

**APPENDIX A**

**Statement of the KRG on Iraq's MoO Claims**

The KRG provides the following background information, although as explained in the Motion to Vacate, the well-pled allegations of the Amended Complaint are accepted as true for purposes of this motion as required by law, even where they are in fact incorrect. This background information is provided as a supplement to the letter of 29 July 2014 to the Court which corrected certain misrepresentations in the original Complaint of the Ministry of Oil of Iraq ("the MoO") filed on 28 July 2014.

Iraq is a federal state. The Constitution describes a federal, de-centralized system of government for Iraq in which sovereignty is shared between the federal government of Iraq, the KRG (which is recognized in Article 117 of the Constitution) and the various provinces or "governorates" of Iraq. The de-centralized nature of Iraq's federal system applies to oil and gas, to tax, to customs, to the administration of civil and criminal law, and to the provision of military and police security within the Kurdistan Region, all of which are exclusive responsibilities of the KRG. In the case of oil and gas, Article 111 of the Constitution provides that Iraq's subsurface oil and gas "are owned by all the people of Iraq *in all the regions and governorates.*" Article 111 clearly does not confer any managerial rights upon the federal government at all. Rather, the Iraqi Constitution reserves to the KRG and the producing governorates rights in relation to the management of that oil and gas, whether before or after the oil and gas has been extracted.

The Iraqi federal government is weak by design. It is easy to illustrate the relative constitutional weakness of the federal government as compared with other federal governments around the world. The Iraqi Constitution provides very few exclusive powers to the federal government, all of which are set forth in Article 110. The few powers that are identified as exclusive to the federal government are, in all relevant respects, qualified as

*policy* making powers without any other exclusive authorities (such as exclusive legislative authority) to require the implementation of those policies. None of the powers stipulated in Article 110 extends to oil produced in the Kurdistan Region. Article 114 of the Iraqi Constitution lists certain shared powers (shared, that is, between the federal government and the producing regions and governorates), none of which pertain to oil. Shared powers in respect only of the “management of oil and gas extracted from present fields” are set forth in Article 112. “Management” in Article 112 includes all post-extraction transportation, marketing, export and sales of oil and gas. Under any plausible definition of “present fields” (e.g., fields that were in commercial production at the time the Constitution was approved by Iraqi parliament, 15 August 2005), no fields in the Kurdistan Region are present fields. Moreover, even if the Kurdistan Region *were* to contain any present fields, any right of the federal government to manage such fields would be thrown into serious doubt by the federal government’s chronic and well-publicized failure to meet its mandatory revenue sharing obligations set out in Article 112 itself.

The KRG’s authority over the Kurdistan Region and the oil and gas in the Region is further evidenced by the “paramountcy” clause at Article 115, which is crucial to any understanding of the Iraqi federation. Article 115 of the Iraqi Constitution states that “all powers not stipulated in the exclusive powers of the federal government belong to the authorities of the regions and governorates that are not organized in a region.” No provision of the Iraqi Constitution specifically addresses the circumstances of the management of oil and gas extracted from fields other than present fields – that is to say, management of fields that were not in commercial production before 15 August 2005. The management of oil and gas extracted from such fields – which might be called “future fields” – is clearly not an exclusive power of the federal government stipulated by Article 110 of the Constitution, and is not even identified as a shared power under Article 112. It follows, therefore, by simple

operation of Article 115, that the management of future fields, to the extent that they lie in the Kurdistan Region, is an exclusive power of the KRG. The rights of the KRG to management of oil and gas from future fields include exploration, production and also post-extraction transportation, marketing, export and sales.

The limitation and qualification of federal powers and reservation of powers in the Kurdistan Region (and producing governorates), including in respect of oil, was a fundamental element of the 2005 constitutional bargain. That bargain was ratified by an overwhelming popular vote by Iraqis in the October 2005 constitutional referendum. The Iraqi people voted against centralized power in Baghdad, and against centralized power over oil in particular. It has been recognized and documented by respected members of the international community that centralized governments in Iraq – including, most notably, the Ba’ath Party governments of Saddam Hussein – had repeatedly used oil revenues to bankroll armed conflict, including genocidal conflict, against the Iraqi people themselves. Those who suffered were from many different ethnicities and religious communities. Amongst those who suffered most intensely were Iraqi Kurds, hundreds of thousands of whom were, from the 1960s onward, deported, harassed and executed (after their villages were burned) precisely because they happened to be in geographical proximity to existing or prospective oil and gas fields. In part for these historical reasons, the Constitution makes abundantly clear that any law which contradicts the Constitution is rendered void by operation of Article 13. It is disturbing that the federal government now argues in its Amended Complaint that certain laws from the Saddam Hussein era, made under a notoriously undemocratic regime whose members have been found guilty of the most serious crimes against humanity, are again to be relied upon by an Iraqi government in support of the centralization of oil powers, and where that centralization finds no support in the Constitution itself. Indeed, as the MoO itself concedes in its Amended Complaint, the MoO itself holds no authority greater than that

of an Iraqi law passed in 1976, at point in Iraq's history when legislative authority in Iraq was held by the notorious Revolutionary Command Council, a creature of the Ba'ath Party, and when Iraq's anti-Kurdish genocide was gathering pace.

To make quite sure that no Saddam-era oil laws can apply in the Kurdistan Region, the KRG in 2007 parliament unanimously passed the Oil and Gas Law (Law No. 22 of 2007). That law is, by virtue of Article 115 of the Iraqi Constitution,<sup>1</sup> superior to any conflicting federal law, and explicitly renders invalid all inconsistent laws, including most of the Saddam-era laws upon which the MoO purports to rely.<sup>2</sup> The KRG Oil and Gas Law differs markedly from the extant Saddam-era federal laws. It is investor friendly, transparent, and consistent with all benchmarks established for such laws by the IMF, the World Bank, and revenue transparency NGOs such as the Extractive Industries Transparency Initiative.

The KRG performs its constitutional duties to manage oil resources in the Kurdistan Region on behalf of the people of Iraq in accordance with the laws of the Kurdistan Region, including the 2007 Oil and Gas Law. The KRG's oil and gas industry is lawful, heavily regulated, and carefully managed. It is administered in the interests of the people of Iraq. The KRG has always committed to share with the federal government the revenues that the KRG derives from its oil production, provided naturally that the federal government undertakes to share its revenues with the KRG.<sup>3</sup>

The KRG's oil and gas regime has been extremely successful. Pursuant to the KRG's constitutional authority and in accordance with the laws of the Kurdistan Region, including the Oil and Gas Law - 2007, the KRG has entered into production sharing agreements with more than 55 international oil companies, including subsidiaries of major U.S.-based

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<sup>1</sup> See also Constitution, Article 121 Second: "In case of a contradiction between regional and national legislation in respect of a matter outside the exclusive authorities of the federal government, the regional power shall have the right to amend the application of the national legislation within that region."

<sup>2</sup> KRG Oil and Gas Law (Law No. 22 of 2007), Article 59 First.

<sup>3</sup> See KRG Oil and Gas Law (Law No. 22 of 2007), Articles 18 and 19; KRG Law on Identifying and Obtaining Financial Dues to the Kurdistan Region – Iraq from Federal Revenue (Law No.5 of 2013).

companies ExxonMobil, Chevron, Hess, Marathon, and others.<sup>4</sup> None of these companies could lawfully engage in such business if—as MoO’s Amended Complaint suggests—the KRG’s entire oil industry were tantamount to theft in which the oil companies would be complicit. None of these very careful, well-advised, and successful companies has concluded that the consent or other approval of the Iraqi federal government was required for their activities, including export and sale of their share of oil production in the Kurdistan Region.

As is evident from the Amended Complaint, the MoO nevertheless disputes the KRG’s authority to export and sell certain oil from KRG territory. The claims brought by MoO are motivated by an increasingly autocratic or even dictatorial political agenda and are urged by a caretaker (that is to say, unelected) federal government in Baghdad that has a record of routinely violating or ignoring the Constitution.<sup>5</sup> Most immediately, the KRG notes with concern that the federal government refers in its pleadings to its “police power.”<sup>6</sup> In doing so, the federal government implicitly threatens to use force in, and perhaps even to invade, the Kurdistan Region in support of its stated case. These threats are, for the time being, absurd. The federal government has no “police power” under the Constitution that would extend into the Kurdistan Region, which is well secured by the KRG’s constitutionally-mandated regional guard.<sup>7</sup> Moreover, as a matter of practicality, the federal government’s military has failed (where the KRG forces have succeeded) to engage even a

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<sup>4</sup> See, e.g., KRG list of KRG Ministry of Natural Resources Production Sharing Contracts, available at <http://www.krg.org/p/p.aspx?l=12&p=1> (last visited, Aug. 1, 2014).

<sup>5</sup> The federal government has, for example, repeatedly violated almost every human, civil and political right listed in the Constitution. It has taken repeated action to compromise or demolish the independence of the Iraqi legislature, judiciary, the Central Bank of Iraq and other vital federal institutions. Where the Constitution requires the federal government to pass, and act in accordance with, legislation, the federal government has almost invariably failed to do so. The federal government has failed to protect minorities; it has conducted criminal trials *in absentia*; it has conducted unlawful detentions; it has failed to compensate victims of former Iraqi regimes; it has failed to conduct mandatory referendums; and it has failed to share revenue in accordance with Articles 112 and 109. Most recently, the federal government has imposed an embargo on air cargo, including food and medical supplies, into and out of the Kurdistan Region, a clear violation of freedom of movement protections in Article 24 of the Constitution and the cause of great immediate hardship.

<sup>6</sup> Am. Complaint ¶ 16, Docket 7.

<sup>7</sup> See Constitution Article 121 Fifth: “The regional government shall be responsible for all the administrative requirements of the region, particularly the establishment and organization of the internal security forces of the region such as police, security forces, and guards of the region.”

few hundred “ISIS”<sup>8</sup> militiamen who now, because they have captured heavy weaponry from feckless or corrupt Iraqi federal government officials, control much of central Iraq. Whatever their absurdity, however, the military threats in the MoO’s pleadings against the KRG are yet further evidence of the Iraqi federal government’s unwillingness to be constrained by Iraq’s federal constitution and Iraqi law. The fact that the federal government has even initiated these extraordinary legal proceedings, under threat of force, in a non-Iraqi jurisdiction, *against one of its own political subdivisions* – the KRG – is evidence that Iraq has now become the archetype of a failed or rogue state.

As the MoO concedes in its Amended Complaint, the Republic of Iraq has submitted to the “Iraqi Supreme Federal Court” for resolution these “Iraqi constitutional and legal issues” relating to the export of crude oil.<sup>9</sup> Moreover, as it also concedes, the case has not been resolved and is currently pending in Iraq. Notwithstanding the pendency of these proceedings in Iraq, the MoO now seeks to obtain in this Court the very same relief that it sought unsuccessfully to obtain in Iraq, where the Iraqi Supreme Federal Court has already denied the MoO’s petition for a pre-judgment injunction. On June 25, 2014, the MoO petitioned the Iraqi Supreme Federal Court to issue an injunction to prevent the KRG from exporting oil extracted from KRG territory. The Iraqi Supreme Federal Court denied the petition, reasoning that it “contradicts the judicial precedent” to issue such an order prior to the resolution of the merits in the Iraqi Supreme Federal Court.<sup>10</sup>

Thus, no Iraqi court (nor, for that matter, any other court) has ever concluded that the KRG’s production and export of oil amounts to “conversion” or is in any way unlawful. Similarly, no sovereign (with the sole exception of the current Iraqi federal government) has

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<sup>8</sup> A common abbreviation of the name of the radical armed Islamist group known as the “Islamic State of Iraq and Levant”.

<sup>9</sup> The Iraqi Supreme Federal Court is an entity which is described in Articles 92 and 93 of the Constitution. It is unclear whether such a body has been properly constituted by the federal government in accordance with those and other provisions of the Constitution.

<sup>10</sup> Am. Complaint ¶ 17, Docket 7. By denying the petition, the Supreme Federal Court prevented the MoO from seeking to advance its civil case against the KRG in an Iraqi district or “Rassafa” court. Contrary to the suggestions of the plaintiff, there is no “ongoing” proceeding of a “criminal” nature against the KRG.



ever concluded that the KRG has acted unlawfully. The United States government, for its part, has recently confirmed that “[t]here is no U.S. ban on the transfer or sale of oil originating from any part of Iraq,” including Kurdistan.<sup>11</sup>

Finally, in response to the MoO’s Amended Complaint, the KRG must reiterate the deep dismay that it expressed in its letter of 29 July 2014 to the Court. In the few days since 29 July, ISIS military activity near the borders of the Kurdistan Region has increased markedly. The KRG’s regional guard (known as the “Peshmerga”) has been confronted in the last 48 hours by new attempts to penetrate the Kurdistan defences. Thousands of new refugees are now streaming into the Kurdistan Region, including large numbers of Iraq’s historical religious and ethnic minorities – such as Iraqi Christians, Turkomen, Yazidis, and Shabak – who face persecution and death at the hands of ISIS, and who are offered scant protection by the Iraqi federal government. It is a matter of great distress to the KRG that the Iraqi federal government, far from assisting the KRG in its fight against heavily armed aggressors, has completely cut off the KRG’s federal revenue entitlements, has enforced frequent air embargoes against the KRG, and is now taking steps in this Court to try to eliminate the KRG’s only other source of revenue.