal for an International Arbitration Tribunal on Business and Human Rights’, (2016) 57 *Harvard International Law Journal*, Online Symposium 66. See also IBA: ‘Achieving Justice and Human Rights in an Era of Climate Disruption’ International Bar Association Climate Change Justice and Human Rights Task Force Report (2014), available at: <<http://www.ibanet.org/PresidentialTaskForceClimateChangeJustice2014Report.aspx>> accessed 5 May 2017.

See for further refinement of the idea (March 2017: ‘New Business and Human Rights Arbitration Rules: a call by international law experts’ (Stockholm Chamber of Commerce), available at: <<http://www.sccinstitute.com/about-the-scc/news/2017/new-business-and-human-rights-arbitration-rules-a-call-by-international-law-experts/>> accessed 5 May 2017.

³⁴⁷ *Ibid.*

transnational corporations or businesses. The abuses include, but not limited to personal injury, property destruction and environmental damage. The Tribunal, therefore, seeks to substitute for domestic civil courts, which could often prove to be a suitable avenue for achieving adequate remedies.³⁴⁸ Currently, the main reason for which the existing civil courts (especially in developing countries) are unable to solve many cases of serious human rights abuses involving business enterprises is the absence of an independent and functional judicial system. The tribunal seeks to use alternative dispute resolution (ADR) methods to provide justice where justice is lacking.³⁴⁹ As opposed to civil courts, the tribunal would fare more favourably because of its approach to using ADR which excludes the role of the *forum non-convenience* doctrine (being the reason for rejection of many ATCA cases in US courts³⁵⁰), thereby allowing parties throughout the world to avail themselves of the services of the tribunal. It also seeks to streamline its operations by ensuring that there are less formal pleadings required thus achieving flexibility in the examination of witnesses. Recruiting of enough suitably qualified arbitrators to work on a relatively dedicated basis would ensure that there is no overcrowding of the docket as it happens in many civil courts. This proposal is using the limits of arbitration as a consensual system of dispute resolution. With its highly qualified expert dispute resolvers drawn from all over the world and supported by the assistance of a competent secretariat, it would make ADR attractive to all the affected, thus obtaining consent would only be a formality. Victims are, therefore, likely to consent to the use of the tribunal, especially in cases where no other forum is available.³⁵¹

Endowing the process of the tribunal with a public function will serve to alleviate abuse, which is, at times, orchestrated by government agencies. This implies in the case where the host state abuses its regulatory or administrative authority over business entities, and then the tribunal will adjudicate such issues.

ADR can also address well human rights issues on the inter-state level. Some states have been previously accused of violating human rights. For instance, on 9 August 2011, the United States went to arbitration against Guatemala to effectively enforce its labour laws. Guatemala has previously violated human rights. The US and Guatemala agreed to postpone the arbitration pending the negotiation and implementation of the Enforcement Plan. Guatemala has been trying to implement the measures outlined in the Enforcement Plan.³⁵² However, failure by Guatemala to closely adhere to the provision on adherence to human rights has moved the US for the first time ever to intervene and begin formal consultations used to resolve trade disputes in the area of labour rights enforcement. The USTR announced that it would finally move forward to arbitration in the long-running dispute with the government of Guatemala regarding whether or not Guatemala is meeting the labour commitments of the DR-CAFTA or CAFTA.³⁵³ In announcing the decision, the USTR stated that the goal is to improve conditions that workers face every day. It is worth noting that Six Guatemalan labour unions and the AFL-CIO labour federation had filed a complaint in April 2008 accusing the government of Guatemala of failing to effectively enforce laws guaranteeing employees the right to organize

³⁴⁸ Cronstedt, Thompson, Chambers, Margolis, Rönnegard and Tyler (n 342) 5.

³⁴⁹ Ibid., 6. See also Boulle Laurence, 'ADR in cross-border investment disputes', (2011) 12 (5) ADR Bulletin, available at: <<http://epublications.bond.edu.au/adr/vol12/iss5/1>> accessed 5 January 2017

³⁵⁰ Engle (n 342), 499.

³⁵¹ Office of the United States Trade Representative: 'United States Proceeds with Labor Enforcement Case against Guatemala', available at: <http://www.ustr.gov/about-us/press-office/press-releases/2014/September/United-States-Proceeds-with-Labor-Enforcement-Case-Against-Guatemala>> accessed 24 September 2016.

³⁵² Ibid.

³⁵³ Ibid.

and bargain collectively, the right of association, and conducive conditions of work. Whilst the United States initiated a state-to-state arbitration against Guatemala in 2011, it kept putting Guatemala under pressure to eventually reach an accord with it on a series of wide-ranging improvements to its labour laws.³⁵⁴

On an aspirational note, one might like to raise expectation that Iraqi government can for the benefit of its people encourage shareholder activism for the protection of human rights including social / labour rights and the environment³⁵⁵ as well as facilitate the settlement of stakeholders' disputes with investing international oil companies and businesses by ADR methods.³⁵⁶ It needs to be stressed that the UN SDGs require such steps, especially SDG Goal 16 categorically requires states "to provide access to justice for all and build effective, accountable and inclusive institutions at all levels."

Apart from safeguarding human rights, international law also requires Iraq to check on the environmental impact as a result of the oil and gas exploration.³⁵⁷ In this regard, the UN Secretary-General's special representative, Professor John Ruggie drafted a framework to streamline the implementation of international law (esp. the state's duty to protect human rights).³⁵⁸ Along the lines, Iraq should ensure that all the businesses in the petroleum sector

³⁵⁴See Luke Eric Peterson, 'United States brandishes threat of renewed state-to-state arbitration unless Guatemala ramps up labour rights improvements' (October 28, 2013), <<http://kluwerarbitrationblog.com/2013/10/28/united-states-brandishes-threat-of-renewed-state-to-state-arbitration-unless-guatemala-ramps-up-labour-rights-improvements/>> accessed 17 May 2017.

³⁵⁵ See generally, Benjamin J. Richardson, *Socially Responsible Investment Law Regulating the Unseen Polluters* (OUP, USA, 2008); Maniruzzaman, 'Creeping Legitimacy of Corporate Social Responsibility' ((n 124)1.

³⁵⁶See generally, David A Collins, 'Alternative Dispute Resolution for Stakeholders in International Investment Law', (2012) 15(2) *Journal of International Economic Law*, 673–700. See also John Forester, *Dealing with Differences: Dramas of Mediating Public Disputes* (OUP NY, 2009); Karin Lukas, Barbara Linder, Astrid Kutrzeba, Claudia Sprenger, *Corporate Accountability - The Role and Impact of Non-Judicial Grievance Mechanisms* (Edward Elgar Publishing, 2016); Juan Pablo Calderón-Meza, 'Arbitration for Human Rights: Seeking Civil Redress for Corporate Atrocity Crimes', (2016) 57 *Harvard International Law Journal (Online Symposium)*; "Online Symposium: An International Jurisdiction for Corporate Atrocity Crimes", (2016) 57 *Harvard International Law Journal*, available at: <<http://www.harvardilj.org/2016/07/online-symposium-an-international-jurisdiction-for-corporate-atrocity-crimes/>> accessed 25 February 2017

See a recent interesting IBA report: 'Achieving Justice and Human Rights in an Era of Climate Disruption' – International Bar Association - Climate Change and Human Rights Task Force (July 2014), available at: <<http://www.ibanet.org/PresidentialTaskForceClimateChangeJustice2014Report.aspx>> accessed 16 May 2017.

³⁵⁷See generally on the international law policy: *Pulp Mills on the River Uruguay* (Argentina v. Uruguay) (ICJ Judgment of 20 April 2010), available at <<http://www.icjci.org/docket/index.php?p1=3&p2=3&case=135&p3=4>> accessed 25 May 2017; see commentaries Cymie R. Payne, 'Pulp Mills on the River Uruguay: The International Court of Justice Recognizes Environmental Impact Assessment as a Duty under International Law' (2010) 14 (9) *American Society of International Law*, available at: <<http://www.asil.org/insights/volume/14/issue/9/pulp-mills-river-uruguay-international-court-justice-recognizes>> accessed 5 May 2017. Cymie R Payne, 'Environmental Impact Assessment as a Duty Under International Law: The International Court of Justice Judgment on Pulp Mills on the River Uruguay' (2010) 3 *European Journal of Risk Regulation*, 317, available also at: SSRN: <<http://ssrn.com/abstract=1689928>> accessed 12 May 2017; El Preiss, 'The International Obligation to Conduct an Environmental Impact Assessment: The ICJ Case Concerning the Gabcikovo Nagymaros Project' (1999) 7 *NYU Environmental Law Journal*, 307; Peter D. Cameron and Michael C. Stanley, *Oil, Gas, and Mining: A Sourcebook for Understanding the Extractive Industries* (Washington, DC: World Bank, 2017) available at: <https://openknowledge.worldbank.org/handle/10986/26130> License: CC BY 3.0 IGO, accessed 20 June 2017.

³⁵⁸John Gerard Ruggie, 'Business and Human Rights: The Evolving International Agenda', (2007) 101 *American Journal of International Law*, 3; John Gerard Ruggie, *Just Business: Multinational Corporations and Human Rights* (W.W. Norton & Co., NY, Lond., 2013). See generally, J. L. Černič and T.V. Ho (eds.), *Human Rights and Business: Direct Corporate Accountability for Human rights* (WLP, 2015); Article 46: 'Environmental Impact Assessment', '*Draft International Covenant on Environment and Development*–

respect and comply with such rules relating to human rights and the environment by exercising due diligence.³⁵⁹ These clearly prohibit environmental damage that could be in the form of spilling the oil or leakage of nuclear.³⁶⁰ The participating bodies that are the government and the private corporations / businesses should ensure that they conform to the dictated guidelines, so as not to upset the eco-system balance.³⁶¹ There is the standard that all corporations / businesses should maintain such as using eco-friendly means of exploration and disposal of the end products.³⁶²

Environmental despoliation (via oil spills, hydrocarbon releases, blowouts, and gas flaring) raises the questions of various species' protection and the biodiversity. Pollution, explosions, and displacement affect the populace. The major issue of the Iraqi environment is the depleted uranium pollution, which poses risks to public health.³⁶³ Other sources of contamination are the military munitions used in conflicts that have been going on ever since 1991. The effects are increased cases of congenital defects, cancer and poisoning. The degree to which IOCs and the national oil company monitor their environmental impacts and make statements regarding the environment, provision for adequate compensation, and clean-up mechanisms in polluted areas is an issue that remains for their relevant codes of conduct to deal with in ensuring the maintenance of facilities for the community around.³⁶⁴ Iraq's competitor Iran is lately making

Implementing Sustainability – Fifth Edition: Updated Text (Gland, Switzerland: IUCN, 2015) (IUCN Environmental Policy and Law Paper No. 31 Rev. 4, available at: <https://portals.iucn.org/library/node/46647>, accessed 20 July 2017.

³⁵⁹ See on 'Human Rights Due Diligence' at <https://business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-companies/type-of-step-taken/human-rights-due-diligence> accessed 25 March 2017. It is noteworthy that the new UN General Comment (23 June 2017) on business and human rights clarifies that the state duty to protect includes making corporate human rights due diligence mandatory: see General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities (UN Committee on Economic, Social and Cultural Rights), E/C.12/GC/24 (23 June 2017), available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f24&Lang=en <accessed 7 July 2017.

³⁶⁰ Miriam Mafessanti, 'Responsibility for Environmental Damage under International Law: Can MNCs Bear the Burden? ... And How?' (2009-2010) 17 Buffalo Environmental Law Journal, 87, 90.

³⁶¹ Christopher D Stone, 'Common but differentiated responsibilities in international law' (2004) 98 American Journal of International Law, 276-301 ; see also IBA: 'Achieving Justice and Human Rights in an Era of Climate Disruption' (International Bar Association Climate Change Justice and Human Rights Task Force Report, 2014), available at <http://www.ibanet.org/PresidentialTaskForceClimateChangeJustice2014Report.aspx> accessed 7 February 2017.

³⁶² Alhaji Marong, 'From Rio to Johannesburg: Reflections on the Role of International Legal Norms in Sustainable Development', (2003) 16 Georgetown International Environmental Law Review, 21. Tess Riley, 'Just 100 companies responsible for 71% of global emissions, study says' (10 July 2017), available at: <https://www.theguardian.com/sustainable-business/2017/jul/10/100-fossil-fuel-companies-investors-responsible-71-global-emissions-cdp-study-climate-change> accessed 28 July 2017.

³⁶³ Riyadh Abdullah Fathi, Lilyan Yaqup Matti, Hana Said Al-Salih and Douglas Godbold, 'Environmental pollution by depleted uranium in Iraq with special reference to Mosul and possible effects on cancer and birth defect rates', available at: <http://www.tandfonline.com/doi/abs/10.1080/13623699.2013.765173?journalCode=fmcs20> accessed 23 January 2017.

³⁶⁴ See, for example, the OECD Guidelines for Multinational Enterprises (2011 Edition) (Parts IV and VI), available at <http://dx.doi.org/10.1787/9789264115415-en> / <http://www.oecd.org/corporate/mne/48004323.pdf> accessed 25 May 2017; Sean D Murphy, 'Taking Multinational Corporate Codes of Conduct to the Next Level' (2005) 43(2) Columbia Journal of Transnational Law, 390; Detlev F Vagts, 'The Governance of the Multinational', (2005) 23 (3) Wis. Int'l L.J. 526 ; John Gerard Ruggie, 'Regulating Multinationals: The UN Guiding Principles, Civil Society, and International Legalization', available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2474236 accessed 5 May

a good headway in managing environmental issues in the oil and gas sector with new measures which would undoubtedly prove a challenge to Iraq.³⁶⁵ Many oil spills in Kurdistan are neither recorded nor acted upon, and the present environmental law is hardly effective. Foreign investors' clean-up is often limited and shrouded in secrecy to prevent accurate estimation of spillage and damages. Additionally, the oil companies have made no serious effort to discover the impact of their activities on the environment. CSR efforts made by the IOCs leave many aspects of transparency and accountability beyond public scrutiny,³⁶⁶ which often, in fact, turn out to be mere 'green-washing', *i.e.* the so-called 'faux CSR' that belies the reality.³⁶⁷

6.3.3 Legal challenges pertaining to sustainable development in Iraq

The concerns for sustainable oil and gas development in Iraq and the Kurdistan region are associated not only with peaceful negotiations but also legal disputes. The legal status of sustainable development has proven to be a concept that goes against that legal taxonomy. Lowe's interpretation of sustainable development is instructive for judicial or arbitral bodies, which may use it to legitimize recourse in regard to evaluative treaty interpretation essential in conflict resolution.³⁶⁸ The interpretive role of sustainable development is vital, for it holds vast power of liberty to the judges and arbitrators. Although the interpretive role is powerful, it cannot be limited to only one function in cases of rare disputes.³⁶⁹ It is noteworthy that there is a tendency in the juristic exercise towards an expansive interpretation of the concept of sustainable development that may impact the scope of the various standards of treaty protection of foreign investors including non-discrimination³⁷⁰ and fair and equitable treatment.³⁷¹

2017; Karl P Sauvant, 'The negotiations of the United Nations Code of Conduct on Transnational Corporations: Experience and lessons learned', (2015) 46 *Journal of World Investment and Trade* 11-87, available at: <http://works.bepress.com/karl_sauvant/158> accessed 1 May 2017.

³⁶⁵ See Mona Agha Seyed Jafar Kashfi, 'Cabinet approves general conditions governing Iran's Upstream Oil and Gas Contracts (2016): improvements in the assessment and management of the environmental impacts of upstream oil and gas operations', (2017)10(2)*JWELB*, 136-146, available at: <<https://academic.oup.com/jwelb/article/doi/10.1093/jwelb/jwx002/3098286/Cabinet-approves-general-conditions-governing-Iran>> accessed 2 May 2017.

³⁶⁶ Michael J Watts, 'Righteous oil? Human rights, the oil complex, and corporate social responsibility', (2005) 30 *Annual Review of Environment and Resources* 373-407; Adam Sulkowski, and Sandra Waddock, 'Beyond Sustainability Reporting: Integrated Reporting is Practiced, Required and More Would Be Better', (2014) 10(4) *University of St. Thomas Law Journal*, available at: <<http://ir.stthomas.edu/ustlj/vol10/iss4/7/>> accessed 25 May 2017. See Reporting on the SDGs, available at: <<https://www.globalreporting.org/information/SDGs/Pages/Reporting-on-the-SDGs.aspx>> accessed 14 May 2017.

³⁶⁷ Miriam A Cherry, and Judd F Sneirson, 'Beyond Profit: Rethinking Corporate Social Responsibility and Greenwashing After the BP Oil Disaster', (2011) 85 *Tulane Law Review*, 982, 985.

³⁶⁸ See, for example, Vaughan Lowe, 'Sustainable Development and Unsustainable Arguments' in Alan Boyle and David Freestone (eds.), *International Law and Sustainable Development: Past Achievements and Future Challenges* (OUP, 1999) 19, 21, also available at Oxford Scholarship Online: <<http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780198298076.001.0001/acprof-9780198298076-chapter-2>>

³⁶⁹ Barral (n 23) 377-400. See generally, Marie-Clarie C. Segger and Judge C.G. Weeramantry (eds.), *Sustainable Development Principles in the Decisions of International Courts and Tribunals: 1992-2012* (Routledge 2017).

³⁷⁰ Marcos Orellana, 'Investment Agreements & Sustainable Development: The Non-Discrimination Standards', (2011) 11 *Sustainable Development Law & Policy*, 3.

³⁷¹ See generally, Roland Kläger, '*Fair and Equitable Treatment*' in *International Investment Law* (Cambridge University Press, 2011) 197-213; Steffen Hindelang and Markus Krajewski (eds.), *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (Oxford University Press, 2016); Lise Johnson, 'Ripe for Refinement: The State's Role in Interpretation of FET, MFN, and Shareholder

Iraq has currently faced with legal challenges that may hinder its sustainable development if not properly checked. To start with, there is a disagreement on the sharing of the revenue generated from oil and gas business between the federal government and the regional governments.³⁷² Although there is a draft document stating how to share the revenue, the representatives from the Kurdish and the Sunnis have failed to agree on it. The Iraqi constitution has also created some differences between the two communities regarding the new and old oil fields. The other major challenge is the inability of the companies in the oil business in Iraq to comply fully with the regulations set by international law in relation to human rights and the environmental protection and conservation. The law, as discussed earlier, has been faced with challenges from both traditional and free market sources. The criticism is that it fails to create responsibilities for covered foreign investors, even though it creates rights. There are also protests that it might also limit the host state's ability to implement public policies that are needed to promote sustainable development and responsible business conduct.³⁷³ The legal challenges that pose drastic risks to the sustainable development of oil and gas can be mentioned as follows, for example:

6.3.3.1. *Shatha al Musawi vs BP and China National Petroleum Company*³⁷⁴

In 2010 Ms Shatha al Musawi (member of Iraqi parliament) filed a lawsuit in the Supreme Court of Iraq alleging that the Rumaila oilfield contract violated the Iraqi Constitution of 2005; the contract was awarded by the Ministry of Oil (MoO) to BP and China National Petroleum Company in the 2009 bidding round.

The Iraqi Ministry of Oil has responded to the said allegation to the effect that: (1) the constitutional requirement for the approval of the Council of Representatives (the Iraqi parliament) only applies to international treaties and agreements between the State of Iraq and other States, so commercial contracts between the Regional Oil Company (ROC) and the International Oil Companies (IOCs) do not need such approval; and (2) the Technical Service Contracts (TSC) were awarded under the proposed federal hydrocarbons law, though it has not

Rights', Oxford GEG Working Paper 2015/101 (April 2015), available at: <<http://ccsi.columbia.edu/2015/05/21/ripe-for-refinement-the-states-role-in-interpretation-of-fet-mfn-and-shareholder-rights/>> accessed 15 March 2017; Lise Johnson and Merim Razbaeva, 'State Control Over Interpretation of Investment Treaties', Columbia Center on Sustainable Investment (April 2014), available at: <http://ccsi.columbia.edu/files/2014/04/State_control_over_treaty_interpretation_FINAL-April-5_2014.pdf> accessed 5 May 2017.

³⁷² See generally, Rex J Zedalis, *Claims Against Iraqi Oil and Gas: Legal Considerations and Lessons Learned* (CUP, 2010); Rex J. Zedalis, 'The role provincial governmental units can play regarding oil and gas development agreements in the Kurdish North: allocation of Iraqi constitutional power' (2013) 6(4) *Journal of World Energy Law and Business*, 314; Rex J. Zedalis, 'Foundations of Baghdad's Argument that Regions Lack Constitutional Authority Over Oil and Gas Development Agreements', (2008) 26 (2) *Journal of Energy & Natural Resources*, 303; Rex J. Zedalis, 'Foundations of Baghdad's Argument that Regions Lack Constitutional Authority Over Oil and Gas Development Agreements', (2008) 26 *Intl Bar Assoc.'s J. Energy & Nat. Res. L* 303; María Lasa Aresti, 'Oil and Gas Revenue Sharing in Iraq' (2016), available at <<http://www.resourcegovernance.org/analysis-tools/publications/revenue-sharing-case-study-oil-and-gas-revenue-sharing-iraq>> accessed 25 February 2017. See also Lorian Admon Yacoub, 'Reconstructing the Governance of Iraqi Oil (2003-2013) – Distribution of Oil Revenues Among Kurdistan and Iraq's Provinces (PhD thesis, University Sheffield, 2015).

³⁷³ Jeffrey D Sachs, 'ExxonMobil's Dangerous Business Strategy', (Project Syndicate, 17 April 2015), available at <<https://www.project-syndicate.org/commentary/exxonmobil-oil-drilling-climate-change-by-jeffrey-d-sachs-2015-04>> accessed 20 January 2017.

³⁷⁴ *Shatha al Musawi vs BP and China National Petroleum Company* (2010), available at <<http://whoswholegal.com/news/features/article/28421/oil-gas-contracts-iraq/>> accessed 27 February 2017.

yet been approved by the Council of Representatives.³⁷⁵ However, during July (2010) Baghdad conference, MoO asked BP/CNPC to convert \$500 million signature bonus from interest bearing loan into \$100 million unrecoverable payment, following what other IOCs did for West Qurna1 and Zubair oilfields. The decision by MoO (seen as a pre-emptive measure) intends to weaken the lawsuit that was ongoing before the Federal Supreme Court (FSC).³⁷⁶

The purpose of this case was probably to bring about drastic implications in regard to the legality of contracts awarded in the years 2008-2009. This could affect BP, Royal Dutch Shell, Eni, CNPC, ExxonMobil, Gazprom, Petronas, and Lukoil. Ms Shatha al Musawi argued that the contract was not as per the Iraqi constitutional requirements.³⁷⁷ The legal challenge was unsuccessful, as it halted on process grounds as Ms Shatha al Musawi was ordered by the court to pay a deposit of three hundred million Iraqi dinars, which would be refunded back to her if she won. She lacked the necessary amount for the deposit and the case collapsed.³⁷⁸

6.3.3.2. *Gulf Keystone vs Excalibur Ventures*³⁷⁹

Excalibur Ventures claimed that it was permitted to a 30% share in Gulf Keystone Shaikan oilfields, which approximately holds 12 billion barrels of oil, worth \$1.6 billion. Excalibur Ventures did not fulfil its contractual terms with Gulf Keystone in the development of oil fields in the Kurdistan region. This case had been in contention for three years, which contributed to the holding back of stocks of Gulf Keystone, making it to incur a financial loss. In 2013 a UK court decided in favour of Keystone because Excalibur had no valid claims against the former.³⁸⁰

It has to be stressed that due to the absence of clear legal prescriptions in case of joint bidding affairs in Iraq, foreign investors' fate remains uncertain. This makes investors jittery and shy away from similar transactions due to prospective legal wrangles. Consequently, it may adversely affect Iraq's sustainable development plan in the future.

³⁷⁵Sami Shubber, 'Iraq Oilfields Challenge – Legal Opinion' available at: <<http://www.iraq-businessnews.com/2010/08/07/iraq-oilfields-challenge-legal-opinion/>> accessed 25 May 2017.

³⁷⁶Ahmed Mousa Jiyad, 'Regimes Governing the Development of and Revenues from Upstream Petroleum Sector in Iraq', available at: <<http://www.iraq-businessnews.com/wp-content/uploads/2012/03/Ahmed-Mousa-Jiyad-Development-of-and-Revenues-from-Upstream-Petroleum-Sector-in-Iraq.pdf>> accessed 25 March 2017.

³⁷⁷There was a legal opinion presented in June 2009 by The Legal Committee at Iraq Energy Institute in response to the request made by the Oil & Gas Committee in the Iraqi Parliament in the absence of a federal hydrocarbon law. This opinion assesses the legality of the contracts of the Federal Ministry of Oil in the absence of a Federal Hydrocarbon Law, according to this legal opinion, the Federal Ministry of Oil, by executing contracts and agreements without constitutional endorsement by the Iraqi Parliament (as the sole legislative authority pursuant to the 2005 Iraq Constitution), would not only be defying prevailing Iraqi laws, but also deliberately defying its constitutional legal obligations with which even the pre-2003 regime complied. The legal opinion was presented before the *Shatha Almosawi* case was filed. This legal opinion is available at <<http://www.iraqenergy.org/news/downloader.php?dfile=Legal%20Opinion%20on.pdf>> accessed 25 April 2017.

³⁷⁸*Shatha al Musawi vs BP and China National Petroleum Company* (n 374).

³⁷⁹*Excalibur Ventures LLC v. Texas Keystone Inc. & Ors*, [2010], High Court of Justice, Queen's Bench Division, Commercial Court, 10-1517 [2013]. See Nicholas Scott, 'Excalibur v Gulf Keystone: a victory for common sense', (2014) 7(2) *Journal of World Energy Law and Business*, 171.

³⁸⁰Sarah Young, 'Gulf Keystone wins Kurdistan oilfield ownership court case' available at: <http://arabianindustry.com/oil-gas/news/2013/sep/10/gulf-keystone-wins-kurdistan-oilfield-ownership-court-case-4440397/#.UuI_UxDfq1s> accessed 25 April 2017.

6.3.3.3. *Dana Gas vs. Kurdistan region*³⁸¹

In the year 2013, Dana Gas PJSC, one of the largest investors in the Kurdistan Region's oil and gas sector, filed a case against the KRG under the terms of the Dana Gas 2007 agreement with KRG to the London Court of International Arbitration (LCIA), due to non-payments for condensate and liquefied petroleum gas products supplied from Khor Mor gas field and disputes on gas production rights. This case has established the first instance of an IOC suing the KRG.³⁸² The breach of the contract as well as ignoring the legal aspects and obligations by the KRG is a risk to the sustainable development of the Iraqi oil and gas sector. This is due to the fact that many willing investors will be discouraged to sign contracts with the KRG in view of the prospect of similar problems denting on investors' confidence, thus hindering any further development plans of Iraq. Recently, the LCIA has decided in favour of Dana on different counts.³⁸³

Of late, the KRG has signed a multibillion-dollar agreement to export oil to Turkey.³⁸⁴ Dana Gas PJSC updated creditors recently that they would maintain the choice of enforcing a claim in a Turkish court in seizing products from KRG until its receivables are met.³⁸⁵ Therefore, if the KRG refuses to comply with the demands of Dana Gas PJSC, Turkey could be persuaded by Dana to seize any imports from Kurdistan awaiting the conclusion of the terms of the negotiation.

On a cautionary note it has to be said that since the ratification of the ICSID Convention by Iraq in 2015 there appears to be a number of disputes being referred to ICSID arbitration. One may thus mention the recent ICSID case *Itisaluna Iraq LLC and others v. Republic of Iraq* (ICSID Case No. ARB/17/10, registered on 13 April 2017) based mainly on Agreement between Japan and the Republic of Iraq for the Promotion and Protection of Investment. The scale of the trend will not be clear until a few more years have passed. In the future, with the ratification of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), there may be prospect of increasing of such cases against Iraq. Although it may be a sign of investors' confidence in investing in Iraq, it has to maintain a healthy balance of relational conflicts so that it is not overwhelmed with investors' disputes which would stand in its way towards sustainable development.

³⁸¹*Dana gas vs. Kurdistan region* [2013], LCIA.

³⁸²A partner at a top international law firm said concerning Dana-KRG case, "such claims in other countries are frequently conducted through bilateral or multilateral investment treaties. Moreover, it is not unusual for a government to owe upstream companies money, but moving to arbitration is less desirable. It is pretty much the last resort. First, because if you have an investment, you need the government's goodwill to continue operating there. And second, even if you win, there's no guarantee you can make the country pay".

³⁸³Dana Gas Group Awarded \$1.98 Billion in Iraq Kurds Dispute

<<https://uk.news.yahoo.com/uaes-dana-gas-says-wins-1-98-bln-130151214--business.html>> accessed 29 May 2017.

'Dana Gas Group Gets \$121M Arbitral Award In Kurdistan Row', available at:

<https://www.law360.com/internationalarbitration/articles/891864/dana-gas-group-gets-121m-arbitral-award-in-kurdistan-row?nl_pk=262ca4be-105d-4731-8d19-de67fa1b4513> accessed 29 May 2017.

³⁸⁴Turkey is a signatory to the New York Convention. This convention applies to the recognition and enforcement of foreign arbitral awards.

³⁸⁵Mirna Sleiman and Julia Payne, 'UPDATE 4-Energy firm hits Iraqi Kurdistan with first major legal dispute' Reuters, available at: <<http://uk.reuters.com/article/2013/10/22/danagas-kurdistan-idUKL5N0IC09520131022>> accessed 29 May 2017.

7. Concluding Remarks and Recommendations

The issue of sustainable development is increasingly gaining importance in Iraq as the country moves towards long-term development following decades of conflicts. The future of Iraqi oil and gas is bleak though. This is because the main actors — the federal government / federal oil ministry in Iraq and the MNR in the Kurdistan region, have not yet any similar or synchronised plans for the future of the industry. They have both set up their policies on the privatization of the nationalized part of the existing Iraqi oil and gas wealth. The Iraqi petroleum sector needs to be developed according to the policy options within Iraq's framework of national development plans. However, due to various political factors and conflicting perspectives of regional governments there appears to be a considerable degree of legal and policy uncertainties that may impact upstream arrangements involving IOCs. This includes the status of the contractual arrangements which concern the fundamental question as to which authority (*i.e.* federal or regional) should have the power to authorize them has been a significant challenge pertaining to Iraqi oil development. Ambiguities, imperfections and inconsistent or contradictory interpretations of certain constitutional provisions are prone to generating daunting uncertainties as are references to older laws, though still valid. For instance, Law No 150 of 1987 contradicts with article 20 of the Iraqi constitution (2005); therefore, changing this law after signing the contracts will implicate the financial burden of Iraq, *i.e.* by making the nation pay for the IOCs' compliance in case any dispute arising is settled in their favour. IOCs might be hired to carry out services under contract, for a limited time period and for a fixed fee or under PSCs. This has contributed to the confusion concerning the respective roles of the legislative and executive branches of the government in the development of upstream petroleum. One may guess that this state of affairs bears out the fact that oil and gas in Iraq cannot be legally privatized any time soon.

It is the cumulative responsibility of the industry stakeholders to regulate CSR policies internally and externally at the corporate, state (both host and home states) and international levels. The growth of international trade and investment in extractive industries has heightened the importance of global commitment to the success of CSR, which will improve accountability and ensure corporate governance for greater social good and at the same time maintain corporate sustainability as a good business strategy.³⁸⁶ Iraq needs foreign investment to allow

³⁸⁶See generally, A F M Maniruzzaman, 'Risk Management and Dispute Avoidance in Oil and Gas Investments in Developing Countries: The Way Forward', in Sharif Bhuiyan, Philippe Sands and Nico Schrijver (eds), *International Law and Developing Countries: Essays in Honour of Kamal Hossain* (Brill Nijhoff, 2014) 198; Michael E. Porter & Mark R. Kramer, 'Strategy and Society: The Link Between Competitive Advantage and Corporate Social Responsibility' (December 1, 2006) Harvard Business Review, p.78. See also a multiyear research project report - David Kiron, Gregory Unruh, Nina Kruschwitz, Martin Reeves, Holger Rubel, Alexander Meyer Zum Felde, 'Corporate Sustainability at Crossroads: Progress Toward Our Common Future in Uncertain Times' (*MIT Sloan Management Review* and The Boston Consulting Group: May 23, 2017), available at: <http://sloanreview.mit.edu/projects/corporate-sustainability-at-a-crossroads/> accessed 20 June 2017: This report synthesizes eight years of research, over 150 interviews, and more than 60,000 survey respondents to identify the eight key evidence-based factors that distinguish companies that have been successful in their sustainability strategies. They are found to drive sustainable business practices, regardless of industry or region:

1. Articulate a practical sustainability vision and ambition that lays the foundation for new business practices.
2. Identify and prioritize material issues to focus resources.
3. Embed sustainability organizationally through cross-functional teams, clear targets, and key performance indicators (KPIs).
4. Innovate on multiple dimensions of your business model.
5. Develop a clear business case.
6. Get the board of directors on board.

production to grow at a faster rate than under the auspices of a national enterprise. Aspects such as production sharing agreements, oil taxation, and contract clauses carry both negative and positive outcomes. As far as IOCs are concerned corporate social responsibility towards sustainable development of Iraqi oil and gas is a fundamental approach. Through the CSR programmes, the communities receive outstanding benefits including health, sanitation, education, agriculture and environmental management. A further significant challenge to Iraq's advancement of the oil sector is that resources are not evenly partitioned across the sectarian-demographic lines. Several oil fields are found in the Shia-dominated south region while the best projections for future drilling are located in the Kurdish north region, with few resources in control of the Sunni minority. Management over rights to reserves is a contentious issue between the ethnic Kurds and other groups living in the oilfield regions.³⁸⁷ Gas flaring continues to be significantly high. Data collected from April 2013 from the MoO reveals that 73.4% of the associated gas in Iraq flared, and most of that - *i.e.*, 71.5%, occurred in the southern oilfields.³⁸⁸ It is noted in a report (2016) that Iraq vents and flares around 16bcm gas a year.³⁸⁹

In conclusion, it is fair to say that until a well thought-out policy and legal framework can be put in place, it is not worthwhile for issuing exploring licenses for oil that Iraq does not yet need to produce. Absent a specific, clear and functional federal hydrocarbon law, vague and ambiguous provisions of the current Constitution and selective invoking of pre 2003 laws will create a great deal of legal unpredictability. A shaky legal framework as such governing the upstream petroleum projects is undoubtedly averse to sustainable development of any country, let alone Iraq. There is thus always political risk for investors in respect of their deals of uncertain legal status governed by unpredictable legal regime which may not help sustainable development of Iraq's oil and gas sector. Iraq is definitely one of the most alluring petroleum provinces in the world and has no water-ways or pipeline problems for transportation of energy to the world market.

As of now, Iraq has not yet embraced the provisions on sustainable development as per the recent trends in BITs (*i.e.* the new generation of BITs³⁹⁰), as mentioned earlier. As regards the provisions of sustainable development concerning the environment, labour, anti-corruption, human rights, health and safety, Iraq needs to learn from other countries' recent BITs.³⁹¹ Iraq needs to appreciate in full its right to regulate and especially the contour of indirect expropriation³⁹² to be agreed with its treaty partners, and it should avoid the lowering of environmental standards in order to promote sustainable development.

7. Communicate a sustainability value-creation story to your shareholders.

8. Collaborate with a variety of stakeholders to drive strategic change.

³⁸⁷Zedalis (n 9).

³⁸⁸Ahmed Mousa Jiyad, 'Oil, Sustainable Development and the Management of the Transformation in Iraq' (n 93) accessed 20 May 2017.

³⁸⁹ Iraq: Oil and Gas Report (Q4 2016) (n 4).

³⁹⁰ See 'Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria' (3 December, 2016) – see especially Art.1(3) and Art. 24(1). See also a commentary on this BIT by Tarcisio Gazzini, 'Nigeria and Morocco Move Towards a "New Generation" of Bilateral Investment Treaties' (8 May, 2017), available at: <<https://www.ejiltalk.org/nigeria-and-morocco-move-towards-a-new-generation-of-bilateral-investment-treaties/>> accessed 25 May 2017.

³⁹¹ Ibid.

³⁹² Vera Korzun, 'The Right to Regulate in Investor-State Arbitration: Slicing and Dicing Regulatory Carve-Outs' (2017) 50(2) Vanderbilt Journal of Transnational Law, 355, also available at SSRN: <<https://ssrn.com/abstract=2950939>> accessed 25 May 2017; Lise Johnson and Merim Razbaeva, 'State Control Over Interpretation of Investment Treaties', Columbia Center on Sustainable Investment (April 2014), available

For proper sustainable development of the petroleum industry, Iraq needs to employ foreign capital and expertise to boost up the production and also rescue the dwindling oil infrastructure. However, this prospect has been met with opposition by some of the country's leaders, claiming that bringing in foreigners might interfere with the sovereignty of Iraq and also take away the full ownership of petroleum from the people of Iraq. For sustainable development in Iraq, a rigid mechanism has to be put in place to regulate the petroleum industry and find proper ways of overcoming the current challenges being faced. This will be in accordance with international law and, therefore, even the international community like the UN would be willing to come forward and support Iraq on this issue of sustainable development. In addition, to rescue the workers from exploitation in terms of violation of their human rights, it is essential that proper measures of human rights due diligence³⁹³ for handling these are initiated. The afore-mentioned tribunal has all good prospects of solving this problem. Something needs to be implemented so as to prevent human suffering, and environmental and property damage. This way, the posterity will be content with themselves to be able to live in the decent environment left for them. Responding to the needs of the rapidly changing society would require a sound legal machinery. If all the stakeholders work together in good faith for a common goal of sustainable development, the success of its realization in Iraq should not be that far away!

at: http://ccsi.columbia.edu/files/2014/04/State_control_over_treaty_interpretation_FINAL-April-5_2014.pdf.> accessed 25 May 2017.

See W. Michael Reisman and Robert D. Sloane, 'Indirect Expropriation and Its Valuation in the BIT Generation' (2004) 74 *The British Yearbook of International Law*, 115; Sebastián López Escarcena, *Indirect Expropriation in International Law* (Edward Elgar, 2014).

³⁹³ 'On Human rights due diligence', see <<https://business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-companies/type-of-step-taken/human-rights-due-diligence>> accessed 29 May 2017. OECD - Public Consultation: 'Due Diligence Guidance for Responsible Business Conduct' (9 February 2017), available at: <http://www.oecd.org/corporate/mne/due-diligence-guidance-for-responsible-business-conduct.htm> accessed 10 June 2017.

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