

The Federal Oil and Gas Council: Basic Issues for Consideration.

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Introduction

During the 3rd session of the Symposium for Reviewing Iraq Oil Policy held in Baghdad between 27th February and 1st March 2009 a proposal was mentioned to create a Federal Oil and Gas Council (FOGC) on the same provisions that were previously suggested in the proposed Oil and Gas Law (OGL), which is still with the Council of Representatives (CoRs). FOGC, according to the proposal, is to be created by a decision from the Council of Ministers (CoM).

The first recommendation of the Symposium, as formulated and circulated by the organisers, endorses the proposal stating that FOGC is to be entrusted with managing the “extractive sector” on behalf of CoM, and to prepare short, medium and long term plans for the development of the said sector.

Apart from the above, no further details were provided and, due to time constraints, no serious and thorough discussions took place in that session (though this author was given 2 minutes only to comment on the proposal).

Faced with serious financial crisis due to low oil prices and thus declining export revenues (Fiscal argument); increased difficulties to even maintain an acceptable oil production capacity (Capacity argument); and intensified emphasis by potential international oil companies (IOCs) and other related foreign investors on the need to have a clear legal framework that insures predictability (Legal-framework argument), the government was hard pressed to do something to set the wheels moving. To implement its presented plans to attain oil production capacity targets, the government has three options regarding the legal framework:

1. Pressurise the parliament to approve OGL
2. Using a set of old laws that permit, from the point of view of the government, the Ministry of Oil (MoO) to enter into international contracts and agreements, but with specific approval by CoM,
3. Create FOGC by an executive order

My discussions outside the formal sessions of the Symposium with well informed and well connected old colleagues revealed two diametrically contesting views regarding the fate of OGL: one side suggested that OGL is a done deal destined for approval by parliament very soon; while the other believed there is slim hope, if any, in reaching agreement on this law and thus other options should be explored. The proposal to create FOGC through an executive order by CoM makes the pendulum tilt towards the second school of thought. This, however, seems easier said than done as shall be discussed hereunder.

FOGC is an important organ and could have a vital and critical role in the future development of the petroleum sector and, consequently, the reconstruction efforts of the entire economy

and its sustainable development. Considering the significance of this council, the purpose of this paper is to provide a comprehensive assessment and shed light on basic issues pertinent to this council, with the aim of making a positive contribution to the professional debate on this important issue. But before doing so I would like to address two pressing questions: which of the OGL drafts is being referred to; and how problematic is it to enact FOGC by an executive order.

Which draft of OGL?

The proposal to create FOGC refers to the relevant provisions in the draft OGL. The question is which draft of OGL do they refer to? This author has three drafts of OGL: February 2007 draft, which has 43 articles; July 2007 draft, which has 53 articles and a third draft, which has 51 articles, that was included in the folder distributed to the participants at the Baghdad February Symposium. I was also told of a fourth one. Provisions related to FOGC in these three drafts are not identical and, accordingly, could have different implications. A quick review of the third draft was done in preparation of this intervention. (I have dealt at length with the first two drafts of the law previously (*See: [Key questions over the Oil and Gas Law in Iraq](#)*).

I would suggest that the proponents of the proposal either present the full draft of FOGC proposal or specify which among the three, or four, drafts of OGL is used as the reference for establishing the FOGC.

Enactment of FOGC by executive order

The proponents of the proposal suggest the enactment of FOGC by a Prime Minister's executive order. This is very problematic from more than one aspect.

First, it gives the executive branch the upper hand by circumventing the parliament in this important matter, at a time when OGL, which incorporates FOGC, is with parliament. Will the parliamentarians see this as arm twisting, serious circumventing, or a further weakening of the House of Representatives or just a test balloon? How legal and constitutional is it to create an organ that is part of a proposed legislation under consideration by the legislative branch? Will this entity, i.e., FOGC be transitional or permanent considering OGL is currently with parliament? Furthermore, will this affect the deliberations on other much anticipated laws of MoO and Iraq National Oil Company (INOC)?

Second, the proposed legislation for the creation of the National Council for Reconstruction and Development (NCRD) is tabled for the first reading with the parliament (Item 13 on the list of proposed laws for the 1st reading as on May 12th, 2009). The prime purpose of NCRD is to speed up contract awards for strategic projects, including oil field development contracts. (*See: [Comment on the National Council for Reconstruction and Development in Iraq](#)*). A few questions are relevant here. Why NCRD was sent to parliament to be created by law while FOGC, which from constitutional and strategic aspects is no less, if not more, important than NCRD, is not? Obviously there is a case of inconsistency here. Furthermore, will the enactment of FOGC by the executive branch affect the attitude of parliament when addressing the contents, role and conditions of NCRD in the second reading of the proposed law? And in case of conflict between the two councils, who will resolve them and how? Finally, will this

add further strain to an already tense and uncomfortable relation between the executive and the legislative branches in the country and could further impact the recovery of the oil sector? Third, further arguments could also be made regarding two other legislations that have direct relevance to FOGC, namely Investment Law No. 13 of 2006 and Law No. 64 regulating Private Investment in Refineries. In my opinion, the creation of FOGC by an executive order is a non-starter and thus should not be entertained.

Provisions related to FOGC within OGL

In the following, which draws mostly on earlier interventions mentioned above, I will discuss at length all aspects related to the proposed FOGC taking the July 2007 draft of OGL as the reference text and, when necessary, make comparative crosschecking with the other two drafts.

I- Status of FOGC

Articles 5 and 10 deal with the formation of FOGC and Article 9 outlines its core functions, which are elaborated further, by other articles throughout the legislation. From all the provisions of OGL related to FOGC it appears that FOGC has, or could have, a powerful status of a mini-council of ministers or super-ministry. In this respect it has similarities with the Energy Council, which replaced the Supreme Council for Oil Policy created in the aftermath of the invasion. But it is more akin to an earlier bodies under the former regime, namely the Follow-up Committee for Oil Affairs and Agreement Implementation, known as the ‘Follow-up Committee’ (1969–80) and its successor the External Economic Relation Committee (EERC) of the CoM (1980–87). There are three basic differences between FOGC and the aforementioned two committees, which it seems that the authors of OGL overlooked when granting FOGC such mandates, authority and powers:

1. Under the previous political regime both legislative and executive powers were in the hands and under the exclusive disposal of the same supreme authority, and this had granted the former committees, which were connected to that supreme authority, very effective power over oil and gas. The current political order is significantly different with supposedly clear demarcation between the two branches – the legislative and the executive. In other words FOGC should not have, or should not be mandated to have both of these powers.
2. The former two committees had their own legal identity and framework. The EERC, for example, had its own law, which defined all related legal matters: its establishment, mandate and authority, membership, permanent staff, rules for conducting its work, the approval of its decisions by a higher authority...etc. The FOGC, unlike the previous committees especially the EERC, does not have its own law base. It derives its legitimacy from this Law and this could, constitutionally speaking, make some of its decisions, or even involvement in oil and gas matters outside the scope of this Law, legally questionable.
3. All members of the EERC and its permanent staff were Iraqi citizens, and it was not even allowed to employ non-Iraqis. This body of permanent staff, headed by a secretary-general, was the secretariat of the Committee and provided all logistical, technical and administrative functions and support for the ‘Committee members’ who were from outside

the secretariat. As for FOGC, according to Article 9 (4th), its president issues ‘internal orders’ specifying the Council’s formations, subdivisions and functions. This paragraph is better than what was proposed in the previous draft¹, but it is difficult to assess the role, functions and composition of this supportive entity before it is established and before the internal order is finalized and known. Furthermore, unlike EERC, FOGC has the mandate to employ non-Iraqis as shall be discussed later.

II – Structure and composition of FOGC

There are two categories of members within FOGC: those representing specific named entities and members chosen for their own competences. Moreover, the Law obligates the creation of the *Bureau of Independent Advisers* (BIAs). The Prime Minister, or his nominee, presides over the FOGC. The ‘representative’ members are provided for in Article 5 (1st, subparagraphs A to G). They retain their membership in FOGC as long as they maintain their positions in the entities they represent. The maximum number of the ‘appointee’ members is three. They should be ‘Experts in petroleum, finance and economics’ and ‘[A]ppointed for a period not exceeding five (5) years based on a resolution from the [CoM]’ (Article 5 (H)).

There are a few remarks to be made on FOGC membership:

1. The total number of FOGC members is open-ended. This depends on the number of the ‘Producing Governorates not included in a Region’, and on the number of the ‘chief executives of important petroleum companies’. The threshold qualifying a producing ‘Governorate’ for FOGC membership ranges between 100,000 boe (barrels of oil equivalent) to 150,000 boe, depending on the version of OGL draft. And the number of the ‘chief executives of important petroleum companies’ depends ultimately on the proposed laws regarding MoO and INOC. It is envisaged to see FOGC with a rather large number of memberships. Experience tells that such a large number could make the council inefficient in conducting its business and performing its duties. Since FOGC decisions are taken on a two-thirds majority (Article 9 (3rd)), then with such high membership a good deal of discussion can be expected on any issue and many sessions would be needed to make a decision. Considering the time limitation of 60 days, which the Law imposes on FOGC (Article 18 (4th, C)) to review and disapprove a contract otherwise the said contract becomes binding, a prolonged discussion might lead to approving-by-default of contracts that are not in the best interest of the country.
2. The ‘representatives’ are not ‘full-time’ members and surely they are expected to depend largely on the professional and specialized logistical support from within FOGC, not from the entities they represent. Non-availability of such logistical support could very well hamper the work of FOGC and the time it needs to accomplish its duties, especially those with a predetermined time frame under Article 18 mentioned above. Under the current and foreseeable political climate in the country there could be a high membership turnover rate since the appointments of ministerial posts and other positions qualifying for FOGC membership is politically driven. This undoubtedly has its negative consequences and impacts on the performance of FOGC. Additionally, a full attendance record is not always possible due to members’ frequent absence on missions outside the country. Without permanent substitute/ alternates members, there would be a serious communication, information and discontinuity problems among the members. Except for its president, the

¹ Article 5 (C, Tenth) in the February draft states that “[FOGC] may create entities necessary for the implementation of its duties,” which is much weaker than Article 9 (Fourth) in the July draft.

Law does not mention the substitute membership in FOGC, which we think should be considered.

3. The functions and responsibilities of FOGC require advanced competence in international legal frameworks especially in the field of private international law of contracts. Yet there is no legal expert among the three fixed-term appointees. How could FOGC address the complicated legal matters of various contracts? Probably through the BIAs. The July 2007 draft of OGL adds a legal professional to the BIAs but not to FOGC members, thus increasing the reliance of FOGC on the BIAs even further, especially if they are, or most of them are, not Iraqis.
4. Article 5 concludes with the following: ‘The formation of the [FOGC] shall take into consideration a fair representation of the basic components of the Iraqi society.’ This sentence is not only meaningless and redundant but dangerous as well since the ‘representative’ members are there by virtue of the entities they represent, and thus have nothing to do with the fair representation of the basic components of Iraqi society. Again, the three fixed-term experts are supposed to be appointed on the basis of their expertise. The question is what should come first: expertise, specialization and professional competence or societal representation? However, this sentence could very well be a cause for unnecessary sectarian conflict and generate inefficiency, and thus constitute a serious weakness in the Law. (The said sentence was not mentioned in Article 5 of the third version of OGL)

III – Bureau of Independent Advisers (BIAs)

Article 10 mandates the creation of BIAs, which could include unspecified number of experts in oil and gas and law to ‘[S]tudy exploration, development and production contracts and oil and gas field development plans and any other matters relevant to this, and to provide advice and recommendations [...] to the Council’. FOGC decides the number and selection of the advisers. Each will be hired for a one-year renewable term. The inclusion of this bureau in the three drafts of the Law is controversial, causes resentment and rejection, and casts doubt on the seriousness and integrity of the FOGC and even the Law itself.

First, the prime objectives of the bureau were stipulated under Article 10 as mentioned above. However, the Law grants them substantive and broader powers. The Bureau, under Article 18 (4th), is the only party who evaluate contracts and recommends them to FOGC. In other words, FOGC will be de facto under the tutelage of the BIAs. In addition, the Bureau in the final analysis determines the period of time available to FOGC in its decision-making. Moreover, this advisory body becomes the ultimate decision-maker with regards to all ‘exploration and production contracts’ concluded by the Kurdistan Regional Government (KRG) before this Law enters into force, as stated in Article 47 (2nd).

What are the justifications for providing this advisory body with ultimate power to make decisions? Why was this additional authority to make binding opinion granted? What are the consequences of this Article on the KRG’s political behaviour by concluding and signing as many contracts as possible to create a certain fait accompli before this Law enters into force? (Similar provision was mentioned in Article 40 (A) in the draft of February 2007. However, Article 46 (Second) in the third draft of OGL gives FOGC the final say on the KRG contracts).

Second, in the light of Article 10 (1st) the Bureau assesses ‘exploration, development and production contracts’. This gives the impression that only these contracts would be evaluated by the BIAs. However, Article 18 (4th, A) refers to the assessment of ‘development and production contracts’ by the BIAs as well. This is a clear discrepancy between the two articles reflecting a weakness in the Law and expanding the mandate, role and influence of the BIAs.

Third, although the July draft does not contain the phrase ‘Iraqi or foreign’, which was in the February draft, it equally does not specify that advisers should be Iraqis. Therefore the possibility that they could all or mostly be foreigners is highly probable, since the third draft of OGL mentions “Iraqis and foreigners” in its Article 10 (Second). If this happened, it certainly would erode the image and reputation of the FOGC, question its integrity and patriotism and seriously tarnish the legitimacy of its decisions.

Fourth, what exactly could ‘independent adviser’ be in the context of this Law and the prime functions of the FOGC and above all the importance of petroleum for the Iraqi economy and society? An independent, neutral or indifferent when addressing matters of interest to the Iraqi economy vis-à-vis a contractor at the time when the Law and the FOGC itself aim ‘to ensure maximum returns to the people of Iraq’? What are the objective criteria or measures available before the FOGC to assess the independence, objectivity or neutrality of opinion expressed by an ‘adviser’ before relying on them when making vital decisions that have serious repercussions on Iraq’s interests? Finally, how can an adviser be independent of the interests of his employer and payroll master, and does this raise moral and ethical questions?

Fifth, examples of operational questions that are relevant include: who would have the competence to check the qualifications of the foreign advisers and verify their credentials? Who would prepare the shortlist, conduct the interviews and suggest nominations? Will it be a foreign recruitment agency, the Iraqi embassies, a donor or the FOGC itself? What are the precautions and safeguards against possible infiltration of advisers with hidden political agendas and/or financial interests? With contracts for business worth millions if not billions of dollars, how can the FOGC be assured of the integrity of these advisers and their recommendations regarding related contracts and/or a specific international oil company (IOC)? Finally, how feasible and productive is it to recruit an adviser for a short term of one year, though with a possibility of extension, to give advice on matters of long-term strategic importance that has far-reaching consequences for the Iraqi economy? And what are the consequences of such a frequent turnover of advisers? (Article 10 (Second) of the third draft of OGL left the period of engagement open to be decided by instructions from the chairman of FOGC).

Consequently, this bureau raises a good deal of suspicion and many questions, which cast serious doubt on its feasibility, usefulness and those who were behind it to begin with. The possibility of total dependency on these advisers is real and high and this represents a detrimental and severe regulatory capture.

IV – Role, responsibilities and powers of FOGC

OGL entrusts FOGC with a wide range of responsibilities and powers. Hence, it has a critical role in the future development of the petroleum sector, the prospects of the national economy and the degree of effective national control over significant and finite natural resources. In effect, FOGC possesses excessive authority and powers. History and political science have

repeatedly demonstrated that power corrupts and absolute and excessive power corrupts absolutely.

According to Article 9 (1st), FOGC is '[R]esponsible for the federal petroleum policies, exploration and field development plans and major pipeline plans and their modification' and preparing contract 'models' and 'exploration, development and production contracts' and their amendments and '[I]ssuing instructions containing criteria for contracts negotiation and for licensing and development and production contracts' and preparing companies' eligibility criteria. Furthermore, the FOGC '[I]s the competent authority to approve the transfer of rights among holders of exploration, development and production licences and associated amendment of contracts' and to '[E]nsure that the Ministry of Oil and the Iraqi National Oil Company and regional authorities explore, develop and exploit petroleum resources' and '[D]etermine national oil production level in accordance with the national policy'.

It is obvious that entrusting FOGC with these far-reaching responsibilities, even with the presence of the controversial BIAs, puts heavy burdens and daunting tasks on the Council. Considering the structural and institutional weaknesses of the Council, it would be very optimistic to anticipate its effective performance.

Article 21 (3rd, A) further mandates the FOGC to determine the period during which the holders of an exploration, development and production contract may retain the exclusive right to develop and produce petroleum within the limits of a development and production area for a period not exceeding twenty years, which may be extended for additional five years subject to the approval of the CoM.

Authorizing this non-elected organ, i.e., FOGC, to grant lengthy development and production contracts without ex-ante or ex-post approval from the elected entity, CoR, is very questionable and could very well be unacceptable and non-democratic. Knowing the magnitude of the financial returns involved in contracts of such duration, this makes FOGC in its entirety a target for corruption. Without a proper, strong and effective surveillance system and good governance, the Law could in effect create a corruption-enabling environment with incidents of financial irregularities, corruption and bribes. This is possible since 'Corruption is often endemic in societies that rely on extractive industries as their source of income', as UNCTAD 2007 reports.

Finally, FOGC also prepares rules of procedure for site inspections and oil operations by the licensees through 'competent entity' (Article 38), decides on the dissemination of information relating to contracts (Article 43, 4th) and issues internal regulations and instructions for the implementation of this Law (Article 53).

In the midst of granting so much authority to the FOGC, the Law contains some flaws and contradictory and controversial provisions, which have probably been overlooked at the time of drafting OGL:

1. Although FOGC reviews and amends exploration and production contracts, according to Article 9 (1st, A and D), the Designated Authority (DA), not FOGC, is actually mandated to grant extensions to these contracts, under Article 21 (2nd, A and B) without reference to FOGC on these extensions. Another paragraph (2nd, C) under Article 21 indicates a further extension period not exceeding two years without stating who is authorized to grant this extension. Furthermore, an additional paragraph (2nd,

E) authorizes the ‘contracting entity’ to grant the licensee a further period of two years or four years in the case of non-associated natural gas.

This multiplicity, duplication and overlapping of powers constitute legal ambiguity, which could generate conflict between the FOGC and the DA. The potential for conflict is real especially in the northern region since the Law defines DA to mean ‘[MoO], [INOC], or the Regional Authority [RA].’ The RA is the authorized ministry in the regional government (Article 1, 2nd). Apart from this lengthy and repetitive extension, what is even more disturbing is that a serious and fundamental matter such as land relinquishment was not sufficiently dealt with in the Law, and was left to the model contracts (Article 21 (2nd, D)).

2. There is a similar overlapping of powers, envisaged by Article 22, between FOGC, the DA and the MoO regarding approval of and changes to field development plans, and between the FOGC and the MoO regarding pipelines (Article 32), and between the MoO and the DA with respect to Articles 35, 36 and 37 relating to ownership and disposal of information.
3. Uniformity of approval procedure and the approving authority is lacking in the Law. Article 21, for example, refers to approvals from each of the DA, the contracting entity, the MoO, the FOGC and the CoM. Yet those lower in the hierarchy were not required to seek authorization from the next higher level. Article 29 provides another case of duplication of approvals between the MoO and the CoM regarding contracts for non-associated natural gas discoveries.

Once again this overlapping of mandates and powers could become a serious source of contention and that could have an effective impact on the contractual obligations and the interest of Iraq. In the light of the above, there is a genuine need to address such multiple, duplication and overlapping of powers to avoid possible detrimental consequences.

V- FOGC and the Federal Petroleum Policy

Pursuant to Article 8 (2nd) CoM approves and oversees the implementation of federal petroleum policy, which is prepared by FOGC according to Article 9 (1st, A). At the outset it could be difficult to articulate sound, effective and implementable federal petroleum policy without the amendment of the Constitution, especially those articles with direct and indirect relations to petroleum issues. Current deliberations inside parliament reveal some 50 articles are subject to amendment, and the hope to clear and finalise an agreement during the term of the current parliament is very doubtful since Iraq is heading for new legislative elections at the end of this year. A new parliament and, accordingly a new government, might be in place then. The possibility of deferring the amendment, in full or partially, to the next parliament is highly probable.

Leaving this important and complex issue aside and while emphasizing the role and responsibility of CoM to approve and oversee the implementation of federal petroleum policy, the legitimacy and eligibility of FOGC in the preparation of this policy is questionable for the following reasons:

First, a federal petroleum policy within holistic sustainable development should have many macroeconomic aspects and complex intertwined sectoral linkages. It covers, therefore, much wider activities than, but inclusive of, exploration, development and production of petroleum.

In other words and within the oil sector, federal petroleum policy should address all downstream and upstream activities of the industry. Since this Law, according to Article 50, is not concerned with post-production activities, then it becomes abundantly clear that the role of this Law in drafting sound federal petroleum policy is limited hence there is a **jurisdiction problem**.

Second, FOGC derives its legitimacy from OGL. But since the Law does not cover all components of federal petroleum policy, FOGC could not be authorized legally or constitutionally to address policy matters related to oil and gas that fall outside the jurisdiction of the Law, which thus leads to FOGC having a **legitimacy problem**.

Third, on the institutional, structural and composition levels, FOGC does not have representatives from all of the entities that are involved in and have significant contributions to the formulation and implementation of the federal policy. The absence of such representation renders the FOGC unqualified and unable to prepare sound federal policy, hence the FOGC faces a **competency problem**.

In order to resolve these jurisdiction, legitimacy and competency problems, it is possible, and may be essential, to draft a special law, separate from OGL and that is not an executive order, for FOGC that structures its membership, institutional arrangements, organization, mandate and authority etc., taking into consideration what was mentioned in the paragraphs above.

According to Article 8 (3rd), the CoM supervises petroleum operations and enacts related regulations. There are strong reasons to make one believe that this is impractical and undesirable:

First, from an operational perspective it is emphatically unrealistic for CoM to perform an administrative supervisory role on a variety of diverse and geographically dispersed activities over most of Iraq. This becomes clear by looking again to what the term ‘petroleum operations’, as defined in Article 1(13th), covers. Moreover, there are many different layers of administrative functions depending, inter alia, on the complexity and phases of the activities, their location and the executing entity. Some of these activities would be carried out by Iraqi entities while others by foreign contractors in accordance with the relevant contracts. How could CoM oversee all these operations? What mechanisms does CoM have to ensure the effective performance of these tasks? What if this leads to very rigid centralization? Would such functions by CoM collide with the supervisory and regulatory functions by other entities? And what are the modalities to address such duplicating functions?

Second, the Law refers, in Article 22 (1st and 10th) and Article 35(4th), to ‘petroleum regulations’, and to regulations to be issued by FOGC, under Article 53, to facilitate the implementation of the Law. The question now is in what way do these regulations differ from those issued by CoM, to be promulgated under Article 8(3rd)?

The above questions point to a variety of implementation difficulties that executing entities could encounter, and thus due care and functional modalities become necessary to ensure good coordinates between all these regulatory agencies and orderly implementation of tasks.

Concluding Remarks

FOGC is very essential and an important organ, which, if created, could have far-reaching impact on the development of the petroleum sector and the whole economy. Considering the significance of this body on one hand and the many flaws and shortcomings of the provisions related to it in various OGL drafts on the other hand, it is highly desirable and advisable to enact FOGC by a law proposed by the Council of Ministers and approved by parliament. If, however, FOGC is created by an executive order the stalemate between the executive and the legislative branches could continue at the expense of the development of the petroleum sector and the whole economy.

Quick fixes usually create more problems than provide solutions. Therefore, the vision, mission and action of FOGC should be debated thoroughly and comprehensively with a view to create a long lasting entity with professionally competent institutional capacity that can, or could contribute to creating a suitable and functional framework and the needed enabling environment for the development of the petroleum sector.

Furthermore, it would be essential to mandate FOGC with the federal/national petroleum policy in all its three sub-sectors: upstream, midstream and downstream (excluding petrochemical industries), and not confining it to the “extractive sector”, as was suggested during the symposium.

Finally, FOGC’s legal charter (Law), its internal buy-laws (executive regulation), and modus operandi (operational modalities) should always uphold and ensure the attainment of the objectives of the core principles enshrined in the Constitution with regards to ownership of oil and gas and the highest interest of the Iraqi people.

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