

ADVENTURE CAPITALIZING IN BAGHDAD: AN ENTREPRENEURIAL APPROACH TO RECONSTRUCTING IRAQ

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I. INTRODUCTION

Cookies were the last thing on Americans' minds when they toppled Saddam Hussein's regime in March of 2003. However, for Sadik Hamra, owner of one of Baghdad's oldest cookie bakeries, small business owners can offer a great deal to Iraq's new and evolving economy.¹ While entrepreneurs like Hamra struggle to find avenues for expanding business in Baghdad, they become entangled in bureaucracy webs that effectively discourage entrepreneurialism in a country that needs business investment badly. In Hamra's case, his desire for \$4 million in expansion capital cannot be met by the few Baghdad banks that extend loans, most of which demand collateral of 200-800% of the amount requested.² In short, Hamra's company "needs America."³

U.S. entrepreneurs can resolve Hamra's dilemma.⁴ According to Greg Wong, a U.S. Department of Commerce senior commercial officer who was stationed in Baghdad, small businesses could spur Iraq's volatile economy and

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¹ Arlyn Tobias Gajilan, *Entrepreneurs in Iraq Tangle in U.S. Red Tape*, 2004, available at

http://money.cnn.com/magazines/fsb/fsb_archive/2004/11/01/8190934/index.htm.

² *Id.*

³ *Id.*

⁴ The few American entrepreneurs that have invested in Iraq have been widely deemed not to be sufficient for U.S. companies to remain competitive in the region. For example, Paul Brinkley, U.S. Undersecretary of Defense for Business Transformation during the Bush Administration, explained that:

As security has improved, multinational companies have begun establishing operations—and not just in Iraq's oil sector. U.S. efforts since the summer of 2006 have led to the restoration of 100,000 jobs, and it's estimated that hundreds of thousands more have been created as a secondary and tertiary result. This is a good start. But in a country of 29 million people with 6 million potential workers, much remains to be done.

Paul Brinkley, *To Save Iraq, Start Investing*, Dec. 31, 2008, available at <http://www.newsweek.com/id/177417>.

create jobs.⁵ In essence, American entrepreneurs could “rebuild Iraq, one business at a time.”⁶ In doing so, they could alleviate the burden on the U.S. Government and its military in rebuilding Iraq.

In order to engage American entrepreneurialism as a vehicle for Iraqi economic reconstruction, U.S. entrepreneurs must foster “adventure capitalism”⁷ by taking advantage of Iraq’s National Investment Law through the facilitation of foreign direct investment. Fortunately, this National Investment Law provides the atmosphere for adventure capitalism by providing increased political risk insurance, protection against expropriation, and a stable legal system with viable dispute resolution.

In Section II, this note will discuss the factors that led to the passage of Iraq’s National Investment Law. Section III will address the incentives and benefits to U.S. entrepreneurs who engage in adventure capitalism in Iraq. Section IV will analyze and assess Iraq’s National Investment Law and its key aspects that make adventure capitalism by U.S. entrepreneurs a viable way to reconstruct Iraq.

⁵ Gajilan, *supra* note 1 (quoting Greg Wong, U.S. Department of Commerce senior commercial officer).

⁶ *Id.*

⁷ An “adventure capitalist” is an entrepreneur that helps other entrepreneurs financially, and often plays an active role in the company’s operations. Definition of “adventure capitalist”, available at http://www.investorwords.com/127/adventure_capitalist.html. According to wiseGeek.com, a business search engine, “adventure capitalist” may also be defined as an individual who provides a steady stream of capital to a business or other entrepreneur in exchange for some sort of interest or recompense in regard to the project that the lender wishes to undertake. This remuneration can come in several forms. Those who chose to sponsor and financially support efforts to explore or invest in foreign countries were once referred to as adventure capitalists, since they were willing to cover the expenses generated by an expedition or adventure. Today, an adventure capitalist is sometimes referred to as a “venture capitalist.” By either term, the outcome is the same. A wealthy individual encounters a project that is of interest to him or her, meets with persons who wish to oversee and execute the project, and makes a decision on whether or not to extend funding to the endeavor. While adventure capitalists may choose to seek recompense in a number of ways, the most common when it comes to launching a new company is being awarded a seat on the board of directors of the new entity. This allows the adventure capitalist to participate first hand and observe how his or her influx of cash is being managed. In other situations, the adventure capitalist may choose to seek compensation in other ways, such as being featured prominently in the publicity generated by the project, or with some sort of agreement of a sharing of profits should the project achieve its stated goals. wiseGeek.com, *What is an Adventure Capitalist?*, available at <http://www.wisageek.com/what-is-an-adventure-capitalist.htm>. In the context of this note, an adventure capitalist is an American entrepreneur who invests in Iraq as a means to reconstruct the country during the post-war era.

I. DECONSTRUCTING THE PATH TO IRAQ'S NATIONAL INVESTMENT LAW

Foreign direct investment has been an uneasy and often controversial concept for Iraq's new economy since the fall of the Ba'ath Party⁸ in 2003. When the Coalition Provisional Authority, Iraq's transitional government,⁹ issued its now infamous Order 39 under the auspices of L. Paul Bremer, former Director of Reconstruction and Humanitarian Assistance, many decried violations of international law. This order was Iraq's initial foreign investment law after the 2003 transition. Order 39 stated that foreign entrepreneurs were "entitled to make foreign investments in Iraq on terms no less favorable than those applicable to an Iraqi investor."¹⁰ Order 39 also authorized foreign investment in Iraq in all economic sectors except banks, insurance companies, and natural resources.¹¹

Order 39 unleashed an outcry from international law and political science scholars alleging violations of international law and Iraqi sovereignty. Antonia Juhasz, project director for the International Forum on Globalization, claimed that the order opened Iraq's economy to foreign investors only to disadvantage the Iraqis "in one fell swoop by U.S. fiat."¹² Other critics, including the United Nations Security Council, alleged that Order 39 violated the Hague Regulations of 1907. These regulations state that "occupying powers...must safeguard the capital of these properties [of the occupied country] and administer them in accordance with the rules of usufruct."¹³ Perhaps the strongest opposition came from Iraqi businesspersons, who viewed the provision as creating a permanent "world occupation" of its economy. These businesspeople felt that the provision would transform the

⁸ The Ba'ath Party was the entity that propelled Saddam Hussein to the presidency of Iraq in 1979. See generally Tarik Kafala, *The Iraqi Baath Party*, BBC NEWS ONLINE, Mar. 25, 2003, available at http://news.bbc.co.uk/2/hi/middle_east/2886733.stm.

⁹ The Coalition Provisional Authority was dismantled in June 2004 when the U.S. and its coalition forces transferred sovereignty back to the Iraqis. *U.S. Returns Sovereignty to Iraq*, CNN.COM, Jun. 28, 2004, available at <http://www.cnn.com/2004/WORLD/meast/06/28/iraq.handover/index.html>.

¹⁰ *Coalition Provisional Authority Order Number 39: Foreign Investment*, Sept. 19, 2003, available at http://www.cpa-iraq.org/regulations/20031220_CPAORD_39_Foreign_Investment_.pdf.

¹¹ *Id.*

¹² Antonia Juhasz, *The Economic Colonization of Iraq: Illegal and Immoral*, Remarks before the International Forum on Globalization, May 8, 2004, available at <http://www.ifg.org/analysis/globalization/IraqTestimony.html>.

¹³ *Bouvier's Law Dictionary* defines "usufruct" as an arrangement that grants one party the right to use and derive benefit from another's property "without altering the substance of the thing." Naomi Klein, *Bring Halliburton Home*, THE NATION, Nov. 6, 2003, available at <http://www.thenation.com/doc/20031124/klein>.

Iraqis into “immigrants in their own land.”¹⁴ Iraq needed a new provision that protected its own sovereignty while allowing global investment to aid with reconstruction.¹⁵

In order to address these concerns of Iraq’s business leaders and international law scholars, the new Iraqi government repealed Order 39 by passing the National Investment Law (“NIL”) in October 2006.¹⁶ The new provision provided a mutually attractive and much less controversial framework for U.S. foreign direct investment in Iraq.¹⁷ Some of its incentives included an offer of tax-free status over ten years for U.S. licensed projects coupled with a commitment not to expropriate or nationalize foreign-owned firms.¹⁸ Additionally, the law created a “National Committee on Investment,”

¹⁴ Mark Fineman, *Open Investment Policy Looks Like “World Occupation” to Iraq*, L.A. TIMES, Sept. 23, 2003, at A1.

¹⁵ See Judith Richards Hope & Edward N. Griffin, *The New Iraq: Revising Iraq’s Commercial Law is a Necessity for Foreign Direct Investment and the Reconstruction of Iraq’s Decimated Economy*, 11 CARDOZO J. INT’L & COMP. L. 875, 877 (2004). (“Iraqi’s commercial law has been in desperate need of change, based on accepted, consensus-level international standards. To ensure their long-term stability and continuity, a necessity for a stable investing environment, these new measures should be achieved with the input and accord of the people of Iraq.”)

¹⁶ *Iraq MPs Pass Law to Encourage Foreign Investment*, AFX NEWS LTD., Oct. 11, 2006, available at http://www.iraqupdates.com/p_articles.php/article/10999.

¹⁷ It also enhanced the competitive capabilities of the Iraqi economy. Dr. Mahdi Al-Hafiz, member of the Iraqi Parliament and former minister of planning, explained the benefits of the law for Iraqis:

The truth is that the benefits of foreign direct investment are clear and of significant importance for the remarkable development experiences in many countries such as China, India, Malaysia, Mexico and Brazil and other countries in the world, in all continents. They are the acquisition of modern technologies, the fight against unemployment (creating job opportunities), the development and diversification of exports and the variation of the productive base of the national economy and others. This is what Iraq needs, more than ever, in the framework of...policies and orientations to reform and diversify the economy, reconstruction, tackling the problem of unemployment and improve (sic) the quality of services and expand them (sic). It is an urgent necessity imposed by the significant lack of internal financial resources, compared to the high estimated cost to achieve these programs and projects.” Al-Bayan, *The Investment Law Seeks to Enhance the Competitive Capabilities of the Iraqi Economy*, Oct. 12, 2006, available at http://www.iraqupdates.com/p_articles.php/article/11050/refid/RN-story-10-01-2009.

¹⁸ *Iraq MPs Pass Law to Encourage Foreign Investment*, *supra* note 16.

overseen by the Iraqi Prime Minister's office, to balance Iraqi interests with foreign direct investment.¹⁹

In order to qualify for coverage under the NIL, U.S. entrepreneurs must meet certain obligations. As a preliminary matter, investors must notify the Iraqi National Commission for Investment (or the appropriate Region or Governorate Commission) in writing immediately after the installation and equipping of the fixed assets for the venture and the date of the beginning of commercial activity.²⁰ Once established, the investor must keep records that are audited by a certified Iraqi accountant.²¹ The investor must also provide an "economic and technical feasibility study," which essentially entails budget and progress statements.²² In addition, the investor must comply with Iraqi environmental laws²³ and keep records of duty-free imports.²⁴ The provisions of the law that may benefit the Iraqis the most require that the U.S. entrepreneur give priority in employment and recruitment to Iraqis,²⁵ adhere to Iraqi employment laws,²⁶ and surrender its business license if it does not provide progress reports of such employment to the National Commission for Investment within six months.²⁷

While these restrictions may seem onerous to the U.S. entrepreneur, the benefits of the NIL outweigh the costs.²⁸ Nonetheless, U.S. investors have been slow to capitalize on Iraq's promising market despite this positive step toward encouraging foreign direct investment in Iraq. Immediately following the military operation in Iraq, the U.S. Congress pledged \$21 billion as a "down payment" on reconstruction, a move aimed at sparking U.S. investors' interests in continuing the effort.²⁹ However, U.S. companies did not seem to be convinced that the rewards of investing in Iraq outweighed the risks. This concern was evident with the surge of violence in 2004 that included the public beheading of Nicholas Berg, a Pennsylvanian contractor working in Baghdad.³⁰

The few American entrepreneurs investing in Iraq at the time had to grapple with theft of their supplies, rocket attacks on buildings where their

¹⁹ *Id.*

²⁰ NATIONAL INVESTMENT LAW [NIL] art. 14(1) (2007), available at http://trade.gov/static/iraq_investmentlaw.pdf.

²¹ *Id.* at art. 14(2).

²² *Id.* at art. 14(3).

²³ *Id.* at art. 14(5).

²⁴ *Id.* at art. 14(4).

²⁵ *Id.* at art. 14(8).

²⁶ NIL art. 14(6).

²⁷ *Id.* at art. 14(7).

²⁸ See *infra* Part III.

²⁹ Ariana Eunjung Cha & Jackie Spinner, *U.S. Companies Put Little Capital into Iraq*, WASH. POST, May 15, 2004, at A17.

³⁰ *Id.*

employees reside, and hostility toward American advertising in the region.³¹ For example, General Electric Co., which sent a unit of business development managers to Iraq to examine the medical supplies market, pulled its operations due to violence in 2004.³² A similar situation occurred with Haworth Inc., a large office equipment company based in Holland, Michigan, which entered into a joint venture to provide technology to the Iraqi government and commercial offices, but then retreated amidst violence.³³

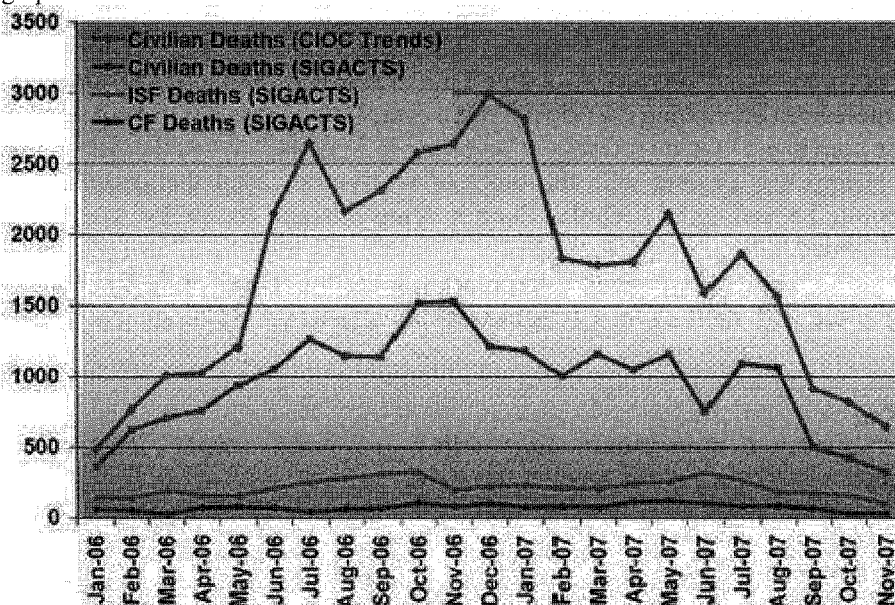
Apart from the conditions on the ground in Iraq,³⁴ U.S. companies were ill-equipped to succeed in Iraq because they simply lacked the know-how that would make them competitive with local and regional Iraqi investors.³⁵ Specifically, Arab firms with more experience working in the region and a higher tolerance for political and economic uncertainty have surpassed U.S. investors in Iraq's emerging markets.³⁶ The contrast has been clear: only one of the 15 banks that applied for licenses in 2004 was American.³⁷ Only a

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ Violence in Iraq has decreased significantly since 2003, as depicted in the following graph:



Source: SIGACTS (CF reports only) and CIOC Trends (CF & Iraqi reports checked for duplication) as of 8 Dec 07. Includes all causes of death.

Bill Roggio, *Iraq by the numbers: Graphing the Decrease in Violence*, THE LONG WAR JOURNAL, Dec. 17, 2007, available at http://www.longwarjournal.org/archives/2007/12/iraq_by_the_numbers.php.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

handful of the 100 companies that applied for cellular phone licenses were American.³⁸

The absence of American entrepreneurs from the Iraqi market has also allowed their European and Asian counterparts to fill the void. For example, a Romanian consortium and a Lebanese company have signed revenue-sharing deals with Iraqi state-owned cement factories, with each entity investing approximately \$150 million.³⁹ Moreover, China has capitalized on its intellectual property expertise by aggressively selling machinery to the Iraqi government as well as electronic products to Iraqi consumers.⁴⁰ In short, American companies are at risk of losing an early opportunity to establish long-term strategic ties with Iraq through entrepreneurial investment.⁴¹

Perhaps more critically, the American government is losing opportunities to reconstruct Iraq in a more efficient and cost-effective manner. While reconstruction plans are often subject to political bureaucracy and partisan ploys in American politics, foreign direct investment by entrepreneurs could fill the void that government resources do not cover. Some of these areas include small business growth, banking stability, and job creation. In fact, foreign direct investment is often regarded by international business transaction lawyers as the best source of finance for domestic capital needs, especially in developing economies.⁴² For example, China, whose economy was once completely operated by the state, has seen “spectacular success” in exploiting foreign direct investment and has become one of the world’s largest economies.⁴³

One attempt by the U.S. Government to improve, or at least to alleviate, the unattractive investment conditions in Iraq occurred in 2006 with the establishment of the “Task Force for Business and Stability Operations in Iraq (“TFBSO”).”⁴⁴ In 2006, “the TFBSO’s initial objective was to restart idled large state-owned factories, restoring employment and stimulating local economic activity.”⁴⁵ However, despite past and current efforts from the U.S.

³⁸ *Id.*

³⁹ Jim Michaels, *Foreign Firms Investing in Iraq*, U.S.A. TODAY, June 17, 2008, available at http://www.usatoday.com/news/world/iraq/2008-06-16-iraqinvestment_N.htm.

⁴⁰ Michaels, *supra* note 39.

⁴¹ *Id.*

⁴² Daniel C.K. Chow & Thomas J. Schoenbaum, *INTERNATIONAL BUSINESS TRANSACTIONS: PROBLEMS, CASES, AND MATERIALS* 399 (Aspen Publishers 2005).

⁴³ *Id.*

⁴⁴ This task force was led by Deputy Secretary of Defense Gordon England to revitalize Iraq’s industrial economy.

⁴⁵ Paul Brinkley, *Restoring Hope: Economic Revitalization in Iraq Moves Forward*, MILITARY REVIEW 14, March-April, 2008, available at <http://usacac.army.mil/CAC/milreview/English/MarApr08/BrinkleyEngMarApr08.pdf>.

Government, the most efficient economic reconstruction in Iraq must come from private investors.⁴⁶ Solicitations from private investors for joint ventures or direct investment in operational state-owned enterprises will mark the first steps to long-term full privatization of these enterprises.⁴⁷ It would also provide stability and a long-term impact in Iraq.⁴⁸ In short, U.S. entrepreneurs can reconstruct Iraq without the hassle of American political partisanship while also contributing to the growth in the economy, labor force, revenue, and productivity of an emerging democracy.

While the NIL provides great potential for Iraq and the U.S. entrepreneurs investing in it, there are concededly a few points of caution to investment in the region. Reconstructing a country like Iraq will be a “‘development-plus’ challenge.”⁴⁹ This means that “countries emerging from protracted civil wars have to confront the normal challenge of socio-economic development while simultaneously accommodating the additional burden of national reconciliation and peace consolidation.”⁵⁰ The International Monetary Fund and other international financial institutions, such as the World Bank and the regional development banks, “play a critical role in post-conflict economic reconstruction.”⁵¹ Given the obvious risk for human safety that is innate to post-war countries, “the high risk that this entails makes reconstruction an investment with a potentially high-rate of return for national governments and the international community.”⁵²

However, to the benefit of U.S. entrepreneurs, Iraq has outgrown its period of post-war civil strife.⁵³ Besides the decrease in violence, the Iraqis have hosted three major elections without significant challenges.⁵⁴ The change in landscape in Iraq has made the time ripe for U.S. entrepreneurs to begin economic reconstruction. Furthermore, “[i]f reconstruction is effective and it succeeds, large spending in military, security, and peacekeeping operations will be avoided in the future.”⁵⁵

⁴⁶ *Id.*

⁴⁷ Brinkley, *supra* note 45.

⁴⁸ *Id.*

⁴⁹ Graciana del Castillo, *Economic Reconstruction of War-Torn Countries: The Role of International Financial Institutions*, 38 SETON HALL L. REV. 1265, 1277 (2008).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ See Roggio, *supra* note 34.

⁵⁴ Iraq’s most substantial concern for elections is not violence, but rather voter registration issues that are common to most countries of the world. For example, in its January 31, 2009 provincial elections, election observers and others complained that hundreds of people—perhaps more—were wrongly omitted from voting lists in areas across Iraq. Brian Murphy, *Iraqi Elections Avoid Violence But Complain Loom*, ASSOCIATED PRESS, Jan. 31, 2009, available at http://news.yahoo.com/s/ap/20090131/ap_on_re_mi_ea/ml_iraq.

⁵⁵ Graciana del Castillo, *supra* note 49.

The NIL can facilitate such reconstruction through U.S. entrepreneurial adventure capitalism.⁵⁶ According to eDinar Financial, an Iraqi currency evaluator, "Iraq suffers from lack of capital available for reconstruction and development due to the accumulation of loans as well as lack of experience due to ongoing wars. This law will immensely help in meeting this need."⁵⁷ Moreover, "that the investment law establishes the basic rules for the investor with guarantees and protection is a very good step in the field of investment."⁵⁸ Most importantly, the provisions of the law can be used as a vehicle to reconstruct Iraq.

II. INCENTIVES AND BENEFITS TO U.S. ENTREPRENEURS

The scarcity of American entrepreneurialism in Iraq has cost U.S. entrepreneurs a significant share in an emerging market⁵⁹ and has stifled an Iraqi reconstruction process that American entrepreneurs could facilitate through their investment. American adventure capitalism would, in turn, create jobs, capital, and prosperity in an emerging country.⁶⁰ The benefits of U.S. entrepreneurial adventure capitalism will not only be felt by Iraqis; there are many practical incentives and benefits to U.S. entrepreneurs who invest in this new economy as well.⁶¹

⁵⁶ Besides the Iraqi prime minister's office overseeing foreign direct investment, several agencies have been established to attract foreign capital, such as the Iraq Foreign Investment Board ("IFIB"). The IFIB focuses on four primary areas of activity: (1) Matching Investors with investment opportunities: IFIB seeks to attract investment through initiating, supporting, and developing a wide variety of sizeable, ambitious, quality projects in Iraq. Projects will enjoy the benefit of risk mitigation facilities to the maximum extent; (2) Multinational Corporations: IFIB seeks to attract the top global multinationals to set-up in Iraq through a comprehensive value-added offering that facilitates their move to the region; (3) Local business: IFIB seeks to assist top local companies in creating higher value-added functions for their businesses by supporting them in building expertise, innovating, growing, creating new partnerships and reaching international customers; (4) Investment funds: IFIB seeks to attract investment funds to Iraq and to assist fund management companies to establish public-private partnerships. IFIB aims to maximize the influx of capital in order to strengthen Iraq's capital markets. The IFIB's strategies may be found at <http://www.ishtargate.org/>.

⁵⁷ *Iraq Investment Law: Privileges and Guarantees Offered to Investors*, EDINAR FINANCIAL, available at <http://www.edinarfinancial.net/iraq-investment-law.php>.

⁵⁸ *Id.*

⁵⁹ See Michaels, *supra* note 39.

⁶⁰ See *id.*

⁶¹ The majority of the benefits described in this section focus on U.S. private reconstruction via foreign direct investment. However, a popular and increasingly cost-efficient form of investment is the joint venture. There are several benefits to U.S. companies for establishing joint ventures in Iraq. This alternative still allows for adventure capitalism as a means to reconstruct Iraq.

First, Iraq under the NIL has developed an efficient infrastructure for foreign investment. For example, the Central Bank of Iraq can intervene, when necessary, in order to maintain stability in the foreign exchange market.⁶² Moreover, there are no taxes or subsidies on purchases or sales of foreign exchange in Iraq.⁶³ Because of the improved security in the country,⁶⁴ there has been an increased supply of goods and services, which has reduced inflationary pressures in comparison to 2006.⁶⁵ Additionally, the Central Bank has implemented effective monetary and exchange rate policies that continue to help temper inflation,⁶⁶ which provides another assurance that U.S. companies will not be investing in a hostile investment climate.

U.S. companies can also earn tax benefits for investing in Iraq.⁶⁷ After the first Gulf War, the U.S. imposed sanctions on trading with Iraq.⁶⁸

⁶² U.S. Department of State, *2008 Investment Climate Statement – Iraq*, available at <http://www.state.gov/e/eeb/ifd/2008/100879.htm>.

⁶³ *Id.*

⁶⁴ See generally Roggio, *supra* note 34.

⁶⁵ U.S. Department of State, *supra* note 62.

⁶⁶ *Id.*

⁶⁷ Because the Kurds in Iraq consider themselves to be a sovereign people, they also passed an investment law when the Iraqi Parliament passed the NIL in 2006. The Kurdistan Regional Government's investment law also provides several tax incentives and exemptions to U.S. corporations that invest in the region. Such benefits may be found in Articles Five and Six of the Kurdistan Region Investment Law. Article Five provides that

- (1) A Project shall be exempt from all non-custom taxes and duties for ten years starting from the date of providing services by the Project, or the date of actual production;
- (2) Equipment and machinery that are imported for the Project shall be exempt from taxes, duties and the condition to obtain an Import License, provided that they cross the Region's borders within two years from the approval of their lists by the Chairman of the Board, and that they are used exclusively for the purposes of the Project, if they fail to be used exclusively for purposes of the Project the exemptions will not apply to them and the Investor will be compelled to pay tax and will be penalized with a fine which is twice as much as the amount of tax due;
- (3) Spare parts that are imported for the Project shall be exempt from taxes and duties, provided that their value does not exceed fifteen percent of the price of equipment and machinery, and with the prior approval of their lists and quantities by the Chairman of the Board;
- (4) Equipment, machines and tools needed to expand, develop or upgrade/modernize the Project shall be exempt from taxes and duties;
- (5) Raw materials imported for production shall be exempt from customs duties for five years, provided that the types and quantities of such materials are specified by the Board, with the priority given to using the locally available raw materials which are suitable in quality and quantity for the investment Project; and
- (6) An Investor may, under the provisions

However, the Internal Revenue Service (“IRS”) now provides that U.S. civilians working in Iraq can claim the tax benefits of living abroad while supporting the United States’ efforts there.⁶⁹ As per a foreign-earned income exclusion, § 911(a) of the Internal Revenue Code allows a “qualified individual” to elect to exclude from gross income “foreign earned income” (as defined in § 911(b)) and “housing cost amount” (as defined in § 911 (c)).⁷⁰ Section 911 (d) defines a qualified individual as a U.S. citizen or resident whose tax home is a foreign country and who meets certain other

of this Law, import all his Project’s needs, including the equipment and machinery. Such imports shall be exempt from all customs duties as they cross the Region’s borders, provided that they are used exclusively for the Project’s purposes.

KURDISTAN REGION INVESTMENT LAW art. 5, available at <http://www.krg.org/articles/detail.asp?nr=107&lngnr=12&nr=12626&smap=04030000>

Article 6 provides that

(1) In accordance with the public interest of the Region, the Board may give additional facilities and incentives to investment Projects licensed under this Law to which either of the following features applies, and in compliance with controls and regulations set by the Board for this purpose: (i) Projects set up in under-developed areas in the Region, (ii) Joint Ventures set up by national and foreign Investors; (2) Depending on the nature of Service Projects which are set up under the provisions of this Law, and in particular Projects of hotels, hospitals, tourist resorts, universities and schools, the Board may offer additional exemptions from charges and duties on their purchases of furniture and supplies for upgrading and modernization once every three years, provided that these should enter into the Region and be used solely for the Project within one year from the date of approval of the purchase lists and quantities by the Chairman of the Board.

Id. at art. 6.

The full text of the Kurdistan Region Investment Law is available at <http://www.krg.org/articles/detail.asp?nr=107&lngnr=12&nr=12626&smap=04030000>.

According to the U.S. State Department,

[t]he most significant difference between the KRG investment law and the national law is that the regional law allows foreigners to own land. Under the Iraqi Constitution, when there is a contradiction between regional and national legislation, the regional law could become the only applicable law in the Kurdish region. How this rule of federalism will work in practice is still unknown.

U.S. Department of State, *supra* note 63.

⁶⁸ John E. Allis, *Tax Benefits to U.S. Individuals Working in Iraq*, THE TAX ADVISOR, Nov. 1, 2003, available at <http://www.allbusiness.com/legal/laws/693434-1.html>.

⁶⁹ *Id.*

⁷⁰ *Id.*

requirements.⁷¹ Moreover, “the IRS noted that an individual must be working on a contract licensed by the Treasury's Office of Foreign Assets Control (“OFAC”) to receive the benefit of the income and housing exclusions.”⁷² Furthermore, contracts approved by the OFAC include the large reconstruction efforts that the U.S. undertook in Iraq beginning in 2003.⁷³

The NIL also provides tax exemptions to foreign investors and provides opportunities for both domestic and foreign investors to qualify for incentives equally.⁷⁴ As will be explained in Section IV, the NIL also allows for investors to remove capital and the proceeds they originally imported into Iraq in accordance with the law.⁷⁵ In principle, the law also allows investors who have obtained an investment license to enjoy exemptions from taxes and fees for a period of 10 years.⁷⁶ An added requisite is that hotels, tourist institutions, hospitals, health institutions, rehabilitation centers and scientific organizations also are granted additional exemptions from duties and taxes on their imports of furniture and other items.⁷⁷ According to the U.S. State Department, this exemption theoretically increases in length to fifteen years if Iraqi investors own more than fifty percent of the project.⁷⁸

Another benefit to U.S. entrepreneurs may be found on a “macro” level: job creation. While Iraq is “a country dependent on oil for over 90% of its export earnings, (its) ever-so-important industry is in deplorable shape.”⁷⁹ As a result of the Hussein regime’s centralized and nationalized oil industry, Iraq is continuously “plagued by fractured pipelines, rusting equipment, and 1970s technology that has become antiquated by contemporary industry standards.”⁸⁰ If U.S. entrepreneurs would develop these old systems, they could create thousands of jobs for American corporations.⁸¹ According to a

⁷¹ *Id.*

⁷² *Id.*

⁷³ Allis, *supra* note 68.

⁷⁴ U.S. Department of State, *supra* note 62.

⁷⁵ *Id.*

⁷⁶ In order to qualify for this exemption, the investor must meet the requirements of Article 7 of the NIL. *See generally infra* note 106.

⁷⁷ U.S. Department of State, *supra* note 62.

⁷⁸ *Id.*

⁷⁹ Ryan Frei, *Extracting Oil from Turmoil: The Iraqi Oil Industry and Its Role as a Promising Future Player in the Global Energy Market*, 4 RICH. J. GLOBAL L. & BUS. 147, 161 (2004).

⁸⁰ *Id.*

⁸¹ While the NIL does not protect investment in oil and gas extraction and production, Article 17(2) provides that:

[t]he imported assets required for the expansion, [development or modernization of the project shall be exempted from fees in case they led to an increase in the designed capacity, provided they are brought in within three years from the date of notifying the Commission of the expansion or development. Expansion, for the purposes of this law, shall mean adding fixed capital assets aimed at

U.S. State Department report, U.S. affiliates of foreign companies (majority owned) employ 5.3 million U.S. workers, or 4.7% of private industry employment.⁸² Thus, investing in Iraq can create good will among employees and the American public-at-large.⁸³

increasing the designed capacity of the project in commodities or services or materials by a percentage exceeding (15%) fifteen percent. Development, for the purposes of this law, shall mean replacing project machines with more developed ones, totally or partially or making a development on the standing devices and equipments of the project by adding new machines and devices or parts thereof with the aim of raising the productive efficiency or improving and developing the quality of the products and services.”

NIL, *supra* note 20, at art. 17.

⁸² United States Department of State, *How Foreign Direct Investment Benefits the United States*, OFFICE OF THE SPOKESMAN, WASHINGTON, D.C., March 13, 2006, available at <http://www.state.gov/r/pa/prs/ps/2006/63041.htm>.

⁸³ The United States Department of State also elaborates on wider-scale benefits to U.S. corporations that invest in countries, such as Iraq:

(1) Foreign Investment Boosts Wages: U.S. affiliates of foreign companies tend to pay higher wages than U.S. companies. Foreign companies support an annual U.S. payroll of \$318 billion, with average annual compensation per employee of over \$60,000. Average compensation per employee within these companies has risen every year since 1992. Some studies have found that foreign companies have paid wages in the past that were as much as fifteen percent higher on average than wages paid by U.S. companies; (2) Foreign Investment Strengthens U.S. Manufacturing: forty-one percent of the jobs related to U.S. affiliates of foreign companies are in the manufacturing sector; (3) Foreign Investment Brings in New Research, Technology, and Skills: Affiliates of foreign companies spent thirty billion dollars on research and development in 2003 and \$109 billion on plants and equipment. These advances are often adopted by locally-owned companies; (4) Foreign Investment Contributes to Rising U.S. Productivity: The increased investment and competition from FDI leads to higher productivity growth, a key ingredient that increases U.S. competitiveness abroad and raises living standards at home; (5) Foreign Investment Contributes to U.S. Tax Revenues: In 2002, foreign affiliates paid \$17.8 billion in taxes, which represented twelve percent of U.S. corporate tax revenues; (6) Foreign Investment Can Help U.S. Companies Penetrate Foreign Markets, and Increase U.S. Exports: U.S. companies can use multinationals' distribution networks and knowledge about foreign tastes to export into new markets. Approximately twenty-one percent of all U.S. exports come from U.S. subsidiaries of foreign companies; (7) Foreign Investment Helps Keep U.S. Interest Rates Low: The inflow of foreign capital also decreases the cost of borrowing money for domestic

U.S. entrepreneurs will also have access to a new market where Americans have been eager to invest: energy. There is a great deal of unknown information in Iraq's energy sector because no major oil exploration has been conducted in Iraq since 1980.⁸⁴ In fact, large oil companies are interested in re-opening in Iraq because of its vast potential, very inexpensive extraction costs, and untapped fields.⁸⁵ Despite politicians' calls to lessen U.S. dependence on foreign oil, Iraq's new oil market can provide profitable benefits to American investors.

Under the NIL, U.S. investors will also have the opportunity to expand their portfolio of investments. According to the U.S. State Department, the NIL allows for foreign investors to exchange shares and securities listed in the Iraqi Stock Exchange ("ISX").⁸⁶ It also allows foreign investors to form investment portfolios.⁸⁷ Historically, trading transactions as well as buy and sell orders were handwritten on grease boards in trading sessions.⁸⁸ However, the automation of the ISX will provide much greater transparency as well as pave the way for foreign investment on the ISX in terms of dematerialized shares.⁸⁹ This will ease the logistical burden of physical certificates.⁹⁰ Additionally, new rules and regulations for the Iraq Securities Commission ("ISC") were introduced into Parliament in 2008 to create a more secure trading market.⁹¹

American entrepreneurs would also have protection of their intellectual property rights in Iraq, which is rare for a new economy and for most developing countries in the world. In 2008, Iraq began the process of developing a new intellectual property law in line with the World Trade Organization Agreement on Trade Related Aspects of Intellectual Property Rights ("TRIPs").⁹² While the exact structure of this and related legislation is still being determined, intellectual property protection functions are spread across several ministries in Iraq,⁹³ which provides for more thorough protection. For example, the patent registry and industrial design registry remain a part of the Central Organization on Standards and Quality Control ("COSQC"), an agency of the Ministry of Planning and Development

entrepreneurs, especially in the small- to medium-sized enterprise sector.

Id.

⁸⁴ Ryan Frei, *supra* note 79, at 161.

⁸⁵ *Id.*

⁸⁶ U.S. Department of State, *supra* note 62.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² U.S. Department of State, *supra* note 62.

⁹³ *Id.*

Cooperation.⁹⁴ Copyrights are protected under the Ministry of Culture.⁹⁵ Trademarks are covered under the Ministry of Industry and Minerals.⁹⁶ This enhanced intellectual property protection will provide assurance to the U.S. entrepreneur that his or her technological ideas will not be misappropriated.

While it is too early in Iraq's new investment climate to accurately assess enforcement of these intellectual property protections, Iraq has become a signatory to several international intellectual property conventions as well as many regional or bilateral arrangements.⁹⁷ Such international agreements include the Paris Convention for the Protection of Industrial Property and the World Intellectual Property Organizations Convention.⁹⁸ Iraq is also a signatory to the Arab Agreement for the Protection of Copyrights and the Arab Intellectual Property Rights Treaty,⁹⁹ both of which provide regional cooperation in the Middle East.¹⁰⁰

Although one particular drawback to the NIL is that it does not allow foreigners to own land, foreign investors are permitted to rent or lease land for up to fifty years.¹⁰¹ Additionally, such rent or lease agreements are

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ U.S. Department of State, *supra* note 62.

⁹⁹ *Id.*

¹⁰⁰ According to the U.S. State Department, Iraq is also

a signatory to thirty-two bilateral, and nine multilateral agreements within the Arab League arrangements on Investments Promotion and Protection. Some of the bilateral agreements with other countries include Afghanistan, Bangladesh, India, Iran, Japan, Jordan, Kuwait, Mauritania, Republic of Korea, Sri Lanka, Syria, Tunisia, Turkey, the United Kingdom, Vietnam and Yemen. These agreements include general provisions on promoting and protecting investments, including clauses on profit repatriation, access to arbitration and dispute settlements, fair expropriation rules and compensation for losses. In addition, Iraq has bilateral free trade area agreements with the following eleven countries: Algeria, Egypt, Jordan, Lebanon, Oman, Qatar, Sudan, Syria, Tunisia, Yemen, and the United Arab Emirates. Iraq is also a signatory to several multilateral agreements, including the "Taysir" agreement with Arab countries dated February 27, 1982, and ratified in January 11, 1982. On July 11, 2005, Iraq and the U.S. signed a Trade and Investment Framework Agreement as a first step toward creating liberalized trade and increasing investment flows between the U.S. and Iraq. The Iraqi Parliament has yet to ratify this agreement.

Id.

¹⁰¹ *Id.*

renewable.¹⁰² However, in the land ownership sector, U.S. investors would still be able to own land if it was located within the Kurdistan Region, as the Kurdistan Regional Government passed its own regional investment law that allows foreign investors to own land.¹⁰³

Finally, U.S. investment in Iraq will simply improve the U.S. economy. The U.S. business community's engagement in "a long-term partnership with Iraq, to invest and develop Iraq's resources and create cultural and educational ties...will directly benefit the U.S. economy."¹⁰⁴ In fact, "Iraqis are eager to gain access to U.S. goods and services, as recent contracts for Boeing aircraft, GE turbines and Case farm tractors show."¹⁰⁵ U.S. entrepreneurs will benefit significantly from being in a region that already seeks their business.

III. RECONSTRUCTING IRAQ THROUGH ADVENTURE CAPITALISM

The NIL provides a number of features that make Iraq more attractive to foreign investors: opportunities for political risk insurance, prohibitions on expropriation, and an established legal system with dispute resolution. Taken together, these features will pave the way for an era of U.S. adventure capitalism in Iraq.¹⁰⁶ Each of these items will be discussed in turn in the following sections.

¹⁰² *Id.*

¹⁰³ See KURDISTAN REGION INVESTMENT LAW, *supra* note 67.

¹⁰⁴ Brinkley, *supra* note 4.

¹⁰⁵ *Id.*

¹⁰⁶ However, before a U.S. entrepreneur can invest in Iraq, he must obtain a license, which is regulated by Article 7 of the NIL. The text of the provision is as follows:

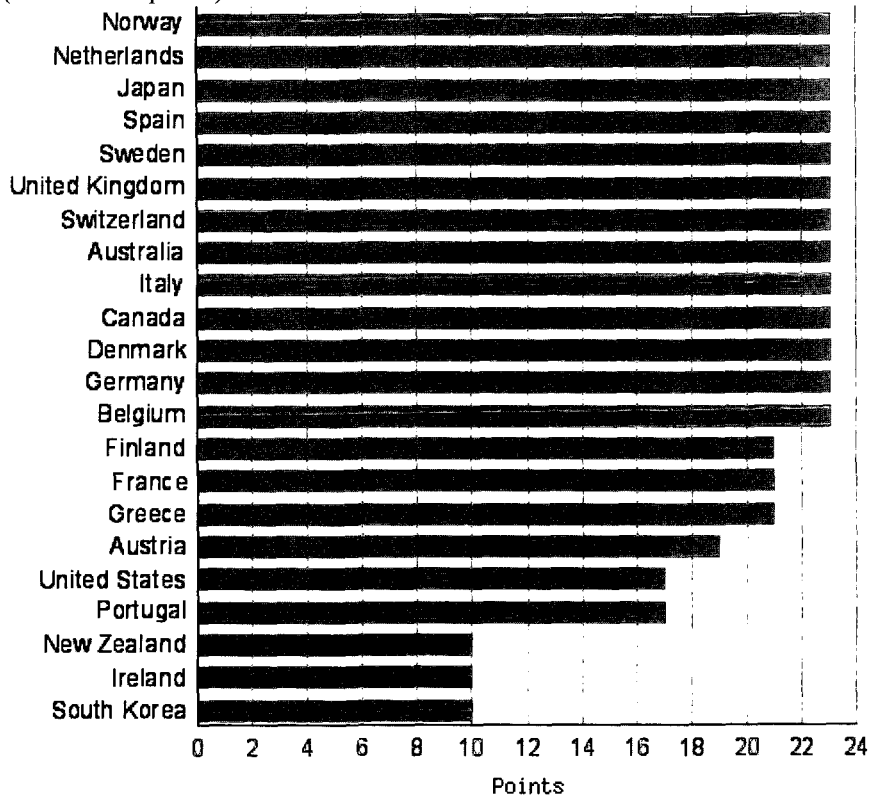
- (A) The Commission shall accept investment license requests for projects whose capital is not less than the minimum amount determined by the Council of Ministers or the Council of Ministers of region as the case, by a regulation issued based on a proposal by the Commission; (B) The Commission must obtain the approval of the Council of Ministers before granting the license if the value of the investment project is more than two hundred and fifty million dollars; (C) The Commission shall make its final decision concerning the requests of investment license within a period not exceeding (45) forty five days from the date of filing a request; (D) The decisions of the Commission regarding the approved investments projects shall be obligatory for the purposes of this law.

NIL, *supra* note 20, at art. 7.

A. *Achieving Entrepreneurial Security by Insuring Against Political Risks*

Political risk insurance is a necessity in an emerging market.¹⁰⁷ The risks in post-war countries, such as Iraq, are not just economic.¹⁰⁸ Rather, corporations that do business in these countries may experience government instability, terrorist activities, blockage of currency, and expropriations.¹⁰⁹ To mitigate these risks, host countries can provide insurance to foreign investors.¹¹⁰ This reality was demonstrated when the Iranian government

¹⁰⁷ In fact, with the NIL, Iraq became one of the first major developing economies in the Middle East to offer political risk insurance and alternative forms of insuring investment to its investors. The following graph indicates the levels at which developed economies offer political risk insurance to foreign investors circa 2009 (measured in points):



Center for Global Development, *Inside the Investment Component*, available at http://www.cgdev.org/section/initiatives/_active/cdi/_components/investment/indicators?print=1&view=graph&indicator=pri.

¹⁰⁸ Sandra T. Vreedburgh, *The Saddam Oil Contracts and What Can Be Done*, 2 DEPAUL BUS. & COM. L.J. 559, 587 (2004).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

urged approval of legislation that would protect investments in Iran's Free Trade Zones, such as the Gulf Islands of Kish and Qeshm and the southeastern port of Shabahar on the Oman Sea.¹¹¹ In Iraq during the months following the fall of Saddam Hussein, a surge of violence was exacerbated by a lack of political risk insurance for U.S. investors. Unfortunately, this problem was not addressed at the outset, as insurance policies were excluded from Order 39.¹¹²

The main provider of international political risk insurance in the United States is the Overseas Private Investment Corporation ("OPIC"),¹¹³ a government agency that makes insurance available to U.S. investors, contractors, exporters, and financial institutions involved in international transactions.¹¹⁴ OPIC covers currency risk, expropriation, and political violence.¹¹⁵ It is available for investments in new ventures, expansions of existing enterprises, privatizations, and acquisitions with positive developmental benefits.¹¹⁶ However, most national political risk insurance programs are restricted and limited in what they can accomplish.¹¹⁷ Such restrictions are imposed by their sponsoring governments and may change as political parties transition into an elected democracy.¹¹⁸ Fortunately, Iraq's new government has addressed this concern through the NIL, which provides several opportunities for insuring against political risk.

At the outset, the NIL provides national treatment to all investors irrespective of their nationality.¹¹⁹ This application of the "national treatment"

¹¹¹ *Id.*

¹¹² Naomi Klein, *Risky Business in Iraq*, THE NATION, Jan. 5, 2004, available at <http://www.commondreams.org/views03/1219-01.htm>.

¹¹³ According to the U.S. State Department, OPIC and the Government of Iraq have executed an Investment Incentive Agreement. However, the Iraqi Parliament has yet to ratify this agreement. U.S. Department of State, *supra* note 62.

¹¹⁴ Overseas Private Investment Corporation, *Insurance overview*, available at <http://www.opic.gov/insurance/>.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ Patrick J. Donovan, *Creeping Expropriation and MIGA: The Need for Tighter Regulation in the Political Risk Insurance Market*, 7 GONZ. J. INT'L L. 3, 3 (2003-2004).

¹¹⁸ *Id.*

¹¹⁹ The text of the provision is as follows:

The Investor irrespective of his/her nationality shall enjoy all privileges, facilitations and guarantees and shall be subject to the obligations stated in this law. The Iraqi and foreign investor shall have the right for, the purposes of housing projects, the use of the land for a sum to be determined between him and the land owner without land speculation according to conditions set forth by the National Commission for Investment and the approval of the Council of Ministers. The Commission shall facilitate the allocation of the required lands for the housing projects. The housing units

principle¹²⁰ provides that foreign investors shall have rights to land rental and lease, convertible currency, access to Iraqi banks, and insurance for “the investment project with any foreign or national insurance company it deems suitable.”¹²¹ Thus, the NIL provides foreign investors the freedom to choose their own mode of insurance rather than requiring them to choose from plans based solely in Iraq. This, in turn, gives U.S. investors leverage in purchasing political risk insurance.

While political risk insurance is the most common method of protecting foreign direct investment, another area in which there is potential for security and protection in Iraq’s new economy is in the realm of secured transactions. Professor Mark Sundahl explains that while Iraqi law may provide for secured lending, some challenges remain in this area.¹²² In his view, Iraq’s laws of secured transactions must be reformed to ensure that lenders take security in the assets of their borrowers.¹²³ Specifically, he emphasizes that a progressive, creditor-friendly law is “essential for the success of Iraq’s future economic stability since international lenders will be more likely to extend low-cost loans if they can be assured a first-priority security interest in the assets of their Iraqi debtors.”¹²⁴

With some reasonable amendments to existing law, Sundahl is optimistic that new Iraqi law has the potential to provide for a creditor-friendly law of secured transactions.¹²⁵ He proposes certain amendments to the Iraqi Civil Code and the 1984 Iraqi Law of Commerce that would contain what he believes to be the five essential elements of a progressive law of secured

shall be allocated for ownership by the Iraqis after the completion of the project.

NIL, *supra* note 20, at art. 10.

¹²⁰ The “national treatment” principle requires that, [S]ubject to national requirements for maintaining public order and protecting national security and consistent with national constitutions, and without prejudice to measures specified in legislation relating to declared development objectives of the developing countries, *entities of transnational corporations should be given (equal) treatment accorded to domestic enterprises in similar circumstances.*

A.M.F. Maniruzzaman, *Expropriation of Alien Property and the Principle of Non-Discrimination of International Law in Foreign Investment: An Overview*, 8 J. TRANSNAT’L L. & POL’Y 57, 72 (1998) (emphasis added).

¹²¹ The text of the provision is as follows: “Insuring the investment project with any foreign or national insurance company it deems suitable.” NIL, *supra* note 20, at art. 11.

¹²² Mark J. Sundahl, *Iraq, Secured Transactions, and the Promise of Islamic Law*, 40 VAND. J. TRANSNAT’L L. 1301, 1301 (2007).

¹²³ *Id.*

¹²⁴ *Id.* at 1303.

¹²⁵ *Id.*

transactions: (1) the creation of non-possessory security interests; (2) the creation of security interests in future assets; (3) the securing of future debts; (4) clear rules that give a secured party priority over competing claimants; and (5) the prompt enforcement of security interests without a court order.¹²⁶

One example of an area in which Sundahl sees potential is in security interests. According to Sundahl, a progressive aspect of Iraqi law is that it allows lenders to create an interest that secures future debts.¹²⁷ For example, “[u]nder Iraqi law, a security agreement can provide that the security interest will secure all future, as well as existing (debts), even if there is no commitment to extend future loans and the size of the future loans is undetermined.”¹²⁸ He notes that this rule, which is found in Article 1331 of the Iraqi Civil Code, provides that a security interest in personal property can secure the same debts as an “authentic mortgage” (i.e., a mortgage of real property).¹²⁹ He reasons that an authentic mortgage can then secure “a conditional future or contingent debt,”¹³⁰ including a credit line, “provided that the exact amount (or the maximum amount) of the debt to be secured is stated in the agreement.”¹³¹ Thus, he concludes, “future debts can be secured on personal property, as well as on real property, provided that a maximum debt limit is set forth in the security agreement.”¹³²

There are several ways in which American entrepreneurs can secure their assets in Iraq. While the NIL explicitly provides for political risk insurance, secured transactions is another area that now has potential in Iraq. Ultimately, the NIL provides U.S. entrepreneurs the foundation necessary to reconstruct Iraq through adventure capitalism and creates avenues for government agencies to implement many of the reforms Sundahl proposes.

B. *Keeping Control of Entrepreneurial Stability Through Prohibitions on Expropriation*

The problem of expropriation is critical in new and developing economies, such as Iraq’s. Entrepreneurs who have productive assets in such countries “suffer a silent but noteworthy impact ranging in severity from the wholesale loss of a business to a modest interruption in the healthy flow of daily commerce.”¹³³ Therefore, while political risk insurance may provide the necessary incentives to make the foreign direct investment in Iraq, the risk of

¹²⁶ *Id.*

¹²⁷ *Id.* at 1340.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Sundahl, *supra* note 122, at 1340.

¹³¹ *Id.*

¹³² *Id.*

¹³³ Bobby L. Dexter, *Shock, Awe, and Expropriation: The Act of State Doctrine and Loss Deductions under Section 165 of the Internal Revenue Code*, 81 TUL. L. REV. 849, 851-852 (2008).

expropriation is one that threatens U.S. businesses once they have established their operations.

Expropriation without due compensation is generally frowned upon in international law.¹³⁴ Iraq's past political instability may serve as an explanation for U.S. investors' concerns. For example, in 1990, during the Iraq-Kuwait conflict, the Iraqi government seized Kuwaiti civil aircraft.¹³⁵ However, since the emergence of Iraq's new government and the passage of the NIL, the risk of expropriation should no longer serve as a barrier to foreign direct investment by U.S. investors.

At the outset, Article 23 of the Iraqi Constitution places a ban on expropriation of private property unless it is "for the purposes of public benefit *in return for just compensation.*"¹³⁶ The NIL, in Article 12, explicitly addresses the risk of expropriation. According to the provision, the seizure or nationalization of the investment project is prohibited (except for those investment projects that were dissolved by a court).¹³⁷ Therefore, the past concerns of expropriation without just compensation are no longer material to Iraq's new economy. U.S. investors should take note and be emboldened by this development.

While the NIL explicitly prohibits expropriation of private entities without just compensation, it also provides for several alternatives to protect against expropriation. For example, Article 11(1) of the NIL allows foreign investors to remove the capital they invested in Iraq along with its proceeds, provided that they pay their taxes and debts to the Iraqi government.¹³⁸ This provision places flexibility in the hands of U.S. investors by allowing them to remove their assets and profits upon any impending crisis or instability in the region.

The law also allows foreign entrepreneurs the right to open accounts in Iraqi *or* foreign currency *or* both at a bank inside *or* outside Iraq for the

¹³⁴ See generally Chow & Schoenbaum, *supra* note 42, at 419.

¹³⁵ *Kuwait Airways v. Iraqi Airways*, [1995] 1 W.L.R. 1147.

¹³⁶ IRAQI CONSTITUTION art. 23(2), available at

http://www.uniraq.org/documents/iraqi_constitution.pdf. (emphasis added).

¹³⁷ The text of the provision is as follows: "Non-seizure or nationalization of the investment project covered by the provisions of this law in whole or in part, except for projects on which a final judicial judgment was issued."

NIL, *supra* note 20, at art. 12(3).

¹³⁸ The text of the provision is as follows:

The investor shall enjoy the following benefits: The investor shall have the right to take out the capital he brought into Iraq and its proceeds in accordance with the provisions of this law and pursuant to the instructions of the Central Bank of Iraq in an exchangeable currency after paying all his taxes and debts to the Iraqi Government and all other authorities.

Id. at art. 11(1).

licensed project.¹³⁹ The disjunctive provision of the NIL gives U.S. investors the ultimate freedom in choosing how to manage their assets. By allowing investors to secure their currency in a bank outside Iraq, the NIL provides a safe harbor for foreign investors whose business might be affected by political or economic instability. In other words, if circumstances arise that threaten a U.S. investor's operations, the investor's assets will be protected because the capital could be secured in a bank in a different country or even a different hemisphere. This is especially important at a time when banks and the world's financial markets are frequently considered subjects for nationalization.¹⁴⁰

While the NIL allows for economic asset mobility, it also allows ample flexibility for U.S. investors to enter and exit Iraq.¹⁴¹ Article 12(2) of the NIL grants the foreign investor and non-Iraqis working in the investment project the right of residency in Iraq and facilitates their entry and exit to and from Iraq.¹⁴² U.S. entrepreneurs would not be constrained to remain in Iraq for an inconvenient or unmanageable period of time simply to satisfy rigid residency requirements. Furthermore, the NIL avoids the bureaucracy involved in traveling within and without the country. Given the complete inflexibility of entering and exiting Iraq during the Saddam Hussein era, the NIL addresses this concern with added leeway.

The NIL also provides incentives for foreign employees to join entrepreneurs in investing in Iraq. The law gives non-Iraqi technicians and administration employees working in any investment project the right to transfer their salaries and compensations outside Iraq after paying their dues and debts to the Iraqi government and all other entities.¹⁴³ Thus, the law not only provides assurances that the directors and officers of foreign direct investment projects will be protected from having their assets jeopardized by political crisis, but it also gives employees the ability to freely transfer their earnings if they determine that their employment in Iraq is no longer feasible.

The NIL removes many of the concerns that U.S. investors faced during the Saddam Hussein era. By explicitly prohibiting expropriation without just compensation and providing various alternatives that would secure entrepreneurs' assets, the American investor has a foundation upon which he or she can adventure capitalize. As indicated above, such a process would be mutually beneficial to American entrepreneurs and Iraqi citizens.¹⁴⁴

¹³⁹ *Id.* at art. 11(5) (emphasis added).

¹⁴⁰ See generally Edmund L. Andrews, *Rescue of Banks Hints at Nationalization*, N.Y. TIMES, Jan. 15, 2009, available at <http://www.nytimes.com/2009/01/16/business/16banking.html>.

¹⁴¹ NIL, *supra* note 20, at art. 11(5).

¹⁴² The text of the provision is as follows: "This law shall guarantee the following for the investor: Granting the foreign investor and non-Iraqis working in the investment projects the right of residency in Iraq and facilitating his/her entry and exit to and from Iraq." *Id.* at art. 12(2).

¹⁴³ *Id.* at art. 12(4).

¹⁴⁴ See *supra* Section III.

C. *Retaining Entrepreneurial Stability through Established Dispute Resolution*

Perhaps the most significant deterrent to U.S. entrepreneurs from investing in Iraq over the past thirty years was the fragmented, and often corrupt, legal system. While domestic arbitration has traditionally been in place, fears of local protectionism, an overreaching government, and incongruous justice have driven investors out of, and away from, investing in Iraq. The new Iraqi government desperately needed to implement a system whereby foreign investors would feel confident and secure that their efforts would not be in vain. It seized on the opportunity to do so in the NIL by fostering a stable legal system with opportunities for alternative dispute resolution.

Article 27 of the NIL outlines the primary dispute resolution system for foreign investors unless the investors agree to an alternative arrangement.¹⁴⁵ Article 27(1) indicates that disputes that arise out of the work contract are exclusively subject to the provisions of Iraqi law and within the jurisdiction of Iraqi courts.¹⁴⁶ The provision elaborates that if a dispute arises that halts work for over three months, Iraq's National Committee on Investment ("NCI") may withdraw the investor's business license and compel the business owners to resolve the dispute within three months.¹⁴⁷ If the

¹⁴⁵ NIL, *supra* note 20, at art. 27 (emphasis added).

¹⁴⁶ The text of the provision is as follows:

Disputes arising between parties who are subject to the provisions of this law shall be subject to the Iraqi law unless otherwise agreed, contrary to the cases that are subject to the provisions of the Iraqi law exclusively or the jurisdiction of Iraqi courts: Disputes arising from the work contract shall exclusively be subject to the provisions of the Iraqi law and the jurisdiction of Iraqi courts. Non-Iraqi laborer shall be exempted if the work contract stipulated otherwise.

Id. at art. 27(1).

¹⁴⁷ The text of the provision is as follows:

Disputes arising between parties who are subject to the provisions of this law shall be subject to the Iraqi law unless otherwise agreed, contrary to the cases that are subject to the provisions of the Iraqi law exclusively or the jurisdiction of Iraqi courts: If a dispute between the partners or between the owner of the project and others in a project subject to the provisions of this law resulted in the stoppage of work for a period exceeding three months, the Investment Commission may withdraw the license and ask the owners of the project to settle the dispute within a period not to exceed three months. If such period elapsed without settling the dispute between the partners or between the owner of the project and others, the commission may take legal measures to liquidate the project and notify the owner of the project or one of the partners of

dispute is not settled within the three-month period, the NCI may take measures to liquidate the project upon notification to the investor.¹⁴⁸ The liquidated assets would then be placed in a bank after appropriate fees are paid to the government and legal costs are compensated.¹⁴⁹ Clearly, the NIL encourages efficient dispute resolution.

The NIL's provision allowing the parties to draft and agree upon their own mechanism for dispute resolution is paramount to the success of U.S. entrepreneurs. Article 27 does not apply if the parties have otherwise agreed to their own form of dispute resolution.¹⁵⁰ The NIL provides specific examples of areas in which this can be done. For example, Article 27(2) allows foreign investors and employees to agree on the law to be applied, the court in which the dispute will be heard, or any other agreement that the parties devise.¹⁵¹ Article 27(2) does not apply if the dispute arises from a crime.¹⁵² This provision gives great flexibility to U.S. entrepreneurs in drafting forum-selection clauses.

Article 27(3) provides even more flexibility by allowing foreign parties that *are* subject to any provisions of the NIL to concur, at the time of the signing of the agreement, on a mechanism of dispute resolution that could include arbitration "pursuant to Iraqi law or any other internationally recognized entity."¹⁵³ The flexibility of resolving the dispute outside of Iraq is critical, especially given the inflexibility of Iraq's previous legal system.

such action. The liquidation money shall be deposited in one of the banks after paying the dues of the State or any other dues after final judgment of their entitlement is rendered.

Id. at art. 27(3).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *See id.* at art. 27(3).

¹⁵¹ The text of the provision is as follows:

Disputes arising between parties who are subject to the provisions of this law shall be subject to the Iraqi law unless otherwise agreed, contrary to the cases that are subject to the provisions of the Iraqi law exclusively or the jurisdiction of Iraqi courts: If parties to a dispute are non-Iraqis and in disputes not arising from a crime, the opponents may agree on the law to be applied, the competent court or any other agreement to resolve their dispute.

Id. at art. 27(2).

¹⁵² *Id.*

¹⁵³ The text of the provision is as follows:

Disputes arising between parties who are subject to the provisions of this law shall be subject to the Iraqi law unless otherwise agreed, contrary to the cases that are subject to the provisions of the Iraqi law exclusively or the jurisdiction of Iraqi courts: If one of the parties to a dispute is subject to the provisions of this law, they may, at the time of signing the agreement, agree on a mechanism to

The dispute resolution provision concludes by addressing the long-held concern with government corruption in legal matters. Article 27(5) provides that disputes arising between the NCI or any governmental entity and the foreign investor are subject to Iraqi law and courts on civil matters provided that the disputes do not arise from a violation of a provision of the NIL.¹⁵⁴ This provision must be considered carefully. On the one hand, it does not address disputes between the investor and the government that *do* arise from the NIL. Thus, it is arguable whether the concern for corruption in foreign direct investment practices has been addressed at all. On the other hand, the provision further provides that, as it relates to commercial disputes, the parties may resort to arbitration provided that such an arrangement is stipulated in the contract creating the relationship between the parties.¹⁵⁵

Thus, while Article 27 does not fully address the concern of government corruption, it allows parties to contract their own method to resolve the dispute in such matters that arise in the commercial sector. Among these provisions, it is clear that the NIL encourages investors to provide for their dispute resolution mechanisms in the form of a contract. Furthermore, it addresses a significant number of concerns that should compel optimism in U.S. entrepreneurs—concerns that were left unaddressed during the Saddam Hussein regime.

If the parties do not agree to their own mechanism for resolving disputes, the NIL includes an enforcement provision in Article 28.¹⁵⁶ This provision specifies that upon violation of the NIL, the NCI has the right to warn the investor in writing to correct the violation within a specific period.¹⁵⁷

resolve disputes including arbitration pursuant to the Iraqi law or any other internationally recognized entity.

Id. at art. 27(4) (emphasis added).

¹⁵⁴ The text of the provision is as follows:

Disputes arising between parties who are subject to the provisions of this law shall be subject to the Iraqi law unless otherwise agreed, contrary to the cases that are subject to the provisions of the Iraqi law exclusively or the jurisdiction of Iraqi courts: Disputes arising between the Commission or any governmental entity and any of those subject to the provisions of this law on matters not related to violations of one of the provisions of this law shall be subject to Iraqi law and courts on civil matters. As for commercial disputes, parties may resort to arbitration provided that such an arrangement is stipulated in the contract organizing the relationship between parties.

Id. at art. 27(5).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at art. 28.

¹⁵⁷ The text of the provision is as follows:

In case the investor violates any of the provisions of this law, the Commission shall have the right to warn the investor in writing to

If the violation is not corrected during the specified time, the NCI will summon the investor or her agent to defend herself and give her another chance to rectify the situation.¹⁵⁸ If the investor still does not comply, the NCI will revoke the investor's business license, deny the investor any exemptions or privileges contained in the NIL, and allow others to sue for compensation based on the investor's violation.¹⁵⁹ Therefore, the importance of an agreement on dispute resolution among the parties is amplified given this provision.

Despite the NIL's foundation for a dispute resolution system, there are several methods of alternative dispute resolution that could complement the new Iraqi legal system. Alternative dispute resolution "is vital interpersonally, locally, nationally, internationally, and across ethnic, religious, and cultural backgrounds."¹⁶⁰ Because Iraq is 97% Muslim,¹⁶¹ alternative dispute resolution will help the U.S. develop approaches to bridge cultural and religious gaps.¹⁶²

The first step in implementing an alternative dispute resolution system in Iraq is identifying whether an "individualist" or "collectivist" approach is appropriate.¹⁶³ Most Iraqis are collectivist, meaning they are "high-context" (communication is imbedded in inferences and context).¹⁶⁴ Americans, however, are generally considered to be "low-context" (communication is

remove the violation within a specific period. In case the investor does not remove the violation within the specified period, the Commission shall summon the investor or who represents him to state his position and grant him other respite to settle the issue. Upon repeating or not removing the violation, the Commission shall have the right to withdraw the investor's license it issued and order stoppage of work on the project and retain the State's right to deny the investor the granted exemptions and privileges from the date of the violation and allow others to retain their rights to demand compensation for the damage caused by this violation, without breaching any punishments or other compensations stipulated in the applicable laws.

Id.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ Joshua F. Berry, *The Trouble We Have with Iraqis is Us: A Proposal for Alternative Dispute Resolution in Iraq*, 20 OHIO ST. J. ON DISP. RESOL. 487, 489 (2005).

¹⁶¹ *Id.* The remaining 3% consists of Christians, such as the Chaldeans and Assyrians, and other ethnic minorities. See generally index mundi, *Iraq Demographics Profile 2008*, available at http://www.indexmundi.com/iraq/demographics_profile.html.

¹⁶² Berry, *supra* note 160, at 491.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 513.

explicit and verbal).¹⁶⁵ Thus, one difficulty in forming a viable alternative dispute resolution system is merging the cultural differences that are significant in the foreign direct investment context but minor among Iraqis.

The second step is choosing a mediator. However, there are difficulties that may arise in the business context. Fairness is critical to successful dispute resolution.¹⁶⁶ Iraqis will likely want a mediator that they know and respect.¹⁶⁷ U.S. entrepreneurs, on the other hand, will likely see a fellow outsider as the only mode of receiving a fair process.¹⁶⁸ A solution to this problem is to have a local figure, such as a mayor, tribal elder, imam, foreign worker, or American military member that both Iraqis and Americans respect.¹⁶⁹ If they do not agree, a mediation committee could meet to appoint a mediation team.¹⁷⁰ However, given the pressing matters that are common in the business community, especially when foreign direct investment is involved, U.S. entrepreneurs may be weary of becoming entangled in complicated and often time-consuming mediation procedures.

The next step is conducting the mediation itself (provided that the above issues are resolved).¹⁷¹ During this process, the mediator should continue to establish trust and confidence in both the Iraqi and U.S. investor so that the outcome is perceived as legitimate.¹⁷² During this time, the mediator should gather the facts and reach a mutually beneficial result.¹⁷³ In the foreign direct investment context, this result must be business-oriented; it must be aimed at preserving the U.S. entrepreneur's project so that the ultimate goal of Iraqi reconstruction through adventure capitalism is promoted.

The final step for implementing an alternative dispute resolution system in Iraq is reconciliation, a critical aspect of Arab and Muslim society.¹⁷⁴ For an American or other non-Iraqi, this ritual is unusual and may be difficult to accept or comprehend given the cultural-context differences previously noted.¹⁷⁵ However, if Americans were to subscribe to this process, it could send a powerful message to local Iraqi communities that the U.S. is interested in doing business in Iraq.¹⁷⁶ Furthermore, if the U.S. entrepreneur

¹⁶⁵ John Barkai, *Cultural Dimension Interests, the Dance of Negotiation, and Weather Forecasting: A Perspective on Cross-Cultural Negotiation and Dispute Resolution*, 8 PEPP. DISP. RESOL. L.J. 403, 408 (2008).

¹⁶⁶ Berry, *supra* note 160, at 516.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 516-517.

¹⁶⁹ *Id.* at 517.

¹⁷⁰ *Id.* at 517-519.

¹⁷¹ *Id.* at 519.

¹⁷² Berry, *supra* note 160, at 519.

¹⁷³ *Id.* at 520.

¹⁷⁴ *Id.* at 521.

¹⁷⁵ *Id.* at 521-522. *See supra* notes 163-165.

¹⁷⁶ *Id.* at 522.

accepts the resolution, the Iraqi counterpart should gain trust and confidence in the foreign direct investment project.¹⁷⁷

The NIL's dispute resolution system is an extremely positive development for U.S. entrepreneurs in Iraq. Its provisions for resolution in Iraq and for freedom of contract to resolve the dispute elsewhere are a world away from the corruption, instability, and inconsistency of the legal regime during the Saddam Hussein era. Even beyond the NIL, there is expanded opportunity for U.S. entrepreneurs in reconstructing Iraq through foreign direct investment given the stable legal system with alternative dispute resolution. In short, the NIL provides the legal foundation for an era of adventure capitalism.

IV. CONCLUSION

U.S. entrepreneurs are behind their European and Asian counterparts in their investment in Iraq's new economy. However, with the passage of Iraq's NIL, American companies have the resources and foundation for profitable and stable investment in a formerly investment-unfriendly environment. The NIL provides for various forms of political risk insurance, protection against expropriation, and a stable legal system with alternative dispute resolution. Moreover, the benefits to U.S. entrepreneurs outweigh the costs, and the benefits to Iraqis, such as Sadik Hamra, are multi-fold. This entrepreneurialism will alleviate the significant burdens that the U.S. government and military face in post-war reconstruction. With the NIL, U.S. entrepreneurs can usher in an era of adventure capitalism and reconstruct Iraq in the process.

¹⁷⁷ *Id.*