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Robert Bejesky

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GEOPOLITICS, OIL LAW REFORM, AND COMMODITY MARKET EXPECTATIONS

ROBERT BEJESKY*

Table of Contents

I. Introduction

The 1973 oil supply shock elevated OPEC to world attention and ensconced it in the general consciousness as a confederacy that is potentially

* M.A. Political Science (Michigan), M.A. Applied Economics (Michigan), LL.M. International Law (Georgetown). The author has taught international law courses for Cooley Law School and the Department of Political Science at the University of Michigan, American Government and Constitutional Law courses for Alma College, and business law courses at Central Michigan University and the University of Miami.

antithetical to global energy needs. From 1986 until mid-1999, prices generally fluctuated within a $10 to $20 per barrel band, but alarms sounded when market prices started hovering above $30.[1] In July 2001, Senator Arlen Specter addressed the Senate regarding the need to confront OPEC and urged President Bush to file an International Court of Justice case against the organization, on the basis that perceived antitrust violations were a breach of "general principles of law."[2] Prices dipped initially, but began a precipitous rise in mid-March 2002.[3] In July 2004, Senator Frank Lautenberg released *Busting Up the Cartel: The WTO Case Against OPEC*.[4] Senators Mike DeWine and Herb Kohl introduced the *No Oil Producing and Exporting Cartels Act of 2004 (NOPEC)*.[5] Shortly after prices appreciated to $100 per barrel for the first time in history, Congressman Jim Saxton produced a Joint Economic Committee Report, *Expect No Relief from OPEC*.[6]

The price of oil hit $147 in July 2008, and underscored increasing global food prices and income inequality, inflation,[7] and seemingly recessionary conditions.[8] The *OPEC Accountability Act* of 2008 was introduced to urge

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1. *See* chart *infra* Part X.

2. 147 CONG. REC. S7942-01 (daily ed. July 19, 2001); *see also* Joel Brandon Moore, *The Natural Law Basis of Legal Obligation: International Antitrust and OPEC in Context*, 36 VAND. J. TRANSNAT'L L. 243, 245, 272 (2003).

3. *See* chart *infra* Part X.

4. Stephen A. Broome, *Conflicting Obligations for Oil Exporting Nations? Satisfying Membership Requirements of Both OPEC and the WTO*, 38 GEO. WASH. INT'L L. REV. 408, 409 (2006).

5. Kenneth S. Reinker, *NOPEC: The No Oil Producing and Exporting Cartels Act of 2004*, 42 HARV. J. ON LEGIS. 285, 285 (2005).

6. JOINT ECON. COMM., RESEARCH REP. 110-19, EXPECT NO RELIEF FROM OPEC (2008), *available at* http://www.house.gov/jec/Research%20Reports/2008/rr110-19.pdf.

7. *See* Kristen Boon, *Coining a New Jurisdiction: The Security Council as Economic Peacekeeper*, 41 VAND. J. TRANSNAT'L L. 991, 993-94 (2008) (noting poor economic conditions linked to many financial, humanitarian and conflict situations); Tim Carey, *Cartel Price Controls vs. Free Trade: A Study of Proposals to Challenge OPEC's Influence in the Oil Market Through WTO Dispute Settlement*, 24 AM. U. INT'L L. REV. 783, 784 (2009); Ganesh Thapa et al., *Soaring Food Prices: A Threat or Opportunity in Asia?*, 2 (Brooks World Policy Inst. Working Paper No. 69, 2009), *available at* http://www.bwpi.manchester.ac.uk/resources/Working-Papers/bwpi-wp-6909.pdf; Thomas Helbling, *Oil and Food Prices Expected to Ease Only Moderately*, IMF SURVEY MAGAZINE, July 1, 2008, http://www.imf.org/external/pubs/ft/survey/ so/2008/RES070108A.htm.

8. *See* Stijn Claessens & M. Ayhan Kose, *What Is Recession?*, IMF FIN. & DEV. Mar. 2009, at 52-53, *available at* http://www.imf.org/external/pubs/ft/fandd/2009/03/basics.htm; *Oil price Down on Recession Fears*, BBC, Oct. 16, 2008, http://news.bbc.co.uk/2/hi/business/7673273.htm; Mahmoud Amin El-Gamal & Amy Myers Jaffe, *Energy, Financial Contagion, and the Dollar* 12 (James A. Baker III Inst. For Pub. Policy at Rice Univ., Working Paper 2008), *available at* http://www.rice.edu/nationalmedia/multimedia/contagion.pdf; Paul Leiby,

U.S. Trade Representative diplomatic action,[9] and Congresspersons called for initiating WTO dispute settlement measures against OPEC for a "prohibition or restriction" on trade under Article XI,[10] ostensibly contending that supply collusion led to high prices. Proposals went further with the *Gas Price Relief for Consumers Act of 2008*. This act, which ultimately was not passed, sought to extend the Sherman Antitrust Act extraterritorially and grant federal court jurisdiction over a case in which "any foreign state . . . act[s] collectively or in combination with any other foreign state . . . to limit the production or distribution of oil, natural gas, or any other petroleum product."[11] The bill was sweeping but was premised on narrowly-viewed facts and logic — price trends may not have been due to collusion or supply restrictions but due to informational uncertainties.

Despite global fears over low production levels and rising prices, OPEC maintained oil production at record levels and there was no perceptible shortage.[12] Economists still debate why traders reacted so as to beget sevenfold market price increases over a six-year period; and, since oil is only one production ingredient in gasoline, there is no lack of consumer speculation over whether that should have translated into $4 per gallon fuel prices.[13] One explanation for price trends points to increasing global demand and risk of shortfall due to perceived production and refining facility limitations, but a popularly-accepted recent view has transcended efficient market explanations by positing that trader *speculation* was causing price surges.[14] This article provides a qualitative analysis of an information-related geopolitical and military conflict hypothesis raised by many economists and forecasted by the United Nations.[15]

Impact of Oil Supply Disruption in the United States and Benefits of Strategic Oil Stocks, IEA/ASEAN WORKSHOP 3 (Apr. 6, 2004), http://www.iea.org/Textbase/work/2004/cambodia/bj_Leiby.presentation.pdf.

9. OPEC Accountability Act, S. 2976, 110th Cong. (2008).

10. *See* Broome, *supra*, note 4, at 409; Carey, *supra* note 7, at 783.

11. Gas Price Relief for Consumers Act of 2008, H.R. 6074, 110th Cong. § 102 (2008), *available at* http://www.govtrack.us/congress/billtext.xpd?bill=h110-6074.

12. *See infra* notes 404, 412, 417, 460.

13. *See, e.g.*, Andrew P. Morriss & Nathaniel Stewart, *Market Fragmenting Regulation: Why Gasoline Costs So Much (and Why It's Going to Cost More)*, 72 BROOKLYN L. REV. 939, 939-40 (2007); Jeffrey H. Birnbarum, *Oil Lobby Reaches Out to Citizens Peeved at the Pump*, WASH. POST, May 9, 2008, at D1.

14. *See infra* notes 442, 459-60.

15. *See infra* notes 464-65, 467.

Today's commodity market system involves countries providing oil demand estimates to the International Energy Agency, OPEC members making periodic quota supply announcements and adjustments (on forty-three percent of global supply), and dozens of other countries providing normally stable production.[16] Announcements of supply, demand, shocks, risk, and uncertainty propagate, and traders buy and sell contracts to set oil spot and futures market prices on the New York Mercantile Exchange, the London International Petroleum Exchange, and the Singapore International Monetary Exchange.[17] Consequently, *fear* of shortage increases price and supply side fortuity to producer nations and oil companies, to the chagrin of consumer demand. During the 2002 to 2008 period of drastic price increases, there was no dearth of news releases to breed market uncertainty.

The Middle East holds two-thirds of world oil reserves and Iraq, a founding member of OPEC, possesses somewhere between the largest and fourth largest reserves.[18] The country was placed on the Bush administration's radar shortly after President Bush entered office, and by mid-2002, news chronologies narrated U.N. diplomacy, allegations of threats to international peace and security, and anticipated attack plans.[19] The March 2003 invasion was followed by regular reports of violence that could disrupt oil production, revelations of White House pre-invasion proposals to restructure Iraq's oil industry, and announcements that Coalition Provisional Authority (CPA) directives were abruptly implementing unstable market reforms.[20] Concomitantly, but not always related to events in Iraq, some U.S. officials openly spoke of desires to undermine OPEC.[21] Exiles, appointed to interim governments, announced that reform measures should triple production, revamp property rights, reduce regulatory controls, and open Iraqi

16. *See infra* notes 211, 214, 407-10.

17. INDEP. PETROLEUM ASS'N OF AMERICA, *Understanding The World Petroleum Market*, IPAA FACT SHEETS, 1 (Dec. 2008), http://www.ipaa.org/issues/factsheets/oil/UnderstandingWorldPetro-12-2001.pdf [hereinafter IPAA]; OPEC, *Annual Statistical Bulletin* 113-20 (2008), [hereinafter OPEC, *ASB*], *available at* http://www.opec.org/library/Annual%20Statistical%20Bulletin/pdf/ASB2008.pdf.

18. *See infra* notes 212-13.

19. Robert Bejesky, *Politico-International Law*, 57 LOY. L. REV. (forthcoming 2011) (manuscript at 4-6, 34-39) [hereinafter Bejesky, *Politico*]; Robert Bejesky, *Weapon Inspections Lessons Learned: Evidentiary Presumptions and Burdens of Proof*, 38 SYRACUSE J. INT'L L & COM. (forthcoming 2011) (manuscript at 6-29, 37-51, 56-69) [hereinafter Bejesky, *WI*].

20. *See infra* Parts V, VI.

21. *See supra* notes 2, 4-6, 9-11; *infra* notes 228-30.

oil production to foreign investment; all of which might signal a unilateral intention to bypass OPEC sentiment and later quotas.[22]

The proposed Oil and Gas Law met fierce resistance and was rejected by the Iraqi Parliament in late-2007, leaving the country's energy law obscure.[23] With pending alternative bills, national and regional authorities consummated twenty-year production contracts with multinationals that may conflict with the Iraqi Constitution and be incompatible with OPEC membership.[24] This geopolitical and law reform chronology is addressed from the perspective of competing public and private interests to exhibit how information may have bred commodity trader perceptions of risk and uncertainty, thereby increasing spot and futures oil prices.

II. Geopolitics and Market Equilibrium

Since oil was discovered, countries have fought to control supply, companies have shuffled to service markets to become the dominant multinational corporations, non-democratic rulers have reigned over oil-rich territory to become aristocratic moguls, and, more recently, global financiers have traded on fluctuating prices to reap riches.[25] Periodic speculations of exhausting or diminishing supply circulated, but were followed by new oil discoveries and abundant oil production. "Diminishing supply" arguments recently resurged, with some contending that petroleum resources would soon peak, taper, and exhaust within a century.[26] If geological surveys of 2.3 trillion barrels of proven recoverable reserves are accurate and demand continues unabated,[27] exhaustion is inevitable, as oil is not an abiotic or renewable resource. However, the speculative timeline is predicated on pessimistic contingencies and technological dormancy.

22. *See infra* Part VI.
23. *See infra* Part VII.
24. *See infra* notes 351-64.
25. *See supra* notes 16-17; *infra* parts III, IV.
26. *See* Jacqueline Lang Weaver, *The Traditional Petroleum-based Economy: An "Eventful" Future*, 36 CUMB. L. REV. 505, 509-12 (2006); John E. Rhea, *Privatization in the International Petroleum Industry: The Interplay Between Politics, Economics, and Reliance*, 33 DENV. J. INT'L L. & POL'Y 609, 613 (2005).
27. ORG. FOR ECON. COOPERATION & DEV., THE WORLD ENERGY OUTLOOK 44-148 (Int'l. Energy Agency ed., 1998); Michael Lynch, *'Peak Oil' Is a Waste of Energy*, N.Y. TIMES, Aug. 25, 2009, at A21.

Across all sectors, particularly transportation, the ability to harness renewable and use alternative energy sources, and achieve more efficient energy consumption standards are likely to progress,[28] countering "exhausting supply" arguments.[29] Nonetheless, the public should be concerned with how legislators can promote conservation and how the most efficient technological innovations will develop in light of intellectual property right laws that grant monopolies rather than produce collective goods. Moreover, what scientists and the private sector are expected to accomplish may not be adequately incorporated into American foreign policy or international relations.

Global oil consumption grew from 74 to 85 million barrels per day between 1998 and 2008.[30] Some estimate that potential production—which is fundamental to setting price—might be pushed to 95 million barrels per day.[31] With less than five percent of global population, U.S. consumption is rather disproportionate.[32] Consumption steadily increased to twenty million

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28. *See* James A. Duffield et al., *Ethanol Policy: Past, Present, and Future,* 53 S.D. L. REV. 425-26, 429, 446 (2008) (noting that relatively high oil prices have highlighted some promise for environmentally-friendly corn ethanol as a fuel blend additive to gasoline, as ethanol production has grown from 175 million gallons in the early 1980s to 6.5 billion gallons in 2007); Jonathan D. Schneider, *Book Review: Crude Awakenings: Global Oil Security and American Foreign Policy by Steve Yetiv,* 26 ENERGY L.J. 211, 214 (2005) (noting that statistics indicate significant opportunities for improved transportation sector efficiency); Kwon Mee-yoo, *Electric Bus to Debut in Seoul in 2011,* KOREA TIMES, Aug. 12, 2009, *available at* http://www.koreatimes.co.kr/www.news/nation/2009/09/117_500`9.html (reporting that South Korea expects to install the infrastructure necessary to operate electric buses in Seoul by 2011 and is developing plans to construct a network of charging stations and replace all cars, buses, and taxis with electric or hybrid cars by 2020); Ann Bordetsky et al., *Securing America: Solving Our Oil Dependence Through Innovation*, 25 (Natural Res. Def. Council Issue Paper, Feb. 2005), *available at* http://www. nrdc.org/air/transportation/oilsecurity/plan.pdf (observing that technology exists to attain 40 miles per gallon in light vehicles and it will be "feasible and cost effective" to achieve 55 miles per gallon by 2020); Bradley S. Klapper, *Team Unveils Prototype For Sun-powered Plane*, MSNBC.COM (June 26, 2009), http://rss.msnbc.msn.com/id/31569560/ns/technology_and_science-innovation (reporting that a solar-powered airplane is scheduled for a non-stop flight around the world in 2012); *see also Official Energy Statistics from the U.S. Government*, U.S. ENERGY INFO. ADMIN., http://www.eia.doe.gov/pub/oil_gas/petroleum/analysis_publications/oil_market_basics/demand_text.htm (last visited September 29, 2010). While the transportation sector requires integrating engine weight and fuel in a confined space, fixed plants have ample area to install alternative energy saving devices.

29. Weaver, *supra* note 26, at 513 (listing books that challenge "peak oil" thesis).

30. *World Petroleum Consumption, Most Recent Annual Estimates, 1980-2008*, U.S. ENERGY INFO. ADMIN. (2009), http://www.eia.doe.gov/emeu/international/RecentPetroleumConsumptionBarrelsperDay.xls [hereinafter EIA, *World Petroleum*].

31. OIL, SMOKE, AND MIRRORS (Ronan Doyle 2006) [hereinafter OSM] (including interview with British MP Michael Meacher).

32. *Population*, THE WORLD BANK, http://data.worldbank.org/indicator/SP.POP.TOTL (last visited Sept. 29, 2010) (noting that the U.S. population is 307 million whereas the global

barrels per day, one-fourth of global supply,[33] and the Department of Energy projects that the increase in demand is apt to remain steady and rise to twenty-two million barrels by 2030.[34] Domestic daily production peaked at 9.6 million barrels in 1970 and has since declined,[35] heightening reliance on imports. Twelve million barrels per day—sixty percent of consumption[36]—are imported, and nearly half comes from OPEC countries.[37] Department of Energy statistics maintain that the United States holds less than one percent of the world's proven reserves at twenty-one billion barrels, but imported approximately sixty-eight billion barrels between 1984 and 2008.[38] The "Cheney Report" in May 2001 estimated that domestic production will gradually drop, and demand for imports will increase by six million barrels per day by 2020.[39] Increased demand is by no means limited to the United States. Recently, with robust development and over one-third of the global population, India and China have accounted for seventy percent of the increase in global demand.[40]

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population is 6.7 billion).

33. *See* EIA, *World Petroleum*, *supra* note 30; Nat'l Energy Policy Dev. Group, Reliable, Affordable, And Environmentally Sound Energy For America's Future 8-3 (2001) [hereinafter NEPDG], *available at* http://www.netl.doe.gov/publications/press/2001/nep/national_energy_policy.pdf.

34. U.S. Energy Info. Admin., Annual Energy Outlook 2010: Early Release Overview 12 (2009), *available at* http://www.eia.doe.gov/oiaf/aeo/pdf/overview.pdf.

35. *Petroleum Navigator: U.S. Field Production of Crude Oil*, U.S. ENERGY INFO. ADMIN., http://www.eia.doe.gov/neic/infosheets/crudeproduction.html [hereinafter EIA, *Production*] (last visited Sept. 29, 2010).

36. Schneider, *supra* note 28, at 211.

37. *U.S. Imports by Country of Origin*, U.S. ENERGY INFO. ADMIN., http://tonto.eia.doe.gov/dnav/pet/pet_move_impcus_a2_nus_ep00_im0_mbbl_a.htm; NEPDG, *supra* note 33, at 8-3.

38. *International Energy Statistics: Reserves*, U.S. ENERGY INFO. ADMIN., http://tonto.eia.doe.gov/cfapps/ipdbproject/IEDIndex3.cfm?tid=5&pid=57&aid=6 [hereinafter EIA, *Reserves*] (last visited Sept. 29, 2010) (noting that the US held 21.317 billion barrels in 2009); *International Energy Statistics: US Imports 1984-2008*, U.S. ENERGY INFO. ADMIN., http://tonto.eia.doe.gov/cfapps/ipdbproject/iedindex3.cfm?tid=5&pid=57&aid=3&cid=US,&syid=1984&eyid=2008&unit=TBPD&products=57 (calculating the aggregate daily crude imports for 1984-2008 as 185.787 million barrels and annualized [multiplied by 365] as 67.812 billion).

39. NEPDG, *supra* note 33; Terry Macalister et al., *A Matter of Life, Death - and Oil*, GUARDIAN, Jan. 23, 2003, http://www.guardian.co.uk/world/2003/jan/23/usa.iraq.

40. Jad Mouawad & Julia Werdigier, *Warning on Impact of China and India on Oil Demand*, N.Y. TIMES, Nov. 7, 2007, http://www.nytimes.com/2007/11/07/business/07cnd-energy.html.

If there is a belief that supply may not service demand, then the more cautious and nationalistic *realist* view of international relations suggests that risk of shortfall could influence foreign policy.[41] Perhaps heedful self-interest might translate into flexing military muscle to secure supply, breeding sentiments of safety with military power, and conceivably creating perceptions of unethical or unfair strategic advantage from weaker countries. Cynicism may emerge among developing nations because the United States consumed most of its domestic reserves to fuel a rapid industrialization that provided overwhelming economic power and eventual military hegemony.[42] Likewise, a history of prosperous development generated an infrastructure and culture of disproportionate demand that today pressures available production, *ceteris paribus* increasing global market price.[43]

Applied to current circumstances, there are various iterations of the nationalist interest argument, with one version alleging that the presence of its security forces in Iraq places the United States in control of the global economy[44] and another asserting that exigency can goad a rational choice national needs defense mechanism to act, even if the perceived need is not explicitly espoused as the impetus for action. Retired French Gen. Pierre-Marie Gallois, now an energy strategy analyst, expresses that with "dwindling" reserves, decreasing domestic production, and increasing consumption projections, it is inconceivable that "the United States, that dominates the world with its technology, its economy, its military, its space programs . . . would let itself fall at the mercy of the outside world for an energy source indispensable to its existence."[45]

The Pentagon's Central Command makes "protect[ing] the global flow of petroleum" a mission,[46] and Bush administration neoconservatives blatantly affirmed this position with a vision of more involved Middle East "security," but both frame security over supply flow as a global collective good.[47] In a book published *before* drastic price escalations, Professor Steve Yetiv

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41. *See* Bejesky, *Politico*, *supra* note 19, at 16-18.

42. *See id.* at 13, 20-21, 23-24; *supra* notes 33-38; *infra* notes 45, 61.

43. *See supra* Part II; *infra* Part VIII.

44. MAMDOUH G. SALAMEH, OVER A BARREL 191 (2004). Similar themes are common in documentaries. *See, e.g.*, *Conspiracies: Iraq* (Sky Television 2006); LIBERTY BOUND (Blue Moose Films 2004); DVD: Oil Factor: Behind the War on Terror (Free-Will Productions 2005); *The Money Programme: The Last Oil Shock* (BBC television broadcast Nov. 8, 2000), *available at* http://www.lastoilshock.com/tv.html.

45. OSM, *supra* note 31.

46. MICHAEL T. KLARE, BLOOD AND OIL: THE DANGERS AND CONSEQUENCES OF AMERICA'S GROWING DEPENDENCY ON IMPORTED PETROLEUM 1-2 (2004); *see infra* notes 231-33.

47. Bejesky, *Politico*, *supra* note 19, at 10-13.

emphasized the altruistic and *liberalist* Pentagon mission when he wrote that the role of the military in the twenty-first century is that of "the primary external protector of global oil supplies . . . The rise of the United States in this role took place mostly in the past two decades, and it represents an important anchor of oil stability."[48] He continues, "On a perceptual level, many more actors now believe . . . that the United States has the direct and indirect ability to protect oil stability. That in itself decreases the potential for market instabilities."[49] Some disagree with Yetiv's position,[50] but nonetheless many foreign policy advocates, politicians, and scholars openly discuss the "energy security" preoccupation.[51]

Another approach might favor global market neutrality and disfavor annexing military power to private sector prerogatives and global markets. In a 2002 book, Professor Oystein Noreng emphasized multifaceted economic and political influences on oil price and predicted that there *would not be* an invasion of Iraq because of the risk to global markets.[52] This view may question whether a U.S. military mission as "global oil supply protector" is compatible with capitalism and whether use of force or threats to use force, when related to commodities, alleviates or foments market risk. Because *perceptions* of supply disruption breed market uncertainty and actors have varying views of legitimate *action* or *reaction* to threats, what risks hamper supply, and predictability and stability of the current status quo system, some traders may view hegemonic military power in conjunction with an aggressive neoconservative political regime as an impediment to market efficiency.

Although oil prices remained relatively stable and low for nearly twenty years (excepting a sharp but transient 1991 Gulf War rise) and the U.S. military had not been fully deployed into combat since the Vietnam War, prices underwent an approximate sevenfold increase from long-term median range levels coincident with the transfixion of global attention on Iraq.[53] Circumstances unfolding inside Iraq are assuredly complex and involve rights to natural resources, market reform, public choice and democratization, and

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48. STEVE A. YETIV, CRUDE AWAKENINGS: GLOBAL OIL SECURITY AND AMERICAN FOREIGN POLICY 59 (2005).

49. *Id.*

50. *See, e.g.*, Schneider, *supra* note 28, at 212 ("incomplete, unsatisfying book, and possibly a dangerous one").

51. *See* Jerry Taylor & Peter Van Doren, *The Energy Security Obsession*, 6 GEO. J.L. & PUB. POL'Y 475, 475 (2008); Justin Miller, Book Note, *Crude Power: Politics and the Oil Market*, 45 NAT. RESOURCES J. 266, 267 (2005) (reviewing OYSTEIN NORENG, CRUDE POWER: POLITICS AND THE OIL MARKET (2002)).

52. NORENG, *supra* note 51.

53. *See* chart *infra* Part X.

societal conflict.[54] Market information of instability is relevant to perceptions of short-term supply, Iraq's relationship to OPEC, and the long-term viability of the status quo supply system.[55] Before confronting these contemporary issues, a brief chronology presents the circumstances that formed OPEC to introduce why contentions exist over what is "fair and reasonable" revenue to producer nations vis-à-vis consumer market price, why some espouse security consternation arguments and oppose multinational investment in Iraq, and whether an ICJ or WTO claim against OPEC is feasible or merited.

III. Historical U.S. Foreign Policy in the Middle East

A June 2006 University of Michigan Institute for Social Research poll revealed that seventy-six percent of Iraqis believed that the U.S. invasion was "to control Iraqi oil,"[56] which may be due to the quantity of reserves and sentiments about historical U.S. and British involvement in key OPEC countries, such as Kuwait, Saudi Arabia, Iran, and Iraq.[57] Occupation of Iraq against the will of a substantial percentage of Iraqi citizens who all the while were being apprised that they were *liberated* has happened before.[58] British colonialism[59] established and U.S. administrations[60] supported complacent Middle Eastern governments, and from these relations were granted preferred

54. *See infra* Parts VI, VII.

55. *See infra* Parts VIII, X.

56. UNIV. OF MICH. INST. FOR SOC. RESEARCH, *Iraqi attitudes: Survey Documents Big Changes*, UNIV. OF MICH. NEWS SERV. (June 14, 2006), http://www.ns.umich.edu/news/index.html?Releases/2006/Jun06/r061406a.

57. See generally this Part; *see infra* notes 212-14.

58. *See* ANTHONY ARNOVE, IRAQ, THE LOGIC OF WITHDRAWAL 43-53 (2006); Bejesky, *Politico*, *supra* note 19, at 73-78.

59. *See generally* JOHN FISHER, CURZON AND BRITISH IMPERIALISM IN THE MIDDLE EAST 305 (1999); PETER IRONS, WAR POWERS: HOW THE IMPERIAL PRESIDENCY HIJACKED THE CONSTITUTION 54 (2005); MEHRAN KAMRAVA, THE MODERN MIDDLE EAST: A POLITICAL HISTORY SINCE THE FIRST WORLD WAR 38 (2005)("[T]he French and British carved up the Asiatic Ottoman territories in the Sykes-Picot Agreement, Mesopotamia (Iraq), Arabia, and Palestine became British protectorates, while the Syrian and Lebanese protectorates went to the French"); V.G. KIERNAN, EUROPEAN EMPIRES FROM CONQUEST TO COLLAPSE 1845-1960 (1982), at 200; PHEBE MARR, THE MODERN HISTORY OF IRAQ 22-35 (2004); Robert Cooper, *The New Liberal Imperialism*, GUARDIAN, Apr. 7, 2002, http://www.guardian.co.uk/world/2002/apr/0701. Many condemn colonialism for the political and economic remnants. *See, e.g.*, UDAY SIGH MEHTA, LIBERALISM AND EMPIRE: A STUDY IN NINETEENTH-CENTURY BRITISH LIBERAL THOUGHT (1999); ASHIS NANDY, THE ILLEGITIMACY OF NATIONALISM: RABINDRANATH TAGORE AND THE POLITICS OF SELF (1994); EDWARD W. SAID, CULTURE AND IMPERIALISM (1993).

60. *See* NIALL FERGUSON, COLOSSUS: THE RISE AND FALL OF THE AMERICAN EMPIRE 2, 300-03 (2004).

access to an abundant oil supply and its enormous economic advantage. Lower production costs and long-term access to cheaper oil permitted more efficient development, fostered the American economy's long run dominance, and forged a multinational oil oligopoly comprised of American and British companies.[61]

This exhibition of nationalist self-interest to access or even control foreign supplies is not surprising to find in the early twentieth-century period of colonialism, nascent international rules on cooperation, rapid industrialization, abundant energy need, and heightened dismay over exhausting domestic reserves (as sophisticated geological reserve estimates did not exist). As for Britain's national interest, it never possessed substantial domestic oil reserves but obtained supply from colonies and later relied on offshore production in the North Sea.[62] A *New York Times* article in 1921 seems telling of savvy British financing, uncertainty over domestic exhaustion, and the American industrial "head start":

> While Great Britain obtains about 80 per cent of the oil used on her merchant and naval vessels from the United States, at prices varying from $1.80 to $2.40 a barrel, at the same time, she charges American ships from $7 to $12 a barrel for oil in the Near East, Senator McKellar of Tennessee asserted in the Senate today. . . . 'The oil or petroleum situation . . . is one of such vital importance to our country at this time that I believe it should command some attention of the Congress. According to experts, we own only about one-sixth of the oil resources of the world, yet we are producing nearly three-fourths of the world's supply. It therefore

61. Gas prices are inversely correlated with GDP growth. Linda Bilmes & Joseph E. Stiglitz, *The Economic Costs of the Iraq War: An Appraisal Three Years After the Beginning of the Conflict*, 24 (Harv. KSG Faculty Working Paper Series, Working Paper No. 06-002); James D. Hamilton, *What is an Oil Shock?* (June 2000) (NBER Working Paper Series) (unpublished working paper); *see also* Eric Kades, *Windfalls*, 108 YALE L.J. 1489, 1547 (1999) ("For the duration of the 1970s, domestic petroleum prices remained below world levels by government fiat."); OSM, *supra* note 31 (Economist Chris Sanders noting: "Without cheap oil, the American empire would never have come about, certainly not in anything like the form that we know it. Cheap oil has been absolutely critical to the construction of the political economy that is the United States today. If you remove cheap oil that political economy has to change profoundly.").

62. *See* B.S. MCBETH, BRITISH OIL POLICY, 1919-1939 (1985); David S. Painter, *Oil and World Power*, 17 DIPLOMATIC HIST. 159 (2007); Rowena Mason, *UK Facing 'Energy Crunch' as North Sea Oil and Gas Cash Dries Up*, TELEGRAPH, July 8, 2009, http://www.telegraph.co.uk/finance/newsbysector/energy/oilandgas/5779908/UK-facing-energy-crunch-as-North-Sea-oil-and-gas-cash-dries-up.html; *North Sea Oil Flow Starts Off Britain; Long-Awaited Oil Flow Starts From British Part of North Sea*, N.Y. TIMES, June 12, 1975, at 53.

> appears that it is only a question of time before our own resources will fail, and we will be dependent for our oil supplies on other nations, that is, unless we take action to protect our own resources, or to acquire oil fields in other countries.'[63]

Even before WWI, the British military occupied the Middle East and viewed management over Iraq and Iran as part of a geopolitical resource domination strategy to win future wars.[64] Britain severed southern Iraq in 1899 to form the colony of Kuwait,[65] installed the ruling regime, and maintained British military occupation. In December 1934, British Petroleum and Gulf Oil signed the agreement with the appointed rulers that endowed these companies with exclusive production rights to Kuwaiti oil.[66] Iraq is twenty-five times larger than Kuwait, but some estimate that Kuwait currently possesses 102 billion barrels in proven oil reserves to Iraq's 115 billion barrels.[67]

In Iraq, the British installed a monarchy over three provinces: (1) Kurdish Mosul, (2) Sunni-controlled Baghdad, and (3) Shia-controlled Basra.[68] It was an "Arab façade" government "ruled and administered under British guidance,"[69] "controlled by a native . . . and, as far as possible, an Arab Staff."[70] The fragile government was beholden to the British military, which

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63. *Senators Attack British Oil Policy*, N.Y. TIMES, Jan. 7, 1921, at 15.

64. Before WWI ended, British Foreign Secretary Balfour planned the post-WWI expansion to extend forces north into French-controlled Mosul. ARNOVE, *supra* note 58, at 44-45 (citing Minutes, War Cabinet 457, Imperial War Cabinet 30, Aug. 13, 1918, British Cabinet Records 23, 43). Sir Maurice Hankey, Secretary of the War Cabinet, wrote "Oil in the next war will occupy the place of coal in the present war . . . The only big potential supply that we can get under British control is the Persian [now Iran] and Mesopotamian [now Iraq] supply . . . Control over supply . . . Control over these oil supplies becomes a first class British war aim." Helmut Mejcher, *Oil and British Policy towards Mesopotamia*, 8 MIDDLE EASTERN STUDIES 377 (1972).

65. *See* NOAM CHOMSKY, IMPERIAL AMBITIONS 80 (2005); THE CREATION OF IRAQ 1914-1921 162-63 (Reeva Spector Simon & Eleanor H. Tejirian, eds., 2004).

66. ARCHIBALD CHRISHOLM, THE FIRST KUWAIT OIL CONCESSION AGREEMENT 208 (1975); ANTHONY SAMPSON, THE SEVEN SISTERS 93 (1975) (citing Holmes' cable to Gulf in London, Oct. 15, 1934).

67. EIA, *Reserves*, *supra* note 38; *Background Note: Iraq*, U.S. STATE DEP'T (2010), http://www.state.gov/r/pa/ei/bgn/6804.htm; *Background Note: Kuwait*, U.S. STATE DEP'T (2010), http://www.state.gov/r/pa/ei/bgn/35876.htm.

68. ARNOVE, *supra* note 58, at 44.

69. NAFEEZ MOSADDEQ AHMED, BEHIND THE WAR ON TERROR 27 (2003); WILLIAM STIVERS, SUPREMACY AND OIL: IRAQ, TURKEY, AND THE ANGLO-AMERICAN WORLD ORDER, 1918-1930 (1982) (noting historical British involvement with Iraq).

70. ARNOVE, *supra* note 58, at 45 (citing *Eastern Committee Fifth Minutes*, Apr. 24, 1918, British Cabinet Records 27,24); *The November 26 Declaration of Principles: Implications for*

labeled its presence a "protectorate, a sphere of influence, [and] a buffer State" rather than "colonialism,"[71] even though officials acknowledged keen interest in what were expected to become some of the world's most abundant oil fields.[72] As early as 1910, American and British companies partnered under the name "Turkish Petroleum Company" for early exploration and production.[73] In 1928, the United States and United Kingdom-owned interest was renamed "Iraq Petroleum Company" (IPC). IPC managed all oil production, restricted domestic participation, and prevented new production without the consortium's assent.[74]

The U.S. State Department may have become beholden to oil supply strategy shortly after WWI.[75] American companies were entrenched in Saudi Arabia by the 1930s.[76] After WWII, King Ibn Saud granted the consortium

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UN Resolutions on Iraq and for Congressional Oversight Before the Subcomm. on Int'l Orgs., Human Rights, and Oversight and H. Comm. on Foreign Affairs, 110th Cong. 9-14 (statement of Colonel Douglas Macgregor, U.S. Army, Retired) (emphasizing "the commercial arrangements that bring to mind the British Empire's attempts to extract economic benefit from a weak Iraqi state after World War I").

71. CHOMSKY, *supra* note 65, at 45; *see also* KAMRAVA, *supra* note 59, at 38-39.

72. *See* ARNOVE, *supra* note 58, at 48-49; Kamil Mahdi, *Iraq's Oil Law: Parsing the Fine Print*, WORLD POL'Y J., Summer 2007, at 11, *available at* http://www.mitpressjournals.org/doi/pdf/10.1162/wopj.2007.24.2.11 (noting that "European rivalry over access to Iraq's potential oil resources predates World War I").

73. *See* STIVERS, *supra* note 69, at 7; DENIS BABUSIAUX, OIL AND GAS EXPLORATION AND PRODUCTION: RESERVES, COSTS, CONTRACTS 17-18 (2004); CHRISTOPHER M. BLANCHARD, CONG. RESEARCH SERV., RL 34064, IRAQ: OIL AND GAS LEGISLATION, REVENUE SHARING, AND U.S. POLICY 1 (2008), [hereinafter BLANCHARD].

74. *See* ZHIGUO GAO, INTERNATIONAL PETROLEUM CONTRACTS: CURRENT TRENDS AND NEW DIRECTIONS 9 (1994) (referencing 1925 D'Arcy concession agreement); SAMPSON, *supra* note 66, at 168; Mahdi, *supra* note 72, at 12 (noting IPC "completely controlled Iraq's industry and reserves under 75-year concessions"); *A History of Foreign Oil Firms in Iraq*, REUTERS, Dec. 7, 2009, *available at* http://www.reuters.com/article/idAFGEE5B60HD20091207.

75. *See* SAMPSON, *supra* note 66, at 61, 87, 187, 198.

76. *Id.* at 91, 103; *see generally* ANTHONY CAVE BROWN, OIL, GOD, AND GOLD: THE STORY OF ARAMCO AND THE SAUDI KINGS (1999); ROBERT DREYFUSS, DEVIL'S GAME 70 (2005) ("The immense oil deposits in Saudi Arabia make that country more important to American diplomacy than almost any smaller nation"); NUBAR GULBENKIAN, PANTARAXIA, 227 (1965); LIBERTY BOUND, *supra* note 44 (historian Howard Howard Zinn remarking that oil "is the reason behind all of American foreign policy since WWII"). In May 1933, King Ibn Saud granted a sixty-year concession to Standard Oil Company of California (SoCal), now Chevron. *See* BROWN, *supra* at 52. Production began in May 1939 and the King increased the concession geographical size to 444,000 square miles, an area as large as Louisiana, Oklahoma, New Mexico, and Texas combined. SAMPSON, *supra* note 66, at 91. By 1938, the production interest was called Arabian-American Oil (Aramco) and included SoCal, the Saudi royal family interests, and Texaco, and Exxon and Mobil joined in Nov. 1948. *See* BROWN, *supra* at 157-160. It was recently called "the largest and richest consortium in the history of commerce." CHALMERS

Arabian American Oil Company (Aramco)[77] special access privileges; and President Roosevelt declared that "defense of Saudi Arabia is vital to the defense of the United States."[78] The State Department called Saudi Arabian oil a "stupendous source of strategic power and one of the greatest material prizes in world history" while the British government identified the larger Middle East as "a vital prize for any power interested in world influence or domination."[79] Roosevelt expressed to British Ambassador Halifax: "Persian [Iranian] oil . . . is yours. We share the oil of Kuwait and Iraq. As for Saudi Arabian oil, it's ours."[80]

For sixty years, the American military, through basing rights, placed tens of thousands of soldiers and private mercenary forces on Saudi soil, provided enormous aid, and sold billions of dollars in weapons to the monarchy.[81] The

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JOHNSON, THE SORROWS OF EMPIRE: MILITARISM, SECRECY, AND THE END OF THE REPUBLIC, 218 (2004). In 1948, the exclusive exploitation rights included four of the seven oligopoly oil companies—SoCal (30%), Texaco (30%), Exxon (30%), and Mobil (10%). *See* BROWN, *supra* at 159.

77. Rhea, *supra* note 26, at 615 n.51 (commenting that Saudi Arabia attained 25% interest in Aramco in 1973, 60% in 1974, and full ownership in 1980).

78. JOHNSON, *supra* note 76, at 218; *see* IRONS, *supra* note 59, at 159.

79. MARK CURTIS, THE AMBIGUITIES OF POWER: BRITISH FOREIGN POLICY SINCE 1945, 21 (1995).

80. DREYFUSS, *supra* note 76, at 69 (citing DANIEL YERGIN, THE PRIZE: THE EPIC QUEST FOR OIL, MONEY, & POWER 401 (1991)). Roosevelt cabled Churchill, "Please do accept my assurances that we are not making sheep's eyes at your oil fields in Iraq and Iran." Churchill replied, "Let me reciprocate by giving you the fullest assurance that we have no thought to trying to horn in on your interests or property in Saudi Arabia." *Id.* In June 1943, William Bullitt, Under-Secretary of the Navy, wrote to Roosevelt, "to acquire petroleum reserves outside our boundaries has become . . . vital interest of the United States." SAMPSON, *supra* note 66, at 95-96. Bullitt mentioned that the British controlled Iran so well for "forty years" that it should be a model for a bold U.S. role in Saudi Arabia. *Id.*

81. Roosevelt deployed the first US military forces to Saudi Arabia in 1944. In July 1945, Texaco and SoCal began constructing the Trans-Arabian Pipeline Company ("Tapline"). In 1945 the US and Saudi Arabia agreed to construct the US Dhahran air force base. In 1949, they signed an accord to station 43,000 US troops in Saudi Arabia. Air Base at Dhahran, U.S.-Saudi Arabia, June 18, 1951, 2 U.S.T. 1466; *Is There a Human Rights Double Standard? U.S. Policy Toward Saudi Arabia, Iran, and Uzbekistan Before the Subcomm. on Int'l Orgs., Human Rights, and Oversight and H. Comm. on Foreign Affairs*, 110th Cong. 9-14 (2007), [hereinafter Lippman *Hearings*], (statement of Thomas Lippman, Adjunct Scholar, Middleast Institute), *available at* http://www.internationalrelations.house.gov/110/36062.pdf; DREYFUSS, *supra* note 76, at 70, 90-91, 121; RICHARD P. MITCHELL, THE SOCIETY OF THE MUSLIM BROTHERS 40-42 (1969); SAMPSON, *supra* note 66, at 99. In 1975, Vinnell, a private mercenary company, placed an unofficial American military contingent in Saudi Arabia to protect oil fields. DAN BRIODY, THE IRON TRIANGLE 61-68 (2003); SAMPSON, *supra* note 66, at 303; *Mideast Dilemma: Is U.S. Training a Future Foe?* U.S. NEWS & WORLD REPORT, Feb. 24, 1975, at 21. A curiosity was expressed whether Vinnel was "supposed to be defending the oilfields *from* the Americans, or

assistance may not have been as necessary for thwarting realistic threats to sovereignty as it was effectual to securing the ruling regime from internal revolt.[82] The populace remained economically marginalized and disenfranchised while the expanding royal family lived an eccentric lifestyle, imported luxuries, built palaces and personal infrastructure, and amassed wealth exceeding US $1 trillion.[83] Congress recently held hearings on the half-century-long American legacy of supporting the Saudi government while it was consistently cited for committing human rights abuses.[84]

In 1953, shortly after Iran nationalized oil reserves in response to overwhelming popular sentiment, the British MI6 and American CIA implemented a covert operation that bribed sectors of Iranian society,[85] overthrew the democratically-elected government of Prime Minister Muhammed Mussadiq, and reinstalled the Shah's kleptocracy which reigned for the next twenty-five years.[86] The Shah reversed the nationalization and rewarded coup efforts by providing concessions to Anglo-Iranian Oil (40%)-which was renamed British Petroleum ("BP") in 1954; Royal Dutch Shell (14%); and the five American multinationals (40%).[87] BP now shared the oil

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for the Americans." SAMPSON, *supra* note 66, at 303; *see also* IRONS, *supra* note 59, at 206; CHALMERS JOHNSON, BLOWBACK 92 (2000).

82. *See supra* notes 80-81; *see infra* notes 83-84.

83. BRIODY, *supra* note 81, at 162 (noting that in June 2001, Brad Bouland, chief economist at Saudi American Bank, cited $1 trillion as a best estimate); SAMPSON, *supra* note 66, at 110.

84. Lippman *Hearings*, *supra* note 81, at 6 (stating that President Kennedy "put pressure on the Saudis to abolish slavery"); Charles V. Pena, *Bush's National Security Strategy: A Global Security Strategy That Undermines National Security*, 6 J.L. & SOC. CHALLENGES 45, 68-73 (2004) (asserting the existence of a hypocritical alliance for "oil" and referencing sources claiming hypocrisy extends to U.S. relations with Egypt and Jordan); Taylor & Van Doren, *supra* note 51, at 481.

85. *See* KERMIT ROOSEVELT, COUNTERCOUP: THE STRUGGLE FOR THE CONTROL OF IRAN (1979); Ray S. Cline, *Covert Action as Presidential Prerogative*, 12 HARV. J.L. & PUB. POL'Y 357, 365 (1989); John Radsan, *An Overt Turn on Covert Action*, 53 ST. LOUIS L.J. 485, 496 (2009).

86. *See* STEPHEN DORRIL, MI6 586-92 (2000); DREYFUSS, *supra* note 76, at 109, 115-16; DILIP HIRO, THE IRANIAN LABYRINTH 10-11, 34, 70-71, 75-81, 105 (2005); STEPHEN KINZER, ALL THE SHAH'S MEN: AN AMERICAN COUP AND THE ROOTS OF MIDDLE EAST TERROR 13, 175, 211 (2006); HENRY LONGHURST, ADVENTURE IN OIL: THE STORY OF BRITISH PETROLEUM 144 (1959); SAMPSON, *supra* note 66, at 119. *See also infra* note 90.

87. *See* JOHNSON, *supra* note 76, at 220; Ervand Abrahamian, *The 1953 Coup in Iran*, SCI. & SOC'Y, Summer 2001, at 182-215 (2001).

that it had exclusively controlled for thirty years.[88] The monarchy welcomed the U.S. military as a security force pursuant to a Status-of-Forces Agreement.[89] In 1976, Amnesty International wrote that the Shah government had the "highest rate of death penalties in the world," a "history of torture," and "no country in the world has a worse record of human rights than Iran."[90] Following the 1979 Iranian Revolution, the second rebellion that overthrew the Shah's rule, Iran seized the American embassy, leading to the hostage crisis, and began to expropriate American investments and withdraw assets from the United States.[91] In March 2000, without providing an apology, Secretary of State Albright acknowledged the "significant role" Washington played in "orchestrating the overthrow of Iran's popular Prime Minister Muhammad Mussadiq" and characterized the CIA covert action coup as "a setback for Iran's political development."[92]

The British continued to occupy Iraq pursuant to a thirty-year "treaty" signed in 1930 that purported to protect the colonized country from foreign invasion, but Iraqis objected.[93] After much struggle, and with a substantial portion of Iraqi military officers revolting against the British military hierarchy, the monarchy was overthrown in July 1958.[94] Perceiving foreign

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88. MANUCHER FARMANFARMAIAN & ROXANE FARMANFARMAIAN, BLOOD AND OIL: INSIDE THE SHAH'S IRAN 451-52 (1999); STEPHEN HEMSLEY LONGRIGG, OIL IN THE MIDDLE EAST: ITS DISCOVERY AND DEVELOPMENT 157 (1968); SAMPSON, *supra* note 66, at 43, 128.

89. *See* Sean Foley, *The Iraq Status-of-Forces Agreement, Iran, and Guantanamo Bay*, 34 RUTGERS L. REC. 39, 39 (2009) (discussing 1964 Status-of-Forces agreement).

90. SHELTON RAMPTON & JOHN STAUBER, WEAPONS OF MASS DECEPTION: THE USES OF PROPOGANDA IN BUSH'S WAR ON IRAQ 18 (2003).

91. Darius Adam Marzec, *The New Iraq: Resolving Public and Private Obligations Incurred Under Saddam Hussein's Rule in the Context of International Arbitration*, 7 CARDOZO J. CONFLICT RESOL. 163, 183 (2005). After the 1979 revolution, Art. 81 of the Iranian Constitution prohibited "granting of concessions to foreigners" for "mineral extractions," such as oil. *See* Don Greenfield & Jay Todesco, *Fundamental Aspects of Oil and Gas Revisited*, 42 ALBERTA L. REV. 75, 102-03 (2004).

92. Abrahamian, *supra* note 87; Stephen E. Gottlieb, *In the Name of Patriotism: The Constitutionality of "Bending" History in Public Secondary Schools*, 62 N.Y.U. L. REV. 497, 504 n.33 (1987) (criticizing "extraction" of U.S. involvement in Iran from history textbooks); David E. Sanger, *U.S. Ending a Few of the Sanctions Imposed on Iran*, N.Y. TIMES, Mar. 18, 2000, at A1; Philip Shenon, *Major Overture Toward Iran Expected in Speech by Albright*, N.Y. TIMES, Mar. 17, 2000, at A11. Military involvement in Iran was extensive; the shah hosted "tens of thousands of US military advisors" and Iran "was the number one market for expensive weapons systems." DREYFUSS, *supra* note 76, at 223.

93. *See* ARNOVE, *supra* note 58, at 49-50; DILIP HIRO, IRAQ: A REPORT FROM THE INSIDE 23 (2003); CHARLES TRIPP, A HISTORY OF IRAQ 74, 77 (2000).

94. HANNA BATATU, THE OLD SOCIAL CLASSES AND REVOLUTIONARY MOVEMENTS OF IRAQ 764-67 (2004); JOE STORK, MIDDLE EAST OIL AND ENERGY CRISIS 102 (1975); Mahdi, *supra* note 72, at 12; Richard Sale, *Saddam Key in Early CIA Plot*, UPI (Apr. 10, 2003),

oil companies as remnants of colonialism, Prime Minister Abd al-Karim Qasim's government responded to popular sentiment by passing Public Law 80 in December 1961 to nationalize oil fields and expropriate IPC's interests.[95] There has never been an official acknowledgment, but some scholars and officials contend that there was U.S. covert involvement in assassination attempts against Qasim[96] and that American administrations were involved in installing favorable regimes for the next three decades.[97] Exeter University Economics Professor Kamil Mahdi conjoins this view with the circumstances surrounding the proposed 2007 Oil and Gas Law when he writes that "[t]he US, the IMF and their allies are using fear to pursue their agenda of privatizing and selling off Iraq's oil resources," which will "marginalize Iraq's oil industry," and "undermine the nationalization measures . . . [of] Law Number 80 . . . that recovered most of Iraq's oil from a foreign cartel."[98] He adds, "Iraq paid dearly for that courageous move: the then prime minister, General Qasim, was murdered 13 months later in a Ba'athist-led coup that was supported by many of those who are part of the current ruling alliance—the US included."[99]

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http://www.upi.com/Business_News/Security-Industry/2003/04/10/Exclusive-Saddam-key-in-early-CIA-plot/UPI-65571050017416/.

95. *See* MICHAEL EPPEL, IRAQ FROM MONARCH TO TYRANNY: FROM THE HASHEMITES TO THE RISE OF SADDAM 147-52 (2004); VALERIE MARCEL, OIL TITANS: NATIONAL OIL COMPANIES IN THE MIDDLE EAST 27 (2006); STORK, *supra* note 94, at 105; Mahdi, *supra* note 72, at 12; Sale, *supra* note 94.

96. *See* Sale, *supra* note 94 (noting that U.S. diplomats and intelligence officials involved with Iraq during this period and scholars studying the events reported that the twenty-two-year old Hussein was working with the CIA and was a gunman during the October 7, 1959 botched assassination attempt); *see also* Ra'id Juhi al-Saedi, *Punishment: Investigative Integration of the Code of the High Iraqi Criminal Court and the General Principles of the Iraqi Penal Code: Basic Outcomes*, 40 CASE W. RES. J. INT'L L. 265, 265 (2007); David M. Gersh, Note, *Poor Judgment: Why the Iraqi Special Tribunal Is the Wrong Mechanism for Trying Saddam Hussein on Charges of Genocide, Human Rights Abuses, and Other Violations of International Law*, 33 GA. J. INT'L & COMP. L. 273, 275 (2004).

97. *See* SAID K. ABURISH, SADDAM HUSSEIN: THE POLITICS OF REVENGE (2000); JOHNSON, *supra* note 76, at 223; CORNEL WEST, DEMOCRACY MATTERS 111 (2004); Roger Morris, Op-Ed., *A Tyrant Forty Years in the Making*, N.Y. TIMES, Mar. 14, 2003, at A29. In Feb. 1963, the CIA was allegedly involved in the Baathist coup that killed Qasim, targeted others, and purported attacked "communist militants and sympathizers." ARNOVE, *supra* note 58, at 51 (citing BATATU, *supra* note 94, at 899, 982-94).

98. Kamil Mahdi, Editorial, *Iraqis Will Never Accept This Sellout to the Oil Corporations*, GUARDIAN, Jan. 16, 2007, at 28.

99. *Id.*; *see generally* Mahdi, *supra* note 72.

In June 1961, after the British held Kuwait as a colony for over sixty years and deemed that the ruling monarchy no longer required "protection," it was given independence.[100] Many, including political science scholars who classify Kuwait as only a "partly free" state in datasets,[101] are still critical of the ruling family and its penchant for dismissing *unsatisfactory* parliamentary assemblies for long durations.[102] The country's daily affairs are run by expatriates, who have marginal political rights, have been expelled *en masse* for non-conformity to ruling family dictates, and have encountered significant impediments to attaining citizenship.[103] As a consequence of the colony being severed in 1899, the governing family, dependent on British military protection,[104] enriched itself and supplied British and American oil company distribution routes.[105]

IV. Enter OPEC

The colonial oil production system in the Middle East naturally involved skewed bargaining power that would not be expected to produce anything akin to a Coase Theorem efficiency contractual result.[106] Bilateral relations

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100. *See* Richard Scott, *Independence for Kuwait: UK protection withdrawn*, GUARDIAN, June 20, 1961, at 1.

101. *See* U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1990, at 1513; Nils Petter Gleditsch, Lene Siljeholm Christiansen & Håvard Hegre, *Democratic Jihad? Military Intervention and Democracy*, 18-19 (World Bank Policy Research, Working Paper No. 4242, 2007).

102. *See, e.g.*, Ghanim Al-Najjar, *Challenges of Security Sector Governance in Kuwait*, 13 (Geneva Center For The Democratic Control of Armed Forces, Working Paper No. 142, 2004), *available at* http://www.dcaf.ch/mena/proj_papers_alnajjar.pdf (noting that the National Assembly was suspended from 1976 to 1981 and from 1986 to 1992). For a country with a relatively small population, Kuwait seems to have extensive reliance on police, military, national reserves, and intelligence services. *See id.*

103. *See* U.S. IMMIGRATION & NATURALIZATION SERV., ALERT SERIES: KUWAIT HUMAN RIGHTS AFTER FEB. 28, 1991 3, 5-6, 10, (1992), *available at* http://www.uscis.gov/files/native documents/alkwt92-001.pdf; Michael Kramer, *Kuwait: Back to the Past*, TIME, Aug. 5, 1991.

104. DREYFUSS, *supra* note 76, at 184 (U.S. Foreign Service officer Talcott Seelye commenting about British control); *see also supra* notes 65-66, 100. British Foreign Secretary Selwyn Lloyd explained that by giving nominal independence to Kuwait "we must also accept the need, if things go wrong, ruthlessly to intervene, whoever it is has caused the trouble." NOAM CHOMSKY, HEGEMONY OR SURVIVAL 164 (2003) (citing ABRAHAM BEN-ZVI, DECADE OF TRANSITION 76 (1998)). British troops did return immediately after Abd al-Karim Qasim came to power in Iraq. *Global Connections in the Middle East -- Timeline*, PBS, http://www.pbs.org/wgbh/globalconnections/mideast/timeline/text/time4.html (last visited Apr. 7, 2011) ("1961: As Britain ends its protectorate . . . ").

105. CHRISHOLM, *supra* note 66.

106. *See* R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

between multinationals and countries involved variegated preferential terms of sale, concessions, and tax arrangements; but the resource-endowed nations aggregated previously divided interest into leverage due to the mutual reliance that generated revenues.[107] Countries possessed the commodity, and multinationals held the distribution chain to the ultimate consumer.[108] The dispute was over how revenues should be allocated.[109] After they obtained control over most domestic oil reserves in Iran, Iraq, Kuwait, Saudi Arabia, and Venezuela, these five countries founded OPEC in 1960[110] as a consultative group to renegotiate contractual relations with[111] and counter multinational ability to restrict global competition.[112]

As the story goes, within a decade of OPEC's formation, the organization garnered sufficient collective power and became emboldened as other disagreements in the Middle East ignited.[113] The early-1970s were turbulent and some member countries cut production by twenty-five percent, quadrupling prices.[114] In the United States, real gasoline retail prices rose by over fifty percent between 1972 and 1976,[115] and the tightest pinch involved motorists rationing and waiting in long lines to buy fuel.[116] The lingering economic impact was modest,[117] but the government undertook a more prominent and visible role in national energy policy.[118] Competing

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107. SAMPSON, *supra* note 66, at 108-09, 150-57; Kirsten Bindemann, *Production-Sharing Agreements: An Economic Analysis*, WPM 25, OXFORD INSTITUTE FOR ENERGY STUDIES (Oct. 1999), at 9, *available at* http://www.oxfordenergy.org/pdfs/WPM25.pdf (discussing typical Middle East concessions).

108. SAMPSON, *supra* note 66, at 108-09, 150-57

109. *See generally id.*

110. OPEC Statute, approved Jan. 1961, Chapter 1, art. 1, [hereinafter OPEC Statute] *available at* http://www.opec.org/opec_web/static_files_project/media/downloads/publications/os.pdf; *see* Robert F. Meagher, *Symposium: The United Nations Family: Challenges of Law and Development: Introduction*, 36 HARV. INT'L L.J. 273, 275-76 (1995).

111. HANS VAN HOUTTE, THE LAW OF INTERNATIONAL TRADE 117 (2d ed. 2002).

112. Jeffrey P. Bialos, *Oil Imports and National Security: The Legal and Policy Framework for Ensuring United States Access to Strategic Resources*, 11 U. PA. J. INT'L L. 235, 245 (1989).

113. *See* Robert Copaken, *The Arab Oil Weapon of 1973-74 as a Double-Edged Sword: Its Implications for Future Energy Security* (Sir William Luce Fellowship Paper No. 4, Aug. 2003), *available at* http://dro.dur.ac.uk/90/1/Copaken.pdf.

114. *See* ROBIN LANDIS & MICHAEL KLASS, OPEC: POLICY IMPLICATIONS FOR THE UNITED STATES 9-30 (1980); Gawdat Bahgat, *Oil Diplomacy: American Policy in the Persian Gulf*, 24 FLETCHER F. WORLD AFF. 143, 147 (2000); Meagher, *supra* note 110, at 276.

115. Morriss & Stewart, *supra* note 13, at 1014.

116. *See* YERGIN, *supra* note 80, at 616-17.

117. *See* FRANCISCO PARRA, OIL POLITICS: A MODERN HISTORY OF PETROLEUM 184-85 (2004); Edward Fried, *Oil Security: An Economic Phenomenon*, *in* OIL AND AMERICA'S SECURITY 56-59 (Edward Fried & Nanette Blandin eds., 1988).

118. *See* Alan S. Miller, *Energy Policy From Nixon to Clinton: From Grand Provider to*

country/multinational supply-side interests were quelled since oil became an internationally traded commodity, abundantly available[119] at the market price, but questions remained over how much consumers should value that resource. A "reasonable" consumer and global market price, given oil's essential nature as a macroeconomic production cost, naturally pits consumption/demand in conflict with producer/supply.

One explanation for recent price surges rode the bandwagon of long-existing complaints about OPEC's supply-side dominance. Some contend that OPEC's conduct would constitute a Sherman Antitrust Act criminal restraint on trade if its actions were taken inside the United States.[120] Past federal court cases against OPEC were unsuccessful.[121] However, one can argue that OPEC's actions would violate the *philosophy* of the Sherman Act, but not the standards as interpreted or amended, even if one liberally extrapolates extraterritorial application to the global economy.[122] Reconciling this extraterritorial jurisdiction void was the intention motivating introduction of the Gas Price Relief for Consumers Act of 2008.[123] The Sherman Act's past applicability is clearer.

The predominantly Rockefeller-owned Standard Oil Trust supply monopoly was broken up by the Supreme Court in 1911.[124] In 1951-52, the Federal Trade Commission investigated the oligopoly power and price-setting collusion of the "Seven Sisters," which were primarily the successful

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Market Facilitator, 25 ENVTL. L. 715, 715-17 (1995); Carol L. Powers, *State Taxation of Energy Resources: Affirmation of* Commonwealth Edison Co. v. Montana, 10 B.C. ENVTL. AFF. L. REV. 503, 539 (1982).

119. *See* Morriss & Stewart, *supra* note 13, at 1020.

120. *See, e.g.*, Ian Ayres & John Braithwaite, *Partial-Industry Regulation: A Monopsony Standard for Consumer Protection*, 80 CALIF. L. REV. 13, 43 (1992); Andrew C. Udin, *Slaying Goliath: The Extraterritorial Application of U.S. Antitrust Law to OPEC*, 50 AM. U.L. REV. 1321, 1324 (2001).

121. *See, e.g.*, *Int'l Ass'n of Machinists & Aerospace Workers v. OPEC*, 477 F. Supp. 553 (C.D. Cal. 1979), *aff'd on other grounds*, 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982).

122. *See* Foreign Trade Antitrust Improvement Act (FTAIA), 15 U.S.C. § 6a (1982) (specifying that Sherman Act sections 1 to 7 are applicable if there is a "direct, substantial, and reasonably foreseeable effect" on domestic commerce). *Compare Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909) (holding no extraterritorial application), *with United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945) (allowing extraterritorial application if there is a direct and intended effect on the U.S.), *and* H.R. Rep. No. 97-686, at 9 (1982) ("[W]holly foreign transaction as well as export transactions are covered by the [FTAIA], but import transactions are not").

123. Gas Price Relief for Consumers Act of 2008, H.R. 6074, 110th Cong. § 102 (2008), *available at* http://www.govtrack.us/congress/billtext.xpd?bill=h110-6074.

124. *See Standard Oil Co. v. United States*, 221 U.S. 1 (1911); *see also* SAMPSON, *supra* note 66, at 25-28, 37.

remnants of the Standard Oil Trust—Exxon, Mobil, SoCal, Texaco, and Gulf—and British-owned BP and Shell.[125] Ironically, only months before the OPEC oil crisis arose, the Senate Foreign Relations Committee renewed investigations of the Seven Sisters.[126] As the crisis unfolded, the American multinationals utilized the shifted media spotlight to portray themselves as consuming-nation public interest heroes with power that was obligatory to counter *OPEC's* price-gouging behavior, while American public opinion polls at the time reflected uncertainty over whether OPEC or multinationals were to blame.[127] Nonetheless, from a Western perspective, OPEC was eventually commonly viewed as the market risk.[128]

Others may observe OPEC's producer country aggregation benignly, as a system that provides more market predictability[129] and conservation than either anteceding arrangements or a system in which unassociated interests compete to supply "as much" oil "as rapidly" as possible. While the Supreme Court defined "price-fixing" under the Sherman Act as agreements "formed for the purpose and with the effect of raising, depressing, fixing, . . . or stabilizing the price of a commodity in . . . commerce,"[130] the OPEC Charter blatantly affirms an intention to influence prices but frames collusion as a collective good. The Charter states: "The Organization shall devise ways and means of ensuring the stabilization of prices . . . with a view to eliminating . . . fluctuations."[131] Hence, the reasonableness or even legality of OPEC's supply collusion may hinge upon normative and jurisprudential questions of extraterritorial jurisdiction, whether oil supply management is necessary and/or fosters global supply stability, and the accepted balance between rights of sovereignty over natural resources and global free market mechanisms. By comparison, before OPEC, the "Seven Sisters . . . dominated world petroleum trade," which permitted *them* to "readily adjust supply and demand, thereby greatly influencing price."[132] Congressional investigations not only

125. SAMPSON, *supra* note 66, at 58, 72-79, 106-08, 123-34; U.S. HOUSE OF REP., *Question of Personal Privilege*, May 23, 2007, [hereinafter HOUSE, *Privilege*] *available at* http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?position=all&page=H5639&dbname=2007_record (quoting Antonia Juhasz, Op-Ed., *Whose Oil Is It, Anyway?* N.Y. TIMES, Mar. 13, 2007, at A19 ("Until about 35 years ago, the world's oil was largely in the hands of seven corporations.")).

126. *See* SAMPSON, *supra* note 66, at ix-x, 239, 275, 289.

127. *See id.* at 265-69.

128. Salvatore Lazzari, *Should the Windfall Profits Tax Be Reinstated?*, 48 TAX NOTES 1695, 1695 (1990).

129. *See* Udin, *supra* note 120, at 1355 (noting OPEC coordinates oil management).

130. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940).

131. *See* OPEC Statute, *supra* note 110, art. 2(B).

132. FRED BOSSELMAN ET AL., ENERGY ECONOMICS AND THE ENVIRONMENT, CASES AND

concluded that the global dominance of the Seven Sisters existed, but also discovered that the American-British multinational cartel *did* specifically consummate agreements to limit supply and set higher prices.[133]

Referencing history is not intended to retroactively adjudge "national interest" or "public interest," or to maintain that an alternative and effective supply system was viable in the first half of the twentieth century. The enormous infrastructure and global supply chain investment into what became (perhaps even by necessity) a vertically-integrated industry, combined with geopolitical controversy over natural resource rights and foreign investment expectations, assuredly formed an imperfect market. The history of the colonial system and the shift to OPEC are inescapably important for assessing Congressional inquiries into OPEC's purported anticompetitive behavior, explaining how national security risks were then viewed and may still be viewed as a "security from disruption" foreign policy, and examining how supply side interests competed (and then conformed) in light of rent-seeking behavior that is still eminently pertinent. Due to recent price surges, record revenues/profits were posted by *both* OPEC countries and multinationals.[134] Additionally, combining the history to current circumstances evokes renewed debate over whether current OPEC member infrastructure permits more supply, the extent that members can or should extend domestic production capacity with more investment, and whether members should provide prominent foreign multinational participation inside nationalized industries.

One of the last major events prior to the 1991 Gulf War that involved securing supply as a foreign policy is germane. President Carter strongly emphasized energy policy since the OPEC standoff had recently unfolded,[135] but when the Iranian hostage crisis occurred and Iran banned exports to the United States, crude oil prices surged from $13 to $34 per barrel.[136] Consequently, in January 1980, the "Carter Doctrine" announced that "any attempt by an outside force to gain control of the Persian Gulf region will be regarded as an assault on the vital interests of the United States" and could mandate U.S. military action and intervention.[137] The Carter Doctrine may

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MATERIALS 413 (2006) (citing CTR. FOR STRATEGIC & INT'L STUDIES, THE CRITICAL LINK: ENERGY AND NATIONAL SECURITY IN THE 1980S 126-27 (1982)).

133. *See* BABUSIAUX, *supra* note 73, at 18; SAMPSON, *supra* note 66, at 72-79, 123 (referencing the Achnacarry Agreement of 1928 between Exxon, BP and Shell and fifteen other prime producers and "Draft Memorandum of Principles" (1934)).

134. *See infra* notes 429-30, 450-54, 458.

135. *See* Miller, *supra* note 118, at 717.

136. *See id.* at 718. *Compare* chart *infra* Part X.

137. DREYFUSS, *supra* note 76, at 247-49; Bahgat, *supra* note 114, at 144; Michael Klare, *For Oil and Empire? Rethinking War with Iraq*, 102 CURRENT HIST. 134 (March 2003); Michael Klare, *The Carter Doctrine Goes Global,* PROGRESSIVE, Dec. 2004, at 17, 18.

embody remnants of the colonial-based system, as its promulgation to affront "outside threats" ironically coincided with an oil price surge.[138] The rhetorical precedent may even be one reason that some suggest the Bush administration reverted to garnering supply security by brute force.[139] Even if this is an exaggeration, the history surrounding the Doctrine could be relevant to current commodity market uncertainty.

Bellicose statements about Iraq circulated the media during 2002 and ostensibly generated varying perceptions about the likelihood of invasion, uncertainty of conflict, potential supply disruption, OPEC member reactions, and alternative motives.[140] Shortly after the invasion, news reports discussed activities of White House planning groups that were advising on how Iraq's oil industry should be reformed with market principles, deregulation, strong property rights, and multinational participation to drastically increase production.[141] During occupation, what was publicly articulated, and even what was proposed in the 2007 Oil and Gas Law, bore semblance to that advice, which is unsurprising since many exiles generating White House advisory reports were appointed to top leadership positions in interim governments.[142] Pre-invasion proposals, media announcements during occupation, *potentially* the substance of the proposed 2007 Oil and Gas Law, and the application of Iraq's constitutional federal structure, all could have been interpreted as market signals that Iraq's OPEC membership might be disregarded, which could unsettle the current supply system.[143]

V. Oil Industry Reform Planning for Iraq

A. Future of Iraq Project

The political turnover from the Clinton to Bush administration led to drastic foreign policy shifts. Clinton favored international cooperation in reducing oil consumption, as exhibited by signing the Kyoto Protocol with 122 other countries.[144] While the Senate rejected Clinton's desire for U.S. participation prior to the 1997 meetings, the new Bush administration clearly

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138. *See infra* note 371.

139. *See supra* notes 45, 56; *see infra* notes 218-23.

140. *See* Bejesky, *Politico*, *supra* note 19, at 39-41. *See supra* notes 45, 56; *see infra* notes 218-23.

141. *See e.g.*, Neil King Jr., *Bush Officials Devise a Broad Plan For Free-Market Economy in Iraq*, WALL ST. J. (E. Ed.), May 1, 2003, at A1.

142. *See infra* Part VI.A.

143. *See infra* Part VII.

144. *See* SUSAN R. FLETCHER, CONG. RESEARCH SERV., RL30692, GLOBAL CLIMATE CHANGE: THE KYOTO PROTOCOL (2004).

signaled that it would not adhere to Clinton's assent to the treaty.[145] Despite this, Protocol meetings took place from the perspective of oil commodity prices being low throughout much of the 1990s. Prices bottomed in January 1999 at $10 per barrel, coinciding with the Asian financial crisis, but began an upward trend that reached $30 just prior to the Bush administration entering office.[146]

Unlike the Clinton administration, which was not beleaguered by fear of foreign oil supply disruption, the Bush administration emphasized energy security policy.[147] Likewise, the Clinton administration did not concern itself with security threats from Iraq, but George Bush's inauguration ushered in a band of "neoconservatives" who had held a five-year, high-profile consensus that the Iraqi government should be displaced and contended that the existing regime was a threat to global oil supply.[148] It was later revealed that at White House National Security Council meetings, as early as late-January 2001, administration officials envisaged displacing the Iraqi government[149] and sought prominent exiles to replace Hussein's regime.[150] It is not clear that such planning was taking place with "securing oil supply" as a motive for action, as some have suggested,[151] but information does converge, and market uncertainties might result from that informational overlap.

Many issues merged in early 2002 when select White House, State Department, CIA, and Pentagon officials, as well as over two hundred Iraqi exiles, formed the *Future of Iraq Project* (FIP) to generate advisory reports for an occupation of Iraq.[152] Later declassified documents revealed[153] that the

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145. *See id.* at 2, 12.

146. *See* chart *infra* Part X.

147. *See infra* notes 480-81.

148. Bejesky, *Politico*, *supra* note 19, at 10-12.

149. *See id.* at 34-37.

150. *See* RON SUSKIND, THE PRICE OF LOYALTY: GEORGE BUSH, THE WHITE HOUSE, AND THE EDUCATION OF PAUL O'NEILL 84-85 (2004); Jane Mayer, *The Manipulator*, NEW YORKER, June 7, 2004, at 58; *Newsnight: Secret US Plans for Iraq's Oil* (BBC broadcast Mar. 17, 2005) (explaining that NSC-sponsored meetings were purportedly held in home of Iraqi-born oil industry consultant Falah Aljibury who contended that he "interviewed potential successors to Saddam Hussein on behalf of the Bush administration").

151. *See infra* notes 218-23.

152. Eric Schmitt & Joel Brinkley, *State Dept. Foresaw Trouble Now Plaguing Iraq*, N.Y. TIMES, Oct. 19, 2003, at 1; *see also* Susan B. Glasser & Rajiv Chandrasekaran, *Reconstruction Planners Worry, Wait and Reevaluate*, WASH. POST, Apr. 2, 2003, at A1.

153. Reports were declassified during occupation and seemingly emphasized assiduous administration planning, but revelations could also be perceived as an intention to invade for reasons other than alleged WMD threats since it was the high-profile UN Security Council discussions and inspection processes that shaped public perceptions on the reason for invasion. Public information of this planning emerged shortly after the invasion. *See, e.g.*, Donald L.

project held over thirty meetings from July 2002 to April 2003 and produced a 1,200-page report containing data, strategies, predictions, and warnings about what might follow an invasion.[154] The seventeen FIP working groups considered a broad range of economic and political reform measures,[155] but Oil and Energy Working Group (OEWG) proposals were the most controversial.

The ninety-page State Department document advised that Iraq's energy reserves be opened to international investment "as quickly as possible after the war" to "resolve the economic impoverishment of the country."[156] Political and economic reforms were considered mutually-dependent, necessitating billions of dollars in foreign investment.[157] "Economic impoverishment of the country" seems significantly due to twelve years of sanctions that froze Iraq out of the international economy[158] and capped the quantity of oil that Iraq could supply to global markets.[159] The UN Oil for Food program authorized sales of oil and controlled revenues from oil sales.[160] It also funded humanitarian needs, the weapons inspection process, and war reparations to Kuwait.[161]

With the UN supply cap, some note that Iraq "exempted" from the OPEC quota system in the 1990s.[162] Security Council Resolution 661 (1990) and

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Barlett & James B. Steele, *Iraq's Crude Awakening*, TIME, May 10, 2003, at 49.

154. *See* Farrah Hassan, *New State Department Releases on the 'Future of Iraq' Project*, NAT'L SEC. ARCHIVE, (Sept. 1, 2006), http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB198/index.htm.

155. Schmitt & Brinkley, *supra* note 152.

156. Hassan, *supra* note 154 (internal citations ommitted); U.S. DEP'T OF STATE, OIL & ENERGY WORKING GROUP, THE FUTURE OF IRAQ PROJECT (2003) (declassified in part on June 22, 2005), [hereinafter STATE DEP'T] *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB198/FOI%20Oil.pdf; Antonia Juhasz, *It's Still All About Oil in Iraq*, L.A. TIMES, Dec. 8, 2006, http://articles.latimes.com/2006/dec/08/opinion/oe-juhasz8.

157. *See* STATE DEP'T, *supra* note 156, at 9 ("Iraq's economy upon liberation will be in need of billions of dollars of foreign direct investment. . . . The regime change provides the opportunity to liberate not only the country but also the economy.").

158. Boon, *supra* note 7, at 1001-02; David Malone & James Cockayne, *The UN Security Council: 10 Lessons from Iraq on Regulation and Accountability*, 2 J. INT'L. L. & INT'L REL., Fall 2006, at 1.

159. *See* S.C. Res. 706, U.N. Doc. S/RES/706 (Aug. 15, 1991); S.C. Res. 712, U.N. Doc. S/RES/712 (Sept. 19, 1991); S.C. Res. 661, U.N. Doc. S/RES/661 (Aug. 6, 1990) (started sanctions).

160. *See* GOV'T ACCOUNTABILITY OFFICE, GAO-09-751, UNITED NATIONS: OBSERVATIONS ON THE OIL FOR FOOD PROGRAM AND IRAQ'S FOOD SECURITY 2-3 (2004),[hereinafter GAO].

161. *See* Bathsheba Crocker, *Closing Remarks*, 20 OHIO ST. J. ON DISP. RESOL. 279, 282 (2005); BLANCHARD, *supra* note 73, at 19 (paying five percent of revenues to Kuwait in 2008).

162. David Blair, *Opec Considers Adding Iraq to Quota System*, FIN. TIMES, Oct. 15, 2010 ("Iraq has been exempt from Opec production agreements since . . . 1990."); Simon Webb, *Iraq*

subsequent resolutions *prohibited* other countries from trading with Iraq (except for food and medicine), but the Oil for Food Program was established and *allowed* Iraq to sell as much as $1 billion in oil every ninety days (starting in December 1996), resulting in $67 billion in sales from 1997 to 2003.[163] Between 1991 and 1996, Iraq's production was ten to thirty percent of pre-sanction levels[164] because only domestic needs were being serviced.[165] After the Oil for Food Program was established, production significantly increased, but revenue caps placed permitted exports below Iraq's OPEC quotas.[166] The combined consequence of UN sanctions and Baghdad not having control over revenues is that reinvestment into industry infrastructure, which could have increased production, was limited both by capital and the uncertainty of *if* and *when* exports could be increased.[167] Externally-imposed ultimatums restricted economic development and oil revenues, while other countries, including some Security Council members, sought to develop economic relations with Iraq.[168]

Likely casting uncertainty into OPEC's production quota system is the OEWG claim that "Iraq's oil output is a mere one-third to one-ninth of what it could be if the oil industry was restructured and competitively operated. War and sanctions are not the reason that Iraq's oil industry has chronically failed to achieve its potential output."[169] The OEWG report juxtaposes current production with estimated potential production to "illustrate the magnitude of the losses imposed on Iraq and its people through the chronic *inefficiency* of its oil industry."[170] It states that Iraq's Gross Domestic Product

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Strengthens Hand at OPEC with Oil Deals, REUTERS, Dec. 14, 2009 ("OPEC exempted Iraq in the 1990s"); IPAA, *supra* note 17, at 2 (accurately explaining that "Iraq's petroleum production is defined by the UN sanctions program").

163. GAO, *supra* note 160, at 3-4.

164. *See* OPEC, *ASB*, *supra* note 17, at 54 (reporting Iraq's oil production in thousands of barrels per day 282.5 in 1991, 526.2 in 1992, 659.5 in 1993, 748.7 in 1994, 736.9 in 1995, and 740.4 in 1996).

165. *See id.* at 12 (showing Iraq's export values were significantly lower during the years 1991-1996).

166. GAO, *supra* note 160, at 3-4; STATE DEP'T, *supra* note 156, at 4 (reporting that since December 1996, Iraq has exported oil at a rate of "just under 1.5 million barrels per day").

167. *See supra* notes 159-60; *see infra* notes 178-80, 187-89.

168. *See supra* notes 159-60; *see infra* notes 178-80, 187-89.

169. STATE DEP'T, *supra* note 156, at 1.

170. *Id.* at 2 (emphasis added). Another study furnished similar conclusions that attributed Baghdad's "mismanagement" of the nationalized oil industry as the cause of the country's external debt and poverty. *See* Ariel Cohen & Gerald P. O'Driscoll, *The Road to Economic Prosperity for a Post-Saddam Iraq*, HERITAGE FOUND. BACKGROUNDER, Sept. 25, 2002. The report begins: "As the Bush Administration and Iraqi opposition groups plan the future of a post-Saddam Hussein Iraq without its menacing arsenal of weapons of mass destruction

(GDP) "peaked at $74.9 billion in 1990, collapsed to $10 billion in 1991, and stood at $27.8 billion by 2001."[171] GDP trends trace the period of (1) no sanctions, (2) sanctions, and (3) Oil for Food Program permitted sales.[172] Presuming equivalent economic, political, and social circumstances, the OEWG explains that GDP of the other ten OPEC member states grew by forty-three percent over the same period and suggests that Iraq's economy should have equivalently prospered.[173]

Armed with explanations that isolate externally-imposed sales restrictions as exogenous to production efficiency and a premise that there is a "massive trend to privatization. . .of national oil companies throughout the world" because nationally-owned companies "no longer serve the best interests of their countries,"[174] the report considers three restructuring variables—"decentralizing" production, resource ownership, and foreign investment. The OEWG proposes that decentralization should weaken the Iraqi National Oil Company (INOC), strengthen property right protections, and reduce government regulatory controls.[175] Decentralization might break the INOC into three or four state-owned and/or privatized, commercially-operated, entities and engage in partnerships, joint ventures, service agreements, equity sharing arrangements, or Production Sharing Agreements (PSAs) with international oil companies.[176]

B. Foreign Oil Companies

The OEWG recognized that its proposals for foreign investment were effectively "Iraq's oilfield development programme announced in 1997,"

(WMD), economic issues loom large." *Id.* at 1. It further asserted that failure to increase oil production was due to "diverting at least $6.6 billion -- primarily in revenues from smuggled oil and kickbacks -- to his program to develop nuclear, chemical, and biological weapons and platforms for their delivery." *Id.* at 3. It seems that this $6.6 billion expenditure as a cause for oil industry stagnation was mistaken since all post-invasion inspections concluded that no evidence of WMD programs was discovered.

171. *See* STATE DEP'T, *supra* note 156, at 3.

172. *See* U.S. DEP'T OF ENERGY, TABLE 11.5: WORLD CRUDE OIL PRODUCTION, 1960-2009, *available at* http://www.eia.doe.gov/aer/txt/ptb1105.html.

173. *See* STATE DEP'T, *supra* note 156, at 3.

174. *Id.* at 5.

175. *Id.* at 3-5 (noting several steps to strip authority from the Oil Ministry and enacting laws for "de-monopolisation" so that investment would be "opened to private companies"). *See generally* Cohen & O'Driscoll, *supra* note 170 (proffering that privatization, elevated property right institutions, and open market liberalization would relieve the country's economic ills and advising that the Bush Administration, with Western "expatriate" assistance, "should help Iraqi opposition leaders to develop an economic reform package for their country").

176. STATE DEP'T, *supra* note 156, at 5-6.

albeit without breaking up the INOC.[177] Additionally, the OEWG is aware that the program had already consummated "production sharing contracts, service contracts and joint ventures" with French, Russian, and Chinese companies (and reportedly with Italian, Spanish, Indian, Turkish, Vietnamese, Algerian, Indonesian, and other oil companies).[178] One could contend that these foreign interests may have been a reason for pressure to end sanctions during the mid-1990s.[179] There was a 1997 China National Petroleum Corporation contract to develop the al-Ahdab and Amara oil fields, a $3.7 billion contract with a consortium of Russian oil companies to develop the West Qurna field, a negotiated $4 billion contract with French interests to develop the Majnoon field, and an assortment of other contracts that some argued should have remained valid.[180] Instead, two months after the invasion, Security Council Resolution 1483 was adopted and incorporated language applicable to preexisting contracts:

> *Noting* the relevance of the establishment of an internationally recognized, representative government of Iraq and the desirability of prompt completion of the restructuring of Iraq's debt . . . [The Security Council] further *decides* that, until December 31, 2007, unless the Council decides otherwise, petroleum, petroleum products, and natural gas originating in Iraq shall be immune, until title passes to the initial purchaser from legal proceedings against them and not be subject to any form of attachment, garnishment, or execution.[181]

Identified as the "Occupying Authority" under Resolution 1483, the United States and Britain took administrative control over oil processing, distribution, and revenues from the U.N. Oil for Food Program, and that authority was ostensibly perceived as commissioning domestic "implementing" legislation. On the same day that Resolution 1483 was adopted, President Bush issued Executive Order 13303.[182] Commentators

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177. *Id.* at 6.

178. *Id.*; Barlett & Steele, *supra* note 153; BLANCHARD, *supra* note 73, at 18 n.52.

179. In March 1995, Permanent Security Council members Russia, China, and France supported a resolution to lift sanctions. SARAH GRAHAM-BROWN, SANCTIONING SADDAM: THE POLITICS OF INTERVENTION IN IRAQ 80 (1999).

180. *See Country Analysis Briefs: Iraq*, U.S. ENERGY INFO. ADMIN. 7 (Sept. 2010), [hereinafter EIA, *Iraq*], *available at* http://www.eia.doe.gov/cabs/Iraq/pdf.pdf; Mahdi, *supra* note 72, at 13; *Iraqi Oil Deals Under Saddam*, REUTERS, Oct. 24, 2003; *Foreign Suitors for Iraqi Oilfield Contracts*, JUDICIAL WATCH (Mar. 5, 2001), http://www.judicialwatch.org/IraqOilFrgnSuitors.pdf [hereinafter *Foreign Suitors*].

181. S.C. Res. 1483, ¶ 22, U.N. Doc. S/RES/1483 (May 22, 2003).

182. Exec. Order No. 13303, 68 Fed. Reg. 31,931 (May 23, 2003), *available at* http://

noted that the Order opened a potential constitutional and jurisdictional complication since it prevented legal redress, could nullify court judgments related to previous oil field contracts, and potentially immunize any range of other civil claims.[183] Professor Claire Kelly explains that Order 13303 "arguably challenges our notions of separation of powers, due process and access to the courts . . . [and] appears to extend perpetual judicial immunity to oil companies doing business in Iraq by precluding a class of claims against private companies without providing an alternative forum for those claims."[184] Remedial claims may not have been filed if the Resolution and Executive Order caused a perception of futility. Meanwhile, the policy for the Order, even contained in the title—"Protecting the Iraqi Development Fund"—meant that the CPA would administer the oil industry and revenues and protect resources for "development." Preexisting contract rights were not *per se* protected,[185] even though foreign investment was considered essential for development.[186]

Instead, economic advisors were dispatched to Iraq to advise on how countries such as France, Russia, and China would be compensated for $40 billion in contracts signed with the former government.[187] British and American companies were not involved in agreements, but the United States

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www.ustreas.gov/offices/enforcement/ofac/legal/eo/13303.pdf.

183. *See, e.g.*, Claire R. Kelly, *The War on Jurisdiction: Troubling Questions About Executive Order 13303*, 46 ARIZ. L. REV. 483 (2004); Rod Khavari, *Executive Order 13303: Is the Bush Administration Choosing Corporations Over Human Rights Actions Instituted Via the Alien Tort Claims Act?*, 14 TULSA J. COMP. & INT'L L. 119, 123-24, 141-42, 148 (2006).

184. *See* James Thuo Gathii, *Foreign and Other Economic Rights Upon Conquest and Under Occupation: Iraq in Comparative and Historical Context*, 25 U. PA. J. INT'L ECON. L. 491, 541-42 (2004); Kelly, *supra* note 183, at 484-85. Separation of powers and restrictions on federal court jurisdiction are involved. *See Dames & Moore v. Regan*, 453 U.S. 654, 669 (1981); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). The *Dames & Moore* decision emphasized that the president does not possess plenary authority to settle claims. *See Nat'l Oil Corp. v. Libyan Sun Oil Co.*, 733 F. Supp. 800, 811 (D. Del. 1990). Another alternative might have been to issue "blocking orders" to prevent enforcement of contract rights. *See* Libyan Sanctions Regulations, 31 C.F.R. § 550.209 (2006); Cuban Assets Control Regulations, 31 C.F.R. § 515 (1997). *See generally* COLEMAN PHILLIPSON, THE EFFECT OF WAR ON CONTRACTS AND ON TRADING ASSOCIATIONS IN TERRITORIES OF BELLIGERENTS (1909); Otto C. Sommerich, *A Brief Against Confiscation*, 11 LAW & CONTEMP. PROBS. 152 (1946). Blocking orders would likely have caused scandal if American companies partook in similar contract rights under occupation.

185. *See* BLANCHARD, *supra* note 73, at 18.

186. *See supra* notes 156-57; *see infra* Parts V.C, VI.A, VII.A-C.

187. *See* EIA, *Iraq*, *supra* note 180; Carol Kaysen et al., WAR WITH IRAQ: COSTS, CONSEQUENCES, AND ALTERNATIVES 72 (2002); Emad Mekay, *Challenges 2004-2005: US to Take Bigger Bite of Iraq's Economic Pie*, IPS (Dec. 23, 2004), http://ipsnews.net/interna.asp?idnews=26798.

and the United Kingdom were instead staunchly insisting that sanctions remain, limiting the quantity of oil exports to international markets, and busily quarantining Iraq with controversial no-fly zones.[188] After the invasion, Washington prevented companies from countries such as Russia, Germany and France from engaging in many commercial endeavors, which may have been discriminatory treatment under the WTO and U.S. procurement regulations.[189] Furthermore, misgivings may emerge because international law forbids occupying powers from exploiting the natural resources of an occupied territory.[190]

C. Oil Industry Market Signals

During 2002, diplomacy, likelihood of conflict, and Pentagon invasion plans pervaded the media.[191] Exiles, such as Ahmed Chalabi, publicly stated as early as September 2002 that American oil companies would be favored for oil field investments.[192] Media reports relayed that there were prospects for future foreign commercial activity in Iraq, that foreign oil companies might have investment opportunities, that White House officials had been meeting with opposition leaders to form an interim government and with American and British oil company executives about a possible role in restoring the oil

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188. *See* Bejesky, *Politico*, *supra* note 19, at 54. *See supra* notes 158-59; *see infra* notes 189-91.

189. *See* Michael Davey, *To the Victor Go No Spoils? The United States as an Invading Military Force and Its Relationship With Economic Contracts in Occupied Iraq*, 23 PENN. ST. INT'L L. REV. 721, 733-34 (2005); Charles Tiefer, *The Iraq Debacle: The Rise and Fall of Procurement-Aided Unilaterialism as a Paradigm of Foreign War*, 29 U. PA. J. INT'L L. 1, 43 (2007).

190. *See* Melissa Patterson, *Who's Got the Title? Or, The Remnants of Debellatio in Post-Invasion Iraq*, 47 HARV. INT'L L.J. 467, 478 (2006).

191. *See* Bejesky, *Politico*, *supra* note 19, at 37-41.

192. *See* Peter Beaumont & Faisal Islam, *Focus: Attack on Iraq: Carve Up of Oil Riches Begins: US Plans to Ditch Industry Rivals and Force End of Opec*, OBSERVER, Nov. 3, 2002, at 16 ("The leader of the London-based Iraqi National Congress, Ahmed Chalabi, has met executives of three US oil multinationals to negotiate the carve-up of Iraq's massive oil reserves post-Saddam."); Carola Hoyos, *Exiles Call for Iraq to Let in Oil Companies*, FIN. TIMES, Apr. 7, 2003, at 4; Andrew Buncombe, *Russia Fears US Oil Companies Will Take over World's Second-biggest Reserves*, INDEPENDENT, Sept. 26, 2002, http://www.independent.co.uk/news/world/middle-east/russia-fears-us-oil-companies-will-take-over-worlds-secondbiggest-reserves-607596.html ("Oil companies from around the world are manoeuvering for the multibillion-dollar bonanza that would follow the ousting of Saddam Hussein. . . .[INC head Ahmed Chalabi is quoted:] 'American companies will have a big shot at Iraqi oil.'"); Peter Goodman, *US Advisor Says Iraq May Break with OPEC*, WASH. POST, May 17, 2003, at E01; *Iraq & Oil*, WASH. POST (May 23, 2003), http://discuss.washingtonpost.com/wp-srv/zforum/03/sp_world_goodman052303.htm.

sector, and that oil revenues were apt to fund an occupational government.[193] An *MSNBC* headline read: "Oil after Saddam: All bets are in – A great but quiet rush is on for a stake in Iraq's huge reserves."[194] Announcements might impact stock prices and influence commodity trading if the possibility of invasion appeared likely and it was perceived that certain companies could have an undue advantage in Iraq's energy sector.

Congressional investigations into Halliburton's overcharging revealed that the Pentagon, through the Army Corp of Engineers, awarded Halliburton subsidiary Kellogg, Brown & Root (KBR) a no-bid sole source contract for repairing the oil infrastructure.[195] The "Restore Oil" contract was quietly awarded eleven days before the invasion;[196] the head auditor called it the "most blatant and improper contract abuse I have witnessed during the course of my professional career."[197] Soon after, the FBI initiated an investigation.[198] A Congressional report states: "The Bush Administration started planning for the take-over of Iraq's oil fields nearly a year before the invasion of Iraq."[199]

In addition to the already discussed OEWG planning, the President formed an Energy Infrastructure Planning Group and Halliburton was awarded a $1.9 million contract in fall 2002 to furnish proposals "for U.S. occupation of the Iraqi oil fields."[200] Planning may have derived from early National Security Council (NSC) meetings and accompanying documents, which included a

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193. *See* Neela Banerjee, *Energy Companies Weigh Their Possible Future in Iraq*, N.Y. TIMES, Oct. 26, 2002, at C3 (quoting Adam Sieminski, senior oil analyst at Deutche Bank, who authored a report explaining the benefits to American and British oil companies if there was an invasion, and noted: "The report is a way of saying, 'Watch this space.'"); Beaumont & Islam, *supra* note 192; Dilip Hiro, *How Bush's Oil Grab Went Awry*, NATION, Sept. 26, 2007 (listing pre-invasion news articles discussing US multinational involvement in Iraqi oil fields); Dan Morgan & David B. Ottaway, *In Iraqi War Scenario, Oil Is Key Issue: US Drillers Eye Huge Petroleum Pool*, WASH. POST, Sept. 15, 2002, at A01; Bejesky, *Politico*, *supra* note 19, at 57-58 (noting Bush administration statements about oil revenues funding occupation); Michael Moran & Alex Johnson, *Oil After Saddam: All Bets Are In*, MSNBC, (Nov. 7, 2002), http://www.msnbc.msn.com/id/3071521/; *US Delays Planned Meeting on Exploiting Iraq's Oil and Gas Reserves*, ALEXANDER'S GAS & OIL CONNECTIONS, (Nov. 27, 2002), http://www.gasandoil.com/goc/news/ntn24886.htm.

194. Moran & Johnson, *supra* note 193.

195. *See* U.S. HOUSE OF REP. COMM. ON GOVERNMENT REFORM - MINORITY STAFF SPECIAL INVESTIGATION DIV., HALLIBURTON'S PERFORMANCE UNDER THE RESTORE IRAQI OIL 2 CONTRACT at 2 (2006), *available at* http://www.halliburtonwatch.org/reports/ RIO2_ audit.pdf.

196. *See id.* at 3.

197. 151 CONG. REC. S8379 (July 15, 2005).

198. *See* A. Dickinson, *Government for Hire: Privatizing Foreign Affairs and Accountability Under International Law*, 47 WM. & MARY L. REV. 135, 139 (2005).

199. U.S. HOUSE OF REP. COMM. ON GOVERNMENT REFORM - MINORITY STAFF SPECIAL INVESTIGATION DIV., *supra* note 195, at 2.

200. *Id.*

Foreign Suitors for Iraqi Oilfield Contracts NSC memo dated March 5, 2001, that itemized which countries possessed contracts or interests in attaining contracts and maps of Iraqi oil fields.[201] As early as January 2001, government action quietly stirred over the possible overthrow of an OPEC member government.[202]

As the Security Council "WMD threat" diplomatic sequence unfolded, the possibility of invasion led to indications that there might be a role for foreign oil companies to increase production within an OPEC country possessing a nationalized industry.[203] American oil companies had an early interest in developments inside Iraq, and even provided what was called "pro bono" training and assistance on industry practices.[204] The appointed Ministry of Oil leadership initiated negotiations with foreign companies[205] and implemented an interim modified buy-back contract system whereby international oil companies financed exploration and development expenses in exchange for a guaranteed fee and reimbursed costs.[206] Multinationals could have also benefitted from related occupational reform policies. Financial "dependence" may have encroached upon CPA control over Iraqi revenues, fiscal policy that "dollarized" the economy,[207] Ex-Im Bank loans and guarantees for export and reconstruction,[208] no-bid reconstruction contracts favoring U.S. multinationals, procurement policies that often excluded companies from "non-coalition" countries,[209] and the presence of a U.S. military occupation. New debt and bonds, effectively collateralized by future oil revenues, were

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201. Bejesky, *Politico*, *supra* note 19, at 34-37; *Foreign Suitors*, *supra* note 180.

202. *See* Bejesky, *Politico*, *supra* note 19, at 34-37.

203. *See supra* notes 191-201.

204. *See* Justin Blum, *Big Oil Companies Train Iraqi Workers Free: Global Companies Offer Services to Establish Goodwill, Win Business*, WASH. POST, Nov. 6, 2004, at E01; David Gow & Carolynne Wheeler, *Shell Advert Seeks 'Our Man in Iraq'*, GUARDIAN, Aug. 11, 2004, http://www.guardian.co.uk/business/2004/aug/11/oilandpetrol.iraq#history-link-box.

205. *See* Greenfield & Todesco, *supra* note 91, at 103.

206. *See id.* at 103-04.

207. *See* Haider Ala Hamoudi, *Money Laundering Amidst Mortars: Legislative Process and State Authority in Post-Invasion Iraq*, 16 TRANSNAT'L L. & CONTEMP. PROBS. 523, 531 (2007); Memorandum from the House of Representatives Majority Staff to the Members of the Committee on Oversight and Government Reform (Feb. 6, 2007), *available at* http://www.globalsecurity.org/military/library/congress/2007_hr/070206-memo.pdf.

208. *See Export-Import Bank Support for U.S. Exports to Iraq*, EXP.-IMP. BANK OF THE U.S. 1-2 (Sept. 2004), *available at* http://www.exim.gov/news/iraqfactsheet.pdf.

209. L. ELAINE HALCHIN, CONG. RESEARCH SERV., RL32370, THE COALITION PROVISIONAL AUTHORITY (CPA): ORIGIN, CHARACTERISTICS, AND INSTITUTIONAL AUTHORITIES, 21 (2004), *available at* http://www.fas.org/man/crs/RL32370.pdf; 149 CONG. REC. H9586-87 (Oct. 16, 2003); Tiefer, *supra* note 189, at 42.

issued with longer-term repayment schedules[210] and reconstruction efforts were dominated by American companies charging U.S. costs of reconstruction on a developing country. How this dependent relationship may have unfolded several years later is discussed *infra* in section "VII. 2007 Oil and Gas Bill."

D. Oil Politics

Claims that there were alternative reasons for the Iraq invasion—other than WMD and "threats to peace"—became common both before and after the invasion. For effecting commodity market stability, whether cynicism is merited is inconsequential. The question is whether propagating rumors of "conquest," financial interests, and "peak oil" bred market risk and uncertainty as to the status quo. Several types of public information may be relevant.

Forty-four countries possess ninety-nine percent of the world's oil resources.[211] Iraq likely possesses the second or third largest oil reserves, and the Middle East holds two-thirds of global oil reserves.[212] While unsubstantiated, Iraqi leaders even announced that "unconfirmed or potential reserves" may yield sixty-five percent more oil (214 billion barrels),[213] rivaling that of Saudi Arabia. British Petroleum executives predicted that by 2020, one-third of all oil traded would come from Iraq, Iran and Saudi Arabia.[214]

After the invasion, media stories emerged of American soldiers seizing principal oil fields and labeling them "Forward Operating Base Exxon" and "Forward Operating Base Shell."[215] Some returning soldiers claimed that they were told that the invasion was not about liberation, democracy, or security threats, but about securing oil resources.[216] Iraqi officials alleged that soldiers

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210. *See* Michael Greenstone, *Is the 'Surge' Working? Some New Facts*, (MIT Dept. Of Econ. Working Paper No. 07-24), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1014427&download=yes; *Update 1 – Iraq Settles $1.2 Billion in Saddam-Era Commercial Debt*, REUTERS, Sept. 10, 2008, *available at* http://in.reuters.com/article/idINLA48227020080910.

211. Rhea, *supra* note 26, at 628.

212. *See Program Note: Iraq*, INT'L MONETARY FUND (July 22, 2009), http://www.imf.org/external/np/country/notes/iraq.htm ("third largest"); ARNOVE, *supra* note 58, at xvi; BLANCHARD, *supra* note 73, at 1; EIA, *Reserves*, *supra* note 38 (discussing Saudi Arabia, Iran and Iraq); Juhasz, *supra* note 156.

213. *See* BLANCHARD, *supra* note 73, at 1.

214. *See* Weaver, *supra* note 26, at 543.

215. Neela Banerjee, *Army Depots in Iraqi Desert Have Names of Oil Giants*, N.Y. TIMES, Mar. 27, 2003, at C14.

216. *See* JEREMY BRECHER, ET AL., IN THE NAME OF DEMOCRACY: AMERICAN WAR CRIMES

seized oil fields, guarded the Ministry of Oil building while adjacent ministries were destroyed, and prevented Ministry employees from returning to work.[217]

Some government officials also expressed that oil was a factor driving the invasion and occupation.[218] Representative Dennis Kucinich contended that oil was "the strongest incentive" for the invasion.[219] Undersecretary of Defense Paul Wolfowitz was asked to clarify the rationale for targeting Iraq, but not North Korea, for allegedly possessing WMD, since North Korea had apparently "restarted" its own nuclear projects during that time. He stated: "Let's look at it simply. The most important difference between North Korea and Iraq is that, economically, we just had no choice in Iraq. The country swims on a sea of oil."[220] Former Federal Reserve Chairman Alan Greenspan remarked that "the Iraq war was largely about oil" because Hussein's "behavior" posed a threat to regional oil supplies.[221] Congressman Jim

IN IRAQ AND BEYOND 213 (Jeremy Brecher, et al. eds. 2005) (reporting that an enlistee was allegedly told: "You're not going to make Iraq safe for democracy. . . . You are going for one reason alone: oil. But you're still going to go, because you signed a contract.").

217. *See Bill Moyers Journal: Moyers on Big Oil*, (PBS television broadcast June 27, 2008), *available at* http://www.pbs.org/moyers/journal/06272008/transcript4.html; ARNOVE, *supra* note 58, at 8; *see also* Brecher et al., *supra* note 216. In Baghdad, looting destroyed 158 government buildings, but the Oil Ministry and the Interior Ministry (which holds intelligence files) were secured and heavily protected. *See* LARRY DIAMOND, SQUANDERED VICTORY: THE AMERICAN OCCUPATION AND THE BUNGLED EFFORT TO BRING DEMOCRACY TO IRAQ 282 (2005); Michael Renner, *Iraq's Other Looting*, ASIA TIMES, July 11, 2003, http://www.atimes.com/atimes/Middle_East/EG11AK01.html; JOHNSON, *supra* note 76, at 234.

218. *See* WALDEN BELLO, DILEMMAS OF DOMINATION: THE UNMAKING OF THE AMERICAN EMPIRE 54 (2005) (citing Jeffery Sachs, *America's Disastrous Energy Plan*, FIN. TIMES, Dec. 23, 2003, at Comment 16); Kristen E. Boon, *"Open for Business,": International Financial Institutions, Post-Conflict Economic Reform, and the Rule of Law*, 39 N.Y.U. J. INT'L L. & POL. 513, 533-34 (2007); Marjorie Cohn, *Human Rights: Casualty of the War on Terror*, 25 T. JEFFERSON L. REV. 317, 342 n.147 (2003).

219. *Meet the Press: Dennis Kucinich and Richard Perle Debate Military Action in Iraq* (NBC television broadcast Feb. 23, 2003).

220. *See* BELLO, *supra* note 218, at 54 (citing George Wright, *Wolfowitz: Iraq War About Oil?*, GUARDIAN, June 5, 2003); *Bill Moyers Journal: Moyers on Big Oil*, *supra* note 217. Wolfowitz's quote was purportedly taken out of context. *See also Update: Iraq Was 'War About Oil'*, NEWS 24, (June 5, 2003), http://www.news24.com/Content/World/Archives/IraqiDossier/1072/e7ccef5d48964c6aabce5266160bb49d/05-06-2003-02-12/Update_Iraq_war_was_about_oil. There are three apparent contexts – (1) individual advantage of controlling oil, (2) Hussein's presence caused a threat to regional supply disruption, or (3) oil revenues could somehow fund weapon acquisitions outside of the UN Oil for Food program.

221. Bob Woodward, *Greenspan: Ouster of Hussein Crucial for Oil Security*, WASH. POST, Sept. 17, 2007, at A03; *see Alan Greenspan vs. Naomi Klein on the Iraq War, Bush's Tax Cuts, Economic Populism, Crony Capitalism and More* (Democracy Now! Broadcast Sept. 24, 2007), *available at* http://i2.democracynow.org/2007/9/24/alan_greenspan_vs_naomi_klein_on; *Bill*

McDermott stated on the floor of the House of Representatives: "From the beginning of the Iraq invasion, more moderate voices, especially overseas, questioned whether the ulterior motive behind toppling Saddam Hussein was a grab for Iraqi oil. . . . Gaining access to the oil wealth of Iraq has had oil industries salivating for years."[222] Robert Ebel, a former CIA oil analyst, remarked: "The thought was, 'Why are you going into Iraq? It's about oil, isn't it?' And my response was, 'No, it's about getting rid of Saddam Hussein. The morning after, it's about oil.'"[223]

White House officials denied such charges. In October 2002, White House Press Secretary Ari Fleischer was asked whether oil concerns impelled bellicose rhetoric and affirmed: "[it] is not a factor. This is about preserving the peace and saving the lives of Americans."[224] UN diplomacy intensified, and later that month, Fleischer remarked that diplomatic confrontation only sought to attain Iraq's compliance with Security Council resolutions: "The President has said repeatedly that America's policy is regime change."[225] Fleisher further noted that, "[t]he only interest the United States has in the region is furthering the cause of peace and stability . . . [and] not his country's ability to generate oil."[226] Three months after the invasion, Secretary of State Powell remarked: "We have not taken one drop of Iraqi oil for U.S. purposes, or for coalition purposes. Quite the contrary. . . . It costs a great deal of money to prosecute this war. But the oil . . . belongs to the Iraqi people; it is their wealth, it will be used for their benefit. So we did not do it for oil."[227]

Related developments might suggest otherwise. High-profile Congressional demands for political and legal action to confront OPEC might breed cynicism when combined with other information. The London *Guardian* explained that Pentagon "hawks have long argued that U.S. control of Iraq's oil would help deliver a second objective. That is the destruction of Opec, the oil producers' cartel, which they argue is 'evil' [and] . . .

Moyers Journal: Moyers on Big Oil, *supra* note 217.

222. 153 CONG. REC. H395 (daily ed. Jan. 11, 2007).

223. *U.S. Broadcast Exclusive: Secret U.S. Plans For Iraq's Oil Spark Political Fight Between Neocons and Big Oil*, (Democracy Now! broadcast Mar. 21, 2005), *available at* http://www.democracynow.org/2005/3/21/u_s_broadcast_exclusive_secret_u.

224. Ari Fleischer, *White House Daily Press Briefing*, AMERICAN.GOV (Oct. 9, 2002), http://www.america.gov/st/washfile-english/2002/October/20021009162510safi@pd.state.gov 0.9141504.html.

225. *Id.*

226. *Id.*

227. Colin Powell, *Secretary of State Powell Discusses President's Trip to Africa*, WHITE HOUSE (July 10, 2003), http://georgewbush-whitehouse.archives.gov/news/releases/2003/07/20030710-5.html; Barlett & Steele, *supra* note 153.

incompatible with American interests."[228] White House and State Department documents emphasized the desire for U.S. companies to attain long-term and stable production rights in oil fields and noted that such involvement could undermine OPEC.[229] Two months after the invasion, and before there was any semblance of a representative government, a *Washington Post* article discussed Iraq's future with OPEC in an article entitled, "US Advisor Says Iraq May Break with OPEC."[230]

Some espoused that the military was providing a global collective good by "securing" oil resources. Army General John Abizaid, head of operations in Iraq, stated that the United States may want to maintain a long-term military presence in Iraq to protect moderates against the region's extremists and to protect the flow of oil.[231] In polls conducted at about the same time, Iraqis perceived this intention more cynically as an attempt "to control Iraqi oil."[232] In 2008, Abizaid explained that "American military power keeps the flow of oil going . . . for our friends, and our allies, and the producing nations" and "our enemies are trying to disrupt that movement."[233] That is one perception.

Commodity traders, however, are global, and what may be viewed as "securing," "protecting," or "stabilizing" to some could be viewed as the

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228. Beaumont & Islam, *supra* note 192.

229. *See* Gregory Palast, *OPEC on the March: Why Iraq Still Sells Its Oil A La Cartel*, HARPER'S MAGAZINE, Apr. 2005; *The Oil Factor: Behind the War on Terror* (Democracy Now! broadcast Oct. 22, 2004), *available at* http://www.democracynow.org/2004/10/22/the_oil_factor_behind_the_war (noting that Pentagon DIA analyst Karen Kwiatkowski has remarked: "Democracy is not the reason we went in there. The main reason is geostrategic regional dominance, which is the one that relates to energy supplies."); Broome, *supra* note 4, at 410-12 (citing government affirmations to "bust up the cartel"); Goodman, *supra* note 192; Hoyos, *supra* note 192. *See generally* Oil Factor: Behind the War on Terror, *supra* note 44 (including interviews with Professor Chomsky and *Jane's Defense Weekly* editor David Mulholland describing military power deriving from controlling the heart of Persian Gulf oil supplies).

230. Goodman, *supra* note 192.

231. *See Supplemental Appropriations for Fiscal Year 2006: Hearing Before the Committee on Appropriations United States Senate Special Hearing*, 109th Cong. 190-91, *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_senate_hearings&docid=f:27218.wais.pdf (Abizaid testifying on importance of securing oil infrastructure); *see also* Vicki Allen, *Abizaid Says United States May Want to Keep Bases in Iraq*, REUTERS, Mar. 15, 2006; Jim Garamone, *Abizaid Details al Qaeda's Long-Term Goals*, AM. FORCES PRESS SERV., Sept. 29, 2005, http://www.defense.gov/news/newsarticle.aspx?id=17178 ("forces must remain in the region. . . [to] protect the flow of oil vital to all the peoples of the world"); Thom Shanker & Eric Schmitt, *Pentagon Expects Long-Term Access to Key Iraq Bases,* N.Y. TIMES, Apr. 20, 2003, at A1.

232. *See* UNIV. OF MICH. INST. FOR SOC. RESEARCH, *supra* note 56.

233. *Conversations with History, The Military in the Post-9/11 World: Conversation with John Philip Abizaid, U.S. Army (ret.)*, Berkeley Inst. of Int'l Studies broadcast Mar. 12, 2008) (transcript available at http://globetrotter.berkeley.edu/people8/Abizaid/transcript_abizaid.pdf)

cause of "chaos," "disruption," and "uncertainty" to others. Sevenfold higher prices did not precede the invasion.[234] Instability and escalating prices followed—information about the invasion might have cognitively merged with highly-emotive allegations from various venues about "conquest," "peak oil," national needs, and historical foreign policy toward the Middle East.[235]

VI. Occupation Announcements and Economics

A. Appointing Exiles and Early Public Announcements

The controversy over whether Iraq's nationalized industry should be opened to foreign investment severs use of military force from securing foreign resources, but may still generate questions of whether rational choice is supplanted by compulsion. Advocacy for foreign investment clasps tightly to the dominant discourse of neoliberalism as the most effective means for development, but this premise assuredly polarizes the Iraqi public and OPEC members. The OEWG favored privatization, contending there is a "massive trend to privatization" because nationalized oil companies "no longer serve the best interest of their countries,"[236] but conceded that privatization might lead to nationalism.[237] Instead, it recommended "assist[ing] Iraqi leaders to reorganize the national oil industry as a commercial enterprise" and "encourag[ing] investment in Iraq's oil sector by the international community and by international energy companies."[238] OEWG members working for the Bush White House prescribed what "leaders" should do in the event of regime change and many of those same advisors were appointed to government positions.

Within two weeks of the invasion, exiles began to announce that the nationalized industry should be opened to foreign investment.[239] A *Wall*

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234. *See infra* Part X.

235. *See generally supra* Parts II-III.

236. STATE DEP'T, *supra* note 156, at 5.

237. *See id.* at 28 ("Iraq's enormous reserves of oil and gas are the endowment, patrimony, and birthright of the Iraqi people. This endowment is managed for the Iraqi people by the state."); Hassan, *supra* note 154 (noting the report's finding that privatization may be challenging because "nationalism in Iraqi oil industry is very strong").

238. Juhasz, *supra* note 156.

239. *See* Barlett & Steele, *supra* note 153 ("Iraqi exiles – and the Bush Administration – want to see the Iraqi oil industry privatized in order to attract foreign investment."); Robert Collier, *Foreigners, Exiles Appointed to Help Run Iraqi Oil Ministry*, S.F. CHRON., May 4, 2003, at A9; Hoyos, *supra* note 192; David Ivanovich, *U.S. Plans For Oil Industry After Saddam*, HOUS. CHRON., Feb. 24, 2003, at A01; Stanley A. Weiss, *A Blessing and a Curse: Iraq Needs Help Kicking the Oil Addiction*, N.Y. TIMES, June 13, 2003, http://www.nytimes.com/2003/06/13/opinion/13iht-edweiss_ed3_.html ("Washington dangles the promise of billions

Street Journal article opened by stating: "The Bush administration has drafted sweeping plans to remake Iraq's economy in the U.S. image. . . . [T]he U.S. is calling for the privatization of state-owned industries such as parts of the oil sector, forming a stock market complete with electronic trading and fundamental tax reform."[240] OEWG member Ibrahim Bahr al-Uloum was appointed to head the Ministry of Oil and immediately announced the need for privatization and foreign investment.[241] A *New York Times* article, significantly based on an interview with al-Uloum, stated, "Iraq is preparing plans for the privatization of its giant oil sector, but a decision will not be taken until after elections."[242] Three weeks later, the title of another *New York Times* article read, "Iraq Is Seen as Crucial Factor in OPEC Move to Cut Output," and the article quoted al-Uloum's forecast that production would reach six million barrels per day by the end of the decade.[243]

In June 2004, appointed Prime Minister Iyad Allawi selected Barham Saleh, a man described as lacking economics training but holding neoliberal convictions, to head the Supreme Council for Oil Policy.[244] The Council issued proposals to "divorce government from running the oil industry and to commercialize its operations," open unexploited reserves to private ownership, gradually privatize resources, and foster rapid production growth.[245] In September, Allawi recommended that Production Sharing Agreements be applied to all fields other than those already in production, which meant opening up sixty-three of Iraq's eighty known oil fields and any newly discovered fields to foreign investment and participation.[246] He further

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in untapped petrodollars before the eyes of desperate Iraqis."); *BP Maps Out Iraq Strategy*, CNN, Apr. 9, 2003, http://www.cnn.com/2003/BUSINESS/04/09/bp.reut/.

240. Neil King Jr., *Bush Officials Draft a Broad Plan For Free-Market Economy in Iraq*, WALL ST. J., May 1, 2003, at A1.

241. *See* Jill Carroll, *Why a Black Market For Gasoline Vexes Iraq*, CHRISTIAN SCIENCE MONITOR, Apr. 20, 2005, at World 06; Eric Pfanner, *Iraq Seen as Crucial Factor in OPEC Move to Cut Output*, N.Y. TIMES, Sept. 26, 2003, at W1; HOUSE, *Privilege*, *supra* note 125 (referencing quotes in several periodicals, noting Uloum's OEWG position was to "[open] to international oil companies as quickly as possible after the war. . .[and] attract investment of oil and gas resources," and documenting later announcements of intentions to privatize the industry after becoming Oil Minister).

242. Nicolas Pelham, *Iraqi Minister Sees Oil Privatization Obstacles*, N.Y. TIMES, Sept. 5, 2003.

243. Pfanner, *supra* note 241.

244. Mahdi, *supra* note 72, at 14 n.9.

245. *Id.*

246. *See* REP. OF IRAQ COUNCIL OF MINISTERS, OIL & ENERGY COMMITTEE, FINAL DRAFT IRAQ OIL AND GAS LAW (Feb. 15, 2007), art. 12(B), *available at* http://web.krg.org/uploads/documents/Draft%20Iraq%20Oil%20and%20Gas%20Law%20English__2007_03_09_h17m2s47.pdf [hereinafter IOG LAW] (proposed law affirming INOC authority over existing

contended that production would more than triple to six to eight million barrels per day within five years.[247] At a National Press Club Conference, appointed Iraqi Finance Minister Mahdi announced plans for a new petroleum law and predicted that opportunities would be "very promising to the American investors and to American enterprise, certainly to oil companies."[248] In early 2005, Ahmed Chalabi, who already had a history of making similar statements, was appointed chair of the Iraqi Energy Council and became the interim Oil Minister in December.[249] Also, many former American and British multinational executives were appointed to Ministry of Oil advisory positions and to CPA-Ministry of Oil liaison positions,[250] perhaps giving an impression that policies and opportunities would favor particular interests. OEWG advisors contended that "drawing upon international experience, from the oil industry or other sectors, . . . might calm fears of those opposing de-monopolization" reform.[251]

Accommodating optimistic estimates from reform-oriented appointees, the White House provided an "instructional" approach to shape premises favoring reform.[252] A U.S. State Department/Bearing Point Study selected seven country models—Kuwait, Iran, Venezuela, Indonesia, Malaysia, Saudi Arabia, and Azerbaijan—categorized them by varying degrees of government involvement in the oil industry, and presented indicators of prudent operation to foster R&D, effective business practices, and "good governance and the

fields bill but opening others to foreign investment); *see also* HOUSE, *Privilege*, *supra* note 125 (referencing Allawi's "guidelines to the Supreme Council for Oil Policy"); ARNOVE, *supra* note 58, at 75; Carola Hoyos, *Baghdad Re-entry to Market 'Could Have Big Impact,'* FIN. TIMES, Feb. 21, 2003 (Yergin contending that control over Iraq will be of great significance because of "the scale of the resources" and potential "realignment" of oil exporting interests); Muriel Mirak-Weissbach, *Cheney's Oil Law for Iraq is Neocolonial Theft*, GLOBAL RESEARCH, Oct. 8, 2007.

247. REP. OF IRAQ, IRAQI STRATEGIC REV. BOARD, MINISTRY OF PLANNING AND DEVELOPMENT COOPERATION, NATIONAL DEVELOPMENT STRATEGY 2005-2007, at 15, June 30, 2005, *available at* http://siteresources.worldbank.org/IRFFI/Resources/Iraq-NDS-July14-FINALFINAL[1].pdf.

248. *See* Jefferson Morley, *Washington's Waning Influence in Iraq*, WASH. POST, Feb. 22, 2005; Juhasz, *supra* note 156; Mekay, *supra* note 187.

249. *See Minister Goes in Iraq Oil Crisis*, BBC, Dec. 30, 2005; *see also* Lionel Beehner, *Backgrounder: Iraq and Oil: Revenue-Sharing Among Regions*, COUNCIL ON FOREIGN RELATIONS, Dec. 29, 2005, *available at* http://www.cfr.org/publication/9482/iraq_and_oil.html.

250. *See, e.g.*, Neela Banerjee, *A Retired Shell Executive Seen as Likely Head of Production*, N.Y. TIMES, Apr. 2, 2003, at B12; David Teather, *American to Oversee Iraqi Oil Industry*, GUARDIAN, Apr. 26, 2003; *see also* HOUSE, *Privilege*, *supra* note 125 (referencing multinational executive appointees); Mahdi, *supra* note 72, at 15; Palast, *supra* note 229; Renner, *supra* note 217.

251. STATE DEP'T, *supra* note 156, at 4.

252. *See supra* notes 244-50; *see infra* notes 253-56.

rule of law."[253] It also presented foreign participation modes to accommodate a time frame for "rehabilitating" and "developing" the oil sector.[254] The report produced from the study does not overtly favor a particular reform model but itemizes justifications for decentralizing power and control from the central government to achieve an industry market structure and attract foreign investors with lower risk and guaranteed return.[255] It emphasizes the commercial-like environment in the selected countries and recognizes that dominant companies in those countries are all state-owned.[256] However, the report does not explore public interest consequences of state-ownership, or mention the impact of OPEC production quotas on industry operations, and only discusses foreign investment vehicles in abstract and non-quantitative terms.

B. Rent-Seeking as a Potential Cause of Conflict and Market Instability

Privatization and related reform measures that reduce government involvement in the oil industry can impact public interest and foreign investors. Proposals to weaken government control over extraction and to permit foreign investment are apt to breed uncertainty among OPEC members. This uncertainty may then create trader uneasiness about future global supply and commodity pricing. This section discusses key economic impacts of proposed Iraqi oil law reform measures and how they may breed anxiety. The proposed federal law that sought to implement reforms by creating new institutions in Iraq is discussed in the next section.

In a privatized world that lacks substantial government restrictions over commodity or product supply, the efficient market presumption is that competitive entities will make production decisions to maximize profits and shareholder value.[257] Without supply collusion, an industry's infrastructure capacity would be maximized based on demand and price expectations.[258]

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253. BEARING POINT & USAID, OPTIONS FOR DEVELOPING A LONG TERM SUSTAINABLE IRAQI OIL INDUSTRY 7-8, 32, Dec. 19, 2003, *available at* http://www.platformlondon.org/carbonweb/documents/Bearing_Point_Iraq_oil.pdf.

254. *Id.* at 1-2.

255. *See id.* at 7 ("[M]ore and more countries are coming to realize that these non-core obligations have imposed costs upon the NOC [national oil sector] and may have diluted the incentive to maximize profits, hindering the entity's ability to raise external capital, to compete at international standards, and to maintain or expand the country's oil production capacity, which should be its main function.").

256. *See id.* at 1, 10-13.

257. William Lazonick & Mary O'Sullivan, *Maximizing Shareholder Value: A New Ideology for Corporate Governance*, 29(1) ECON. & SOC. 13 (2000).

258. *See* Joseph E. Stiglitz, *Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Frameworks in a Globalized World Balancing Rights and Responsibilities,*

Product supply would abound, profit margins would decrease, and a lower equilibrium price would exist for consumers.[259] Ergo, *if* OPEC's existence and oil production quota decisions do set artificially high prices,[260] then competing (rather than cooperating) interests would be apt to supply more oil and global consumers would be appeased with lower prices.[261]

Higher prices decrease GDP, increase food and other commodity prices, and lower expendable income.[262] The undesirability of these conditions is espoused by those who favor weakening OPEC. However, the price that maximizes consumer utility is arguably inversely correlated with the rent-seeking interests of *both* producer countries and multinationals, and may even be met by relative indifference from some industry and political interests.[263]

When supply system principles are applied to drastic reform initiatives, such as those pushing privatization and foreign participation in Iraq, interests become multifaceted and not entirely self-evident. One might assume that multinationals would prefer privatization if it permits enhanced operational control and lowers risk by granting property rights. But if privatization places oil production decisions within the prerogative of the private sector (with no OPEC quotas), and Iraq either sets a precedent for privatization or diminishes

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23 AM. U. INT'L L. REV. 451, 484-86 (2008) (referencing dominance of Adam Smith's "invisible hand" as a basis of neoliberal theory and explaining that it should not be regarded as ironclad).

259. *See* LÉON WALDRAS, ELEMENTS OF PURE ECONOMICS (1874) (Allen & Unwin, eds. 1954).

260. *See supra* notes 2, 4-6, 9-11; *see infra* notes 417-25. Since OPEC meeting announcements typically reference quota decisions based on whether the market is adequately supplied, an alternative view is that the quota itself is a *perception* rather than an actual limitation that sets an artificially high price.

261. ROBERT PITOFSKY, HARVEY J. GOLDSCHMID, & DIANE P. WOOD, TRADE REGULATION 490 (5th ed. 2003). The assumption of preferring lower prices emphasizes short- and mid-run public interest as a function of measurable consumer utility. Alternatively, a longer term speculative perspective is that higher oil prices *now* might stimulate alternative energy innovations and thereby lower energy prices in the future.

262. *See supra* notes 7-8, 61.

263. *See* Ralph S. Brown, Jr., *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 108 YALE L.J. 1619, 1633-34 (1999); Richard A. Oppel Jr., *Cheney Tax Plan From '86 Would Have Raised Gas Prices*, N.Y. TIMES, April 6, 2004, at A20 (Senator Cheney remarking that Americans had to rid themselves "of the fiction that low oil prices are somehow good for the United States"); *SUVs and the Politics of the Energy Bill*, NPR (June 18, 2007), http://www.npr.org/templates/story/story.php?storyId=11164724 (noting luxury SUV current-year tax write off advocacy as an economic stimulus seems to exhibit indifference). U.S. automakers advocated high oil consumption patterns during the 1990s by favoring SUVs, opposed electric vehicles, and rejected higher efficiency standards. *See* KEITH BRADSHER, HIGH AND MIGHTY: SUVS--THE WORLD'S MOST DANGEROUS VEHICLES AND HOW THEY GOT THAT WAY 388-96 (2002); Don Mayer, *Corporate Citizenship and Trustworthy Capitalism: Cocreating a More Peaceful Planet*, 44 AM. BUS. L.J. 237, 265 (2007).

OPEC power, then future oil prices and multinational revenues could be lower.[264] U.S. producers supply forty percent of domestic oil consumption from U.S. reserves and participate in foreign production,[265] which means that multinationals generate a higher percentage of revenues at the market price by *free riding* on any potential impact that OPEC may have on setting a higher global market price.[266] If multinationals act to increase shareholder value by maximizing risk-adjusted profit expectations,[267] then their optimum rational preference would likely be to favor reform that guarantees long-term exclusive production rights, short of privatization, with a reasonable national level cap on production. Multinationals dominate the global shipping and vertical distribution chain, add value during refining (e.g. converting crude oil into petroleum), and franchise gas stations that sell fuel to consumers, but they still procure a percentage of oil from many foreign sources at a cost closer to the market price than to the cost of extraction.[268] Naturally, profit margins have the potential to be higher if multinationals participate in production and replace a higher percentage of oil acquired at market price

264. *See Newsnight*, *supra* note 150 (emphasizing that American oil company interest in Iraq is long-term access and distribution rights, but multinationals may oppose privatization if OPEC's existence correlates with higher prices). Oil companies sometimes advocate policy shifts toward countries such as Iran, Iraq, and Libya away from confrontation to normal diplomatic relations. *See* Cyrus Bina, *The American Tragedy: The Quagmire of War, Rhetoric of Oil, and the Conundrum of Hegemony*, J. IRANIAN RES. & ANALYSIS, Nov. 2004, at 7, *available at* http://www.urpe.org/ec/Iran/bina_oil_2.pdf. Easing tensions would likely reduce risk and potentially open opportunities, but perceptions of "turbulence" may raise uncertainty and increase prices.

265. *See supra* notes 36-37; *infra* notes 268, 448-54.

266. *See* RICHARD CORNES & TODD SANDLER, THE THEORY OF EXTERNALITIES, PUBLIC GOODS AND CLUB GOODS (1986) (expressing a broader theorization of the traditional public goods free rider problem with reference to "uncompensated interdependencies"); *The Cowardly Giants*, NEWSWEEK, Nov. 17, 2007, http://www.newsweek.com/2007/11/17/the-cowardly-giants.html.

267. JOEL BAKAN, THE CORPORATION: THE PATHOLOGICAL PURSUIT OF PROFIT AND POWER 60 (2004); MARJORIE KELLY, THE DIVINE RIGHT OF CAPIRAL: DETHRONING THE CORPORATE ARISTOCRACY 19-28 (2001); Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at 17.

268. *See generally* Fernanando Barrera-Rey, *The Effects of Vertical Integration on Oil Company Performance*, OXFORD INSTITUTE FOR ENERGY STUDIES (Oct. 1995), http://www.oxfordenergy.org/pdfs/WPM21.pdf; Wes Kusner et al., *Oil Industry: Global Value Chains*, DUKE UNIV., http://www.duke.edu/web/soc142/team9/GVC.html (last visited Aug. 6, 2010) ("Although the overall production of oil is driven by global demand, the value chain in producer-driven and many of the companies are vertically integrated and have control over every level in the chain."); SAMPSON, *supra* note 66, at 58.

cost with oil acquired at something closer to extraction cost, which may be as low as $1 to $2 in the Middle East.[269]

The reverse side of the rent-seeking shift by which multinationals can replace a higher percentage of market price cost with extraction cost is the effect on Iraqi public interest. Participation via either Production Sharing Agreements or concessions redirects revenues from the public to the private producer, and the public instead receives allocated percentages of that market price revenue. Foreign producers hold long-term and exclusive production rights while Iraqis retain the remainder interest in an exhaustible resource and receive various revenue sharing and taxation percentages depending on the terms of the foreign participation vehicle. Meanwhile, the typical nationalized OPEC member exports at the market price and revenues remain with the domestic producer. World Bank consultant Mamdouh Salameh contends that the U.S. invasion of Iraq was "undoubtedly about oil" and emphasizes that the optimistic estimates of 330 billion barrels of proven and probable oil reserves at a high $130 per barrel price would be valued at $42.9 trillion—over three times the annual U.S. GDP.[270] Others explain that Iraq produced oil without external assistance and investment for over three decades,[271] and that trading domestic control for new technology and expertise brought by foreign multinationals is not imperative, given the ease of accessing Iraq's reserves (by comparison to off-shore operations, such as those in the North Sea) and low exploration costs with already-mapped giant oil fields.[272] This potential future revenue loss, however, is the trade-off for receiving a present large capital infusion from risk-bearing investments. Estimates for necessary oil field investments in Iraq have ranged from $1

269. Robert Grosse & Juan Yanes, *Why Oil Will Cost $5 per Barrel in 2010*, 25 FLETCHER F. WORLD AFF. 59, 62 n.4 (2001).

270. Mamdouh G. Salameh, *The Oil 'Price Rise' Factor in the Iraq War: A Macroeconomic Assessment* 1 (U.S. Assn. For Energy Econ. Working Paper Series 08-008, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1140333.

271. *See, e.g.*, Banerjee, *supra* note 193; Helmut Merklein, *Who Needs Big Oil in Iraq: The Case for Going it Alone*, MIDDLE EAST ECON. SURVEY (Dec. 1, 2004), http://www.menafn.com/qn_print.asp?StoryID=38863&subl=true.

272. *See* Saeed Shah, *Scramble for Iraq's Oil Begins as Troops Start to Pull Out*, INDEPENDENT, Feb. 23, 2007, at Business 58; Tariq Shafiq, *Iraq's Draft Petroleum Law: An Independent Perspective*, MIDDLE EAST ECON. SURVEY (Feb. 19, 2007), http://www.mees.com/postedarticles/oped/v50n08-5OD01.htm; Heather Stewart, *Iraq Poised to Hand Control of Oil Fields to Foreign Firms*, OBSERVER, Feb. 25, 2007, at Business 1; Hassan Jumah Awwad al-Asadi, Head of the Fed'n of Oil Unions, Speech on Oil Law: History Will Not Forgive Those Who Play Recklessly With Our Wealth (Feb. 6, 2007) (transcript available at http://www.basraoilunion.org/2007/02/history-will-not-forgive-those-who-play.html) (expressing adamant opposition and noted that technical training, higher technology, and foreign capital were unnecessary).

billion to $38 billion, depending on production targets and time periods for development.[273]

These economic results may be what is presently on the cusp of unfolding in Iraq. The rhetoric that heightened industry efficiency was required to surmount extraordinary production goals drove the perception of need for large-scale foreign capital infusion. Initial goals of at least three million barrels per day or more were espoused,[274] which were modest, within OPEC's quota system, and did not invoke controversy. What did invoke controversy were production estimates that significantly exceeded modest increases, the parties advocating production criterion, and plans for how goals would be achieved.[275] The OEWG report, the State Department/Bearing Point Study, exile statements, the Bush administration, and interested party advice all presumed that foreign investment was required to substantially increase production with greater efficiency in the national public interest to support economic development and democratization.[276]

Undeniably, oil revenues are a public imperative since they previously accounted for more than ninety percent of government revenue,[277] but because of the structure of the global oil market, it is not clear that producing more or achieving greater efficiency would be the public's rational choice. If Iraq doubled production, but new laws and institutions primarily shifted revenues to the private sector of foreign and/or *nouveau riche* domestic oil companies,

273. *See, e.g.*, Merklein, *supra* note 271; Sam Vaknin, *Analysis: Is it All About Oil?*, UPI, Mar. 20, 2003, http://www.upi.com/Business_News/2003/03/20/Analysis-Is-it-all-about-oil-II/UPI-24021048173854. There may also be perception differences about foreign investment between global commodity traders, multinationals, and financiers who understand investment opportunities, and the media's portrayal of OPEC or Iraqi perceptions. Consider this opening paragraph in a more recent article: "Iraq is *poised* to open its coveted oil fields to foreign companies this week for the first time in nearly four decades, a politically risky move in a country *eager to shake off the stigma* of occupation." Ernesto Londoño & K.I. Ibrahim, *Iraq Set to Seek Foreign Oil Bids: Critics Say Contracts Will Benefit Giant Firms, Hurt Government Politically*, WASH. POST, June 28, 2009 (emphasis added); *see also* Carola Hoyos, *Call for Opec to Let in Oil Majors to Boost Output: Total Chief Believes Expertise of Industry Leaders Can Help to End Shortages*, FIN. TIMES, Sept. 13, 2004, at 1 (noting that OPEC members "must open their doors to international oil companies to ensure that supply meets growing demand").

274. Merklein, *supra* note 271. By comparison, Saudi Arabia produces 11 million bbl/d and Iran produces 4.2 million bbl/d, countries that are over four times and three times the geographic size as Iraq respectively. *See Country Analysis Briefs: Saudi Arabia*, U.S. ENERGY INFO. ADMIN. 2, http://www.eia.doe.gov.emeu/cabs/Saudi_Arabia/pdf.pdf (last updated Nov. 2009); *Country Analysis Briefs: Iran*, U.S. ENERGY INFO. ADMIN. 3, http://www.eia.doe.gov/emeu/cabs/Iran/pdf.pdf (last updated Jan. 2010).

275. *See generally* Parts VI(A)(B), VII(A).

276. *See supra* notes 156, 175, 192-94, 237-53; *see infra* notes 292-97.

277. *See* Kanan Makiya, Op-Ed., *Present at the Disintegration*, N.Y. TIMES, Dec. 11, 2005, at WK13; BLANCHARD, *supra* note 73, at summary, 1.

and those entities recouped most of the value from additional production, the real value to the public may actually decrease.[278] Resources could be depleted twice as rapidly with only marginal increased public benefit from additional production.[279] Moreover, while it may not be controversial that the private sector, and particularly multinationals, can be more efficient in production,[280] achieving efficiency improvements of 10%, 25%, or even 50% seems inconsequential *if* public/private rent-seeking shifts from market revenues on additional production can approximate 100% to 500%, particularly with

278. *See* Juhasz, *supra* note 156; Vernon L. Smith, *The Iraqi People's Fund*, WALL ST. J., Dec. 22, 2003, at A14 ("A central issue in Iraq . . . remains whether the people control government through voting and taxes or the government controls the people through a monopoly of natural resources.").

279. Alternatively, one can postulate scenarios where there is desire to maximize production and perhaps even indifference over whether foreign participation is utilized to achieve higher production. For example, as a contraposition to "peak oil," renewable energy resources might gradually lower global demand, drop price, and leave a future Iraq with a retrospective sentiment of regret that it did not supply a maximum quantity at a somewhat lower price. Anticipated value of remaining reserves fifty years forward are endogenous to some oligopolistic behavior and forecasting models. *See* James Griffin & Weiwen Xiong, *The Incentive to Cheat: An Empirical Analysis of OPEC*, 40 J.L. & ECON. 289, 293-99 (1997). Interim winners of substantially-increased production are global consumers with lower price and Iraqis with potentially higher total revenues (but lower reserves with marginal residual value). Losers are other oil endowed nations with less revenue due to lower price at potentially lower supply quantities. Technological development may make such a market structure possible, but from the perspective of present conditions, such a scenario requires layering numerous contingencies to register a rational choice. There are more immediate conditions that influence perceptions.

280. This premise has been justified on multiple theoretical grounds for decades. *See, e.g.*, M. OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965) (discussing public choice and interest group advocacy); JOHN VICTORS & GEORGE YARROW, PRIVITIZATION: AN ECONOMIC ANALYSIS (1988) (noting that some industry case studies refute privatization/greater efficiency assumption); O.E. WILLIAMSON, THE ECONOMICS OF DISCRETIONARY BEHAVIOR: MANAGERIAL OBJECTIVES IN A THEORY OF THE FIRM (1964) (employing agency theory); A.A. Alchian & H. Demsetz, *Production, Information Costs and Economic Organizations*, 62 AM. ECON. REV. 777 (1972) (applying property rights theory); H. Averch & L.L. Johnson, *Behaviour of the Firm Under Regulatory Constraint*, 52 AM. ECON. REV. 1052 (1962) (discussing regulatory control theory); K.L. Dewenter & P.H. Malatesta, *State-Owned and Privately Owned Firms: An Empirical Analysis of Profitability, Leverage, and Labor Intensity*, 91 AM. ECON. REV. 320, 320-34 (2001) (utilizing empirical confirmation). Recent studies have even found that nationally-owned oil companies are less efficient than privately owned companies. *See* Nadejda Makarova Victor, *On Measuring the Performance of National Oil Companies (NOCs)* 21 (Standford Univ. Program on Energy & Sustainable Dev., Working Paper No. 64, 2007), *available at* http://iis-db.stanford.edu/pubs/21984/WP64,_ Nadja_Victor,_NOC_Statistics_20070926.pdf; Christian Wolf, *Does Ownership Matter? The Performance and Efficiency of State Oil vs. Private Oil (1987-2006)* (Univ. Of Cambridge-Judge Bus. Sch., Working Paper, 2009), *available at* http://ssrn.com/abstract=1139025.

sustained higher market prices. With multifarious clashing domestic and international interests, it is not surprising that it would take four years to achieve the first tangible manifestation of federal-level Iraqi energy law reform.

VII. Iraq's 2007 Oil and Gas Bill

A. Political Will and Regulatory Authority

If a country chooses to legitimately exploit its natural resources, then there presumably must be an acceptable balance between public and private rights. On the one hand, increasing short-term supply of a resource, such as oil, could be accomplished by increasing production of existing facilities within months. Increasing production on these facilities will involve preexisting conditions, rights, obligations, and norms. However, the drilling, completion, production, infrastructure construction, and transport of oil from new facilities to already-existing or new pipelines can take much longer. Moreover, tapping new fields will invoke new property and contract rights, which are apt to gain legitimacy by garnering political will and ideally having a sanctioning legislative structure. For Iraq, since production from preexisting oil fields was not meeting new target levels, there was much pressure to adopt a new federal energy law structure. This pressure resulted in the 2007 oil and gas law draft bill, which was not enacted into law, but has nonetheless resulted in PSAs with foreign investors pursuant to its terms.

The "Restore Oil" contract was awarded prior to the invasion and obligated Halliburton to optimize production on existing fields.[281] By 2007, Halliburton had charged $2.4 billion to repair the existing infrastructure,[282] but 2008 production was only about 2.5 million barrels per day, which was lower than pre-invasion levels.[283] The company blamed security problems,[284] but low production numbers might not have been precise due to the lack of metering

281. *See supra* notes 195-202.

282. *See* Edward Epstein, *Firm Linked to Cheney Wins Oil-Field Contract: Hussein May Destroy Facilities in Event of War*, S.F. CHRON., Mar. 8, 2003, at A12; Memorandum from Minority Staff to the Member of the Committee on Oversight and Government Reform (Feb. 15, 2007), *available at* http://www.reform.democrats.house.gov/documents/20070215105317-73621.pdf.

283. *See* Andrew E. Kramer, *Deals With Iraq Are Set to Bring Oil Giants Back*, N.Y. TIMES, June 19, 2008, at A1; Ghazi Sabir-Ali, *Let Iraqis Rebuild Their Own Country*, GUARDIAN, Aug. 1, 2003, Guardian Leader 23 (former Iraqi oil executive contending that within fourteen days of the 1991 Gulf War oil was pumping at 75% of pre-war capacity and also explaining that four months into the present invasion, Iraq was importing oil for the first time in sixty years and paying excessive prices).

284. *See* Kramer, *supra* note 283, at A1.

equipment to accurately track crude oil extraction.[285] The U.S. Government Accountability Office ("GAO") estimated that hundreds of thousands of barrels may have been unaccounted for each day due to theft and smuggling.[286]

For several years, the media relayed political leaders' optimistic announcements of drastic production increases and promises of legislative reform, but news releases also depicted potential disruption to oil production and public hostility to market-based institutional structures, foreign investment, and even occupation.[287] The succession of exiles, appointed leaders, and pro-occupation officials needed no goading to publicly promise extensive and expeditious market reform and a prominent role for multinationals.[288] Others maintained that economic reform measures were externally-dictated, which may not have boded well for expectations of stability since the *ex post facto* "liberation" justification for invasion presumed "democratic will" would determine natural resource rights and transactions.[289]

Highly publicized legislative initiatives embodied the greatest likelihood of adoption in early 2007 and controversy coincided with oil market prices escalating to new highs.[290] Later-elected Iraqi officials, who would ostensibly have a greater shared interest with the populace than did earlier CPA-appointed and exile-run governments, were urged by the United States, oil companies, and other foreign interests to enact new laws.[291] That prodding even involved the IMF preconditioning loan assistance on promises to enact a new petroleum law by the end of 2006.[292]

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285. *Covering the Period from the Establishment of the DFI on May 22, 2003 Until the Dissolution of the CPA on June 28, 2004*, INT'L ADVISORY & MONITORING BD. OF THE DEV. FUND FOR IRAQ, 2-4, 7-8, 11, http://www.iamb.info/pdf/iamb_ 12142004.pdf (last visited Sept. 15, 2010) (noting that the Board repeatedly asked CPA to install metering equipment).

286. *See id.* at 4; Gina Chon, *Turf War Hits Iraq's Oil Industry*, WALL ST. J., July 30, 2008, at A1; Senators Hillary Rodham Clinton & John Ensign, *An Oil Trust for Iraq*, WALL ST. J. Dec. 18, 2006, at A16 (strong mechanisms needed to secure production revenues from pilfering and corruption); James Glanz, *Billions in Oil Missing in Iraq, U.S. Study Finds*, N.Y. TIMES, May 12, 2007, at A1; Philip Shishkin, *Losing Fuel: Pipeline Thefts Cripple Iraqi Oil Production*, WALL ST. J., May 25, 2007, at A1; BLANCHARD, *supra* note 73, at 20-21.

287. *See generally* infra Part X.

288. *See supra* notes 156-57, 192, 239-52.

289. *See* Bejesky, *Politico*, *supra* note 19, at 74-77; *infra* notes 292-304.

290. *See* chart *infra* Part X.

291. *See infra* notes 293-97.

292. Tina Susman, *Iraqis Resist U.S. Pressure to Enact Oil Law*, L.A. TIMES, May 13, 2007, http://articles.latimes.com/2007/may/13/world/fg-oil13; *Iraqi: Letter of Intent, Memorandum of Economic and Financial Policies*, INT'L MONETARY FUND 10 (Dec. 6, 2005), http://www.imf.org/external/np/loi/2005/irq/120605.pdf; BLANCHARD, *supra* note 73, at 25.

In the United States, Section 1314 of FY2007 Supplemental Appropriations Act espoused that the "passage of oil and gas sector framework and revenue sharing legislation" were "important benchmarks that would indicate the current Iraqi government's commitment to promoting political reconciliation and long term economic development."[293] Consequently, Prime Minister Nouri al-Maliki appointed a three-member Oil and Energy Committee to draft legislation.[294] In February 2007, al-Maliki's cabinet approved the Committee's product.[295] To become binding, the bill required legislative approval, but there were no public consultations, hearings, parliamentary committee debates, or investigations.[296] The Bush administration, oil companies, and the IMF had received copies of the bill, and the British Parliament debated the bill and its consequences,[297] but the Kurdish delegation, which held 53 of the 275 seats in the parliament, complained on the eve of the scheduled vote that its members had not yet seen the proposed law.[298]

The bill met fierce resistance from the public, economists, government officials, politicians, trade unions, organizations, and various sector interests which emphasized that external investment was unnecessary to develop energy resources.[299] There were large protests and oil workers went on

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293. BLANCHARD, *supra* note 73, at 2.

294. *See id.* at 6.

295. *See* Edward Wong & Damien Cave, *Iraq Cabinet Approves Draft Oil Law*, N.Y. TIMES, Feb. 26, 2007, http://www.nytimes.com/2007/02/26/world/africa/26iht-iraq.4729390.html.

296. *See* Mahdi, *supra* note 72, at 14; Mahdi, *supra* note 98.

297. *See* 455 PARL. DEB., H.C. (6th Ser.) (2007) 1500, *available at* http://www.publications.parliament.uk/pa/cm200607/cmhansrd/cm070124/debtext/70124-0016.htm#07012465000725 (MP Michael Meacher remarking: "[A] new draft law is about to be pushed through the fledgling Iraqi Parliament by the United States that will set up contracts to allow major US and British oil companies to extract substantial parts of the oil profits for a period of up to 30 years. No other middle eastern producer-country has ever offered such hugely lucrative concessions to the big oil companies.").

298. *See* BLANCHARD, *supra* note 73, at 4.

299. *See* Chip Cummins & Hassan Hafidh, *Iraqi Oil Wealth Stays Locked Up*, WALL ST. J., Feb. 20, 2007, at A8; *Kurds Speak Out Against Key Oil Law*, ASSOCIATED PRESS, July 11, 2007, http://www.usatoday.com/news/world/2007-07-11-iraq-oil-law_N.htm; *Nobel Laureates Condemn Iraq Oil Law, U.S.*, UPI, June 20, 2007, http://www.upi.com/Science_News/Resource-Wars/2007/06/20/Nobel-laureates-condemn-Iraq-oil-law-US/UPI-63571182375086/; Joshua Partlow, *Missteps and Mistrust Marks the Push for Legislation*, WASH. POST, Sept. 5, 2007, at Foreign A12; *Sunni Clerics Group Attacks Iraq's Draft Oil Law*, REUTERS, Mar. 6, 2007, http://www.alertnet.org/thenews/newsdesk/PAR649745.htm; Jonathan Steele, *Good News from Baghdad at Last: The Oil Law Has Stalled*, GUARDIAN, Aug. 3, 2007, at 35; *Top Iraq MP: No Oil Law under Occupation*, UPI, Aug. 3, 2007, http://www.upi.com/Science_News/Resource-Wars/2007/08/03/Top-Iraq-MP-No-oil-law-under-occupation/UPI-71641186174090/; Erik Leaver & Greg Muttitt, *Slick Connections: U.S. Influence on Iraqi Oil*,

strike.[300] Over four hundred leading academics, industry experts, and engineers provided a written interpretation of the bill and contended that "it is clear that the Iraqi government is trying to implement one of the demands of the American occupation" and the legislative framework "lays the foundation for a fresh plundering of Iraq's strategic wealth and its squandering by foreigners, backed by those coveting power in the regions, and by gangs of thieves and pillagers."[301] Furthermore, Professor Kamil Mahdi remarked that the bill had only been discussed "behind closed doors," that parliament and the government had not yet proven to be "capable of protecting the country's sovereignty and the people's rights and interests," and that it would not be in Iraq's best interest or "fair" to pass a law that permitted long-term contracts under occupation without conditions of peace.[302]

An April 2008 Congressional CRS Report emphasized the highly-public consternation over "foreign participation," but also cited the "proper role and powers of federal and regional authorities in regulating oil and gas development" and revenue sharing formulas as key sources of disagreement.[303] After months of parliamentary haggling over alternative language, debates on the cabinet-approved bill terminated without agreement.[304] Other draft laws are still being considered.[305] Nonetheless, apposite language, toiled over during the drafting of the proposed 2007 oil

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FOREIGN POLICY IN FOCUS 1 (July 17, 2007), http://www.carbonweb.org/documents/Slick_Connections.pdf.

300. David Bacon, *Iraqi Worker's Strike to Keep Their Oil*, DOLLARS & SENSE, Sept./Oct. 2007, at 272; Claudia Parsons, *Iraqi Union Leader Urges Opposition to Oil Law*, REUTERS, June 18, 2007, http://www.reuters.com/article/idUSN18475951.

301. JOSEPH E. STIGLITZ & LINDA J. BILMES, THE THREE TRILLION DOLLAR WAR: THE TRUE COST OF THE IRAQ CONFLICT 220 (2008); *419 Iraqi Intellectuals Reject Proposed Oil Law*, 50 MIDDLE EAST ECON. SURVEY (Aug. 13, 2007), http://www.mees.com/postedarticles/oped/v50n33-5OD02.htm.

302. Mahdi, *supra* note 98; BLANCHARD, *supra* note 73, at 5.

303. BLANCHARD, *supra* note 73.

304. *See* Cynthia A. Bolden & Jerrod Fussnecker, *The Status of Kirkuk Under Article 140 of the Iraqi Constitution: The Need for Adjudication By the Iraqi Supreme Court as Part of an Integrated Solution*, 77 U. CIN. L. REV. 1555, 1555 (2009); James Glanz, *Iraq Compromise on Oil Law Seems to Be Collapsing*, N.Y. TIMES, Sept. 13, 2007, at A1; *Iraq MP: Kurds, Government Stall Oil Law*, UPI, Jan. 10, 2008, http://www.upi.com/Science_News/ Resource-Wars/2008/01/10/Iraq-MP-Kurds-government-stall-oil-law/UPI-56181200004114/; Kramer, *supra* note 283 (proposed law still "pending in Parliament"); Alissa J. Rubin, *Iraqi Lawmakers Split on Oil Law*, N.Y. TIMES, July 22, 2007, http://www.nytimes.com/2007/07/22/world/middleeast/22cnd-iraq.html; Susman, *supra* note 292.

305. BLANCHARD, *supra* note 73, at 1; Bolden & Fussnecker, *supra* note 304 at 1578; *Iraq Oil Law a Priority, PM Hopeful Allawi Says*, REUTERS, Mar. 31, 2010, *available at* http://www.reuters.com/article/idUSLDE62U1CO20100331.

and gas law, illustrates clashing international and domestic interests, the commodity market uncertainty existing at the time, and the consequences for current and future potential developments.

The proposed law was not comprehensive, but provided a broad and terse skeletal framework that required supplementation.[306] It emphasized investment procedures without clear government/producer revenue sharing formulae and introduced potentially complex overlapping agency responsibilities.[307] The failed bill makes five federal-level entities responsible for regulating and administering Iraq's oil and gas industry: (1) the Council of Representatives enacts all legislation; (2) the Council of Ministers proposes legislation, policy, and monitors the Oil Ministry; (3) the Federal Oil and Gas Council (FOGC) assists policymaking, coordinates regional responsibilities, proposes legislation, changes, and authorizes "Exploration and Production Contracts" and "Rights," and ensures that resources are discovered, developed, and produced; (4) the Ministry of Oil proposes federal policy and laws, consults with regional authorities, spearheads international negotiations, and enforces the law; and (5) the Iraqi National Oil Company participates in exploration and production operations, and forms subsidiary companies.[308] The FOGC wields overall authority. It is comprised mostly of appointed cabinet ministers, but also includes regional representatives and a "panel of oil experts from inside and outside Iraq."[309] The sixth actor incorporates federalism—Provincial Authorities participate in contracting and collaborate with the Ministry to monitor and supervise industry activities.[310] While public interests could be well represented in industry processes with so many entities involved, excessively-overlapping authorities might also create confusion and abet responsibility-shirking.

B. Public Interest and Production Rights

U.N. principles affirm that a "sovereign state has the sole power to control its natural resources."[311] The Iraqi Constitution states that "oil and gas is the property of all the Iraqi people in all the regions and provinces,"[312] but regions

306. Shafiq, *supra* note 272.

307. Nicole B. Herther-Spiro, *Can Ethnic Federalism Prevent "Recourse to Rebellion?" A Comparative Analysis of the Ethiopian and Iraqi Constitutional Structures*, 21 EMORY INT'L L. REV. 321, 361 (2007).

308. *See* IOG LAW, *supra* note 246, art. 5.

309. *Id.* at 4(38), 5(C)(6); *see* BLANCHARD, *supra* note 73, at 4.

310. IOG LAW, *supra* note 246, art. 5.

311. *Machinists & Aerospace Workers v. OPEC*, 477 F. Supp. 553 (C.D. Cal. 1979), at 567 (referencing UN General Assembly Resolutions 1803, 3821, 3201, 3171, 3016).

312. Articles 1, 25, 108, Doustour Joumhouriat al-Iraq [The Constitution of the Republic of Iraq] of 2005, *available at* http://www.uniraq.org/documents/iraqi_constitution.pdf.

and the federal government exercise those rights and interests.[313] The bill's language generally affirmed these principles,[314] with perpetual resource rights remaining with the local government or "people," while permitting the grant of an "exclusive right" to conduct "Exploration and Production" over a geographical "Contract Area" for a time period.[315] "Exploration and Production Rights" can be granted by a "Regional Authority" or the Oil Ministry, with the FOGC holding ultimate authority over contract terms and approval.[316] A core contention was whether PSAs would be the standard foreign investment vehicle.[317] PSAs can more fully approximate a long-term restrictive property right than a contract, license, service agreement, or joint venture,[318] all of which would normally incorporate more host government financial and regulatory discretion over investor operations.[319] PSAs provide greater investor certainty and control, and shift a higher percentage of risk/reward to the investor. Typical PSA terms, however, do not endow virtual property rights over resources as concessions once did in the pre-OPEC colonial-style agreement.[320]

The bill did not overly embrace any specific investment vehicle, but stated that "contractual terms" will vary and "take account of the specific characteristics and requirements of the individual area, . . . whether resources are discovered or not, the risks and potential rewards . . . and the technological and operational challenges presented."[321] This guiding provision emphasized discretion, but other applicable provisions implied governing investor right parameters that are typically found in a PSA or concession agreement and there were no provisions that direct alternative contract forms.[322] The CRS Report to Congress alluded to the PSA

313. *Id.* at art. 108, 111(1), 117.3; *see* Herther-Spiro, *supra* note 307, at 361; Vanessa J. Jimenez, *Iraq's Constitutional Process: Challenges and the Road Ahead*, 13 HUM. RTS. BRIEF 21, 23 (2005)

314. IOG LAW, *supra* note 246, arts. 9(4), 13.

315. *Id.*, at preamble, art. 13(A)(B)(F).

316. *Id.*, arts. 5(C), 9, 10(B)(C)(D); BLANCHARD, *supra* note 73, at 4.

317. *See supra* notes 176, 246, 299-303; *see infra* notes 318-34. Licenses are also being considered in more recent investment projects. Kadhim Ajrash, *Iraq Oil Ministry Recommends Approving Shell Gas Project*, BLOOMBERG (Mar. 30, 2011), http://www.bloomberg.com/news/2011-03-30/iraq-oil-ministry-recommends-approving-shell-gas-project-1-.html?cmpid=msnmoney.

318. *See* Bindemann, *supra* note 107, at 11.

319. MAZEN LABBAN, SPACE, OIL & CAPITAL 118-19 (2008); Robert Bejesky, *Investing in the Dragon: Managing the Patent Versus Trade Secret Protection Decision for the Multinational Corporation in China*, 11 TULSA J. COMP. & INT'L L. 437, 462 (2004).

320. LABBAN, *supra* note 319, at 9-11; *see supra* Part III.

321. IOG LAW, *supra* note 246, art. 9(B)(3).

322. *See* Bindemann, *supra* note 107, at 9-17.

controversy when it noted that the bill does not mandate the use of PSAs but acknowledged that "the law states that contract holders *may* be given exclusive rights to exploration, development, production, and marketing of Iraqi oil for specified periods. . ."[323]

Article 13(A) of the draft bill states that an "Exploration and Production Contract *shall* give the holder an exclusive right to conduct Petroleum Exploration and Production in the Contract Area." If there is a "Discovery," Article 13(E) provides that the "right *may* be retained by the holder" to "determine the commercial value of a Discovery" for two to four years. Article 13(F) explains that the "holder . . . *may* retain the exclusive right to develop and produce Petroleum" for fifteen to twenty years, as determined by the FOGC.[324] The question is what level of discretion was intended by the FOGC approval process, how the FOGC would have exercised authority, and at what point the "holder" would have had a continuous and indivisible right. The bill referred to "Exploration and Production Contract" in substantive provisions seventy-three times as a single unit and never defined or referenced "exploration" or "production" contracts separately from one another.[325] Possibly this is because foreign investors have a risk/return payoff expectation, which would presumably not involve fronting investment capital for exploration on a pro bono basis.

High-profile dissent over the bill seemed to flow from such ambiguities and highlighted how long-term property rights inevitably collide with public interest.[326] Holders might reap lottery rewards with vested rights that are seemingly irrevocable by subsequent administrations. If an "Exploration and Production Right" is granted, the contract area could be fully exploited for the PSA duration, with the only clear exception being national policy production level restrictions that "shall be applied in a fair and equitable manner and on a pro-rata basis."[327] Viewed only from this bill's superficial framework, if a "Contract Area" yields $500 billion in market price revenues, the holder captures the revenues as reduced by what normally could be various oil distribution, tax, profit, bonus, and royalty sharing processes.[328] With the

323. BLANCHARD, *supra* note 73, at 5 (emphasis added). The OEWG preferred PSAs and contended that they are standard industry practice. STATE DEP'T, *supra* note 156, at 4-5; Greenfield & Todesco, *supra* note 91, at 99 (different perception of common investment vehicles).

324. IOG LAW, *supra* note 246, arts. 13(A)(B)(E)(F).

325. *See id.* Word count retrieves seventy-five instances of "exploration and production" right or contract. *See id.*

326. *See* Christiana Ochoa, *From Odious Debt to Odious Finance: Avoiding the Externalities of a Functional Odious Debt Doctrine*, 49 HARV. INT'L L.J. 109, 135 (2008).

327. IOG LAW, *supra* note 246, art. 20.

328. SVETLANA TSALIK & ANYA SCHIFFRIN, OPEN SOCIETY INSTITUTE, COVERING OIL: A

recent oil price fluctuations and trends, rent-seeking shifts between the "Right Holder" and the Iraqi public interest in the resource not only involve risks associated with discovery and production, but now implicate the possibility that revenues could be generated at per barrel market prices as high as $147.

The only revenue sharing arrangement in the 2007 draft bill was in Article 34, which provides that the right "holder . . . shall pay" a royalty of 12.5 percent of production (to *someone*).[329] The other operative provision governing revenue allocation involved the previously-referenced contract discretion, based on the "specific characteristics" of the "Contract Area" when "Exploration and Production Rights" are granted.[330] Revenue Watch Middle East director Yahia Said remarked: "[T]he aim of this law from the beginning was to promote foreign investment in Iraq's oil sector. Yet while the law opens the door for foreign companies, there are careful, deliberate mechanisms in place to maintain control in the hands of national government."[331] Professor Mahdi disagreed and contended that Iraqi national and regional authorities are weak, lack "negotiating or economic strength," and "will likely be forced to rely on contracts preferential to foreign oil companies."[332] He further explained that the "range of measures" presented in the bill opens the door to later privatization.[333]

Given such discretionary authority within Iraq's incipient democracy, some could contend that granting "Right Holders" two-decade-long PSAs that generate market price revenues, with *potential* production quantity discretion, unduly undermines public interest and conflicts with the Constitution's affirmation that "oil and gas is the property of all the Iraqi people." The Constitution provides some basis for undoing a granted PSA, which is precisely what many Iraqi political leaders have already argued for with regard to recently granted production rights.[334] Whether a "Right" can be annulled, from the perspective of either public interest or investor risk, however, depends on interaction among several provisions.

REPORTER'S GUIDE TO ENERGY AND DEVELOPMENT 76-77 (2005); Nutavoot Pongsiri, *Partnerships in Oil and Gas Production-sharing Contracts*, 17 INT'L J. PUB. SECTOR MGMT. 432-35 (2004); Bindemann, *supra* note 107, at 15.

329. IOG LAW, *supra* note 246, art. 34; *see also* Mahdi, *supra* note 72, at 19 (calling 12.5 percent royalty an "excessively high rate of profit" to the "exploration and production right" holder).

330. IOG LAW, *supra* note 246, arts. 9, 10(B)(C)(D). *But see* Pepe Escobar, *US's Iraq Oil Grab is a Done Deal*, ASIA TIMES, Feb. 28, 2007 (explaining that the legal status of oil fields and revenue sharing remain unclear under proposed law).

331. BLANCHARD, *supra* note 73, at 5.

332. Mahdi, *supra* note 72, at 17.

333. *Id.* at 19.

334. *See infra* notes 351-64.

Article 25 of the Constitution affirms that the "State shall guarantee the reform of the Iraqi economy in accordance with modern economic principles to insure full investment of its resources, diversification of its sources, and the encouragement and development of the private sector."[335] Article 26 specifies that the "State shall guarantee the encouragement of investment in the various sectors, and this shall be regulated by law."[336] Article 112 states that the government "shall . . . formulate the necessary strategic policies to develop the oil and gas wealth in a way that achieves the highest benefit to the Iraqi people using the most advanced techniques of the market principles and encouraging investment."[337] Article 23 addresses the sanctity of foreign investment: "Private property is protected. . . . Expropriation is not permissible except for the purposes of public benefit in return for just compensation, and this shall be regulated by law."[338] Iraqis lived in a relatively closed, socialized, and developing country, but managed to codify both "property rights" and proscriptive capitalist policymaking as "Fundamental Rights and Liberties" in the Constitution.[339]

C. Federalism and OPEC

Iraq's federal structure produced tension over revenue sharing, regulatory authority, and OPEC relations. The proposed bill geographically divided resources into regional sectors. This is consistent with the Constitution's re-codification of the federalism structure that was imposed by Article 4 of the CPA's Transitional Administrative Law and OEWG recommendations.[340] Adhering to strict sub-national territorial prescriptive jurisdictional prerogative, however, is not necessarily consistent with constitutional provisions that require Iraq's natural resource wealth be distributed in a "fair manner"[341] since some regions are more resource-endowed.[342]

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335. Article 25, Doustour Joumhouriat al-Iraq [The Constitution of the Republic of Iraq] of 2005, *available at* http://www.uniraq.org/documents/iraqi_constitution.pdf.

336. *Id.* at art. 26.

337. *Id.* at art. 112(2).

338. *Id.* at art. 23; *see* M.H. Mendelson, *Compensation for Expropriation: The Case Law*, 79 AM. J. INT'L L. 414 (1985) (noting that how to quantify "just compensation" for long-term contract rights involving natural resources is a enduring international law issue).

339. Section 2, Doustour Joumhouriat al-Iraq [The Constitution of the Republic of Iraq] of 2005, *available at* http://www.uniraq.org/documents/iraqi_constitution.pdf. All aforementioned provisions except for article 112 appear in this section. *Id.*

340. *See* IOG LAW, *supra* note 246; *see also* Andrew George, *We Had to Destroy the Country to Save It: On the Use of Partition To Restore Public Order During Occupation,* 48 VA. J. INT'L L. 187, 187 n.1 (2007) (noting that Bush administration officials openly spoke of "partitioning" Iraq into three countries).

341. Article 1, Doustour Joumhouriat al-Iraq [The Constitution of the Republic of Iraq] of

Groups generally represented self-interest in the federal-state constitutional division[343] consistent with relative population size and proven oil resources. Sunnis purportedly preferred strong central government control over contract negotiations, participation, and revenue control because regional reserves are low.[344] Shi'a wanted regional government negotiations but with central government review.[345] Kurds preferred rather plenary regional power in negotiating and signing contracts[346] because they are the minority population but have regional control over substantial proven reserves.[347] Alternative draft bills do provide substantial national government control but with significant regional negotiating authority for contracts.[348] Under these proposed provisions, the federal government would collect all revenues, create an oversight commission, fund national priorities, and provide "Regions and Governorates" with monthly allocations.[349]

Even without a foundational federal energy law, the combination of cash-strapped authorities needing revenues and surging property right claims to oil-rich land[350] generated sub-national contracting prerogatives that may conflict with federal governance.[351] By 2007, the Kurdistan Regional Government

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2005, *available at* http://www.uniraq.org/documents/iraqi_constitution.pdf; *see* Ashley S. Deeks, *First Annual Race in Law & Culture Symposium*, 28 WHITTIER L. REV. 837, 845-46 (2007) (participant in constitutional processes noting that critics "argue that the [constitutional] provisions allocating oil revenues leave too much authority to the oil-producing region" and could conflict with international law); Sameera Fazili & Adil Ahmad Haque, *Breaking, Buying, and Building Nations*, 30 YALE J. INT'L L. 367, 367 (2005) ("Iraqi state composed of three confederated regional governments" may be "setting the stage for conflict over land, water, oil, and other resources.").

342. BLANCHARD, *supra* note 73, at 15.

343. *Id.* at 11-12, 14.

344. Herther-Spiro, *supra* note 307, at 363; *Foreign Suitors*, *supra* note 180.

345. Herther-Spiro, *supra* note 307, at 363; *Foreign Suitors*, *supra* note 180.

346. *See* Herther-Spiro, *supra* note 307, at 363.

347. *See id.*; *Foreign Suitors*, *supra* note 180.

348. Bolden & Fussnecker, *supra* note 304, at 1578.

349. *See* LAW OF FINANCIAL RESOURCES OF 2007, arts. 1(1), 2(a), 3(4), 4(1), 6 (as passed by Iraq's Council of Ministers, June 2007), *available at* http://www.krg.org/pdf/english_draft_revenue_sharing_law.pdf; *see also* Ben Lando, *Iraqis Make Progress on Sharing Oil Sales,* UNITED PRESS INT'L, June 21, 2007, http://www.upi.com/Science_News/Resource-Wars/2007/06/21/Iraqis-Make-progress-on-sharing-oil-sales/UPI-51511182440906.

350. *See Iraq: In Kurdistan, Land Disputes Fuel Unrest*, HUMAN RIGHTS WATCH (Aug. 2, 2004), http://www.hrw.org/en/news/2004/08/02/iraq-kurdistan-land-disputes-fuel-unrest. In March 2006, the Commission for Resolution of Real Property Disputes was created to address claims. BLANCHARD, *supra* note 73, at 16.

351. *See* Tariq Shafiq, *Kurdistan Regional Government Hydrocarbon Law: A Commentary*, MIDDLE EAST ECON. SURVEY (Sept. 18, 2006), http://www.mees.com/postedarticles/oped/v49n38-5OD01.htm; *see also* Mahdi, *supra* note 72, at 17 ("In the absence of a national project,

had already signed eight PSAs with obscure oil and gas companies,[352] and it adopted its own regional oil law in August 2007.[353] The contracts purportedly "elevate[d] tensions" between the Kurdistan Regional Government and the Iraqi federal government,[354] and a Tawafia Party member called the contracts "not legal."[355] Moreover, this situation may have upset the status quo by creating a three-level constitutional conflict among sub-national, national, and international authorities regarding whether there would be later adherence to national production quotas and whether sub-nationally-granted contract rights might permit liberal investment and production terms.[356] During OPEC diplomatic meetings, members were meeting with a new Iraqi government that was setting ambitious production targets and seeking to depart from the nationalized model.[357]

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the main conflicts that are likely to emerge in the fight for oil will cut across [regional] communities.").

352. *See* Mahdi, *supra* note 72, at 15; Shafiq, *supra* note 351 (critiquing the proposed regional law).

353. The Kurdistan Regional Government was even signing contracts before its regional law was adopted. *See* Petroleum Act of the Kurdistan Region of Iraq of 2006, art. 79 (as drafted by the Iraq Council of Ministers), *available at* http://www.krg.org/pdf/Kurdistan_Act_COM_draft_22_October_2006.pdf (declaring that "[a]ny agreement related to Petroleum Operations entered into by the Regional Government prior to the entry into force of this Act . . . shall remain in force"); Oil & Gas Law of the Kurdistan Region - Iraqi Law No. 22 of 2007, art. 54, *available at* http://www.krg.org/uploads/documents/Kurdistan%20Oil%20and%20Gas%20Law%20English__2007_09_06_h14m0s42.pdf (adopting as regional law a provision stating that "[a]ll agreements related to Production Sharing Contracts entered into by the Regional Government prior to the entry into force of this Law, shall be subject to review by the Regional Council"); *see also* Michael A. Fletcher, *Iraq Oil Deal Gets Everybody's Attention*, WASH. POST, Sept. 24, 2007, at A17, http://www.washingtonpost.com/wp-dyn/content/article/2007/9/23/AR2007092300778.html (stating that the Kurds signed several contracts with foreign oil companies before the regional law was enacted); BLANCHARD, *supra* note 73, at 9-10, 14-15.

354. *Iraq's Budget Surplus: Hearing Before the H. Comm. On the Budget*, 110th Cong. 64 (2008) (statement of Christopher M. Blanchand, Analyst in Middle Eastern Affairs, Congressional Research Service); *see also* Ned Parker, *Iraqi Political Factions Pressure Kurds*, L.A. TIMES, Jan. 14, 2008, http://articles.latimes.com/2008/jan/14/world/fg-iraq14.

355. Glanz, *supra* note 304.

356. This sets aside the already noted trade-off between maximizing production and the probability of lower market price. Without this impact, nationally capping production and imposing quotas limits supply and lowers profitability of the investing producer.

357. *Iraq Eyes OPEC Top Spot, Seeks India Pact*, UPI, Feb. 11, 2010, *available at* http://www.upi.com/Science_News/Resource-Wars/2010/02/11/Iraq-eyes-OPEC-top-spot-seeks-India-pact/UPI-49041265914800/; *Iraq on a Collision Course with OPEC*, UPI, Dec. 23, 2009, *available at* http://www.upi.com/Science_News/Resource-Wars/2009/12/23/Iraq-on-collision-course-with-OPEC/UPI-34541261587345/; Oliver Morgan, *Iraq 'May Have to Quit OPEC,'* GUARDIAN, Apr. 27, 2003, http://www.guardian.co.uk/business/2003/apr/27/iraq.oilandpetrol.

At the federal level, the Iraqi Oil Ministry recently consummated no-bid contracts with companies such as Exxon Mobile, Shell, Total, BP, and Chevron as a "stop-gap measure to bring modern skills into the fields while the oil law was pending in Parliament."[358] It was reported that a prequalification review process was established with competitive efficiency reviews,[359] but other reports revealed that there were forty-six foreign companies from countries including China, India, and Russia, vying for participation, but no-bid contracts favored American and British multinationals.[360] Media announcements of negotiations and contracting procedures were made in June and July 2008, at the height of the highest oil price trading in the $120 to $147 per barrel range.[361] Iraq's Parliament vowed to challenge Oil Ministry approval of a multibillion-dollar contract that would endow Iraq's Southern Gas Company and Shell exclusive rights in Basra's southern gas fields for a twenty-five year extendable contract.[362] The Oil Ministry claimed there was no legal basis for the challenge, while a Parliament committee contended that "Shell will seize everything" and that the contract would not be in "Iraq's best interests."[363] June 2009 agreements

358. Kramer, *supra* note 283; *see also* BLANCHARD, *supra* note 73, at 11 (noting that, in April 2008, the Oil Ministry was negotiating contracts with several major international oil companies).

359. *See* BLANCHARD, *supra* note 73, at 10-11; Carola Hoyos, *US Oil Companies Lose Out in Iraq Auction*, FIN. TIMES (LONDON), Dec. 13, 2009, http://www.ft.com/cms/s/0/20016a3a-e81c-11de-8a02-00144feab49a.html.

360. *See* Kramer, *supra* note 283. *But cf.* Hoyos, *supra* note 359 (reporting that "U.S. oil groups were all but shut out from Iraq as it completed the biggest oil field auction in history").

361. Kramer, *supra* note 283 (In June 2008, Leila Benali of Cambridge Energy Research Associates called the contracts a "foothold" for longer-term opportunities: "[T]he bigger prize everybody is waiting for is development of the giant new fields."); Shafiq, *supra* note 272 (a drafter of the proposed Oil and Gas Law, explained that a "stampede for exploration and development contracts at this particular juncture of Iraq's political and economic development would be viewed as mortgaging the reserves of future generations. It would also fuel the view that the war was about oil."); Londoño & Ibrahim, *supra* note 273 (oil executives "eager to get a foothold in Iraq"); Gina Chon, *Big Oil Ready for Big Gamble in Iraq*, WALL ST. J., June 24, 2009, http://online.wsj.com/article/SB124579553986643975.html; Carola Hoyos & Roula Khalaf, *Will the Tap Open? Why Oil Groups Dream of the Day They Can Enter Iraq*, FIN. TIMES (LONDON), Dec. 8, 2006, *available at* http://admin.iraqupdates.net/scr/preview.php?article=12459; *Petroleum & Other Liquids*, U.S. ENERGY INFO. ADMIN., http://tonto.eia.doe.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=RWTC&f=D [hereinafter EIA, *Petroleum*] (last updated Mar. 9, 2011).

362. *See* Ahmed Rasheed, *Iraq Lawmakers Say Will Challenge Shell Gas Deal*, REUTERS, Nov. 25, 2008, http://www.reuters.com/assets/print?aid=USLP12241120081125; *Shell Secures 25-Year Access to Iraq's Oil, Gas*, WASH. TIMES, Nov. 7, 2008, http://www.washingtontimes.com/news/2008/nov/07/shell-acquires-25-year-access-to-natural-gas-in-so.

363. *See* Rasheed, *supra* note 362; *Iraq Oil Law a Priority*, *supra* note 305.

were similarly condemned, with the *Washington Post* noting that "Iraqi politicians and some veteran oil officials have said the deals are unduly beneficial to oil giants, which are viewed warily by many in this deeply nationalistic but cash-strapped country."[364]

Pre-invasion exile proposals, particularly with regard to favoring deregulation and subnational governance,[365] resemble the system that actually unfolded after the invasion. Recently granted production rights also seem to reflect substantive provisions of the failed 2007 oil and gas law. The informational chronology of violence, potential supply disruptions, announcements of expeditious adoption of new laws, recalcitrance to proposals, and then consummation of PSAs even in the absence of the law that suggests them, took place inside one of the world's most oil-endowed countries. The common denominators were uncertainty and periodic chaos, which likely had a reverberating impact on the market.

VIII. Oil Price Surges

A. Causal Hypotheses

Market trends between 2002 and 2008 are probative to the queries of whether domestic events inside Iraq influenced trader expectations, and whether military security stabilizes or disrupts markets. Because oil supply projections impact spot and futures market trading, daily news of conflict,[366] uncertainty as to the outcome of occupation, and proposals for drastic industry restructuring[367] may breed excessive risk. From the mid-1980s until March 2002, oil prices fluctuated within a \$10 to \$20 per barrel band with a general \$15 median price.[368] A precipitous price rise began in mid-March 2002 at \$21 and hit \$147 in July 2008.[369] Prices steadily dropped after July 2008 and closed in December 2008 at \$36.[370] In assessing whether information about Iraq influenced market trading, it is necessary to consider why a multitude of other explanations are not fully compelling. A U.S.

364. Londoño & Ibrahim, *supra* note 273.

365. *See supra* note 141, 341 and accompanying text.

366. *See supra* notes 19, 21-22 and accompanying text; *see infra* notes 476-79 and accompanying text; *see also* Greenstone, *supra* note 210 (noting that announcements of violence influence the trading price of Iraqi bonds--i.e. price reflecting expectation of future ability repay--and that there was a forty percent decline in trading price).

367. Cf. STIGLITZ & BILMES, *supra* note 301, at 116-17.

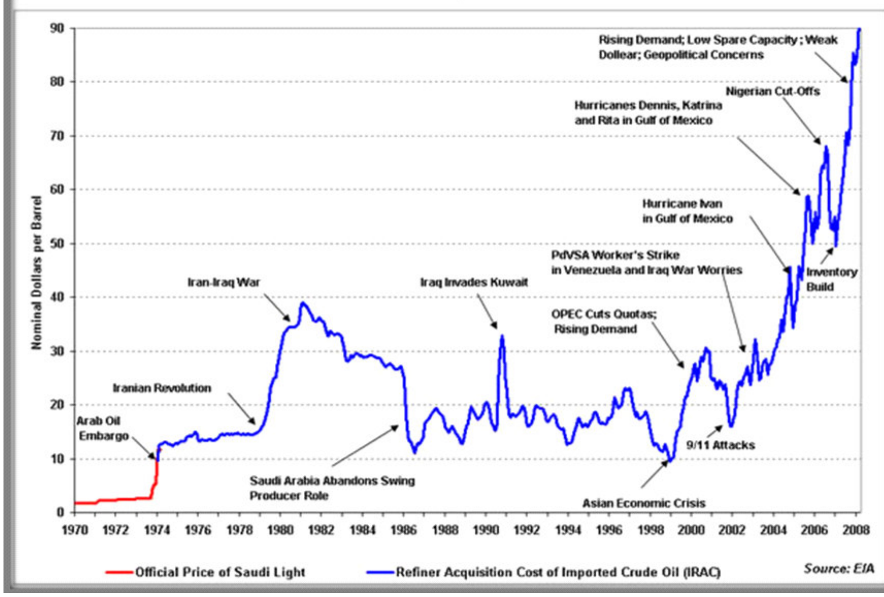
368. *See* Kades, *supra* note 61, at 1551 ("[T]he market price has never exceeded \$40 a barrel, and has, for the most part, fluctuated between \$10 and \$25 for the last decade.").

369. *See* EIA, *Petroleum*, *supra* note 361.

370. *See id.*

Department of Energy graph covering price trends through December 2007 provides a starting point.

GRAPH A: U.S. DEP'T OF ENERGY, ENERGY INFO. ADMIN. CHART



Tendered explanations for market fluctuations include possible uncertainty after the 9/11 attack, the Venezuelan union strike, Hurricanes Ivan, Katrina, and Rita, the Nigerian oil cut-offs, a rising dollar and low spare capacity, and OPEC quota announcements.[371] Many similar events occurred over the preceding twenty years without a drastic and sustained several-year price escalation and it is not clear that these explanations even account for short-term fluctuations. The following price comparisons use spot rates.[372]

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371. *See Annual Oil Market Chronology: Overview*, U.S. ENERGY INFO. ADMIN., http://www.eia.doe.gov/emeu/cabs/AOMC/Overview.html (last visited Sept. 23, 2010). This chart was originally accompanied with a narrative that referenced labels as probative causes of price trends. The narrative has since been removed, but the Department of Energy's explanations were cited in other sources. See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-25, COMMODITY FUTURES TRADING COMMISSION: TRENDS IN ENERGY DERIVATIVES MARKET RAISE QUESTIONS ABOUT CFTC'S OVERSIGHT 22 (2007) [hereinafter GAO, DERIVATIVES], *available at* http://www.gao.gov/new.items/d0825.pdf.

372. Respective futures contract prices are similar to but often slightly higher than the spot rate. *NYMEX Futures Prices*, U.S. ENERGY INFO. ADMIN., http://tonto.eia.doe.gov/dnav/pet/pet_pri_fut_s1_d.htm (last updated Mar. 9, 2011). This generally indicates a normal uncertainty band and/or expected increasing price trend. See generally the dates cited in infra text for a

While one might expect that a dramatic event like 9/11 could cause market instability, there was no significant fluctuation (the price on 9/11 was $27.65) for nearly two weeks.[373] Prices then dropped by over twenty percent (the price on 9/25 was $21.63), hit the lowest level in over two years (the price on 11/15 was $17.50), and remained between $17 and $24 per barrel for nearly six months (from 9/11/01 until 3/08/02).[374]

In early April 2002, there was a three-day coup that ousted Venezuelan President Hugo Chávez and the U.S. Department of Energy chronology noted that "a general strike [began] in Venezuela . . . nearly halting oil production."[375] There was no oil price increase following the events and prices remained between $22 and $24 throughout April.[376] Rather prolonged strikes, that began in early December 2002 and continued through most of January 2003, were said to "dramatically" drop exports and coincided with prices that started at $27 per barrel and fluctuated as high as $35 during this two-month period.[377] Prices eventually dropped below pre-strike levels.[378]

Acts of nature were also referenced as a possible cause of price increases.[379] A fractional share of global oil production takes place in hurricane-prone regions of Mexico, Texas, Louisiana, and the Gulf of Mexico.[380] The fall 2004 hurricane season, which included Hurricane Ivan, coincided with some higher daily prices than existed prior to the season (the price was $46 on August 23 and was $47.30 on November 11).[381] Fall 2005 was a record-setting hurricane season and included Hurricanes Katrina and Rita, but there were no drastic price increases, and the season actually

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comparison of futures contracts 1-4 with spot rates.

373. *See* EIA, *Petroleum*, *supra* note 361; *see also Annual Oil Market Chronology*, U.S. ENERGY INFO. ADMIN. (July 2007), http://www.eia.doe.gov/emeu/cabs/AOMC/pdf.pdf [hereinafter EIA, *Chronology*] (noting that on Sept. 24, 2001, "[c]rude oil and petroleum products futures [fell] to their lowest levels in nearly two years").

374. EIA, *Chronology*, *supra* note 373.

375. *Id.* at 33.

376. *See* EIA, *Petroleum*, *supra* note 361. In particular, look at the entries for April 2002.

377. EIA, *Chronology*, *supra* note 373, at 36-37. In particular, look at the entries for Dec. 2, 2002; Dec. 16, 2002; Dec. 18, 2002; Jan. 6, 2003; Jan. 21, 2003; and Jan. 29, 2003. *See also* EIA, *Petroleum*, *supra* note 361. In particular, look at the entries for Dec. 2002 and Jan. 2003.

378. *See* EIA, *Petroleum*, *supra* note 361. In particular, look at the entry for April 10, 2003.

379. *See supra* note 371; *see infra* note 451.

380. *See* EIA, *Production*, *supra* note 35 (documenting how, in 2007, the United States only produced seven percent of the world's crude oil and how a good portion of that production was located in away from hurricane-prone regions).

381. *See* EIA, *Petroleum*, *supra* note 361; *Hurricane Ivan Passes Battered Cuba*, CNN, Sept. 14, 2004, http://www.cnn.com/2004/WEATHER/09/13/hurricane.ivan/index.html (noting that Hurricane Ivan caused oil companies to evacuate offshore rigs and stop "production of nearly 100,000 barrels of oil per day).

coincided with a downward price trend (the price was $65.46 on August 22 and was $57.45 on November 11).[382]

On December 20, 2005, militants disrupted oil production in Nigeria, and Shell declared "*force majeure* on its crude oil exports from the country."[383] There was a fairly steep incline in price that began one week *after* the disruption,[384] but by then Shell had already made repairs and kept production flowing.[385] Continued conflict in Nigera required Shell to extend *force majeure* on exports, which amounted to one-fifth of Nigeria's production.[386] However, oil prices remained stable[387] and actual production declines were negligible.[388] Through the latter half of 2006, Nigeria's production was approximately 5% lower,[389] but by October global market prices dropped to new eight-month lows when it was announced that U.S. oil inventories were actually "bulging."[390] Moreover, Nigeria's drop involved only 0.7% of global production and it appears that other OPEC members compensated for that decrease.[391]

Scholars generally have not attempted to quantify an informational impact of the "diminishing supply" and "peak oil" contentions that garnered much media attention as prices rose,[392] but offer a range of tangible hypotheses[393]

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382. *See* EIA, *Petroleum*, *supra* note 361; *New Orleans Braces for Monster Hurricane*, CNN, Aug. 29, 2005, http://www.cnn.com/2005/WEATHER/08/28/hurricane.katrina (documenting the build-up to Hurricane Katrina in late August 2005); *Rita Growing Weaker, Slower*, CNN, Sept. 25, 2005, http://www.cnn.com/2005/WEATHER/09/24/rita/index.html (documenting the aftermath of Hurricane Rita in late September 2005). *Cf.* Charles Martel, *Bring It on Home: A Gulf Coast Marshall Plan Based on International Humanitarian Standards*, 32 VT. L. REV. 57 (2007) (discussing ways to deal with the long-term damage caused by Katrina).

383. EIA, *Chronology*, *supra* note 373, at 49. In particular, see the entry for Dec. 20, 2005.

384. *See* EIA, *Petroleum*, *supra* note 361. Look particularly at the entries from Dec. 20, 2005 through Jan. 30, 2006 (rising from $57.81 to $68.36).

385. EIA, *Chronology*, *supra* note 373, at 49. See the entry for Dec. 20, 2005.

386. *Id.* See the entry for Feb. 21, 2006.

387. *See* EIA, *Petroleum*, *supra* note 361. See the entries for Feb. 21, 2006 through March 27, 2006.

388. *See* OPEC, *World Oil Supply*, MONTHLY OIL MARKET REPORT, Mar. 2006, at 29, 34, *available at* http://www.opec.org/opec_web/static_files_project/media/downloads/publications/MR032006.pdf (noting that Nigerian oil production losses "were partly offset by increases elsewhere").

389. *See* OPEC, *World Oil Supply*, MONTHLY OIL MARKET REPORT, Dec. 2006, at 33, 38, *available at* http://www.opec.org/opec_web/static_files_project/media/downloads/publications/MR122006.pdf.

390. *Oil Rebounds on Nigerian Violence*, CNNMONEY.COM, Oct. 4, 2006, http://money.cnn.com/2006/10/04/markets/oil_eia/index.htm

391. *See infra* notes 407-12, 416.

392. *See* Weaver, *supra* note 26, at 507-08. Using "peak oil" consternation as an influence

that reflect orthodox explanations for price increases, which is that lower supply or *perceptions* of shortfall to service demand begets rising prices.[394] Department of Energy reports asserted that traders reacted to soaring demand from India and China,[395] that there was a perceived ineffective industry reaction to revived economic conditions following the late-1990s Asian financial crisis, that demands pressed upon non-OPEC countries failed to meet expectations, that there was low OPEC spare capacity to increase production, and that geopolitical instability in Iraq, Nigeria, Venezuela and Iran generated uncertainty[396] and some unanticipated supply disruptions.[397] Another report suggested that trading instability was abetted by industry weaknesses in "timely data collection, more efficient taxation, improved investment environment, and energy conservation."[398]

With so many potential supply-side effects for increasing price trends, perhaps a plausible explanation is that there may have been an actual or perceived lack of investment in infrastructure to support increased demand and/or risk of shortfall.[399] However, the uncertainty in this explanation is that

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on price would seem to require an assumption that traders adapted forecasting models and expectations either because tangible effects of depletion were plausible or because producer behavior might adapt to allegations. Perhaps the most dominant informational impact would be on consumer perceptions, but that does not set oil or gasoline prices.

393. *See* Stéphane Dées et al., *Assessing the Factors Behind Oil Price Changes*, (European Cent. Bank, Working Paper Series No. 855, 2008), *available at* http://www.ecb.int/pub/pdf/scpwps/ecbwp855.pdf.

394. *See generally id.*; *see also* INT'L ENERGY AGENCY, WORLD ENERGY OUTLOOK TECH. REP. (2007); Griffin & Xiong, *supra* note 279, at 290-91; Rhea, *supra* note 26, at 610.

395. Weaver, *supra* note 26, at 513.

396. *STEO Supplement: Why Are Oil Prices So High?*, U.S. ENERGY INFO. ADMIN., http://www.eia.doe.gov/emeu/steo/pub/pdf/high-oil-price.pdf (last visited Sept. 23, 2010).

397. *Global Oil Supply Disruptions Since 1951*, U.S. ENERGY INFO. ADMIN., http://www.eia.doe.gov/security/distable.html (last visited Sept. 23, 2010). Labor strikes and unrest in Venezuela caused an estimated 2.1 million barrel per day (pbd) drop for three months (from Dec. 2002 until Feb. 2003); unrest in Nigeria caused a drop of 0.3 pbd for six months (from Mar. 2003 until Aug. 2003); and the Iraq war caused a one million pbd decrease for nineteen months (from Mar. 2003 until Sept. 2004). *Id.* However, the Venezuela strikes did not seem to have a significant impact on market price, the Nigerian drops were minor, and decreases in Iraqi supply are questionable. *See supra* notes 285, 375-78, 383-91. Also, it seems that OPEC countries increased supply to accommodate non-OPEC decreases. *See infra* notes 407-12, 416.

398. *See The Structure of the Oil Market and Causes of High Prices*, INT'L MONETARY FUND (Sept. 21, 2005), http://www.imf.org/external/np/pp/eng/2005/092105o.htm [hereinafter INT'L MONETARY FUND].

399. *See id.* (noting that with "perception of a limited response of investment . . . [p]roduction capacity is unlikely to grow enough to outpace future growth in consumption"); *see also* Bassan Fattough, *Spare Capacity and Oil Price Dynamics*, MIDDLE EAST ECON.

investments in available reserves to increase supply also depend upon what the hypothetical demand level would be *if* the price of oil products was not already endogenous to currently-prevailing economic conditions.[400] Countries periodically submit estimated demand to the International Energy Agency ("IEA"),[401] but anticipated consumption derives from existing market prices and expected economic growth. Some percentage of the "lack of investment" causation may be premised on a hypothetical scenario of abundant consumption irrespective of price.[402] It is not clear that there were unexpected production limitations before substantial price hikes began in mid-March 2002. As prices rose to new highs, a 2005 IMF report recognized this, but with a caveat.[403] It noted that "crude oil demand growth for 2005 has so far been broadly in line with IEA projections, [and] while supply (with non-OPEC supply shortfalls offset by higher OPEC output) appears adequate . . . strong demand continues to put pressure on production capacity."[404] Likewise, statistics readily available in 2007 and 2008 indicated that crude oil

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SURVEY (Jan. 30, 2006), http://www.mees.com/postedarticles/oped/v49n05-5OD01.htm; GAO, DERIVATIVES, *supra* note 371, at 4; IPAA, *supra* note 17.

400. Lutz Kilian, *Oil Price Volatility: Origin and Effects*, World Trade Org. Research & Analysis (2010), *available at* http://www.wto.org/english/res_e/publications_e/wtr10_forum_e/wtr10_kilian_e.htm ("There is no consensus in the literature on how to model the global market for crude oil."). However, three implications for recent price trends on models are: [1] that "endogenous determination of real price of oil. . . are best thought of as the response to an average oil price shock. . . . [2] It is more appropriate to think of oil price fluctuations as symptoms of the underlying oil demand and oil supply shocks. . . . [3][fixed variable theoretical models] are misleading and must be replaced by models that allow for the endogenous determination of the price of oil.". *Id.*

401. *See, e.g.*, *Oil Market Report*, INT'L ENERGY AGENCY, 5-17 (Sept. 10, 2009), http://omrpublic.iea.org/currentissues/full.pdf.

402. Global crude oil production increased from 64 million barrels per day (bpd) (2002), to 67 million (2003), 70.5 million (2004), 71.6 million (2005), 71.7 million (2006), 71.4 million (2007), and 72 million (2008). OPEC, *ASB*, *supra* note 17, at 22; *see also Production of Crude Oil Including Lease Condensate (Thousand Barrels Per Day)*, U.S. ENERGY INFO. ADMIN., http://tonto.eia.doe.gov/cfapps/ipdbproject/iedindex3.cfm?tid=5&pid=57&aid=1&cid=&syid=2002&eyid=2008&unit=TBPD (last visited Sept. 23, 2010). Production increased by approximately three million bpd from 2002 to 2004 but consumption only marginally increased from 2005 to 2008. *See* OPEC, *ASB*, *supra* note 17, at 22. If actual demand increased at a moderately linear rate, then supply did not service demand. However, in 2005, the price per barrel was hitting record highs, generally fluctuating for most of the year between $50 and $70 per barrel, which was a fairly drastic increase over the $35-$55 range of the previous year. *See* EIA, *Petroleum*, *supra* note 361. It is not clear if stagnant consumption bred lower demand from the global economic downtrend, if supply *did not* service actual demand to cause a price hike, or if already higher oil prices weakened demand. All of these are causes antecedent to actual lower consumption.

403. *See* INT'L MONETARY FUND, *supra* note 398.

404. *Id.*

inventories across consuming nations were plentiful, but market prices kept increasing to their highest levels as if there were shortfalls.[405]

B. OPEC as "Scapegoat"

OPEC supply announcements and actual supply have been blamed for price increases, but this is not a compelling explanation.[406] From 2002 to 2008, OPEC exports steadily appreciated from an average of 18.8 million barrels per day to 24.2 million,[407] which increased OPEC's share of world oil exports from 52.8% to 60.3%.[408] Over this six-year period, global supply grew by 12.5%[409] and OPEC's share grew from 40% to 46% of total production.[410] Before drastic price surges, the organization had been following a preferred $22 to $28 per barrel price band policy, but as prices appreciated the IMF noted that "OPEC has kept production and official quotas at record levels."[411] Again, during the highest price trends in 2007 and 2008, importing countries often held historically high inventories, signaling no risk of shortfall, and OPEC members consistently monitored the market to ensure that it was sufficiently supplied.[412]

Moreover, it does not appear that OPEC supply announcements were opportunistic. When OPEC members modify a production quota, it is a new international agreement that remains until it is overridden by a later quota agreement.[413] An agreement to increase quotas *maintains* the higher

405. *See infra* note 412.
406. *See infra* Part VIII.B.
407. OPEC, *ASB*, *supra* note 17, at 31.
408. *Id.* at 34.
409. *Id.*
410. *Id.* at 22.
411. INT'L MONETARY FUND, *supra* note 398; *see also* Carey, *supra* note 7, at 806.
412. *See* Press Release, OPEC, Statement by HE Abdalla Salem El-Badri, Secretary General of OPEC, on Oil Market Fundamentals (June 14, 2007), *available at* http://www.opec.org/opec_web/en/press_room/1150.htm; Press Release, OPEC, 146th (Extraordinary) Meeting of the OPEC Conference (Dec. 5, 2007) [hereinafter OPEC, *146*], *available at* http://www.opec.org/opec_web/press_room/1006.htm; Press Release, OPEC, 148th Meeting of the OPEC Conference (Mar. 5, 2008) [hereinafter OPEC, 148], *available at* http://www.opec.org/opec_web/en/961.htm; Press Release, OPEC, Press Statement by HE Abdalla Salem El-Badri, OPEC Secretary General (May 8, 2008) [hereinafter OPEC, EL-Badri (May 8)], *available at* http://www.opec.org/opec_web/en/957.htm; Press Release, OPEC, 149th Meeting of the OPEC Conference (Sept. 10, 2008) [hereinafter OPEC, 149], *available at* http://www.opec.org/opecna/press%20releases/2008/pr112008.htm.
413. OPEC Statute, supra note 110, art. 3 ("Member Countries shall fulfill, in good faith, the obligations assumed by them in accordance with this Statute."); *see infra* note 414 (meeting announcements referencing agreements to maintain quotas keeps the status quo, whereas modifying creates a new status quo).

production. Between March 2002 and December 2008, there were at least thirty OPEC production announcements emanating from official meetings and semi-official fora.[414] Production quotas were increased six times, and on five of those occasions market prices still appreciated following the announcement,[415] which may be inconsistent with the expectation that increasing supply will lower price.

Most important is the trend of *sustained* higher production. Using the quota announcement on March 15, 2002 as a benchmark, which occurred just before the sustained price increases began, announced production quotas were higher than the reference point by 17% on April 24, 2003, 27% on December 10, 2004, 29% on June 1, 2006, 25% on September 12, 2007, and 25% on May 8, 2008.[416] Six quota decreases were also announced over the same period, but the first four cuts were between 2% and 4% of the preceding production quota and on each occasion it was recognized that overproduction led to building inventories in consuming nations.[417] The logistics process of production, transportation, refining, and consumption is not geared to "supply

414. *See* EIA, *Chronology*, *supra* note 373, at 32, 34-38, 40-47, 49-51. In particular, look at these dates: Mar. 15, 2002; June 26, 2002; Sept. 19, 2002; Dec. 12, 2002; Jan., 12, 2003; Mar. 11, 2003; Apr. 24, 2003; June 11, 2003; July 31, 2003; Sept. 24, 2003; Dec. 4, 2003; Feb. 11, 2004; June 3, 2004; Dec. 10, 2004; Jan. 30, 2005; Mar. 16, 2005; June 15, 2005; Jan. 31, 2006; Mar. 8, 2006; June 1, 2006; Sept. 11, 2006; Oct. 19, 2006; and Dec. 14, 2006. *See also* Press Release, OPEC, 144th Meeting of the OPEC Conference (Mar. 15, 2007), *available at* http://www.opec.org/opec_web/en/press_room/1155.htm; Press Release, OPEC, 145th Meeting of the OPEC Conference (Sept. 11, 2007), *available at* http://www.opec.org/opec_web/en/press_room/1011.htm; Press Release, OPEC, 147th (Extraordinary) Meeting of the OPEC Conference (Feb. 1, 2008), *available at* http://www.opec.org/opec_web/en/962.htm; Press Release, OPEC, 150th (Extraordinary) Meeting of the OPEC Conference (Oct. 24, 2008) [hereinafter OPEC, *150*], *available at* http://www.opec.org/opec_web/en/947.htm; Press Release, OPEC, 151st (Extraordinary) Meeting of the OPEC Conference (Dec. 17, 2008) [hereinafter OPEC, *151*], *available at* http://www.opec.org/opec_web/en/945.htm; OPEC, *146*, *supra* note 376; OPEC, *148*, *supra* note 412; OPEC, *149*, *supra* note 412.

415. *See* EIA, *Chronology*, *supra* note 373, at 36-37, 40, 46-48. In particular, look at these dates: Dec. 12, 2002; Jan. 12, 2003; Apr. 24, 2003; Mar. 16, 2005; June 15, 2005; and Sept. 11, 2007); *see also* EIA, *Petroleum*, *supra* note 361. See the entries for the corresponding dates and daily price trend fluctuations following those dates.

416. EIA, *Chronology*, *supra* note 373, at 32, 34, 39, 45, 50. See the entries for Mar. 15, 2002; June 26, 2002; Apr. 24, 2003; Dec. 10, 2004; and June 1, 2006. *See also* Jad Mouawad, *OPEC to Lift Oil Output Modestly*, N.Y. TIMES, Sept. 12, 2007, at C1; OPEC, *El-Badri* (May 8), *supra* note 412; *Member Countries' Crude Oil Production Allocations*, OPEC, http://www.opec.org/opec_web/static_files_project/media/downloads/data_graphs/ProductionLevels.pdf (last visited Sept. 24, 2010); EIA, *Petroleum*, *supra* note 361 (see the entries for the corresponding dates and daily price trend fluctuations following those dates).

417. EIA, *Chronology*, *supra* note 373, at 42-43, 51. See the entries for Sept. 24, 2003; Feb. 11, 2004; Oct. 19, 2006; and Dec. 14, 2006.

as much and as fast as possible," but is a planning process to ensure that bottlenecks do not prevail in the system. The fifth OPEC cut on October 24, 2008 was based on a "slowdown in oil demand" due to the "financial crisis" and purported oversupply.[418] The sixth cut on December 17, 2008 cited a need to stabilize the market after prices had plummeted to $36 per barrel.[419]

While OPEC meetings are often accompanied by enormous pageantry and commentary on the content and meaning of announcements, the data does not suggest that traders do not trust OPEC members or the status quo supply system.[420] Likewise, congressional demands for a WTO dispute settlement action against OPEC members for colluding and/or failing to produce more rapidly cannot be sustained on the facts. OPEC maintained record level quotas, produced at those elevated levels throughout the duration of high prices, made guarantees that there would be no shortfall, and overproduced on quotas.[421] If there is merit to the congressional chastisements, allegations of wrongdoing would need to be premised on the mere fact that OPEC exists, rather than on the organization partaking in acts of extortive collusion.

Department of Energy statistics indicate that there were no drastic price movements (excepting 1991 Gulf War circumstances) from the mid-1980s until 2002, but the Department also surprisingly contended in its 2006 *OPEC Analysis Brief* that member countries had colluded to maintain artificially high prices since 1982.[422] One cannot unequivocally refute this hypothesis because price movements within a $10 to $20 band will be "artificial" if one juxtaposes a hypothesized world where *but for* OPEC's existence, the commodity would trade at $5 per barrel. The contention seems particularly unrealistic because shortly after crude oil futures began being traded on the New York Mercantile Exchange in 1983,[423] prices substantially dropped and

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418. OPEC, *150*, *supra* note 414.

419. OPEC, *151*, *supra* note 414; EIA, *Petroleum*, *supra* note 361 (see the entry for Dec. 17, 2008).

420. *See* F. Wirl & A. Kujundzic, *The Impact of OPEC Conference Outcomes on World Oil Prices 1984–2001*, 25(1) Energy J. 45 (2004) (noting weak impact of announcements on price); *see also supra* note 414 (see EIA interpretive commentary for referenced dates and referenced news sources).

421. *See* EIA, *Chronology*, *supra* note 373, at 34, 36, 38, 40, 43-46, 49. See the entries for June 26, 2002; Dec. 12, 2002; Mar. 11, 2003; Apr. 24, 2003; Feb. 11, 2004; May 22, 2004; Dec. 10, 2004; Mar. 16, 2005; and Feb. 8, 2006).

422. *See OPEC Analysis Brief*, U.S. ENERGY INFO. ADMIN. (Nov. 26, 2004), http://www.eia.doe.gov/emeu/cabs/opec.html; *see also* James Bixby, *The 2005 Energy Policy Act: Lessons on Getting Alternative Fuels to the Pump for Minnesota's Ethanol Regulations*, 26 J. L. & POL'Y 353, 355 n.10 (2008); *see supra* chart in Part VIII.

423. *See* IPAA, *supra* note 17, at 1; *NYMEX and ICE's Long-Standing Rivalry*, REUTERS, Nov. 30, 2009, http://www.reuters.com/article/idUKTRE5AT3GF20091130.

remained low. Throughout this period, this translated into gasoline prices for consumers that rarely rose above $1.30 per gallon.[424]

Republican Congressman Jim Saxton's February 2008 Joint Economic Committee Report, entitled *Expect No Relief From OPEC*, blamed American economic ills on OPEC's purported objective to "maximize the wealth transfer from oil consuming nations by manipulating the international oil market."[425] OPEC President Chakib Khelil's retort blamed the weak U.S. dollar for high oil prices.[426] That "weakened dollar" could have been significantly due to the Bush administration's foreign wars that blew a hole in the current account deficit[427] and contributed to doubling the national debt.[428] Undeniably, with higher trading prices, OPEC countries did attain higher revenues, which increased from $216 billion (2002) to $267 billion (2003), $375 billion (2004), $555 billion (2005), $662 billion (2006), $745 billion (2007) and $1 trillion (2008).[429] These are not "profits," but sales "revenues." By comparison, in 2004, British and American oil giants (BP Amoco, Shell, Exxon Mobil, Total, Chevron Texaco, and ConocoPhillips)

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424. *See Retail Gasoline Historical Prices*, U.S. ENERGY INFO. ADMIN., http://www.eia.doe.gov/oil_gas/petroleum/data_publications/wrgp/mogas_history.html (click "All Grades"; then open Microsoft Excel spreadsheet; then choose Data Set 1) (last visited Sept. 24, 2010) (listing historical datasets); *Weekly U.S. Midgrade Conventional Retail Gasoline Prices*, U.S. ENERGY INFO. ADMIN., http://tonto.eia.doe.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=MG_MCO_US&f=W (last visited Sept. 24, 2010).

425. JOINT ECON. COMM., *supra* note 6, at 1.

426. *See* David Goldman, *Fed Could Burst Oil's Bubble*, CNNMONEY.COM, Apr. 29, 2008, http://money.cnn.com/2008/04/29/news/economy/oil_dollar/index.htm?postversion=2008042911.

427. *See* C. EUGENE STEUERLE, CONTEMPORARY U.S. TAX POLICY 238-39 (2004); Katherine Pratt, *Deficits and the Dividend Tax Cut: Tax Policy as the Handmaiden of Budget Policy*, 41 GA. L. REV. 503, 508 (2007); Daniel N. Shaviro, *Reckless Disregard: The Bush Administration's Policy of Cutting Taxes in the Face of an Enormous Fiscal Gap*, 45 B.C. L. REV. 1285, 1298 (2004).

428. *See Revenues, Outlays, Deficits, Surpluses, and Debt Held by the Public, 1968 to 2007, in Billions of Dollars*, CONG. BUDGET OFFICE, 1 (Sept. 2008), http://www.cbo.gov/budget/data/historical.pdf (noting that the annual account surplus/deficit was 86.4 (2000), -32.4 (2001), -317.4 (2002), -538.4 (2003), -568.0 (2004), -493.6 (2005), -434.5 (2006), -342.2 (2007)); *see also Historical Debt Outstanding – Annual 2000-2008*, U.S. DEP'T OF TREASURY, http://www.treasurydirect.gov/govt/reports/pd/histdebt/histdebt_histo5.htm (last updated Nov. 17, 2009) (listing the national debt (in trillions) over the past decade as $5.674 (2000), $5.807 (2001), $6.228 (2002), $6.783 (2003), $7.379 (2004), $7.933 (2005), $8.507 (2006), $9.008 (2007), and $10.025 (2008)).

429. OPEC, *ASB*, *supra* note 17, at 13; *see* Christopher Johnson, *OPEC Oil, Gas Income Tops $1 Trillion, Reserves Up*, REUTERS, July 8, 2009, http://www.reuters.com/article/idUSTRE5673L920090708; *OPEC Oil Export Revenues*, U.S. ENERGY INFO. ADMIN., http://www.eia.doe.gov/emeu/cabs/OPEC_Revenues/Factsheet.html (last visited Sept. 24, 2010).

"revenues" exceeded $1 trillion when total OPEC revenue was $375 billion.[430] OPEC maintains that supply limits exist to maintain stable prices and taxpayers spend $651 billion annually on the Department of Defense,[431] which apparently has one prime mission of "protecting" global oil supply.[432]

Some contend that OPEC has lost power over time,[433] and others maintain that OPEC serves as an economic "boogey man" deficient of the power often attributed to it.[434] The contentions are arguable but highlight one of the most prominent responsibility-dodging arrangements that exist. Consuming countries provide demand estimates and OPEC announces periodic quota adjustments.[435] If OPEC announces a quota cut, it may even specifically state that market prices should be higher, but it generally justifies quota decisions on whether there are adequate supplies and consuming nation inventories.[436] If OPEC announces a quota cut and normal market expectations prevail, traders presumably react to the announcement and the market surmises that supply will actually decrease, make the commodity more valuable, and appreciate price. However, this is not always the market reaction. Since 1993, OPEC has announced twelve quota reductions and eighty percent of the time those cuts did eventually correlate with prices that did not further decrease below the preferred price band.[437] If price does increase, OPEC members sell at the higher price, leading to their fortunate income appreciation, while multinationals attain higher revenues from their own

430. VICTORS & YARROW, *supra* note 280, at 12. OPEC state-owned company profit margins are apt to be much higher than the vertically-integrated multinationals.

431. DEP'T OF DEFENSE, THE BUDGET FOR FISCAL YEAR 2009, at 49, *available at* http://www.gpoaccess.gov/usbudget/fy09/pdf/budget/defense.pdf.

432. *See supra* notes 45-50, 218-23, 231-33.

433. *See, e.g.*, M.A. Adelman, *Oil Resource Wealth of the Middle East*, 4 ENERGY STUD. REV. 7 (1992); Clifton Jones, *OPEC Behavior Under Falling Oil Prices: Implications for Cartel Stability*, 11 ENERGY J. 117 (1990); Jesica E. Seacor, Comment, *Environmental Terrorism: Lessons From the Oil Fires of Kuwait*, 10 AM. U.J. INT'L L. & POL'Y 481, 504 n.99 (1994).

434. *See generally* ALI D. JOHANY, THE MYTH OF THE OPEC CARTEL: THE ROLE OF SAUDI ARABIA (1980); Gaurav Sodhi, *The Myth of OPEC*, CTR. FOR INDEP. STUDIES (June 24, 2008), http://www.cis.org.au/media-information/opinion-pieces/article/302-the-myth-of-opec (arguing that, while some consider OPEC a "boogey man," OPEC likely "is pumping as much oil as it can"); Kilian, *supra* note 400 ("the popular notion that OPEC constitutes a cartel that controls the price of oil has not held up to scrutiny").

435. *See supra* notes 401, 407, 410, 414.

436. *See supra* notes 417-19; *see also supra* note 110 (Charter mission statement).

437. *See EIA Analysis: OPEC*, ALEXANDER'S GAS & OIL CONNECTIONS (Oct. 1, 2002), http://www.gasandoil.com/goc/features/fex24081.htm; *OPEC Cuts Oil Production in Move to Boost Prices*, FOXNEWS.COM, Oct. 24, 2008, http://www.foxnews.com/story/0,2933,443913,00.html; *Organization of the Petroleum Exporting Countries*, N.Y. TIMES TOPICS, March 16, 2009, http://topics.nytimes.com/topics/reference/timestopics/organizations/o/organization_of_petroleum_exporting_countries/index.html.

production and refined products.[438] When gasoline prices increase, Americans blame oil companies and/or OPEC,[439] oil companies blame distribution logistics and OPEC,[440] American politicians blame OPEC,[441] and OPEC blames multinationals for insufficient refining capacity, consuming nations for excessive consumption patterns, U.S. fiscal conditions, and trader reactions.[442]

As for discrepancies between *announced* and *actual* supply, OPEC member actions suggest that they do not have the understanding and necessary conditions to maintain a tenacious collusive equilibrium as defined in game theory models.[443] OPEC members have a history of cheating on their agreements with each other, overproducing on quotas[444] and entering into periods of internecine accusation-casting over whether other members have been cheating.[445] The pattern has prevailed for decades without an effective monitoring or punishment consequence to curtail future cheating.[446]

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438. *See supra* note 429; *see infra* notes 447-54.

439. *See* Spencer Weber Waller, *Suing OPEC*, 64 U. PITT. L. REV. 105, 106 (2002).

440. *See Crude Coverage*, BUSINESS & MEDIA INSTITUTE, http://www.businessandmedia.org/specialreports/2008/MediaMyth/Crude_Coverage/CrudeCompany.asp; Steve Hargreaves, *Don't Blame Us For Prices - Oil Execs*, CNN.COM, available at http://money.cnn.com/2008/05/21/news/economy/oil_hearing/index.htm; *infra* note 451.

441. *See* Weaver, *supra* note 26, at 574.

442. *See* Senator Ron Wyden, The Oil Industry, Gas Supply and Refining Capacity: More Than Meets the Eye (June 14, 2001), *available at* http://wyden.senate.gov/issues/gas_prices/pdfs/wyden_oil_report.pdf ("the record shows. . .that major oil companies pursued efforts to curtail refinery capacity as a strategy for improving profit margins; that competing oil companies worked together to subvert supply; that refinery closures inhibited supply; and that oil companies are reaping record profits"); OPEC Q. ENVTL. NEWSL., (OPEC) (first quarter 2009), *available at* http://www.opec.org/opec_web/static_files_project/media/downloads/press_room/1Q09EnvNewsletter.pdf; *IMF Meeting OPEC Says Producers Not to Blame For High Oil Prices*, FORBES, Apr. 22, 2006, http://www.forbes.com/feeds/afx/2006/04/22/afx2689141.html ("Qatar's oil minister blamed high oil prices on 'horrible' speculation and 'geopolitics' rather than any shortage of supplies."); *supra* notes 17, 426

443. FERENC FORGO ET AL., INTRODUCTION TO THE THEORY OF GAMES, at xvii (1985).

444. *See* A. F. Alhajji, *Why Do Some OPEC Members Cheat? The Case of the United Arab Emirates*, 23 J. ENERGY & DEV. 59 (1997); Sel Dibooglu & Salim N. AlGudhea, *All Time Cheaters Versus Cheaters in Distress: An Examination of Cheating and Oil Prices in OPEC*, 31 ECON. SYSTEMS 292 (2007); Griffin & Xiong, *supra* note 279, at 290-91 (noting prevalence of Saudi Arabia to consistently cheat to meet "residual demand at the official OPEC price"); Arik Hesseldahl, *Oil Cheating For Fun and Profit*, FORBES, Aug. 26, 2002, http://www.forbes.com/2002/08/26/0826oil.html.

445. Youssef M. Ibrahim, *Iran and Arabs Clash in OPEC on Oil Policy*, N.Y. TIMES, Dec. 10, 1987, at D1; Leo Lewis, *OPEC Split in Row Over Oil 'Cheating,'* INDEP. (London), Mar. 10, 2002, http://www.independent.co.uk/news/business/news/opec-split-in-row-over-oil-cheating-653466.html.

446. Ian Ayres, *How Cartels Punish: A Structural Theory of Self-Enforcing Collusion*, 87

For American gasoline consumers, multinationals significantly control the supply chain with their refineries, distribution routes, and gas station franchises, and often participate in domestic and foreign production.[447] U.S. gasoline prices were $1.50 per gallon in January 2003, $3.00 per gallon in July 2006, and exceeded $4.00 per gallon in June 2008.[448] With each new oil price surge, there was a new surge in gas prices.[449] The oil majors not only became *larger* due to increased production costs, but also kept posting profits that surpassed previous years' records.[450] In 2005, oil company executives provided many explanations when they were called before Congress to testify about potential gasoline price gouging. James Mulva, CEO of Conoco Phillips, stated: "Today's higher prices are a function of longer-term supply and demand trends and lost energy production during the recent hurricanes."[451] The *New York Times* remarked about Exxon Mobil's fortuitous rise to become the largest corporation in the world: "The increase occurred as oil prices rose to a record, swelling the company's 2004 sales to $298 billion—more than the gross domestic product of Norway."[452] Three years later, Exxon Mobil "beat its own record for the highest profits ever recorded by any company, with net income rising three percent to $40.6 billion, thanks to surging oil prices."[453] Across the Atlantic, January 2008 headlines read: "Shell smashed all-time British company profit records today, posting 2007 earnings of $27.5 billion."[454]

COLUM. L. REV. 295, 301-02, 315-16 (1987); Griffin & Xiong, *supra* note 279, at 305-07.

447. *See supra* note 268.

448. *See supra* note 424.

449. INT'L MONETARY FUND, *supra* note 398.

450. *See, e.g.*, Shirleen Dorman, *Chevron's Net Income Soars*, WALL ST. J., Nov. 1, 2008, at B5; David Ellis, *Exxon Shatters Profit Records*, CNNMONEY.COM, Feb. 1, 2008, http://money.cnn.com/2008/02/01/news/companies/exxon_earnings; *Exxon-Mobil Earnings Jumped 27% in Quarter*, N.Y. TIMES, Feb. 1, 2005, at C4; Chris Isidore, *Exxon Mobil Sets Profit Record*, CNNMONEY.COM, Jan. 30, 2006, http://money.cnn.com/2006/01/30/news/companies/exxon_earns; *Shell Sets New UK Profits Record*, BBC NEWS, Jan. 31, 2008, http://www.news.bbc.co.uk/2/hi/7219148.stm; *Shell's 'Obscene' £13.9 Billion Profit Is Biggest Ever by British Company*, DAILY MAIL, Jan. 31 2008, http://www.dailymail.co.uk/news/article-511387/Shells-obscene-13-9billion-profit-biggest-British-company.html; Adam Smith, *BP and Shell Downplay Record Profits*, TIME, Apr. 29, 2008, http://www.time.com/time/business/article/0,8599,1735821,00.html.

451. Vikas Bajaj, *Oil Executives Defend Profits Before a Critical Congress*, N.Y. TIMES, Nov. 9, 2005, http://www.nytimes.com/2005/11/09/business/09cnd-energy.html.

452. *Exxon-Mobil Earnings Jumped 27% in Quarter*, N.Y. TIMES, Feb. 1, 2005, http://query.nytimes.com/gst/fullpage.html?res=9C0DE0DD123BF932A35751C0A9639C8B63.

453. Jad Mouawad, *Exxon Mobil Profit Sets Record Again*, N.Y. TIMES, Feb. 1, 2008, http://www.nytimes.com/2008/02/01/business/01cnd-exxon.html.

454. *Shell's 'Obscene' £13.9 Billion Profit Is Biggest Ever by British Company*, *supra* note 450; *see also* Guy Chazan, *Shell Warns on Output After Profit Gusher*, WALL ST. J., Feb. 1,

A related factor that might have bred commodity market uncertainty, especially since it coincided with the first drastic price escalations during 1999, was information regarding anti-competitive supply chain relations with the proposed mergers and Federal Trade Commission ("FTC") investigations and approvals of the BP Amoco (January 1999), Exxon Mobil (November 1999), and Chevron Texaco (September 2001) mergers.[455] The mergers were controversial, and involved divestitures, restructuring, and FTC complaints that attempted to block the agreements.[456] In effect, it was a further consolidation of the "Seven Sisters."[457] Unsurprisingly, ten-year stock values of all three of these companies tracked the high oil price trends with stock prices appreciating by as much as 300 percent.[458]

C. "Speculation" Combined with Underlying Supply Uncertainty?

With numerous causal influences and no consensus as to what made traders react to drive prices so high, in 2009 it was commonly reported that market *speculation* was causing recent price surges.[459] In July 2009, Nobel Laureate

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2008, at A10.

455. *See* EIA, *Chronology*, *supra* note 373, at 20-24, 26, 30. See the entries for: Aug. 11, 1998; Dec. 2, 1998; Jan. 1, 1999; Mar. 31, 1999; May 27, 1999; Nov. 30, 1999; Feb. 2, 2000; Oct. 15, 2000; Nov. 18, 2000; Mar. 12, 2001. *See also FTC Consent Agreement Allows the Merger of Chevron Corp. and Texaco Inc., Preserves Market Competition*, FED. TRADE COMM'N (Sept. 7, 2001), http://www.ftc.gov/opa/2001/09/chevtex.shtm.

456. *See* John Hayes et al., *Market Definition in Crude Oil: Estimating the Effects of the BP/ARCO Merger*, 52 ANTITRUST BULL. 179 (2007) (discussing market issues involved with the mergers); *Exxon/Mobil Agree to Largest FTC Divestiture Ever in Order to Settle FTC Antitrust Charges*, FED. TRADE COMM'N (Nov. 30, 1999), http://www.ftc.gov/opa/1999/11/exxonmobil.shtm; Nancy Rivera Brooks & James F. Peltz, *Critics Line Up Against Chevron-Texaco Merger*, L.A. TIMES, Oct. 17, 2000, http://articles.latimes.com/2000/Oct/17/news/mn-37675; *see also* Complaint, *In re* Chevron Corp., No. C-4023 (Fed. Trade Comm'n Sept. 17, 2001), *available at* http://www.ftc.gov/os/2001/09/chevtexcmp.htm Complaint, *In re* British Petroleum Co., No. C-3868 (Fed. Trade Comm'n Apr. 19, 1999), *available at* http://www.ftc.gov/os/1999/04/981-0345.%20c3868%20british%20petroleum%20cmp.htm.

457. *See supra* notes 125-26.

458. *See* Stock Price of BP, MORNINGSTAR, http://quote.morningstar.com/Stock/s.aspx?t=BP&culture=en-US&region=USA&r=278669& byrefresh=yes (follow the "10Y" hyperlink) (last updated Sept. 29, 2010); Stock Price of Chevron Corporation, MORNINGSTAR, http://quote.morningstar.com/Stock/s.aspx?t=CVX (follow the "10Y" hyperlink) (last updated Sept. 29, 2010); Stock Price of ExxonMobil Corporation, MORNINGSTAR, http://quote.morningstar.com/Stock/s.aspx?t=XOM (follow the "10Y" hyperlink) (last updated Sept. 29, 2010).

459. *See* Lonnie K. Stevans & David N. Sessions, *Speculation, Futures Prices, and U.S. Real Price of Crude Oil* (Soc. Sci. Research Network, Working Paper, July 2, 2008), *available at* http://ssrn.com/abstract=1154686 (follow the "One-Click Download" hyperlink); Jon Birger, *Oil: Speculating on Higher Prices*, CNNMONEY.COM, (Aug. 3, 2009, 11:32 AM), http://money.cnn.com/2009/08/03/pf/oil_prices_rebound.fortune; *Did Speculation Fuel Oil Price Swings?*,

Paul Krugman wrote: "[O]il inventories are bulging, with huge amounts held in offshore tankers as well as in conventional storage. So this time there's no question: speculation has been driving prices up."[460] "Gambling" on the direction of prices in the futures commodity market may have been a culprit contributing to the earlier price spikes. Speculation has been periodically fingered for causing "artificial" prices in markets for more than a century.[461] However, because trading is assumed to be guided by unassociated self-interest[462] and by definition the futures market price is formed by aggregating the varying expectations and information of all traders,[463] it is probable that sequential information generated future supply level uncertainty to foster speculation conditions and drive sustained price increases to sevenfold higher prices over six years.

The most astute forecast may have been provided in a January 2003 UN *World Economic Situation and Prospects* report, which alerted that two of the four great economic uncertainties and risks for the global economy were "sustainability of the external deficits of the United States" and "military action in [Iraq, which] might lead to a disruption in oil supplies, provoking an oil-supply shock to the world economy exacerbating the effects of the increase in oil prices in late 2002."[464] Similarly, in August 2002, *Forbes* magazine wrote: "Where there's a rumor of war, there's nervousness in oil markets. It's to be expected that the saber rattling coming out of the White

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60 MINUTES (Jan. 11, 2009), http://www.cbsnews.com/stories/2009/01/08/60minutes/main4707770.shtml; INT'L MONETARY FUND, supra note 398; *Study Argues C.F.T.C. Missed Oil Speculation*, N.Y. TIMES DEALBOOK BLOG (Aug. 27, 2009, 4:19 PM), http://dealbook.blogs.nytimes.com/2009/08/27/study-argues-cftc-overlooked-oil-speculation/.

460. Paul Krugman, *Oil Speculation*, N.Y. TIMES OPINION PAGES (July 8, 2009, 9:01 AM), http://krugman.blogs.nytimes.com/2009/07/08/oil-speculation/; Kilian, *supra* note 400 ("[T]here is no evidence that [speculation] caused the surge in the real price of oil during 2003-06 and only very limited evidence that it helps explain the 2007-08 oil price surge.").

461. *See, e.g.*, CEDRIC B. COWING, POPULISTS, PLUNGERS, AND PROGRESSIVES: A SOCIAL HISTORY OF STOCK AND COMMODITY SPECULATION 1890-1936 3-24 (1965); RICHARD J. TEWELES ET AL., THE COMMODITY FUTURES GAME: WHO WINS? WHO LOSES? WHY? 11-14 (1974); Wendy Collins Perdue, *Manipulation of Futures Markets: Redefining the Offense*, 56 FORDHAM L. REV. 345-47 (1987); Steve Thel, *Regulation of Manipulation Under Section 10(b): Security Prices and the Text of the Securities Exchange Act of 1934*, 1988 COLUM. BUS. L. REV. 359, 364 (1988).

462. Price collusion has been a crime under U.S. federal law for over eighty years. Future Trading Act, Pub. L. No. 67-66, § 5(d), 42 Stat. 187, 188 (1921), *amended by* Pub. L. No. 74-675, § 9, 49 Stat. 1491, 1499-1500 (1936) (current version at 7 U.S.C. § 6 (2000)).

463. Kenneth Arrow, *Futures Markets: Some Theoretical Perspectives*, Summer 1981 J. FUTURES MKTS. 107, 114; Charles C. Cox, *Futures Trading and Market Information*, 84 J. POL. ECON. 1215, 1216-18 (1976).

464. U.N. ECON. & SOC. AFF., *World Economic Situation and Prospects 2003* 5-6 (2003), *available at* http://www.un.org/esa/policy/wess/wesp03-c1.pdf.

House about a possible invasion and change of regime in Iraq should have oil traders debating how oil markets will react . . . But [for maintaining supply] it's important to keep in mind that OPEC members routinely cheat on their outputs."[465] In September 2005, the IMF surmised that "*fears* of potential supply disruption" were a major cause of price increases.[466] Other scholars directly cited the invasion of Iraq as the cause of oil price increases to varying degrees.[467]

IX. Strategic Interests in Afghanistan

A. Coveted Pipelines

Public information involving Afghanistan may offer additional insight as to whether military actions precipitate market uncertainty. In an *ABC Nightline* broadcast devoted to the subject of securing oil and gas pipelines across Afghanistan, Ted Koppel opened by stating:

> Sometimes, and this may be one of those times, the obvious—our war against international terrorism—intersects with the not so obvious, developing the last major untapped pool of oil and gas in the world. It's not immediately evident and no one in the administration is talking about it openly, but the war on terrorism could produce major dividends for the United States . . . There are, in the region, massive energy resources and the presence of American military forces in Kyrgyzstan, for example, could ultimately enhance the ability of U.S. companies to move that oil and gas through previously inaccessible regions.[468]

A defining characteristic of the Cold War was that the "Seven Sister" multinational oligopoly permitted the U.K. and United States to use "supply

465. Hesseldahl, *supra* note 444.

466. INT'L MONETARY FUND, *supra* note 398 (emphasis added).

467. *See, e.g.*, STIGLITZ & BILMES, *supra* note 301, at 218 (estimating oil increases partially due to war in Iraq and citing a *Wall Street Journal* editorial contending that "[t]he best way to keep oil prices in check is a short, successful war on Iraq"); David Richardson, *Economics of War with Iraq*, Current Issues Brief No. 21, 2002-03, AUSTL. PARL., *available at* http://www.aph.gov.au/library/Pubs/cib/2002-03/03cib20.htm; Andrew Leigh et al., *What Do Financial Markets Think of War in Iraq?* (Nat'l Bureau of Econ. Research, Working Paper No. 9587, 2003), *available at* http://www.nber.org/papers/w9587; Salameh, *supra* note 270.

468. *Nightline: In the National Interest: Dividends from the War on Terrorism* (ABC television broadcast Apr. 25, 2004); *see also* BHC, Larry T. Marek, The Caspian Sea Pipeline: A Clear Strategic U.S. Interest (June 30, 2007) (Research Paper, U.S. Army War College), *available at* http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA471547&Location=U2&doc=GetTRDoc.pdf.

of oil" economic relationships as leverage to maintain countries within the capitalist geopolitical orbit. Russia, with its expansive energy resources, did the same with Soviet bloc countries.[469] With the Cold War over, Western oil companies began investing billions of dollars in the mid-1990s and were even granted rights to exploit by Caspian countries that were formerly under Soviet influence.[470] Capitalizing on investments would presumably require a means of efficiently transporting resources from the landlocked region to global markets.[471] The chief candidates included a westerly route (generally across the Balkans) and a southerly route (through Afghanistan), while geopolitics with Russia and Iran made paths through these countries unlikely options.[472]

The U.S.-Soviet "proxy war" during the 1980s left Afghanistan with battling regional factions and an impoverished population.[473] Amid turmoil, outside interests became consumed with the prospect of constructing pipelines across Afghanistan.[474] In 1998, a Taliban representative spoke at Columbia University to a room filled with oil company representatives and explained: "The people of Afghanistan are happier now that we have come. We have

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469. *See* SAMPSON, *supra* note 66, at 5-8, 156-64.

470. *See* JOHNSON, *supra* note 76, at 179.

471. *See* Barry Hart Dubner, *The Caspian: Is it a Lake, a Sea or an Ocean and Does it Matter? The Danger of Utilizing Unilateral Approaches to Resolving Regional/International Issues*, 18 DICK. J. INT'L L. 253, 284-87 (2000); *Caspian Sea Region: Natural Gas Export Options*, U.S. ENERGY INFO. ADMIN. (July 2002), http://www.eia.doe.gov/emeu/cabs/caspgase.html.

472. Dubner, *supra* note 471, at 284-87; Larry Chin, *Players on a Rigged Grand Chessboard: Bridas, Unocal and the Afghanistan Pipeline*, ONLINE JOURNAL (Mar. 6, 2002), http://www.onlinejournal.com/archive/03-06-02_Chin.pdf.

473. *The September 11th Sourcebooks: Volume VII: The Taliban File*, NAT'L SEC. ARCHIVE (Sept. 11, 2003), http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB97/; *see also* Eric S. O'Malley, *Destabilization Policy: Lessons from Reagan on International Law, Revolutions and Dealing with Pariah Nations*, 43 VA. J. INT'L L. 319, 353 (2003) (discussing U.S. support for Mujahadeen); James Risen, *Russians Are Back in Afghanistan, Aiding Rebels*, N.Y. TIMES, July 27, 1998, http://www.nytimes.com/1998/07/27/world/russians-are-back-in-afghanistan-aiding-rebels.html.

474. *See, e.g.*, BERNARD A. GELB, CONG. RESEARCH SERV., RS21190, CASPIAN OIL AND GAS: PRODUCTION AND PROSPECTS (2006), *available at* http://www.usembassy.it/pdf/other/RS21190.pdf; JOHNSON, *supra* note 76, at 169-70; Timothy L. Fort & Cindy A. Schipani, *Ecology and Violence: The Environmental Dimensions of War*, 29 COLUM. J. ENVTL. L. 243, 253 (2004); Pepe Escobar, *Pipelineistan, Part 1: The Rules of the Game*, ASIA TIMES (Jan. 25, 2002), http://www.atimes.com/c-asia/DA25Ag01.html; Chin, *supra* note 472; *see also* NEPDG, *supra* note 33, at 8.12; AHMED RASHID, TALIBAN: MILITANT ISLAM, OIL AND FUNDAMENTALISM IN CENTRAL ASIA 175-76 (2000) (claiming U.S. interest manifested into assisting Taliban mujahideen faction to attain power, apparently in the hope that it could secure a pipeline); Seymour M. Hersh, *The Price of Oil*, NEW YORKER, July 9, 2001, at 48; Risen, *supra* note 473.

brought stability and peace to the country."[475] The Taliban apparently could not provide security to the proposed pipeline route, seemingly because it lacked the military strength and popular support to exercise control across a mountainous and poor country with decrepit infrastructure and regional warlords vying for power and wealth by harvesting and trafficking in opium.[476]

Developments kindled during the Clinton administration, and some officials annexed assuring energy supply with national security. *Strategic Assessment 1999*, prepared for the Secretary of Defense and Joint Chiefs of Staff, affirmed that access to energy resources would shape international security, emphasized that up to two-thirds of the world's oil and gas needs "will come from the turbulent regions of the Persian Gulf and the Caspian basin," and even speculated that military force could be required if there was a threat to supply.[477] In a June 1998 CATO Institute speech entitled *Defending Liberty in a Global Economy*, Halliburton CEO Richard Cheney emphasized instability in oil rich regions and highlighted the suddenly-emerging strategic significance and American business opportunities in the Caspian.[478] In fall 1999, Cheney spoke at the London Institute of Petroleum and contended: "[B]y 2010 we [the world] will need on the order of an additional fifty million barrels a day. So where is the oil going to come from? . . . [T]he Middle East with two-thirds of the world's oil and the lowest cost, is still where the prize ultimately lies."[479] Cheney's assessment was over 300 percent higher than actual consumption growth over this period, but *if* his forecast was taken seriously, it could have provided signals to the market of

475. Aliya Haider, *The Rhetoric of Resistance: Islamism, Modernity, and Globalization*, 18 HARV. BLACKLETTER L.J. 91, 122 (2002).

476. *See* John A. Glaze, *Opium and Afghanistan: Reassessing U.S Counternarcotics Strategy*, STRATEGIC STUD. INST. (Oct. 2007), http://www.strategicstudiesinstitute.army.mil/pdffiles/pub804.pdf; Chin, *supra* note 472.

477. INST. FOR NAT'L STRATEGIC STUD., NAT'L DEF. U., STRATEGIC ASSESSMENT 1999: PRIORITIES FOR A TURBULENT WORLD xii, 39-54, (1999) *available at* https://digitalndulibrary.ndu.edu/cdm4/document.php?CISOROOT=/ndupress&CISOPTR=12900&REC=2; *see also* Ritt Goldstein, *Oil Wars Pentagon's Policy Since 1999*, SYDNEY MORNING HERALD, May 20, 2003, http://www.smh.com.au/articles/2003/05/19/1053196528488.html.

478. Richard B. Cheney, *Defending Liberty in a Global Economy*, Speech Delivered at the Cato Institute Collateral Damage Conference (June 23, 1998), *available at* http://www.cato.org/speeches/sp-dc062398.html; *see also Nightline*, *supra* note 468 (emphasizing Bush administration appointee connections to oil industry and Cheney's interest in the Caspian region).

479. Dick Cheney, Speech at the London Institute of Petroleum Autumn Lunch (1999), *available at* http://web.archive.org/web/20000414054656/www.petroleum.co.uk/speeches.htm; *see also Bill Moyers Journal: Moyers on Big Oil*, *supra* note 217.

fear of shortage and that the incoming administration would emphasize an "energy security" foreign policy.

Within days of taking office, newly-elected Vice President Cheney created and led an Energy Task Force (ETF) that espoused a mission to meld "the review of operational policies towards rogue states" and design policies "regarding the capture of new and existing oil and gas fields."[480] A May 2001 National Energy Policy Development Group (NEPO) report, entitled *Reliable, Affordable, and Environmentally Sound Energy for America's Future*, stated: "By any estimation, Middle East oil producers will remain central to world oil security. The Gulf will be a primary focus of U.S. international energy policy."[481] The report noted the importance of Caspian region oil and recognized that "proven oil reserves in Azerbaijan and Kazakhstan are about twenty billion barrels,"[482] which would be valued at $1 trillion with a $50 per barrel price. These estimated oil reserves are insignificant in comparison to proven Middle East reserves, but Turkmenistan is estimated to have the fifth largest gas reserves.[483] For multinationals, investments in the Caspian region diversify global operations and provide potentially higher profit margins with involvement in production and pipeline ownership.[484] For global markets, new production would provide another non-OPEC source of supply.[485] The NEPO report iterated dependence on Middle Eastern oil and the importance of regional alliances, estimated that the United States would require approximately fifty percent more imported oil over the next decade, and warned that "[a] significant disruption in world oil supplies could adversely affect our economy and our ability to promote key foreign and economic policy objectives."[486] Several other White House documents, memos, oil production tables, and maps of Iraqi oil fields (with February and March 2001 dates) later surfaced.[487] British reports also emphasized reliance on Middle

480. 150 CONG. REC. H4273-74 (daily ed. June 16, 2004) (statement of Rep. Pallone).

481. NEPDG, *supra* note 33, at 8.5.

482. *Id.* at 8.12.

483. *See Turkmenistan Country Profile*, BBC, http://news.bbc.co.uk/2/hi/south_asia/country_profiles/1298497.stm (last updated Nov. 4, 2010).

484. RICHARD SOKOLSKY, NATO AND CASPIAN SECURITY 69-70 (1999), available at http://www.rand.org/pubs/monograph_reports/MR1074/mr1074.chap6.pdf.

485. *Id.*

486. NEPDG, *supra* note 33, at x, 1.13, 8.3-8.5; Macalister, *supra* note 39.

487. *See, e.g.*, *Cheney Energy Task Force Documents Feature Map of Iraqi Oilfields*, JUDICIAL WATCH (July 17, 2003), http://www.judicialwatch.org/iraqi-oilfield-pr.shtml; *see also* 150 CONG. REC. H4273-74 (daily ed. June 16, 2004); Rebecca Leung, *Bush Sought 'Way' to Invade Iraq?*, CBS NEWS (Jan. 11, 2004), http://www.cbsnews.com/stories/2004/01/09/60minutes/main592330.shtml (referencing maps of oil fields and National Security Council planning).

Eastern oil, and Foreign Secretary Jack Straw's "Strategic Priorities for British Foreign Policy" speech in January 2003 noted that one critical priority was "to bolster the security of British and global energy supplies."[488]

B. Enron

During the late-1990s, Enron consummated contracts across South Asia, courted Taliban officials to corporate meetings in Texas, and escorted them to diplomatic meetings at the State Department.[489] At the same time, Enron unfurled a mission statement to become the world's leading company, and *Fortune* magazine identified it as one of "America's Most Innovative Companies."[490] During its high-profile insolvency and bankruptcy period,[491] Enron became regarded as an excessively leveraged[492] paper company, without assets,[493] but with an enigmatic financial structure[494] that permitted it to concoct fraudulent profitability accounting scenarios with affiliated shell

488. Jack Straw, Strategic Priorities for British Foreign Policy (Jan. 6, 2003) (transcript available at http://www.guardian.co.uk/politics/2003/jan/06/foreignpolicy.uk1).

489. *See The September 11th Sourcebooks: Volume VII: The Taliban File*, *supra* note 473; Craig Forcese, *Globalizing Decency: Responsible Engagement in an Era of Economic Integration*, 5 YALE. HUM. RTS. & DEV. L.J. 1, 16 (2002); Winston P. Nagan & Craig Hammer, *The New Bush National Security Doctrine*, 22 BERKELEY J. INT'L L. 375, 435 (2004); *Taleban in Texas for Talks On Gas Pipeline*, BBC, Dec. 4, 1997, http://news.bbc.co.uk/2/hi/world/west_asia/37021.stm.

490. *See* Nicholas Stein, *The World's Most Admired Companies*, FORTUNE, Oct. 2, 2000, at 182; *see also* Jacqueline Lang Weaver, *Can Energy Markets Be Trusted? The Effect of the Rise and Fall of Enron on Energy Markets*, 4 HOUS. BUS. & TAX L.J. 1, 17 (2004); Agis Salpukas, *Firing up an Idea Machine; Enron is Encouraging Entrepreneurs Within*, N.Y. TIMES, June 27, 1999, http://www.nytimes.com/1999/06/27/business/firing-up-an-idea-machine-enron-is-encouraging-the-entrepreneurs-within.html.

491. *See* Richard D. Cudahy & William D. Henderson, *From Insull to Enron: Corporate (Re)Regulation After the Rise and Fall of Two Energy Icons*, 26 ENERGY L.J. 35, 83-84 (2005).

492. *See* Third Interim Report of Neal Batson, Court-Appointed Examiner at 9, *In re* Enron Corp., No. 01-16034 (AJG) (Bankr. S.D.N.Y. June. 30, 2003).

493. *See* Peter G. Gosselin, *Enron a Rerun of History*, L.A. TIMES, Feb. 22, 2002, at A1; John Micklethwait & Adrian Wooldridge, *A Corporate Crisis? No, Just Business As Usual*, WASH. POST, June 23, 2002, at B1.

494. *See* Jeffrey N. Gordon, *What Enron Means for the Management and Control of the Modern Business Corporation: Some Initial Reflections*, 69 U. CHI. L. REV. 1233, 1236 (2002); Steve Leisman, *Deciphering the Black Box: Many Accounting Practices, Not Just Enron's, Are Hard to Penetrate*, WALL ST. J., Jan. 23, 2002, at C1.

companies.[495] Engaging in a decade of risky investments across Asia did not provide stability to its financial condition.

Enron's regional interest in Asia began in November 1993 when it contracted to build the Dabhol power plant in India.[496] At the time, it was the largest investment for both Enron and India at $2.9 billion and would give Enron a 65% controlling interest in a facility expected to provide 20% of India's energy needs by 1997.[497] By June 1998, the Dabhol power plant was producing overpriced energy at only ten percent of originally-anticipated capacity, and was mismanaged, plagued with corruption charges, going bankrupt, and scheduled to shut down in June 2001.[498] In summer 2001, the Bush White House constituted a "Dabhol Working Group" to urge India to continue funding the plant and keep it open.[499] A congressional investigation found that Enron's plan was to service energy production by transporting "liquified natural gas," which made the operation "not economically viable."[500] When the project operated, India, Enron, and other participating regional governments might have presumed that sufficient natural gas would be transported across Afghanistan. In June 1996, while Dabhol was under construction, Enron signed a $1.3 billion contract to exploit Uzbekistan's natural gas fields and the U.S. government authorized $400 million in funding from the Overseas Private Investment Corporation (OPIC) to support the

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495. *See* Second Interim Report of Neal Batson, Court-Appointed Examiner at 22-29, *In re* Enron Corp., No. 01-16034 (AJG) (Bankr. S.D.N.Y. Jan. 21, 2003); Harold S. Peckron, *Watchdogs that Failed to Bark: Standards of Tax Review After Enron*, 5 FLA. TAX REV. 853, 903 (2002).

496. LOREN FOX, ENRON: THE RISE AND FALL 49-53 (2004).

497. *See* Saritha Rai, *New Doubts on Enron's India Investment*, N.Y. TIMES, Nov. 21, 2001, at W1.

498. *See* COMMITTEE ON GOVERNMENT REFORM, U.S. HOUSE OF REPRESENTATIVES, 107TH CONG., BACKGROUND ON ENRON'S DABHOL POWER PROJECT 8-13 (2002) [hereinafter CGR]; Sylvie Choukroun, Enron in Maharashtra: Power Sector Development and National Identity in Modern India (Apr. 16, 2002), at 19-43 (unpublished Masters thesis, Univ. Of Pa.) (chronicling Indian government, media, and public reaction to Enron), *available at* http://lauder.wharton.upenn.edu/pdf/SylvieChoukroun_Thesis.pdf. *See generally* Tony Allison, *Enron's Eight-Year Power Struggle in India*, ASIA TIMES, Jan. 18, 2001, http://www.atimes.com/reports/CA13Ai01.html; Celia W. Dugger, *High-Stakes Showdown; Enron's Fight Over Power Plant Reverberates Beyond India*, N.Y. TIMES, Mar. 20, 2001, at C1.

499. *See* CGR, *supra* note 498, at 16; Dana Milbank & Alan Sipress, *NSC Aided Enron's Efforts*, WASH. POST, Jan. 25, 2002, at A18; Karen Tumulty & Michael Weisskopf, *What $6 Million Can Buy*, TIME, Jan. 28, 2002, http://www.time.com/time/magazine/article/0,9171,1001699,00.html.

500. CGR, *supra* note 498, at 5-6.

investment.[501] Several Caspian pipeline deals have since emerged,[502] but India is still seeking additional natural gas resources.[503]

C. The Invasion of Afghanistan

After the invasion of Afghanistan, U.S.-appointed President Hamid Karzai (reelected to a five-year term in November 2009)[504] signed an agreement in May 2002 with Turkmenistan and Pakistan to build the trans-Afghan gas pipeline project,[505] and the Pentagon located bases along the proposed route.[506] While the U.S. military seemed primed to ensure security to the

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501. *See OPIC to Underwrite Uzbek Gas E&D*, 94 OIL & GAS J. 35 (1996); *Uzbekistan Has Difficulties Finding Venues for Its Gas*, ALEXANDER'S GAS & OIL CONNECTIONS (Oct. 12, 1998), http://www.gasandoil.com/goc/news/ntc85031.htm.

502. Pipelines toward Europe have been built. *See* EIA, *Chronology*, *supra* note 373 (see July 13, 2006); JOHNSON, *supra* note 76, at 173. Additional routes are being considered. *See Go-ahead For Balkan Oil Pipeline*, BBC, Dec. 28, 2004, http://news.bbc.co.uk/2/hi/business/4130271.stm; Balazs Koranyi, Gas Disputes May Spur Plans For Balkan Pipeline, REUTERS, Jan. 25, 2009, http://uk.reuters.com/articlePrint?articleId=UKLO45463120090125. In 2007, construction of a seven-thousand-kilometer natural gas pipeline from Turkmenistan to China began. *China President Opens Turkmenistan Gas Pipeline*, BBC, Dec. 14, 2009, http://news.bbc.co.uk/2/hi/8411204.stm.

503. *See* K. ALAN KRONSTADT, CONG. RESEARCH SERV., RL33529, INDIA-U.S. RELATIONS 1, 27 (2007), *available at* http://fpc.state.gov/documents/organization/80669.pdf; ARIEL COHEN ET AL., HERITAGE FOUND., THE PROPOSED IRAN-PAKISTAN-INDIA GAS PIPELINE: AN UNACCEPTABLE RISK TO REGIONAL SECURITY (2008), *available at* http://www.heritage.org/research/asiaandthepacific/bg2139.cfm.

504. *See* U.N. Sec. Council, Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions, S/2001/1154 (2001), *available at* http://www.unhcr.org/refworld/docid/3f48f4754.html; JAMES DOBBINS ET AL., AMERICA'S ROLE IN NATION-BUILDING FROM GERMANY TO IRAQ 133 (2003); *Karzai Declared Elected President*, BBC NEWS (Nov. 2, 2009), http://news.bbc.co.uk/2/hi/south_asia/8337832.stm.

505. *See Turkmen-Afghan-Pakistani Gas Pipeline Accord Published*, ALEXANDER'S GAS & OIL CONNECTIONS (June 27, 2002), http://www.gasandoil.com/goc/news/nts22622.htm; *Afghanistan Plans Gas Pipeline*, BBC, May 13, 2002, http://news.bbc.co.uk/2/hi/business/1984459.stm; *3 Nations Pushing For Afghan Pipeline*, N.Y. TIMES, Dec. 27, 2002, at A8.

506. Former Defense Intelligence Agency Analyst Karen Kwiatkowski references a map of military bases and remarks: "If you map the proposed pipeline route across Afghanistan and you look at our bases, it matches perfectly. Our bases are there to solve a problem that the Taliban could not solve. The Taliban couldn't provide security in that part of Afghanistan. Well that's where our bases are. So, does that have to do with Osama bin Laden? It has nothing to do with Osama bin Laden." DVD: Hijacking Catastrophe: 9/11 Fear & Selling American Empire (Media Education Foundation 2006). In particular, see the interviews with Kwiatkowski and Vandana Shiva. *See also* Ramtanu Maitra, *US Scatters Bases to Control Eurasia*, ASIA TIMES, Mar. 30, 2005, http:/www.atimes.com/atimes/central_Asia/GC30Ag01.html; Nagan & Hammer, *supra* note 489, at 377 (noting that the war cost little but strategic value of "projected oil pipeline" was great).

proposed pipeline route, whether the original purpose of the invasion—to fight al Qaeda-was accomplished remains debatable.

The September 14, 2001 congressional resolution authorized the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the [September 11, 2001] terrorist attacks."[507] Pentagon news releases chronicled the "hot pursuit" and escape of a convoy suspected to be carrying Osama bin Laden and al-Qaeda members in hundreds of cars and trucks across the country.[508] On another occasion, militants were nearly surrounded but were able to flee into Pakistan across unblocked mountain passes.[509] An unknown number of other militants were purportedly picked up by relief planes in Konduz and flown safely into Pakistan.[510] Enemy elusiveness began to bedazzle the global media when vivid sketches surfaced of massive multi-story cave complexes that no one could discover, yet insurgents supposedly used to evade capture.[511] Within six months, the Bush administration allegedly lost interest in bin Laden,[512] shifted attention to Iraq,[513] and allocated

507. S.J. Res. 23, 107th Cong. (2001).

508. *See* Philip Smucker, *Bin Laden 'Fled to Hills' as Jalalabad Fell*, TELEGRAPH (London), Nov. 23, 2001, http://www.telegraph.co.uk/news/worldnews/asia/afghanistan/1363262/Bin-Laden-fled-to-hills-as-Jalalabad-fell.html.

509. *See* Sami Yousafzai et al., *How Al Qaeda Slipped Away*, NEWSWEEK, Aug. 19, 2002, *available at* http://www.newsweek.com/id/65417.

510. *American Morning with Paula Zahn: New Report Claims Secret U.S. Airlift of Pakistani Military Advisors out of Afghanistan Was also an Escape Route for Enemy* (CNN televised broadcast Jan. 21, 2002) (transcript available at http://transcripts.cnn.com/TRANSCRIPTS/0201/21/ltm.10.html).

511. *See* Edward Jay Epstein, *Fictoid #3: The Lair of bin Laden*, http://www.edwardjayepstein.com/nether_fictoid3.htm (last visited Sept. 30, 2010); *see also Meet the Press: Secretary Rumsfeld Interview*, (NBC television broadcast Dec. 2, 2001) (transcript available at http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2585) (addressing underground fortress "blueprints" from the *London Times*, Rumsfeld noted: "There's not one of th[e]se [cave complexes]. And I might add, Afghanistan is not the only country that has gone underground. Any number of countries have gone underground . . . There are many of th[e]se.").

512. Transcript, Third Presidential Debate, WASH. POST., Oct. 13, 2004, http://www.washingtonpost.com/wp-srv/politics/debatereferee/debate_1013.html (during the 2004 Presidential debates, Bush and Kerry sparred over whether the Bush Administration was focusing on Osama bin Laden, and Kerry explained that Bush stated: "I don't really think about him very much. I'm not that concerned" about Osama bin Laden); *see* Press Conference from Pres. George W. Bush to the Media (Mar. 13, 2002) (transcript available at http://archives.cnn.com/2002/ALLPOLITICS/03/13/bush.transcript ("[W]ho knows if he's hiding in some cave or not? We ha[ve]n't heard from him in a long time . . . . I don't know where he is . . . . [Y]ou know, I just don't spend that much time on him.").

513. *See* SENATE SELECT COMMITTEE ON INTELLIGENCE, 108TH CONG., REP. ON THE U.S. INTELLIGENCE COMMUNITY'S PREWARE INTELLIGENCE ASSESSMENTS ON IRAQ 496 (2004)

nearly $1 billion to the Pakistani military for the next five years to support the mission of capturing bin Laden.[514] The assignment of culpability for 9/11 that "justified" the invasion of Afghanistan seemed to shift from a malicious man to the allegiant group called al Qaeda, to the Taliban, and even to segments of the Afghani population and regional warlords that might oppose occupation,[515] while sometimes placing innocent civilians at risk.[516]

There are parallels between the invasion of Iraq and the invasion of Afghanistan. They both involved addressing purported security threats and possible post-invasion economic benefits by remaining in occupation.[517] For Afghanistan, it was an interest that might manifest into long-coveted pipeline routes.[518] If traders viewed this invasion and occupation information as either a Pentagon focus on protecting global energy supply or an act of nationalist self-interest, then it may have signaled to them a market uncertainty that further fueled the rapid inflation of global oil prices.

X. Conclusion

There have been numerous explanations for the drastically higher oil prices trends that prevailed during the period from 2002 to 2008. This article offers a detailed supply side explanation of how conflict and geopolitics may generate commodity market uncertainty. The five most dramatic price spikes in the past forty years coincided with what were arguably the five most turbulent Middle East events over that period—the OPEC embargo/standoff during 1973, the 1979-80 Iranian hostage crisis, the Iran-Iraq war during the early-1980s, the 1991 invasion of Kuwait, and the 2003 invasion and occupation of Iraq.[519] The current increase coincided with the Pentagon's first full-scale deployment since the Vietnam War, to a region possessing two-thirds of global oil reserves.

A finance axiom is that information moves markets.[520] If the news depicts

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(statement of Senator Wyden) (criticizing Bush administration for shifting attention onto Iraq).

514. *America's Most Wanted Eludes Capture*, ABC NEWS, Sept. 9, 2007, http://abcnews.go.com/GMA/story?id=3577176.

515. *See* ALFRED W. MCCOY, A QUESTION OF TORTURE 214 (2006); MARK DENBEAUX, REPORT ON GUANTAMAMO DETAINEES: A PROFILE OF 517 DETAINEES THROUGH ANALYSIS OF DEPARTMENT OF DEFENSE DATA, *available at* http://law.shu.edu/publications/guantanamoReports/guantanamo_report_final_2_08_06.pdf.

516. *See Afghanistan's Civilian Deaths Mount*, BBC, Jan. 2, 2002, http://news.bbc.co.uk/2/hi/south_asia/1740538.stm; *U.S. Slammed for 'Cluster' Bombs*, CBS NEWS, Dec. 18, 2002, http://www.cbsnews.com/stories/2002/12/18/terror/main533520.shtml?tag=mncol;lst;1.

517. *See generally* Parts V, VI, VII.

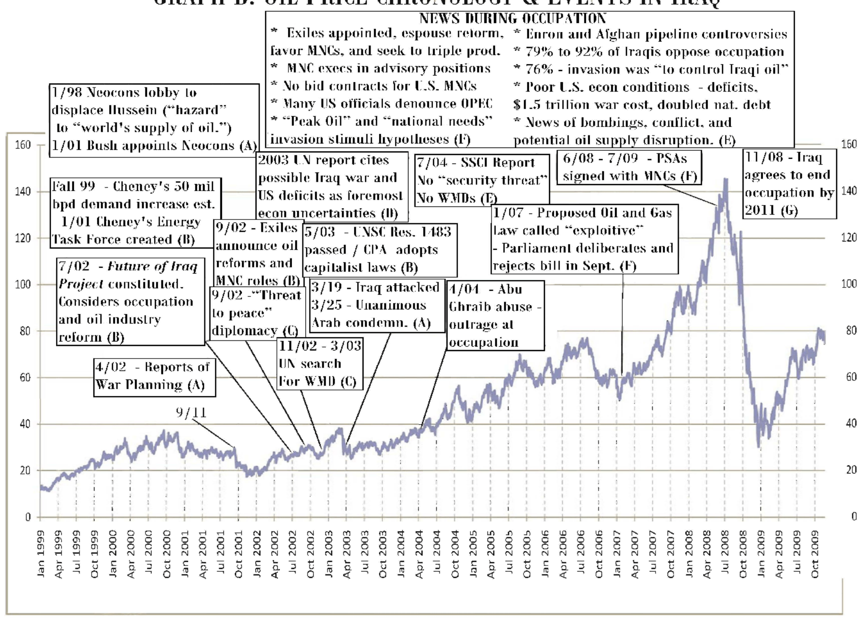
518. *See generally* Part IX.A.

519. *See supra* notes 115, 136, 371, 373.

520. *See* Paul C. Tetlock, *Giving Content to Investor Sentiment: The Role of Media in the*

conditions that might cause supply shortfall or uncertainty, then naturally a commodity becomes more valuable. The following chart illustrates this by imposing dominant global headlines on a graph of oil prices.

GRAPH B: OIL PRICE CHRONOLOGY & EVENTS IN IRAQ



A. Bejesky, Politico, *supra* note 19, at 10-14, 22, 34, 38-41.
B. *See supra* Part V.A.; *supra* notes 207-10, 478-84.
C. Bejesky, WI, *supra* note 19, at 6-29, 37-51, 56-69
D. *See supra* note 464.
E. Bejesky, Politico, *supra* note 19, at 6, 41-42, 49-50, 56-61, 77-78.
F. *See supra* notes 26, 45-51, 142, 193, 209, 228-30, 250, 299-305, 350-64, 467, 497-503.
G. Bejesky, Politico, *supra* note 19, at 9.

Three distinct trader perceptions may follow from this information: (1) there is a lingering remnant of the *realist*-based "use of force" system to garner energy supply, (2) OPEC's supply system cohesion might be disrupted, and (3) conflict could subvert short-run supply.

First, the United States currently uses one-fourth of global oil production and imports sixty percent of that consumption. With no WMD, no Iraqi government ties to al Qaeda, an Iraqi public favoring democratization but evidently opposed to occupation, and many top officials acknowledging that oil was a motivation for the invasion of Iraq,[521] and with the mission in Afghanistan possibility being interpreted as a shift from capture of Osama bin

Stock Market, 62 J. FIN. 1139 (2007); Lauren Cohen et al., *The Small World of Investing: Board Connections and Mutual Fund Returns* 1 (Nat'l Bureau of Econ. Research, Working Paper No. 13121, 2007), *available at* http://www.hbs.edu/research/pdf/08-055.pdf.

521. *See* Rhea, *supra* note 26, at 609.

Laden to protection of a proposed pipeline route, it is highly probable that revelations feed market perceptions that there were other reasons for military action or that U.S. military dominance was employed to control or secure foreign resources. Perceptions may be mutually reinforcing with "peak oil" hypotheses and knowledge of historical British and American foreign policy if future risk of shortage appears realistic. After taking office in January 2001, President Bush's top appointed neoconservative officials were the modern day equivalent of "hawks" and proponents of military hegemony. They had blatantly advocated overthrowing the Iraqi government for five years prior to the 2003 invasion, but emphasized altruistic intentions, which included protecting global oil supply and wielding a prominent U.S. military role in the Middle East.

Second, U.S. officials openly condemned OPEC, referred to it as an "evil cartel," and wanted to "break it up" even though OPEC was producing at record levels and trader market reactions drove high prices.[522] There were projections that Iraqi oil production—at approximately 2.5 million barrels per day—was only one-third of potential production, with the OEWG even providing a one-ninth estimate. Current production is only seven percent of OPEC's total but expanding production threefold would move the production range to twenty percent,[523] cutting into a higher percentage of supply and presumably pulling Iraq out of OPEC and quota negotiations. Remaining member countries could be left with revenue shortfalls and public account disruptions that might inspire two extreme reactions—members could either fend for themselves at the current price or band together to drastically drop exports. Such effects are usually not immediate, but uncertainty is the basis of the futures market.

Third, reports of violence in Iraq signaled potential production disruptions. Those conditions did not exist before the invasion. During the occupation-protected governmental restructuring, White House/CPA dictates were imposed on a relatively closed and socialized economy and the media reported that reforms would overwhelmingly benefit U.S. corporations.[524] Adopting market-oriented legislative structures may be rational and advisable in the end, but these reforms were excessive "shock treatment," neither gradual nor stable, and it appeared as if institutions to protect foreign oil investors' property rights were being locked in even before there was an

522. *See supra* notes 2-6, 9-11, 228.

523. DEP'T OF ENERGY, *supra* note 172 (showing that production vacillated between 1.31 to 2.36 mbpd between 2002 and 2008).

524. *See, e.g.*, Gathii, *supra* note 184, at 513; Nagan & Hammer, *supra* note 489, at 377 (calling this a "win-win scenario for American corporate interests, as well as the Iraqi exiles who would replace Saddam's ruling autocracy"); Bejesky, *Politico*, *supra* note 19, at 78-79.

elected Iraqi government. Imposed rules were consistent with White House and Iraqi exile pre-invasion planning proposals, despite questionable public acceptance of the rules and even drastic repudiation.

Against this backdrop of reform, and after there *was* an elected Iraqi government, new oil law proposals endeavoring to stimulate foreign investment were fiercely resisted as "exploitive." Without a new federal oil law and in light of constitutional controversies over sub-national assertions of authority and the legal status of the federal government's PSAs with foreign investors during 2008 and 2009, market uncertainty still remains. The allegation that Iraq "requires" large-scale multinational capital infusion, when OPEC countries have had nationalized industries for decades and are awash in reinvestment revenues to increase production, is extremely controversial.

Regarding the viability of an ICJ/WTO claim against OPEC, it is assuredly *possible* for OPEC to exploit a situation that might result in higher global and artificial prices, but the facts indicate that this *did not* happen, and so did not cause the recent soaring prices. With such low and stable prices prevailing from the mid-1980s until 1999, it is not clear that OPEC's behavior has been unreasonably opportunistic for the past thirty years. As for American politicians transfixed on expedient explanations for American economic downturns and high oil and gasoline prices, they should search for answers beyond OPEC heuristics. The potential to obscure clear vision might even be higher with the $393 million spent by the U.S. oil industry on lobbying and campaign contributions during the Bush administration's tenure.[525] Politicians should focus on legislation that merges policies that reduce demand, improve energy efficiency, and support environmental protection. As Thomas Friedman notes, the fact that the United States must alter its energy consumption patterns to reduce the price of oil is "no longer a hobby for high-minded environmentalists or some personal virtue. It is now a national security imperative."[526] If consumption reduces due to technological progress, then demand and global market prices drop *ceteris paribus*. So, too,

525. *See* 150 CONG. REC. H4274 (daily ed. June 16, 2004); *see also, e.g.*, Lindsay Renick Mayer, *Big Oil, Big Influence*, PBS, Aug. 1, 2008, http://www.pbs. org/now/shows/347/oil-politics.html ("$393.2 million"); Leslie Wayne, *Companies Used to Getting Their Way*, N.Y. TIMES, Dec. 4, 1998, http://www.nytimes.com/1998/12/04/business/companies-used-to-getting-their-way.html. *But cf.* Lloyd Hitoshi Mayer, *What is This "Lobbying" That We Are So Worried About?*, 26 YALE L. & POL'Y REV. 485, 492 (2008) ("[T]he Supreme Court has held that Congress cannot prohibit individuals or entities, including corporations, from expending funds on speech aimed at influencing government actions in most instances.").

526. Thomas L. Friedman, *The First Law of Petropolitics*, FOR. POL'Y 28, 36 (May/June 2006); *see also* Justin Stolte, *The Energy Policy Act of 2005: The Path to Energy Autonomy?*, 33 J. LEGIS. 119 (2006); Roger C. Altman, *The Beltway's Energy*, WALL ST. J., June 16, 2006, at A14 ("[T]he only real strategy on oil is to use less of it.").

should the "national security" anxiety, articulated by some as manifesting into a post-Cold War Pentagon mission to "protect" global oil supply, dissipate. The argument that global military hegemony breeds stability—including for markets—out of what would otherwise be chaos, lacks substantial foundation.