
Iraqi Oil and Revenues from Its Sale: A Review of How Existing Security Council Resolutions Affected the Past and May Shape the Future

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Abstract

The newly proposed Iraqi oil and gas legislation is currently making its way through Iraq's political process. The specific content of that legislation may be criticized for a variety of reasons. Nonetheless, while early Security Council resolutions addressing Iraq's oil and gas, and revenues from its sale, demonstrated extensive supervision over such by the international community beginning in the 1990s, more recent resolutions assign Iraq the kind of control that suggests its peoples are entitled to manage those resources and monies as they see fit. At the same time, the international community cannot ignore the importance of oil and gas to the economic well-being of Iraq, and the link between economic health and the survival of that country's nascent democracy. As a consequence, despite the fact that Security Council resolutions have seen fit to permit Iraqi authorities to resume autonomous control over that nation's hydrocarbons and the revenues produced by the sale of such, serious consideration should be given to the adoption of a new resolution, extending beyond the current 31 December 2007 date Iraq's protection against legal claims from existing and potential creditors.

1 Introduction

The civil unrest that has plagued Iraq over the last couple of years may be traced to sectarian rivalry, ambitions of autonomy for specific regions of the country, the

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interference of foreign fighters, and perhaps, even, the meddling of neighbouring states.¹ As one looks forward, however, each of these ‘drivers of unrest’ is likely to be accentuated by the matter of oil (hereinafter also referred to as oil and gas, or as hydrocarbons, or as petroleum). Indeed, the recently completed Baker-Hamilton Iraq Study Group Report to President George W. Bush on the US foreign policy options in Iraq notes the significance of questions regarding Iraqi oil in bringing stability to that nation-state.² Oil is Iraq’s principal natural patrimony. Traditionally, Iraq has long been regarded as holding the world’s fourth largest proven national reserves, right behind Saudi Arabia, Canada and Iran.³ By some more recent estimates, Iraq’s reserves are thought to place it in the number two spot.⁴ Short of alleged suspicions about weapons of mass destruction, asserted links to al-Qaeda, thin hopes of creating a ‘beacon of democracy’ in the Middle East, and its strategic location in a geopolitically important region of the globe, little other reason exists for the coalition’s March 2003 military invasion of Iraq than the importance of oil.⁵

During the inter-war years following the 1991 First Gulf War, the United Nations supervised the international sale of Iraqi oil, with the objectives being to increase assurance that revenues were not diverted by Iraq to prohibited weapons activities, and that the humanitarian needs of the people of Iraq were being met.⁶ Following Saddam Hussein’s ouster from power with the 2003 invasion, the UN established the independently monitored Development Fund for Iraq (IDF or Fund) to manage the

¹ See generally Global Security.org, ‘Iraqi Insurgency Groups’, available at www.globalsecurity.org/military/ops/iraq_insurgency.htm (accessed 28 Nov. 2006); International Crisis Group, ‘In Their Own Words: Reading the Iraqi Insurgency—Executive Summary’, 15 Feb. 2006, available at www.crisisgroup.org/home/index.cfm?id=3953&l=1 (accessed 28 Nov. 2006); Source Watch, ‘Iraqi Insurgency’, available at www.sourcewatch.org/index.php?title=Iraqi_insurgency (accessed 28 Nov. 2006).

² On the Iraq Study Group’s recommendations concerning oil, see *The Report of the Iraq Study Group*, recommendations 62 and 63 (6 Dec. 2006), excerpted at the United States Institute of Peace website, available at www.usip.org/isg/iraq_study_group_report/report/1206/index.html (accessed 9 Dec. 2006). See generally Salih, ‘Iraqis Fight Over Oil Spoils’, *Asia Times*, 25 Oct. 2006, available at www.iraqupdates.com/p_articles.php/article/11332 (accessed 30 Nov. 2006); Weinstein, ‘The Uncertainty of Iraq’s Transition’, *PINR*, 26 July 2004, available at www.pinr.com/report.php?ac=view_report&report_id=188 (accessed 30 Nov. 2006).

³ See generally ‘Greatest Oil Reserves by Country’ (compilation of figures in 103 *Oil and Gas Journal* (2005) 47), available at www.infoplease.com/ipa/A0872964.html (accessed 20 Nov. 2006); GlobalFirePower.com, ‘Top Proven Oil Reserves in the World (in barrels)’, available at www.globalfirepower.com/list_oil_proven.asp (accessed 20 Nov. 2006).

⁴ See GlobalPolicy.org, ‘Oil in Iraq’ (estimating proven reserves in Iraq at 200+ billion barrels), available at www.globalpolicy.org/security/oil/irqindx.htm (accessed 25 Nov. 2006).

⁵ See Alkadiri and Mohamedi, ‘World Oil Markets and the Invasion of Iraq, Middle East Report’, available at www.merip.org/mer/mer227/227_alkadiri_mohamedi.html (accessed 29 Nov. 2006); Boal, Clark, Matthews, and Watts, ‘Blood for Oil?’, *London Review of Books*, 21 Apr. 2005, available at www.lrb.co.uk/v27/n08/ret01_.html (accessed 28 Nov. 2006). See also Paul, ‘Confidential Document on Iraq Oil Lobbying’, *Global Policy Forum*, 14 July 2006, available at www.globalpolicy.org/security/oil/2006/0714confidential.htm (accessed 12 Dec. 2006) (containing a link to confidential conversations regarding the protection of oil interests).

⁶ See generally UN Security Council (SC) Res. 706 (15 Aug. 1991), available at www.iraqwatch.org/un/unsresolutions/s-res-706.htm (accessed 20 Nov. 2006); and Res. 986 (14 Apr. 1995), available at www.iraqwatch.org/un/unsresolutions/s-res-986.htm (accessed 20 Nov. 2006).

revenues generated by export oil sales.⁷ The revenues from oil sales and the IDF have operated with insulation from legal claims,⁸ thus freeing up activities and monies for concentration on Iraqi reconstruction.

Until the Security Council's adoption of Resolution 1723 on 28 November 2006,⁹ the IDF's authorization was set to expire roughly four weeks later at the end of the year.¹⁰ Both the IDF, and the immunity enjoyed by it and the revenues it handles, are now set to expire on 31 December 2007.¹¹ The arrival of that date will witness an undoubted rush of assorted characters, many with less than noble ambitions and no particular direct long-term interest in stabilizing the political and security situation in the Middle East, all seeking access to Iraq's oil revenues. Government officials in that country and company executives from outside, as well as legal claimants from various locations, will be freed to pursue the almighty dollar, whether through clever or shady business dealings or purportedly legitimate requests for compensation filed in appropriate judicial forums.

As though to add further complication, in late October of 2006, Kurdish regional governmental authorities in the north of Iraq published a petroleum law asserting extensive control over oil resources situated in their region.¹² The Kurdish law was certainly based on the fact that the earlier adopted 2005 Iraqi Constitution¹³ provided for a politically weakened central government and substantial control over petroleum resources to be vested in producing regions.¹⁴ Aside from showing concern with the Kurdish approach,¹⁵ central governmental authorities in Baghdad have been struggling to develop an analogous national legislative measure of their

⁷ See UN SC Res. 1483 (22 May 2003), para. 12, available at www.iraqwatch.org/un/unsresolutions/un-sres1483-052203.pdf (accessed 20 Nov. 2006).

⁸ See *ibid.*, at para. 22

⁹ Available at <http://daccessdds.un.org/doc/UNDOC/GEN/N06/632/35/PDF/N0663235.pdf?OpenElement> (accessed 29 Nov. 2006).

¹⁰ See para. 3 of UN SC Res. 1637, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N05/592/77/PDF/N0559277.pdf?OpenElement> (accessed 25 Nov. 2006), which extends to 31 Dec. 2006 the expiry date established for the IDF in para. 25 of SC Res. 1546, available at www.iraqwatch.org/un/unsresolutions/s-res-1546.pdf (accessed 25 Nov. 2006).

¹¹ On the expiry date for the immunity from legal action see para. 22 of SC Res. 1483, *supra* note 7. On the 31 Dec. 2007 expiry of the IDF see para. 3 of SC Res. 1723, *supra* note 9.

¹² See Petroleum Act of the Kurdistan Region of Iraq, Council of Ministers' draft (22 Oct. 2006), available at www.krg.org/pdf/Kurdistan_Act_COM_draft_22_October_2006.pdf (accessed 19 Nov. 2006). See also Explanatory Memorandum for the Draft Petroleum Act of the Kurdistan Region of Iraq (22 Oct. 2006), available at www.krg.org/pdf/EM_Kurdistan_Petroleum_Act_22_October_2006.pdf (accessed 19 Nov. 2006).

¹³ See Associated Press, 'Iraqi draft constitution approved, official says', *MSNBC* (Microsoft/NBC), 24 Oct. 2005, available at www.msnbc.msn.com/id/9803257 (accessed 20 Feb. 2007).

¹⁴ For such an assessment see Memorandum ('USAID-Funded Economic Governance II Project') from Jonkers, Senior Advisor–Petroleum Law, to USAID/US Department of State, Reference: National Hydrocarbon Working Group/Legislative Drafting Committees (27 July 2006).

¹⁵ See Radio Free Europe/Radio Liberty, 'Kurdish Oil Law Poses Problem for Baghdad', 9 Nov. 2006, available at www.iraqupdates.com/p_articles.php/article/11693 (accessed 30 Nov. 2006); Al-Maliki, 'Oil Resources Belong to All Iraqis', *Iraq Directory*, 20 Nov. 2006, available at www.iraqupdates.com/p_articles.php/article/11956¹⁵ (accessed 30 Nov. 2006).

own.¹⁶ Where those discussions of the central government will wind up is far from clear. As of the middle of March 2007, there have been indications that the negotiations have made headway,¹⁷ but sources close to the process disclose that numerous difficult issues are far from being definitively resolved. In any event, once the drafting of a national legislative measure is completed, it still must secure the approval of Iraq's Council of Ministers and the Parliament prior to becoming law.

Taking the coalescence of these various developments and previously referenced dates for the expiry of relevant Security Council resolutions as a cue, it seems fitting to briefly recall the background of the UN resolutions speaking to the matter of Iraqi oil and the revenues generated by its sale. Such an examination provides insight by which to better understand and evaluate the picture soon to unfold before us. While the details of that picture may concern such mundane questions as the role of regional versus central governmental authorities regarding oil, the relationship between the Iraqi Oil Ministry and the state-owned oil companies, the assessment of oil taxes and the distribution of revenues generated by oil and gas production, and the nature of legal arrangements to be employed when seeking foreign oil companies to undertake exploitation activities in Iraq, it is the Security Council's resolutions on Iraqi oil that provide the foundational support, the basic underpinning for all we are about to witness. Each of the other four matters just referenced is, in its own right, of genuine significance. Yet in the absence of familiarity with the Security Council's resolutions upon which they rest, any understanding of those matters is necessarily incomplete.

¹⁶ See Trade-Arabia, 'New Iraq Oil Law by End of 2006', 3 Nov. 2006, available at www.iraqupdates.com/p_articles.php/article/11535 (accessed 30 Nov. 2006); BBC Monitoring, 'Iraqi Officials on Oil Law of Central Government, Kurdistan Region', 6 Nov. 2006, available at www.iraqupdates.com/p_articles.php/article/11594 (accessed 30 Nov. 2006); Reuters, 'Iraq Leaders Still Wrangling Over Oil Law', 22 Nov. 2006, available at www.iraqupdates.com/p_articles.php/article/12016 (accessed 30 Nov. 2006). For an update as of mid Dec. 2006, see Wong, 'Iraqis Near Deal on Distribution of Oil Revenues', *New York Times*, 9 Dec. 2006, reprinted at *Iraq Updates*, 11 Dec. 2006, available at www.iraqupdates.com/p_articles.php/article/12521 (accessed 14 Dec. 2006).

¹⁷ See Al-Sabaah, 'Cabinet Discusses Oil, Gas Law Draft', *Iraq Updates*, 19 Feb. 2007, available at www.iraqupdates.com/p_articles.php/article/14642 (accessed 20 Feb. 2007); 'Draft Law on Oil Money Moves to Iraqi Cabinet' (from the *New York Times*), *Iraq Updates* (21 Feb. 2007), available at www.iraqupdates.com/p_articles.php/article/14742 (accessed 21 Feb. 2007); AFP, 'Iraqi Cabinet Approves Draft Oil Law', *Iraq Updates*, 28 Feb. 2007, available at www.iraqupdates.com/p_articles.php/article/14975 (accessed 2 Mar. 2007); Al-Sabaah, 'Gas, Oil Law Referred to Parliament', *Iraq Updates*, 28 Feb. 2007, available at www.iraqupdates.com/p_articles.php/article/14988 (accessed 4 Mar. 2007). Indications are that the Iraqi Parliament would like to complete the process for the new hydrocarbons law by the end of May 2007. Problems persist, however. See Oxford Analytical, 'Iraq Oil Law Necessary But Not Sufficient', *Iraq Updates*, 9 Mar. 2007, available at www.iraqupdates.com/p_articles.php/article/15345 (accessed 10 Mar. 2007); AME Info, 'Iraqi Oil Law Under Threat', *Iraq Updates*, 12 Mar. 2007, available at www.iraqupdates.com/p_articles.php/article/15437 (accessed 14 Mar. 2007); Voices of Iraq, 'Iraqi National Slate, IAF Object Debating Draft Law on Oil, Gas', *Iraq Updates*, 13 Mar. 2007, available at www.iraqupdates.com/p_articles.php/article/15460 (accessed 15 Mar. 2007); AFP, 'Iraq Experts Say Draft Oil Industry Law Fraught with Problems', *Iraq Updates*, 19 Mar. 2007, available at www.iraqupdates.com/p_articles.php/article/15625 (accessed 20 Mar. 2007).

2 The First Gulf War Oil Resolutions

Although a wide range of Security Council resolutions were adopted in conjunction with the First Gulf War,¹⁸ three central resolutions were issued to address, among other things, the matter of Iraqi oil resources. Security Council Resolution 661, adopted shortly after Saddam Hussein's invasion of Kuwait in the summer of 1990, is critical to any understanding of subsequent Council promulgations on that score.¹⁹ That resolution established a complete trade embargo with Iraq, thereby effectively preventing Iraq from being able to engage in exportation of its hydrocarbons. The resolution's operative language on that matter can be found in paragraph 3(a). In the relevant part, it provided that the Security Council of the United Nations '[d]ecides that all States shall prevent ... [t]he import into their territories of all commodities and products originating in Iraq ... exported therefrom after the date of the present resolution.'²⁰

Given the obvious revenue significance to Iraq of the impermissibility of Member States committing to purchase Iraqi oil, Resolution 661's embargo set in motion the situation that cascaded into the food, medicine and humanitarian item crisis that eventually necessitated the establishment of the UN Oil-for-Food Programme.²¹ As if to presage the creation of the administrative body that would eventually be charged with the task of overseeing the Oil-for-Food Programme, Resolution 661 provided in paragraph 6 for an entity to supervise compliance with its own dictates regarding the trade embargo on Iraq.²² Essentially, that entity was to be a 'Committee' of the members of the Security Council. Its charge was to collect information concerning activities of Member States and review that information to make sure there was full compliance with the trade obligations imposed by Resolution 661.

During the early spring of 1991, and within weeks of the defeat of Saddam Hussein's forces by coalition military units led by the United States, the UN Security Council adopted Resolution 687,²³ the second of the central resolutions concerning Iraqi

¹⁸ For a review of the SC resolutions that dealt with the extremely important matter of weapons inspections in Iraq see Zedalis, 'Weapons of Mass Destruction in Iraq: The "Final Word" on Efforts to Eliminate Saddam Hussein's Biological, Chemical, and Nuclear Weapons Threat', 10 *Int'l Peacekeeping: The Yearbook of Int'l Peace Operations* (2006) 115; Zedalis, 'Developments Regarding the United Nations Weapons Inspection Regime in Iraq', 8 *Int'l Peacekeeping* (2002) 171; Zedalis, 'Untying the Gordian Knot: Evaluating the Legal Dimensions of the U.N. Weapons Inspection Regime in Iraq and Rethinking the Future' [1999] *Leiden J Int'l L* 297; Zedalis, 'Dealing with the Weapons Inspections Crisis in Iraq', 59 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1999) 37; Zedalis, 'An Analysis of Some of the Principal Legal Questions Relating to the U.N. Weapons Inspections in Iraq', 67 *Nordic J Int'l L* (1998) 249.

¹⁹ See UN SC Res. 661 (6 Aug. 1990), available at www.iraqwatch.org/un/unsresolutions/s-res-661.htm (accessed 28 Nov. 2006).

²⁰ See *ibid.*, at para. 3(a).

²¹ On the general effectiveness and impact of the oil-for-food programme see GlobalPolicy.org, 'Iraq Sanctions: Humanitarian Implication and Options for the Future' (6 Aug. 2002), available at www.globalpolicy.org/security/sanctions/iraq1/2002/paper.htm (accessed 5 Dec. 2006); Holland, 'Iraq and Oil-for-Food: The Real Story' (5 Oct. 2005), available at www.globalpolicy.org/security/sanctions/iraq1/oilforfood/2005/1005realstory.htm (accessed 5 Dec. 2006).

²² See SC Res. 661, *supra* note 19 at para. 6.

²³ The full text of SC Res. 687 is available at www.iraqwatch.org/un/unsresolutions/s-res-687.htm (accessed 30 Nov. 2006).

oil. That resolution was a comprehensive measure addressing a wide-range of issues, including, among others, the establishment of a WMD inspections unit known as UNSCOM,²⁴ and the return to Kuwait of all items plundered from that nation during Iraq's August 1990 invasion.²⁵ In addition, paragraph 22 of Resolution 687 provided that, once Iraq had fully accounted for and freely allowed corroborative inspections associated with weapons of mass destruction, 'the prohibitions against the import of commodities and products originating in Iraq ... contained in resolution 661 (1990) shall have no further force or effect'.²⁶ This provision looked towards the eventual termination of the embargo facing exports of Iraqi oil. Obviously, however, Iraq was never considered to have met its WMD obligations, and thus the contemplated free and open sales of hydrocarbons did not take place pursuant to paragraph 22.

There are provisions in Resolution 687 that build upon what was earlier described in connection with paragraph 6 of Resolution 661 as a presaging of the Oil-for-Food Programme, clearly a programme based on authorized and overseen sales of Iraqi oil.²⁷ In this respect, particular attention should be accorded to paragraphs 18 and 19 of Resolution 687. Paragraph 18 'create[d] a fund to pay compensation for claims' against Iraq arising from the First Gulf War, and established a 'Commission ... [to] administer the fund'.²⁸ While many aspects of this had no particular precedent in paragraph 6 of Resolution 661, that earlier resolution's establishment of a 'Committee' of the UN Security Council to supervise compliance with the embargo²⁹ would ultimately evolve under the Oil-for-Food programme into a supervisory entity charged with ensuring that funds collected from authorized sales of Iraqi oil went to serve humanitarian needs, a responsibility comparable to that assigned the 'Commission' by Resolution 687's paragraph 18. To be sure, however, the role of the 'Commission' was limited to compensating war claims.

Paragraph 19 of Security Council Resolution 687 dealt further with the compensation fund structure administered by the 'Commission', but importantly noted that, since Iraq had been responsible for precipitating the First Gulf War, 'Iraq's contribution to the fund [was to be] based on a [then undetermined] percentage of the value of the export of petroleum and petroleum products from Iraq ...'.³⁰ In light of Resolution 661's existing embargo on Iraqi oil, paragraph 19 of Resolution 687 was clearly signalling a willingness on the Security Council's part to entertain exports of petroleum and petroleum products in order to generate revenues for the specific purpose of paying Compensation Commission claims associated with the First Gulf War.³¹ Taken in

²⁴ See *ibid.*, at paras. 7–14.

²⁵ See *ibid.*, at para. 15.

²⁶ See *ibid.*, at para. 22.

²⁷ See the text accompanying *supra* notes 22–23.

²⁸ See SC Res. 687, *supra* note 23, at para. 18.

²⁹ See the text accompanying *supra* note 22.

³⁰ See SC Res. 687, *supra* note 23, at para. 19.

³¹ In regard to the UN Compensation Commission, see generally M. Frigessi di Rattalma and T. Treves, *The United Nations Compensation Commission* (1999); Zedalis, 'Gulf War Compensation Standard: Concerns Under the Charter', 26 *Revue Belge de Droit International* 333 (1993).

conjunction with the previously alluded to paragraph 22 of Resolution 687,³² two ideas were beginning to emerge: at some point (perhaps because of Iraqi compliance with weapons inspection obligations or because of needs for compensation fund revenues) exports of Iraqi hydrocarbons would resume; and, when that point was reached and revenues began to flow in, the United Nations would not be content to permit the Saddam Hussein regime that remained in power to have direct and complete control over those revenues.

By the summer of 1991, the need for monies to cover the costs of operating UNSCOM and take care of war claims entertained by the Compensation Commission, as well as provide for food, medicines, and other humanitarian supplies desperately needed by the Iraqi people,³³ suggested a loosening of Resolution 661's embargo on export sales of Iraqi oil. On 15 August, the Security Council responded with the adoption of Resolution 706.³⁴ The ninth paragraph of that resolution's Preamble referenced the need for funds to cover such costs, and the fact that the funds could come from the sale of Iraqi oil.³⁵ Paragraph 1 of the resolution's substantive provisions then noted the Council's decision, assuming Iraqi willingness, to permit limited petroleum sales to meet the needs of the Iraqi people for food, medicines, and humanitarian supplies,³⁶ with paragraph 1(b) specifically referencing the Security Council's proposal to create a UN escrow account to manage revenues generated by such sales.³⁷ Paragraph 3 followed this proposal with the expression of the Council that a portion of the revenues also be made available for Compensation Commission claims and expenses attributed to the inspection and disarmament responsibilities of UNSCOM and other weapons inspectors.³⁸ Even though Iraq rejected Resolution 706's proposal, as well as that offered later in Security Council Resolution 712,³⁹ the significance of these proposals should not be overlooked, as they served as basic building blocks in the Oil-for-Food Programme's foundation and opened the possibility of renewed export sales of Iraqi hydrocarbons.⁴⁰

Oil sales eventually did commence a year or so after the Security Council's adoption in April of 1995 of Resolution 986,⁴¹ the third of the central resolutions concerning

³² See *supra* note 26.

³³ For some indication of the worsening humanitarian situation in Iraq at that time, see Letter Dated 20 Mar. 1991 From the Secretary-General Addressed to the President of the Security Council, UN Doc. S/22366, available at www.un.org/Depts/oip/background/reports/s22366.pdf (accessed 6 Dec. 2006).

³⁴ See SC Res. 706, available at www.iraqwatch.org/un/unsresolutions/s-res-706.htm (accessed 4 Dec. 2006).

³⁵ See *ibid.*, at Preamble, 9th para.

³⁶ See *ibid.*, at para. 1.

³⁷ See *ibid.*, at para. 1(b).

³⁸ See *ibid.*, at para. 3.

³⁹ See SC Res. 712, available at www.iraqwatch.org/un/unsresolutions/s-res-712.htm (accessed 4 Dec. 2006).

⁴⁰ On the Iraqi rejection of these two Security Council proposals, see UN Office of the Iraq Programme: Oil for Food—Origins (7 Dec. 2006), available at www.un.org/Depts/oip/background/index.html (accessed 7 Dec. 2006).

⁴¹ See SC Res. 986, available at www.iraqwatch.org/un/unsresolutions/s-res-986.htm (accessed 1 Dec. 2006).

Iraqi oil issued in connection with the Gulf War of 1991. Resolution 986 provided the basis for the formal establishment of the Oil-for-Food Programme, and it also permitted the use of oil revenues for Compensation Commission decisions and weapons inspection activities. This was accomplished by having paragraph 1 of Resolution 986 provide for the lifting of the embargo on UN member-state purchases of exported Iraqi hydrocarbons in effect since Resolution 661.⁴² Paragraph 1(a) of Resolution 986 then provided that the ‘Committee’ of the Security Council established by Resolution 661 to oversee the embargo would have authority concerning the newly permitted export transactions involving Iraqi oil.⁴³ The idea of oversight was to ensure both transparency and compliance with certain obligations established by Resolution 986. This was followed by paragraph 1(b) requiring that revenues produced by the sale of Iraqi hydrocarbons were to be paid ‘directly by the purchaser ... into [an] escrow account ... established by the Secretary-General’.⁴⁴ Iraq was not to have control of receipts from oil sales.

Pursuant to paragraph 7 of Resolution 986, the escrow account established by the Secretary-General was to be subjected to scrutiny by an independent auditor and the Secretary-General was required to ‘keep the Government of Iraq fully informed’ regarding the account.⁴⁵ Paragraphs 8(a) and (b) of Resolution 986 provided for funds in the escrow account to be used in making Oil-for-Food Programme purchases.⁴⁶ Under an implementing Memorandum of Understanding (MOU) concluded with Iraq in mid-1996, the specifics of the Oil-for-Food Programme and its escrow account were further spelled out.⁴⁷ As alluded to earlier, Security Council Resolution 687 had established a compensation fund associated with claims emerging out of Gulf War I, and a ‘Commission’ to administer the fund.⁴⁸ Paragraph 8(c) of Resolution 986 picked up on that by requiring the transfer of a portion of the revenues generated by the sale of Iraqi hydrocarbons to that compensation fund.⁴⁹ It should be noted that paragraph 15 of Resolution 986 provided that ‘the escrow account established for the purposes of this resolution enjoys the privileges and immunities of the United Nations’.⁵⁰ The effect was to provide the escrow account insulation from meaningful legal action.

Distinct from the protection accorded the oil escrow account by the language of paragraph 15, it bears noting that paragraph 14 of Resolution 986, and several paragraphs of Resolution 986’s implementing MOU, addressed the basic matter of legal control over and status of Iraqi hydrocarbons. Paragraph 14 noted that ‘petroleum

⁴² See *ibid.*, at para. 1.

⁴³ See *ibid.*, at para. 1(a).

⁴⁴ See *ibid.*, at para. 1(b).

⁴⁵ See *ibid.*, at para. 7.

⁴⁶ See *ibid.*, at para. 8(a) and (b).

⁴⁷ The specifics of the MOU appear in Letter Dated 20 May 1996 From the Secretary-General Addressed to the President of the Security Council (hereinafter MOU), UN Doc. S/1996/356, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N96/127/71/PDF/N9612771.pdf?OpenElement> (accessed 6 Dec. 2006).

⁴⁸ See text accompanying *supra* notes 28–29.

⁴⁹ See SC Res. 986, *supra* note 41, at para. 8(c).

⁵⁰ See *ibid.*, at para. 15.

and petroleum products subject to this resolution shall while under Iraqi title be immune from legal proceedings⁵¹ It also required Member States to take action to assure protection for such under their own domestic legal systems.⁵² The notions apparently expressed in these protections were that, until legal title is transferred to a purchaser by an authorized Iraqi government entity, control of Iraqi hydrocarbons was left by the UN in Iraqi hands, and that Iraqi oil and oil products were protected by Resolution 986 against all threatening legal action.⁵³ From the implementing MOU, the most substantial language is found in paragraphs 1–5 of Annex II. That Annex sets forth the particulars regarding contractual commitments. In addressing the contract approval process, paragraphs 1–5 plainly indicated purchase contracts and associated documents were to be endorsed by the government of Iraq or SOMO, the Iraqi state oil marketing organization.⁵⁴ It would seem peculiar to have recognized contract endorsement authority, had Iraqi control over its hydrocarbon resources been thought not to exist. On the matter of insulation of Iraqi oil from legal claims as long as title to such remained in Iraqi hands, nothing in the MOU contradicted the language of paragraph 14 of Security Council Resolution 986.

3 The End of the Invasion Phase of the Second Gulf War: A New Oil Resolution Recognizing a Different Approach

Adopted at the end of the invasion phase of the Second Gulf War, Security Council Resolution 1483 of 22 May 2003, contained several extremely significant principles relevant to the issue of Iraqi oil and the revenues generated from the sale of such.⁵⁵ These principles were declared against a backdrop that included the ouster of Saddam Hussein, control of the country by US-led military forces and the so-called Coalition Provisional Authority (CPA), and a desire to assist the Iraqi people in reconstituting a government both democratically elected and capable of directing its own destiny. Given that backdrop, Resolution 1483's principles reflect a 'paradigm shift' regarding the treatment of Iraqi oil.

One of the most significant principles of Resolution 1483 was enunciated in paragraph 10. That principle eliminated the embargo on Iraqi trade established by Resolution 661, including the embargo on Member-State importation of Iraqi petroleum and petroleum products. As it provided: 'all prohibitions related to trade with Iraq

⁵¹ See *ibid.*, at para. 14.

⁵² See *ibid.*

⁵³ For an analysis of the separate question whether the UN or the US-led occupying forces had the better claim over legal title to Iraqi oil following the Second Gulf War: see Langenkamp and Zedalis, 'An Analysis of Claims Regarding Transferable "Legal Title" to Iraqi Oil in the Immediate Aftermath of Gulf War II: Paradigm for Insight on Continuation of UN Juridical Regimes Following the Initiation of Belligerent Occupation', 63 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2003) 605 (UN with superior claim).

⁵⁴ See MOU, *supra* note 44, Annex II, at paras. 1–5.

⁵⁵ See SC Res. 1483, available at www.iraqwatch.org/un/unsresolutions/un-sres1483-052203.pdf (accessed 5 Dec. 2006).

... established by resolution 661 ... shall no longer apply'.⁵⁶ Interestingly, there had been some speculation at the time of the US-led invasion that a motivating factor for the military campaign was control over Iraqi oil resources.⁵⁷ As if to directly and unequivocally reject the possibility of coalition control of Iraq's oil, the second paragraph of 1483's Preamble made it absolutely clear that the Security Council '[r]eaffirms[] the sovereignty and territorial integrity of Iraq'.⁵⁸ And further, the fourth paragraph '[s]tress[es] the right of the Iraqi people freely to determine their own political future and *control their own natural resources*'.⁵⁹ While there may have been some question under Security Council Resolutions 661, 687, and 986 as to whether Iraq controlled its hydrocarbon resources, particularly in view of language in those resolutions suggesting that the UN asserted at least the degree of authority over such necessary to prescribe embargoes and legal protections, Resolution 1483 left no doubt that the UN and its Member States were not claiming control of those or any other Iraqi natural resources. Being a sovereign member of the world community, even though under the reconstruction oversight of an entity other than a fully operating Iraqi government, the people of Iraq, and the people of Iraq alone, had the exclusive authority to determine what was to be done with and exercise control over that country's oil resources.⁶⁰

Paragraph 22 of Resolution 1483, much like paragraph 14 of Security Council Resolution 986,⁶¹ seemed to corroborate the interpretation that control over Iraqi hydrocarbons was recognized as being in the hands of the Iraqis. Paragraph 22 stated, in relevant part, that 'until *December 31, 2007*, unless the [Security] Council decides otherwise, petroleum, petroleum products, and natural gas originating in Iraq shall be immune, until title passes to the initial purchaser from [any and all] legal proceedings'⁶² This reaffirmed the UN's position that not only are the hydrocarbons under the control of Iraq, but they are deemed so integral to the future success of Iraq that until title passes to a purchaser, they are not subject to any form of legal action. But could the same be said about the revenues generated from the sale of hydrocarbons? Again, in line with, but expanding upon Resolution 986's paragraph 15,⁶³ paragraph 22 of Security Council Resolution 1483 noted further that 'proceeds and obligations

⁵⁶ See *ibid.*, at para. 10.

⁵⁷ See the sources cited *supra* at note 5. Clearly, there is a difference between arguing that oil is an important reason motivating the coalition's belief that a need existed for the invasion, and arguing that the invasion was motivated by a desire to control Iraqi oil. With respect to the latter, it is extremely interesting that since the invasion, the world price of oil has risen significantly, threatening world-wide recession. Unless one considers the coalition's objective to have been associated with simply raising the profits earned by international oil companies, rather than assuring consumer access to cheap oil, invading Iraq to control Iraqi oil seems a false explanation of the coalition's action against Baghdad.

⁵⁸ See SC Res. 1483, *supra* note 55, at Preamble, 2nd para.

⁵⁹ See *ibid.*, Preamble, 4th para. (emphasis added).

⁶⁰ On the separate and distinct question whether the resolutions provided superior control to the US-led coalition forces or to the UN, see the text and materials accompanying *supra* note 52.

⁶¹ See the text accompanying *supra* note 51.

⁶² See SC Res. 1483, *supra* note 55, at para. 22 (emphasis added).

⁶³ See the text accompanying *supra* note 50.

arising from sales [of petroleum, petroleum products, or natural gas] ... shall enjoy privileges and immunities equivalent to those enjoyed by the United Nations ...'⁶⁴ Paragraph 22 supplemented this by obligating Member States to take appropriate measures to assure such protection was accorded under their own domestic legal systems.⁶⁵ The same privileges and immunities, and protection in domestic legal systems of Member States, was made applicable as well to the IDF,⁶⁶ an entity set up by another provision of Resolution 1482 to assume financial duties associated with past and future sales of Iraqi oil.⁶⁷

With Saddam Hussein out of power, the embargo on general sales of Iraqi oil eliminated, and legal protection provided to revenues from the sale of Iraqi oil, how were those revenues to be managed, and what impact was to result for the still extant Oil-for-Food Programme and the earlier established UN Claims Compensation Fund? Concerning the Oil-for-Food Programme, paragraph 18 of Resolution 1483 stated that it 'terminates effective on adoption of this resolution the functions related to the *observation and monitoring activities* ... under the Programme, including the monitoring of the export of petroleum and petroleum products from Iraq'.⁶⁸ This essentially eliminated the role of the 'Committee' of the members of the Security Council established under Resolution 661.⁶⁹ Aside from paragraph 18's termination of observation and monitoring activities connected with Oil-for-Food, Resolution 1483 provided acknowledgement in paragraph 16 that a need for the Oil-for-Food Programme remained. Thus, paragraph 16 requested that the Secretary-General 'in coordination with the [CPA], continue to exercise his responsibilities under [a revived Oil-for-Food Programme],⁷⁰ for a period of six months following the adoption of this resolution, and terminate within this time period ... the ongoing operation of the [programme] ... transferring responsibility for ... any remaining activity ... to the [CPA], including by taking ... measures' related to quickly getting humanitarian goods into needy civilian hands, facilitating 'a comprehensive strategy ... in coordination with the [CPA] and the Iraqi interim administration' of a handover of 'all operational responsibility [of the programme], and 'consolidat[ing] into a single fund the accounts established pursuant to [the Oil-for-Food Programme].'⁷¹ Consistent with paragraph 16's call for the ending of the Oil-for-Food Programme after a six-month period, paragraph 19 also called for the simultaneous termination of the Resolution 661 'Committee' observing and monitoring the programme.⁷²

With regard to the actual management of hydrocarbon sales revenues, Resolution 1483 had several important points to make. First, paragraph 17 of that Security Council

⁶⁴ See SC Res. 1483, *supra* note 55, at para. 22.

⁶⁵ See *ibid.*

⁶⁶ See *ibid.*

⁶⁷ See the text accompanying *infra* notes 80–82.

⁶⁸ See SC Res. 1483, *supra* note 55, at para. 18 (emphasis added).

⁶⁹ See the text accompanying *supra* notes 22–23.

⁷⁰ It should be noted that during the months leading up to the Second Gulf War, and during the period of the military campaign itself, the Oil-for-Food Programme obviously had been suspended.

⁷¹ See SC Res., *supra* note 55, at para. 16.

⁷² See *ibid.*, at para. 19.

resolution noted that \$1 billion of ‘unencumbered funds in the account established pursuant to paragraphs 8(a) and (b) of resolution 986 [(i.e., Oil-for-Food Programme revenues)]’ as well as ‘all surplus funds in the escrow accounts [associated with the Oil-for-Food Programme] shall be transferred at the earliest possible time to the Development Fund for Iraq’.⁷³ Second, paragraph 20 followed that by noting that proceeds from ‘all export sales of petroleum, petroleum products and natural gas from Iraq [after] the date of the adoption of this resolution shall ... be deposited into the Development Fund for Iraq until such time as an internationally recognized, representative government of Iraq is properly constituted.’⁷⁴ Interestingly, outside the context of oil-for-food hydrocarbon sales envisioned as taking place for the previously referenced interim six-month time period,⁷⁵ nothing in Security Council Resolution 1483 spoke explicitly to the matter of operational authority to actually make hydrocarbon sales. Presumably, however, in view of Resolution 1483’s recognition of the CPA, and the resolution’s plan to have the UN’s role associated with hydrocarbon sales transition to the CPA itself,⁷⁶ the CPA was implicitly recognized by Resolution 1483 as having such authority, at least in cooperation with appropriate Iraqi agencies (for instance, SOMO, the Iraqi state oil marketing organization)⁷⁷ involved in Oil-for-Food hydrocarbon sales. After all, as noted above, paragraph 16 of Resolution 1483 had spoken of the CPA cooperating with the interim Iraqi administration in oil sales activities,⁷⁸ and SOMO remained functional despite the former government being toppled from power. Paragraph 21 of Resolution 1483 addressed a third, and entirely distinct, point. Specifically, it provided that 5 per cent of funds from renewed hydrocarbon sales were to go into the UN Claims Compensation Fund established by Resolution 687, though it left open the possibility of some other approach being taken by cooperative arrangement between the compensation ‘Commission’ and an ‘internationally recognized, representative government of Iraq’.⁷⁹

The establishment of the IDF referenced in paragraphs 17, 20 and 21 of Security Council Resolution 1483 was called for by paragraph 12 in particular. As the language of that provision declared, the Fund was ‘to be held by the Central Bank of Iraq’ and subject to independent audit approved by the Fund’s International Advisory Monitoring Board (IAMB), comprised of representatives from the UN, IMF and World Bank, among others.⁸⁰ Paragraph 14 then indicated that those accessing the Fund were obligated to do so ‘in a transparent manner’, with the objective being to meet humanitarian needs, infrastructure repair and reconstruction, disarmament objectives, costs of civilian administration ‘and for other purposes benefiting the people of

⁷³ See *ibid.*, at para. 17. For reference to para. 8(a) and (b) of Res. 986, see the text accompanying *supra* note 46.

⁷⁴ See *ibid.*, at para. 20.

⁷⁵ See the text accompanying *supra* note 72.

⁷⁶ See the text accompanying *supra* notes 69–72.

⁷⁷ See the text accompanying *supra* note 54.

⁷⁸ See the text accompanying *supra* note 71.

⁷⁹ See SC Res. 1483, *supra* note 55, at para. 21.

⁸⁰ See *ibid.*, at para. 12.

Iraq'.⁸¹ According to paragraph 13 of Security Council Resolution 1483, each and every disbursement from the Fund, had to 'be ... at the direction of the [CPA], in consultation with the Iraqi interim administration'.⁸²

Clearly, it would be difficult to dispute assertions that the provisions of Resolution 1483 evinced a disposition by the Security Council to exercise a degree of authority over Iraqi oil and the revenues produced by its sales. It was the Security Council that chose to lift the embargo on export sales. It was the Security Council that directed Iraqi oil and the revenues from its sales were to be insulated from legal action. It was the Security Council that provided how proceeds from oil sales activities were to be handled and where they were to be spent. Nonetheless, it seems reasonable to conclude that all this was done in recognition of the political realities that beset Iraq, not in an effort to divest Iraqis from their natural patrimony. Sales had been embargoed to ratchet up international political pressure on Saddam Hussein, and were resumed under the pre-Second Gulf War resolutions to meet humanitarian needs and war compensation claims. With Saddam Hussein removed from power, Resolution 1483 called for Iraqi oil sales to fund full-scale reconstruction costs. Further, Iraqi hydrocarbons, proceeds produced by their sale, and institutions holding and managing such were insulated from legal action in an effort to ensure the availability of self-generated monies for the accomplishment of goals benefiting the people of Iraq. Security Council directives concerning the handling and the expenditure of sales revenues were adopted to minimize the possibility of misdirection of funds to inappropriate and illegal purposes. The language in Security Council Resolution 1483 speaks convincingly of the international community's desire to recognize the right of the Iraqi people, in exercise of its recognized sovereign independence, to control their oil resources and reap the benefits from the sale of such.

4 Birth of Independence: Security Council Resolutions in Contemplation of Increased Iraqi Control of Oil Resources

On 8 June 2004, less than five weeks prior to the CPA's scheduled handover to Iraqi functionaries of all basic governing authority, the Security Council adopted Resolution 1546.⁸³ On the matter of control over Iraqi hydrocarbons, the third paragraph of this resolution's Preamble made clear once again the Security Council's respect for the 'independence, sovereignty, ... and territorial integrity of Iraq'.⁸⁴ The fourth paragraph followed this by reaffirming the 'right of the Iraqi people freely to determine their own political future and control their own *natural resources*'.⁸⁵ Paragraph 2 of Resolution 1546's substantive provisions emphasized this autonomy and control by

⁸¹ See *ibid.*, at para. 14.

⁸² See *ibid.*, at para. 13.

⁸³ See SC Res. 1546, available at www.iraqwatch.org/un//uncsresolutions/s-res-1546.pdf (accessed 15 Dec. 2006).

⁸⁴ See *ibid.*, at Preamble, 3rd para.

⁸⁵ See *ibid.*, at Preamble, 4th para. (emphasis added).

welcoming that the ‘occupation will end [30 June 2004] and the Coalition Provisional Authority will cease to exist, and ... Iraq will reassert its full sovereignty’. Paragraph 3 then reaffirmed the ‘right of the Iraqi people freely to determine their own political future and to exercise full authority and control over their *financial and natural resources*’. From such language in both the Preamble and the substantive provisions, there can be absolutely no question of Iraqi control over all Iraqi resources, hydrocarbon and otherwise. At one time, provisions existed in Security Council resolutions that may have raised questions regarding the nature and extent of Iraq’s control over its petroleum and natural gas resources, but Resolution 1546 clearly enunciated the Security Council’s position that such resources were under the autonomous and independent authority of the Iraqi people.

It will be recalled that both paragraph 14 of Security Council Resolution 986,⁸⁶ and paragraph 22 of Security Council Resolution 1483,⁸⁷ confirmed Iraqi control over its own hydrocarbons by declaring such to be insulated from legal proceedings as long as title to those hydrocarbons remained with Iraq. Resolution 1546 contained similar language of its own in paragraph 27. However, aside from accomplishing such by providing that ‘the provisions of paragraph 22 of resolution 1483 (2003) shall continue to apply’,⁸⁸ paragraph 27 went on to note that the relevant privileges and immunities from legal action ‘shall not apply with respect to any final judgement [sic] arising out of a contractual obligation entered into by Iraq *after 30 June 2004*’.⁸⁹ Obviously, given the CPA’s transfer of full governmental authority to the Interim Government of Iraq (i.e., Prime Minister Ayad Allawi⁹⁰) on that date, the idea was that Iraq should not receive more special protections for obligations thereafter entered into than provided to any other sovereign government. It was seen as one thing to insulate Iraq and its oil from legal actions having as their source claims antedating the passage of governing authority to the Iraqi people, and another thing entirely to insulate it from legal actions for claims arising thereafter. Thus, claims antedating 30 June 2004, whether focused on Iraqi hydrocarbons generally or revenues held by the IDF, continued to be essentially inactive until *31 December 2007*.

With respect to hydrocarbon sales and the revenues from such, the next to last paragraph of the Preamble of Security Council Resolution 1546 acknowledged the ‘benefits to Iraq of the immunities and privileges [that had been] enjoyed by Iraqi oil revenues and by the Development Fund for Iraq’.⁹¹ That paragraph also noted ‘the importance of providing for *continued* disbursements of this fund by the Interim Government of Iraq and of its successors upon dissolution of the Coalition Provisional Authority’.⁹²

⁸⁶ See the text accompanying *supra* note 51.

⁸⁷ See the text accompanying *supra* note 62.

⁸⁸ See SC Res. 1546, *supra* note 83, at para. 27.

⁸⁹ See *ibid.* (emphasis added).

⁹⁰ Prime Minister Allawi’s interim government had been elected to power in June 2004. See UN Report, ‘Post-War Iraq: United Nations Electoral Assistance Missions in Iraq, 26 March–2 June 2004’ (July 2004), available at www.unausa.org/site/pp.asp?c=fvKR18MPJpFdb=345987 (accessed 13 Dec. 2006).

⁹¹ See SC Res. 1546, *supra* note 83, at Preamble, 19th para.

⁹² See *ibid.*

The clear implication from the notion that disbursements were to 'continue' was that the IDF was to be left intact in order to serve as a repository for revenues from any future sales of hydrocarbons. In connection with this, paragraph 26 provided for a transitioning to the Interim Government of Iraq, and its successors, of all responsibilities and obligations had by the CPA under the Oil-for-Food Programme.⁹³ Given that, in large measure, the Oil-for-Food Programme was envisioned to be in the process of phasing out, such responsibilities and obligations were seen to be merely 'wrap-up' in nature.

Of greater significance than paragraph 26, paragraph 24 of Security Council Resolution 1546 provided that rules concerning deposit into the IDF of 'proceeds from export sales of petroleum, petroleum products, and natural gas ... shall continue to apply'.⁹⁴ In other words, the protections previously established by the United Nations to ensure that revenues from the sale of Iraqi oil were not squandered or misdirected still demanded rigorous compliance. Further, paragraph 24 also noted that, following the CPA's dissolution at the end of June 2004, disbursements from the Development Fund for Iraq 'shall be ... solely at the direction of the Government of Iraq'.⁹⁵ In conjunction with this new degree of autonomy, however, that same paragraph 24 continued by observing that all disbursements 'shall be utilized in a transparent and equitable manner and through the Iraqi budget' and, additionally, that the IAMB, the oversight body established under Resolution 1483, 'shall continue its activities in monitoring the Development Fund for Iraq'.⁹⁶ Plainly, the idea was to acknowledge Iraqi control over revenues from oil sales, yet to do so in a way that recognized the nascent character of Iraq's new governmental regime and all the temptations and pressures it might encounter.

From the foregoing, it is apparent that the idea captured in Security Council Resolution 1546 was that of initiating the process of visualizing the Iraqi government as a peer of other governments – without the need for special legal protections, with absolute control over its natural resources, and with greater (though not complete) autonomy in the handling of revenues generated through the sale of those resources. Presumably, as intimated above, one reason for the Security Council holding back with respect to giving Iraq complete discretion on the management of revenues generated through hydrocarbon sales had to do with the realization that, if Iraq were ever to stand on its own as a successful democracy, its crown jewel, its principal national patrimony, its oil and gas deposits, had to be used wisely and not squandered as a result of bad government practices or corruption.

Despite this impetus towards watchfully supervising the use of Iraq's oil revenues, paragraph 25 of Resolution 1546 contained a major concession tilting in the direction of complete autonomy. Specifically, it provided that the terms of paragraph 24, dealing with the deposit of hydrocarbon sales revenues into the IDF, and the role of

⁹³ See *ibid.*, at para. 26.

⁹⁴ See *ibid.*, at para. 24.

⁹⁵ See *ibid.*

⁹⁶ See *ibid.*

the IAMB, 'shall be reviewed at the request of the Transitional Government of Iraq or twelve months from the date of [resolution 1546], and *shall expire* upon the completion of the political process set out in paragraph four above'.⁹⁷ The process set out in paragraph 4 of Resolution 1546 was that which resulted in the drafting of the Iraqi Constitution during the latter half of 2004,⁹⁸ and the January 2005 national elections that led to the ascendancy of, first, the Ibrahim al-Jaafri, and then the Nouri al-Maliki, governments.⁹⁹ Paragraph 25's plain thrust was towards the eventual elimination of Security Council mandated and IDF/IAMB managed and supervised handling of revenues from the sales of Iraqi oil. This created at least the potential for early, unsupervised Iraqi control over oil sales revenues, while legal claims against Iraqi oil and the IDF remained by mandate in abeyance until 31 December 2007.¹⁰⁰

In recognition of the fact that the political situation in Iraq was not sufficiently stable to warrant institution of the envisioned unsupervised Iraqi government control over its oil revenues, the Security Council adopted on 11 November 2005 Resolution 1637.¹⁰¹ Paragraph 3 of that resolution extended both the deposit management authority of the IDF and IAMB's monitoring role until 31 December 2006.¹⁰² Though the extension was important, Resolution 1637 is referenced here primarily because it served as the model for the currently controlling Security Council Resolution 1723, adopted only a few weeks prior to the writing of this essay.¹⁰³ The two resolutions largely track each other. Paragraph 3 of Resolution 1723 provides another extension for the IDF and the IAMB, this time until *31 December 2007*,¹⁰⁴ the exact same date that the insulation of Iraqi oil and the IDF from legal claims is scheduled to expire. Aside from this extension, Resolution 1723's significance resides in its continuation of the international community's commitment to the notion of Iraqi oil and natural gas being under the authority of the government of Iraq, with revenues from the sale of such being used for the benefit of the Iraqi people.

The combination of three specific provisions of Security Council Resolution 1723's Preamble strongly suggest this notion. The fourth paragraph of the Preamble begins

⁹⁷ See *ibid.* (emphasis added).

⁹⁸ On the adoption of that Constitution see 'New Constitution Adopted', *Toronto Star*, 26 Oct. 2005, reprinted by The International Institute for Strategic Studies, available at www.iiss.org/whats-new/iiss-in-the-press/press-coverage-2005/october-2005/new-constitution-adopted (accessed 14 Dec. 2006).

⁹⁹ See generally International Institute for Strategic Studies, 'Iraq's New Administration: End of the Beginning?', available at www.iiss.org/publications/strategic-comments/past-issues/volume-12—2006/volume-12—issue-4/iraqs-new-administration (accessed 14 Dec. 2006).

¹⁰⁰ Again, paras. 22 of Res. 1483, *supra* note 55, and 27 of Res. 1546, *supra* note 83, were the relevant resolutions establishing the insulation from legal claims for both Iraqi oil and the IDF. See the text accompanying *supra* notes 62–63 and 87–91.

¹⁰¹ See SC Res. 1637, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N05/592/77/PDF/N0559277.pdf?OpenElement> (accessed 16 Dec. 2006).

¹⁰² See *ibid.*, at para. 3.

¹⁰³ For the text of SC Res. 1723, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N06/632/35/PDF/N0663235.pdf?OpenElement> (accessed 18 Dec. 2006). The reader should be aware that work on this article was undertaken and completed during the late autumn of 2006 and the winter of 2007.

¹⁰⁴ See SC Res. 1723, *supra* note 103, at para. 3.

by reaffirming, once again, the sovereignty and independence of Iraq.¹⁰⁵ And this is then followed by the Preamble's fifth paragraph also reaffirming not only the right of the Iraqi people to determine their own political future, but also to 'control their own national resources'.¹⁰⁶ Serving as a capstone, paragraph 20 of Resolution 1723's Preamble then notes Security Council recognition of the important role played by the IDF and the IAMB 'in helping the Government of Iraq to ensure that Iraq's resources are being used transparently and equitably for the benefit of the people of Iraq'.¹⁰⁷ On occasion, transparency and proper use of revenues produced by the sale of Iraqi hydrocarbon resources have proven problematic.¹⁰⁸ Nonetheless, the international community has found the use of the IDF and the oversight of the IAMB to be far preferable in maximizing the chances of Iraq's oil resources being used for the benefit of the Iraqi people than the alternative of permitting Iraqi functionaries to assume immediate unsupervised control.

The substantive provisions of Security Council Resolution 1723 basically cover two broad subjects: the reauthorization of the military role of US-led multinational forces in Iraq; and the extension of UN-sponsored mechanisms for the handling of revenues associated with the sale of Iraqi oil and gas. It is the latter that gives legal bite to the idea captured by paragraph 20 of Resolution 1723's Preamble. On that score, paragraph 3 of the Resolution's substantive provisions states the Security Council's decision to extend until 31 December 2007 the duties of both the IDF and the IAMB.¹⁰⁹ This is followed in paragraph 4 by a declaration of the Security Council that the duties of both the IDF and the IAMB 'shall be reviewed at the request of the Government of Iraq or no later than 15 June 2007'.¹¹⁰ It had been just such a formal request by the Iraqi government that resulted in the adoption of Resolution 1723 and its extension of the previous 31 December 2006 end-date for the IDF and IAMB.¹¹¹ And as if to drive home the point that, even though the security situation in Iraq continued to occupy much attention, the importance of the IDF and IAMB in assuring the new government the breathing space necessary to structure administrative networks capable of guaranteeing Iraq's oil and the revenues from the sale of such would be used only for the benefit of the sovereign and independent people of Iraq, the request of the government itself clearly referenced a one-year extension, with a 15 June 2007 review date.¹¹²

¹⁰⁵ See *ibid.*, at 4th para. of the Preamble.

¹⁰⁶ See *ibid.*, at 5th para. of the Preamble.

¹⁰⁷ See *ibid.*, at 20th para. of the Preamble.

¹⁰⁸ See generally Global Policy Forum, *Development Fund for Iraq: Audit Reports*, 1 Jan.–28 June 2004, available at www.globalpolicy.org/security/issues/iraq/dfi/2004/auditreports.htm (accessed 27 Dec. 2006); Special Inspector General for Iraq, 'Reconstruction Audits', available at www.sigir.mil/audits/Default.aspx (accessed 27 Dec. 2006); 'IAMB Says U.S. Should Monitor the Development Fund for Iraq', *Access News*, 28 Dec. 2005, available at www.globalpolicy.org/security/issues/iraq/dfi/2005/1228monitor.htm (accessed 27 Dec. 2006).

¹⁰⁹ See SC Res. 1723, *supra* note 103, at para. 3.

¹¹⁰ See *ibid.*, at para. 4.

¹¹¹ See letter dated 11 Nov. 2006 from the Prime Minister of Iraq addressed to the President of the Security Council, SC Res. 1723, *supra* note 103, at Annex I.

¹¹² See *ibid.*

It would be hard to understand this new resolution as doing anything other than continuing the international community's recognition of Iraq's oil and gas as under Iraqi control, with the role of Security Council designated entities as merely supervisory and interim.

5 General Observations and Suggestions: Effect of the Security Council Regime and How it Could be Enhanced

Though the near and intermediate term economic interests of the US-led coalition in Iraq may suggest insistence on control over Iraqi oil, the UN Security Council resolutions concerning the subject have steadfastly refrained from asserting such. Indeed, as the preceding review of those resolutions indicate, the international community initially asserted authority over Iraqi oil in order to guarantee that it would not provide revenues that could be used for military purposes.¹¹³ It later asserted authority to assure it would produce funds that could be used for the humanitarian needs of the Iraqi civilians.¹¹⁴ And it finally asserted authority to reduce the likelihood that funds generated by its permitted export sale would be misdirected away from legitimate post-war reconstruction costs.¹¹⁵ At every juncture, the Security Council has been concerned with acknowledging the sovereign independence and territorial integrity of Iraq, and the ultimate authority of the Iraqi people to determine the management and disposition of Iraq's national resources. Any UN-asserted authority regarding those resources was envisioned as purely protective, not as indicative of divesting Iraq of superior and ultimate control.

In the context of the current struggles taking place in Iraq over the various questions related to the matter of oil, the existing Security Council resolutions repose the decisive authority in the hands of Iraqis. While coalition allies might attempt to exert influence over the many issues connected with how Iraq's oil wealth is to be handled, it is the people of Iraq that the international community has designated as having the ultimate authority to determine how Iraqi oil and the revenues from its sale are to be managed, disposed of, and utilized. As it currently stands, the Iraqi Constitution picks up on this by providing for an extensive role in matters of oil for provincial governmental units.¹¹⁶ As noted at the outset of this essay, the Kurdish authorities in the north of Iraq adopted provincial legislation in late October 2006 claiming as much autonomy in that respect as they considered permissible under the Constitution.¹¹⁷ How current negotiations will conclude on the role of the central government in the large variety of matters associated with control over and the exploitation of oil, as well

¹¹³ See the text accompanying *supra* notes 25–27.

¹¹⁴ See the text accompanying *supra* notes 27–37.

¹¹⁵ See the text accompanying *supra* notes 56–83.

¹¹⁶ See generally 'Full Text of Iraq Constitution', Associated Press, 12 Oct. 2005, at arts. 108–111 and 117, available at www.washingtonpost.com/wp-dyn/content/article/2005/10/12/AR2005101201450.html (accessed 12 Dec. 2006).

¹¹⁷ See the text accompanying *supra* note 12.

as allocation and expenditure of the revenues produced by its sale remains to be seen. In any event, it is absolutely and indubitably clear that the operative and legally binding statements of the Security Council on each and every conceivable issue associated with Iraq's oil recognize that the Iraqi people are to have the final say. Under controlling Security Council resolutions, oversight of the international community and insulation of Iraqi oil revenues from legal claims continue through 31 December 2007, but there is nothing in those resolutions that divests the Iraqi people of the power to decide upon the nature of the legal regime to govern the management, exploitation and sale of Iraqi oil. Even though what the Iraqis finally decide upon may not prove especially palatable to members of the US-led coalition, the relevant Security Council resolutions are explicit in recognizing their autonomy to fashion the legal regime they deem most appropriate.

The United States and other coalition allies, as well as the various international oil companies to which the Iraqis will have to look to resurrect and expand their oil industry, may well desire an Iraqi hydrocarbons legal regime that contains various features deemed favourable to consuming nations and producing industries. In fact, there is every reason to believe that representatives from both consuming nations and producing industries have exerted substantial pressure on those involved in negotiating Iraq's new petroleum legislation to craft a regime that benefits the interests for whom those representatives speak.¹¹⁸ While that should be viewed as neither surprising nor inappropriate, it is indubitably clear that the nature and character of the regime finally settled upon by Iraqi negotiators and legislators is envisioned by the controlling Security Council resolutions as being entirely and exclusively within the sovereign and independent prerogative of the Iraqi people. Iraqis may submit to the overtures and entreaties of interested outside parties, or they may thoroughly reject the persuasiveness of, and rebuff the pressures inherent in, such parties' arguments. The UN Security Council resolutions leave no question but that the Iraqi people have control over their petroleum resources and are vested with the exclusive and sole power to decide upon the legal regime to govern them. Moreover, that power is not just confined to whether it is the Iraqis or the international community that decides upon the contours of Iraq's future oil and gas legal regime. It also includes the power in Iraqis to decide wisely or foolishly regarding the particulars, the nuts and bolts of that legal regime. The Security Council may once have asserted authority over Iraqi oil and gas, and the proceeds of its sale, to assure revenues were not used for illegal weapons activities or that they were used to fund the humanitarian and reconstruction needs of the people of that nation. At present, however, the resolutions of the Council make clear that the international community respects the sovereign independence of the new Iraqi government and recognizes it has a right equivalent to that of all other sovereign nations to exercise full and decisive control over its own natural resources.

¹¹⁸ See Muttitt, 'Crude Designs: The Rip-Off of Iraq's Oil Wealth' (Nov. 2005), available at www.globalpolicy.org/security/oil/2005/crudedesigns.htm#pumping (accessed 26 Feb. 2007); Mackey (Reuters), 'Oil Majors Maneuver for Prime Position in Iraq' (23 Aug. 2006), available at www.globalpolicy.org/security/oil/2006/0823maneuver.htm (accessed 26 Feb. 2007).

And additionally, not one idea appears in the relevant Security Council resolutions that goes so far as to establish precise substantive standards that must be reflected in any new legal regime crafted by Iraqi negotiators to regulate oil and gas activities. In a word, the United Nations accepts that the Iraqi people have ‘plenary’ authority over their hydrocarbon resources.

But quite apart from the matter of Iraq’s hydrocarbons being under the exclusive and absolute control of the Iraqi people, serious potential problems remain in connection with the existence of the Security Council’s current deadline on the protection of Iraqi oil and gas, and proceeds and obligations from its sale, in regards to legal claims that might involve such. As is well known, the costs of the reconstruction and security operations in Iraq have been staggering, to say the least. Any effort likely to produce over the long term a semblance of success will require a continued financial commitment of substantial magnitude. Despite the fact that legitimate questions may exist with respect to whether the chances of success or the benefits that might potentially emerge from such warrant embracing that kind of expensive and prolonged commitment, there would seem little disagreement that widely opening the doors of the courthouse to those who would seek access to the only prominent income-producing national asset controlled by the Iraqi people could seriously jeopardize the apparently slim prospect Iraq has of securing civil stability and resurrecting itself as a contributing member of the world community.

Aside from the estimated \$700 billion that will have been expended by the US on reconstruction and security efforts in Iraq and Afghanistan by the end of 2008,¹¹⁹ the government in Baghdad is thought by some to have had pre-war debts to foreign governments and non-governmental entities totalling in the vicinity of \$400 billion.¹²⁰ At Iraq’s current oil production rate of around 2 million barrels per day (mbpd),¹²¹ considering the present \$60 per barrel price on the international market, sales should generate gross revenues of around \$44 billion annually. In the event that sufficient improvements in Iraqi production techniques and political stability can be restored to permit reaching the 3 mbpd level, annual sales could bring in approximately \$65 billion in gross revenues. Revenues at either level, however, would have to be reduced to reflect exploration and production expenses and other costs. And to the extent that production activities represent a collaborative venture with international oil companies or other outside business and labour forces, it would be completely unreasonable to expect governmental authorities within Iraq to have anything half-way close to profits approximating revenues earned by the actual sales made on the international market.

¹¹⁹ See Silva, ‘Bush Seeks Jump in War Spending’, *BaltimoreSun.com*, 6 Feb. 2007, available at www.baltimoresun.com/news/nationworld/politics/bal-te.budget06feb06,0,6195214.story?coll=bal-nationpolitics-headlines (accessed 27 Feb. 2007).

¹²⁰ See Gardiner and Miles, ‘Forgive the Iraqi Debt’, The Heritage Foundation, Executive Memoranda #871 (30 Apr. 2003), available at www.heritage.org/Research/TradeandForeignAid/em871.cfm (accessed 27 Feb. 2007)(citing a CSIS study figure of \$383 billion).

¹²¹ See US Dept. of Energy, Energy Information Agency, ‘OPEC Oil Production’, available at www.eia.doe.gov/emeu/steo/pub/3atab.pdf (accessed 27 Feb. 2007), Table 3a Rev. (showing less than 2 mbpd for Jan. 2007).

For the purposes of analysis, if Iraqi oil sales generated net profits available for expenditure in the vicinity of \$25–35 billion annually, it would barely be enough to cover that nation's existing annual budget.¹²² Given the well-known and highly publicized inadequacies in Iraq's basic infrastructure and social services, it would seem unlikely that anyone would suggest that current budget figures are not to be expected to increase rather significantly. While it is true that in the immediate wake of the March 2003 coalition invasion, then US Deputy Secretary of Defense Paul Wolfowitz, a principal architect of the war and leading proponent of the link between Saddam Hussein and international terrorism, indicated in testimony before the Appropriations Committee of the US House of Representatives that he expected that sales of Iraqi oil could cover the costs of the invasion by the 2005–2006 time frame,¹²³ this appears to have represented yet another overly optimistic assessment associated with the Iraq campaign. There can be no quibbling with the fact that Iraqi oil sales are likely to generate considerable sums of cash on an annual basis. Indeed, given estimates of that nation's oil reserves, at present pricing levels total revenues over the life of the oil fields are likely to top, on the very low end, at least \$7 trillion.¹²⁴ Without a doubling or tripling of anticipated near-term production levels, however, it appears improbable that Iraq will be prepared to easily and painlessly pay off any of its pre-war or post-war creditors. And this makes re-extending insulation of the Iraqi government from legal claims against its oil and gas, and the revenues from the sale of such, a terribly important matter for the international community to address.

The mid-November 2004 so-called Paris Club agreement was a partial move in that direction. By virtue of that agreement, 19 major industrial nations, including the United States, Germany, the UK and France agreed to reduce the amount of debt owed them by Iraq. Working on the basis of an Iraqi debt to the concerned governments of \$38.9 billion, the parties consented to a reduction by 80 per cent to a figure of \$7.8 billion.¹²⁵ From indications, the US had apparently wanted a reduction of as much as 95 per cent, while European nations had insisted upon a reduction not exceeding the 50 per cent level. Under those circumstances, the 80 per cent reduction agreement reflected a compromise position.¹²⁶ The agreement, of course, had no applicability to debts owed non-Paris Club nations, nor to those held by private or non-state entities.

Why would it not make sense for the UN to take an approach analogous to that reflected in the Paris Club agreement and adopt a new Security Council resolution

¹²² During 2005, it is reported that the Iraq government spent \$34.6 billion. See US Central Intelligence Agency, *2006 CIA World Factbook*, available at www.cia.gov/cia/publications/factbook/geos/iz.html#Econ (under 'Economy: Budget') (accessed 23 Feb. 2007).

¹²³ See Transcript, Hearing of the Defense Subcommittee of the House Appropriations Committee (27 March 2003).

¹²⁴ This figure is based on assuming a \$60 per barrel price level and a total oil reserve figure of only 115 billion barrels. In the event that there are suggestions that Iraq may have reserves of 200+ billion barrels, see *supra* note 4, then the \$7 trillion figure may have to increase to around \$13 trillion.

¹²⁵ See generally Metzger, 'A Mission Accomplished', *The National LJ*, 10 Apr. 2006, available at www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1144672790115 (accessed 26 Feb. 2006).

¹²⁶ See generally Mitchell, 'Debt Relief Agreement for Iraq', *Jubilee Research*, 29 Nov. 2004, available at www.jubileeresearch.org/news/iraq301104.htm (accessed 26 Feb. 2006).

insulating Iraqi oil, and the revenues produced by its sale, from legal claims associated with all pre-war obligations and post-war security and reconstruction debts? It certainly appears that the international community has no insuperable philosophical objection to the basic concept of such insulation, lest how would one explain the already extant and previously referenced legal protection bestowed by the Security Council upon Iraq.¹²⁷ And surely there can be no doubt that the amount of money involved with pre- and post-war claims could easily overwhelm the budgetary demands on Iraq for virtually every cent of the revenues produced by Iraqi oil and gas sales activity. Against this background, there seems more than adequate reason for the Security Council to consider adoption of a new resolution providing insulation to Iraqi hydrocarbons and their revenues from legal proceedings by claimants as an appropriate and prescient action. Financial resources essential because of the current exigencies faced in Iraq would be assured of commitment to efforts targeting the stabilization and buttressing of Baghdad's fragile fledgling democracy. Any effort to open such resources to being diverted to satisfying financial claims of creditors would seem to go a long way towards condemning that democracy to abject failure.

The precise contours of a new Security Council resolution could vary substantially. It might be that such a resolution could closely track the Paris Club agreement and, for a designated number of years, exempt from pre- and post-war claims by creditors, 80 per cent of the revenues generated by Iraqi oil and gas sales. Conversely, a new resolution might provide for the continuation of the IDF, or the establishment of a similar entity, and permit the Iraqi government to funnel a specific percentage of oil and gas sales revenues into such, with those revenues and the managing entity being accorded complete immunity from legal action. Indeed, there would seem at least four major areas that any new resolution must address. First, as just intimated, the resolution should provide protection for revenues produced by oil and gas sales activities. Second, it should insulate from legal claims those governmental or quasi-governmental entities charged with the responsibility of managing and administering either such revenues or the production and sales generating them. Third, it should also speak to the matter of Iraqi oil and gas proper having immunity from attachment or other form of legal action, whether that oil and gas be in the hands of Iraqis or others. After all, the likelihood of sales and consequent revenues can be seriously diminished if oil and gas that has been lifted or is still in the ground can be subjected to various forms of legal proceedings. And fourth, as with earlier resolutions, any new effort by the Security Council to address the question of immunity from legal claims should require UN Member States to implement the adopted scheme through national legislation.

Irrespective of various approaches that might be taken to structure a new Security Council resolution, with upwards of \$400 billion in pre-war debt alone, in the neighbourhood of \$44 billion annually in oil and gas gross revenues, and existing annual budgetary expenditures of around \$35 billion, there seems little question that simply permitting legal claimants unfettered access to the judicial system for immediate and total satisfaction of all debts would have disastrous consequences for efforts to rebuild

¹²⁷ See the text accompanying *supra* notes 105–106.

a sound nation that is both a helpful and a dependable member of the community of states. Only ingenuity and creativity limit the nature of legal protection that could be afforded by a new Security Council resolution. But no matter the content and structure of insulation provided by any such resolution, there seems every reason to believe that subjecting the nascent Iraqi democracy to precisely the same level of susceptibility to legal action as faced by all other sovereign states would seriously imperil its ability to meet the basic needs of its citizenry and, thus, frustrate the chances of democracy firmly taking hold and flourishing.

6 Conclusion

The reported version of the Iraqi central government's draft oil and gas law is currently navigating the political processes required for it to become effective.¹²⁸ Though political pundits, foreign governmental officials, international oil company executives, or hard-headed economists may ultimately challenge the wisdom of the particular provisions contained in that draft law, there can be little disagreement that a long line of Security Council resolutions vests the people of Iraq and their elected representatives with the autonomous power to settle upon what they think best for their oil and gas resources. As those resolutions have evolved, they have recognized the need to insulate Iraq's hydrocarbon resources, and the revenues produced by their sales, from judicial proceedings initiated by legal claimants. That insulation has been driven by the realization that Iraq and its peoples have faced urgent needs, the satisfaction of which could well have been frustrated had every creditor or claimant with a legitimate or plausible demand been provided the latitude to commence proceedings aimed at Iraqi oil and gas, or the revenues from such.

While the Iraqis may have complete liberty to manage and control the exploitation and use of their natural resources, the country itself remains in a precarious and unstable situation, threatening to tip into total anarchy and all-out civil war. And as long as the economic situation in the nation remains tenuous and unable to even meet the basic needs of most Iraqis, the chances for the nation's new-found democracy do not appear sanguine. If the economic situation is to be turned around, thereby providing at least a modicum of opportunity for the political environment to be stabilized and democracy preserved, Iraq will need access to as much of its oil- and gas-based revenues as possible. A reasonable course of action to achieve this goal would seem to be a new Security Council resolution insulating Iraq's oil and gas, and the revenues from its sales, from legal proceedings of pre- and post-war claimants.

Yet time is running out. The protections from legal action that have been provided by the Security Council in the past are due to expire at the end of 2007. While the Iraqi national government currently focuses on securing successful adoption and

¹²⁸ See a reported version of the new law at www.al-ghad.org/wordpress/wp-content/uploads/2007/02/iraq_oil_law.pdf (accessed 2 Mar. 2007). See *supra* note 17 and also Reuters, 'Sunni Clerics Group Attacks Iraq's Draft Oil Law', *Iraq Updates*, 7 Mar. 2007, available at www.iraqupdates.com/p_articles.php/article/15278 (accessed 7 Mar. 2007).

implementation of its draft oil and gas law, and beginning the long process of creating measures dealing with the allocation in the country of the revenues produced by oil and gas sales, and formulation of standard contracts to govern relationships with international exploration and exploitation companies, the significance of protecting from creditors both the revenues generated by oil and gas activity and the oil and gas itself, remains a matter of terribly vital importance. What does it matter the form taken by Iraq's law governing oil and gas, or the nature of the regional allocation of proceeds from sales, or the structure of the legal relationship with international oil companies, if pre- and post-war creditors acquire unobstructed access to the courts for satisfying their claims? In the absence of continued UN-approved insulation from such claims, the monies necessary to permit the new Iraqi democracy a chance of survival will most likely vanish.