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Foreign Direct Investment in Post-War Iraq: An Investor's Introductory Guide to the Legal Framework

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FOREIGN DIRECT INVESTMENT IN POST-WAR IRAQ: AN INVESTOR'S INTRODUCTORY GUIDE TO THE LEGAL FRAMEWORK

Jordan E. Toone *

Abstract

In spite of its troubled past and ongoing internecine violence, Iraq today stands at the threshold of economic opportunity in ways that few developing states—much less war-torn states like Iraq—could imagine. The Iraq National Investment Commission reported, for example, that in 2010, 178 companies filed for investment licenses totaling \$10.5 billion. Currently, the primary foreign participants in Iraq's post-war economic expansion are sophisticated multinational corporations (MNC), many of which have experience investing in politically and economically unstable markets, including those in the Middle East and North Africa (MENA) region. In their efforts to capitalize on Iraq's unrivalled natural resources and nascent economic development, these MNCs rely on expert in-house counsel, experienced local counsel, and an expanding group of international law firms to navigate Iraq's unique legal landscape.

"Smaller" and less experienced foreign investors, including some small and medium-sized enterprises (SME), sense the opportunities in Iraq and want a seat at the table. Yet, unlike their larger MNC counterparts, many of these SMEs have limited experience conducting business in the MENA region, are wary of the ongoing political and economic instability in Iraq, and often do not have the financial flexibility to retain expert counsel from large international law firms. Although various think tanks, government agencies, and international organizations have provided useful information regarding the legal framework governing foreign direct investment (FDI) in post-War Iraq, the literature remains fragmented and, at times, outdated.

This Article is intended to provide SMEs, theorists, and practitioners an up-to-date, introductory overview of the legal framework governing FDI in post-War Iraq with an eye towards facilitating a greater awareness among SMEs and non-MNC foreign investors of the benefits and challenges attending FDI in post-War Iraq. Specifically, this article briefly explains the broader legal system within which FDI in Iraq takes place and outlines in more detail several common legal issues—such as setting up a business, tax matters, banking, and repatriation of funds—that foreign investors are likely to encounter when preparing for and

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conducting business activity in Iraq. Additionally, this Article provides investors with practical insights into some of the non-legal issues that accompany investment in post-War Iraq, including sociocultural and security issues. This Article is intended to function as a preliminary, scholarly supplement to professional legal advice.

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I. INTRODUCTION

In spite of its troubled past¹ and ongoing domestic violence,² Iraq today stands at the threshold of economic opportunity in ways that only few developing states—much less war-torn states like Iraq—could imagine. Although foreign direct investment (FDI)³ in 2011 totaled only \$1.6 billion⁴ (a figure comparable to FDI totals in countries like Latvia⁵ and Greece⁶), foreign firms and investors reported nearly \$56 billion in “investments, service contracts, and other commercial activities across Iraq,” roughly a forty percent increase over the previous year alone.⁷ The Iraqi National Investment Commission (NIC) has reported that over 950 firms have filed for investment licenses in post-War Iraq, with a total value of approximately \$50.5 billion.⁸ Some Iraqi authorities envision

¹ See generally ALI ALLAWI, *THE OCCUPATION OF IRAQ: WINNING THE WAR, LOSING THE PEACE* 1, 17 (2008); WILLIAM POLK, *UNDERSTANDING IRAQ: THE WHOLE SWEEP OF IRAQI HISTORY, FROM GENGHIS KHAN’S MONGOLS TO THE OTTOMAN TURKS TO THE BRITISH MANDATE TO THE AMERICAN OCCUPATION* 11–12 (2006).

² E.g., Douglas A. Ollivant, *Renewed Violence in Iraq: Contingency Planning Memorandum No. 15*, COUNCIL ON FOREIGN RELATIONS (Aug. 2012), available at <http://www.cfr.org/iraq/renewed-violence-iraq/p28808>; Sinan Salaheddin, *Blasts Aimed at Iraqi Shiites, Police Kill 23*, ABCNEWS.COM (Dec. 31, 2012), <http://abcnews.go.com/International/wireStory/iraq-10-people-killed-attacks-south-baghdad-18098730>; Mohammed Tawfeeq, *September is Deadliest Month in Iraq in More Than 2 Years*, CNN.COM (Oct. 1, 2012), <http://www.cnn.com/2012/10/01/world/meast/iraq-violence/index.html>.

³ The United Nations Conference on Trade and Development (UNCTAD) defines “FDI” as follows:

Foreign direct investment (FDI) is defined as an investment involving a long-term relationship and reflecting a lasting interest and control by a resident entity in one economy (foreign direct investor or parent enterprise) in an enterprise resident in an economy other than that of the foreign direct investor (FDI enterprise or affiliate enterprise or foreign affiliate). . . . Such investment involves both the initial transaction between the two entities and all subsequent transactions between them and among foreign affiliates, both incorporated and unincorporated.

UNCTAD, *World Investment Report 2009*, annex at 243, U.N. Doc. UNCTAD/WIR/2009, U.N. Sales No. E.09.II.D.15 (2009), available at http://unctad.org/en/Docs/wir2009_en.pdf [hereinafter *WORLD INVESTMENT REPORT 2009*] (footnote omitted). In addition, UNCTAD states that: “Flows of FDI comprise capital provided (either directly or through other related enterprises) by a foreign direct investor to an FDI enterprise, or capital received from an FDI enterprise by a foreign direct investor. FDI has three components: equity capital, reinvested earnings and intra-company loans.” *Id.*

⁴ See UNCTAD, *Inward and Outward Foreign Direct Investment Flows, Annual, 1970-2011*, UNCTADSTAT (July 18, 2012), <http://unctadstat.unctad.org/TableViewer/tableView.aspx?ReportId=88> [hereinafter UNCTADSTAT].

⁵ *Id.*

⁶ *Id.*

⁷ DUNIA FRONTIER CONSULTANTS, *2010 YEAR IN REVIEW: FOREIGN COMMERCIAL ACTIVITY IN IRAQ* (2012). To be sure, this Article does not argue that FDI necessarily fosters economic growth and development. The literature on the subject is not uniform. E.g., Brian J. Aitken & Ann E. Harrison, *Do Domestic Firms Benefit from Direct Foreign Investment? Evidence from Venezuela*, 89 AM. ECON. REV. 605 (1999); Har Wai Mun, et al., *FDI and Economic Growth Relationship: An Empirical Study on Malaysia*, 1 INT’L BUS. RES. 11 (2008); Gheorghe Ruxanda & Andreea Muraru, *FDI and Economic Growth. Evidence From Simultaneous Equation Models*, 1 ROMANIAN J. ECON. FORECASTING 45 (2010).

⁸ UNITED STATES BUREAU OF ECONOMIC AND BUSINESS AFFAIRS, *2013 INVESTMENT CLIMATE STATEMENT – IRAQ* (2013) [hereinafter *INVESTMENT CLIMATE STATEMENT*].

future, aggregate FDI figures to approach \$600 billion.⁹ The United States—currently the world’s largest recipient of FDI—received roughly \$226 billion in FDI in 2011.¹⁰

Given the security risks in Iraq and the political and economic instability in the region, it is no surprise that the principal investors in the post-War Iraqi market have been multinational corporations (MNC) with the resources and experience necessary to navigate Iraq’s challenging economic and legal landscape. The NIC reports, for example, that the first companies to enter the post-War Iraqi market included Byblos Bank (a global banking institution that established banking operations in the Kurdish region), Lafarge Cements (a French company that entered the Iraqi market via its acquisition of Orascom in 2008 and employs approximately 2000 people in Iraq), and Zain (a Kuwaiti company that acquired a principal player in Iraq’s telecommunications industry, Iraqna, to create Iraq’s largest mobile carrier).¹¹ The world’s oil giants, including Exxon, Chevron, and Total SA were among the first oil companies to enter the post-War Iraqi market.¹²

The entry of foreign small and medium-sized enterprises (SME) into the post-War Iraqi market has been far less pronounced. The list of challenges facing SMEs in Iraq is lengthy: limited experience conducting business in the Middle East and North Africa (MENA) region; a foreign and sometimes mysterious sociocultural environment; unique business practices; political instability; security concerns; and a nascent legal system with an inexperienced judiciary and a limited history of dispute resolution mechanisms involving foreign investors. When contemplating investment in markets other than Iraq, SMEs and non-MNCs often have several resources to assist them in determining the viability of and planning for foreign investment prior to retaining professional legal counsel.¹³ The literature on investment in the Iraqi market, however, is far less developed. Although various think tanks, government agencies, law firms, and international organizations have provided useful information regarding certain aspects of the legal framework governing FDI in Iraq, the literature on the post-War Iraqi market remains fragmented and, at times, outdated. This Article is a modest attempt to fill this void in the literature, with a particular emphasis on providing an introductory overview of some of the principal legal considerations that

⁹ Serena Chaudhry & Ascel Kami, *Iraq eyes \$600 billion foreign investment*, REUTERS (Oct. 19, 2010, 1:15 PM), <http://www.reuters.com/article/2010/10/19/us-mideast-summit-iraq-idUSTRE69I4HO20101019>.

¹⁰ UNCTADSTAT, *supra* note 4.

¹¹ Republic of Iraq National Investment Commission, *Iraq Overview*, <http://www.investpromo.gov.iq/index.php?id=7> (last visited Apr. 17, 2013).

¹² Brian Swint, *Total Follows Exxon, Chevron Into Kurdistan Region of Iraq*, BLOOMBERG.COM (July 31, 2012), <http://www.bloomberg.com/news/2012-07-31/total-follows-exxon-chevron-into-kurdistan-region-of-iraq.html>.

¹³ E.g., Martin Miranda, *The Legal Obstacles to Foreign Direct Investment in Mexico’s Oil Sector*, 33 FORDHAM INT’L L.J. 206 (2009).

SMEs and non-MNCs need to consider when contemplating entry into the post-War Iraqi market.¹⁴ Although the focus of the Article is to provide SMEs and other non-MNC foreign investors with a practical, introductory overview of the legal regime governing FDI in Iraq, it is hoped that scholars and practitioners alike will be able to draw from the analysis provided herein to supplement comparative analyses, theoretical studies, and practical training, as the case may be.

Part II of the Article provides a brief historical background to the contemporary legal system in Iraq followed by an overview of the existing literature on the legal framework governing FDI in Iraq. Part III examines the contemporary legal framework as it relates to FDI in Iraq, with emphasis on several of the principal issues confronting SMEs and smaller, non-MNC foreign investors seeking to do business in Iraq. Part IV examines various socioeconomic, political, and cultural considerations that often arise as SMEs and non-MNC foreign investors contemplate whether to invest in post-War Iraq. Part V provides some concluding observations.

II. HISTORICAL BACKGROUND AND OVERVIEW OF LITERATURE

A. Historical Overview of Iraq's Legal Framework Governing FDI

The legal framework governing business activity in Iraq traces its roots to the early nineteenth century and Iraq's transition from Ottoman rule to British occupation at the end of World War I.¹⁵ During the ensuing four decades, from 1917 to 1958, Iraq experienced economic instability and minimal economic growth as a result of successive coup d'état, wars, and internecine conflicts.¹⁶ After the Hashemite monarchy was reestablished in 1958, Iraq enjoyed relative prosperity until Saddam Hussein acceded to the presidency in 1979, ushering in a long and often brutal period of suppression of free expression and economic activity.¹⁷ After the United States and Great Britain failed to obtain United Nations approval for intervention in Iraq, U.S.-led Coalition Forces overthrew Saddam Hussein in 2003, ushering in not only a period of devastating conflict, but also a period of significant reform to Iraq's legal system. U.S. forces completed their withdrawal from Iraq in late 2011.¹⁸

Shortly after invading Iraq, the United States and the United Kingdom announced in a letter addressed to the U.N. Security Council the creation

¹⁴ To reiterate, this Article is introductory in nature and is intended to function merely as a preliminary, scholarly supplement to professional legal advice. Nothing contained herein should be interpreted as legal advice.

¹⁵ See generally CHIBLI MALLAT, INTRODUCTION TO MIDDLE EASTERN LAW 300–54 (2009).

¹⁶ See PHEBE MARR, THE MODERN HISTORY OF IRAQ 21–61 (3rd ed. 2011).

¹⁷ FLORIAN AMERELLER ET AL., LEGAL GUIDE TO DOING BUSINESS IN IRAQ 27–28 (5th ed., 2010).

¹⁸ *Last US Troops Withdraw from Iraq*, BBC NEWS MIDDLE EAST (Dec. 11, 2011), <http://www.bbc.co.uk/news/world-middle-east-16234723>.

of the Coalition Provisional Authority (CPA).¹⁹ The CPA subsumed the U.S. Department of Defense's Office of Reconstruction and Humanitarian Assistance, a body created in the aftermath of the invasion and headed by retired U.S. Army General, Jay M. Garner.²⁰ The CPA was responsible for the "reconstruction" of Iraq.²¹ On May 13, 2003, former U.S. Secretary of Defense Donald Rumsfeld appointed L. Paul Bremer (Ambassador Bremer) as CPA administrator, effectively replacing Garner.²²

The legal instruments issued by the CPA included Orders, Regulations, Memoranda, and Public Notices, all of which formed the basis of the U.S.-led transformational agenda in Iraq, and some of which were adopted by the Government of Iraq (GOI) following the CPA's transfer of authority to the GOI in 2004.²³ The CPA issued a total of twelve Regulations, which were "instruments that define[d] the institutions and authorities of the [CPA]."²⁴ There were one hundred Orders, which were "binding instructions or directives to the Iraqi people that create[d] penal consequences or ha[d] a direct bearing on the way Iraqis [were] regulated, including changes to Iraqi law."²⁵ Memoranda "expand[ed] on Orders or Regulations by creating or adjusting procedures applicable to an Order or Regulation."²⁶ Public Notices "communicate[d] the intentions of the Administrator to the public . . ."²⁷ Public Notices had no penal consequence, but were designed to "reinforc[e] aspects of existing law that the CPA intended to enforce."²⁸

The CPA Orders and Regulations dramatically reshaped the legal framework governing Iraq's economy. Among the more influential CPA Orders were CPA Orders 39²⁹ and 40,³⁰ which opened Iraq to foreign

¹⁹ *Letter from the Permanent Representatives of the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations addressed to the President of the Security Council*, U.N. Doc. S/2003/538 (May 8, 2003) [hereinafter *Letter from the Permanent Representatives of the U.K. and U.S.*].

²⁰ CHIBLI MALLAT, *IRAQ: GUIDE TO LAW AND POLICY* 228–29 (2009); Gareth Stansfield, *The Transition to democracy in Iraq: Historical Legacies, Resurgent Identities and Reactionary Tendencies*, in *THE IRAQ WAR AND DEMOCRATIC POLITICS* 151 (Alex Danchev & John MacMillan eds., 2005).

²¹ *Letter from the Permanent Representatives of the U.K. and U.S.*, *supra* note 19.

²² See Letter from CPA Office of Inspector General, Message from the Inspector General of the Coalition Provisional Authority (Mar. 30, 2004), http://www.sigir.mil/files/quarterlyreports/March2004/Report_-_March_2004.pdf; MALLAT, *supra* note 20, at 228–30.

²³ The Coalition Provisional Authority Official Documents, Order 39 (Dec. 20, 2003), <http://www.iraqcoalition.org/regulations> [hereinafter CPA Official Documents] (promoting "foreign investment through the protection of the rights and property of foreign investors in Iraq").

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at Order 40 (Sept. 19, 2003). "Order 40 transformed the state-dominated and centrally controlled banking system to a new structure that grants foreign banks the right to enter and regulate the Iraqi financial market." Hamada Zahawi, *Redefining the Laws of Occupation in the Wake of Operation Iraqi Freedom*, 95 CALIF. L. REV. 2295, n.194 (2007).

investment and revamped Iraq's banking and finance laws. Other CPA Orders that impacted Iraq's economy included Order 54 (Trade Liberalization Policy 2004),³¹ Order 56 (Central Bank Law),³² Order 74 (Interim Law on Securities Markets),³³ and Order 95 (Financial Management Law and Public Debt Law).³⁴ CPA Order 36 outlined the regulations for oil distribution.³⁵ CPA Orders and Regulations had the effect of law.

Shortly after arriving in Iraq, Ambassador Bremer oversaw the creation of the Iraqi Governing Council (IGC),³⁶ the quasi-governmental body established by the CPA in June of 2003, and officially recognized by the U.N. Security Council in Resolutions 1483³⁷ and 1511.³⁸ Theoretically, the CPA was supposed to consult with the IGC "on all matters involving the temporary governance of Iraq," including security.³⁹ In practice, however, this was rarely realized.⁴⁰ Although the IGC passed several resolutions that were, for the most part, substantive contributions to the governance of Iraq during the first year of the occupation, Ambassador Bremer had effective veto power over IGC decisions, and he used it.⁴¹ Overall, the IGC wielded only marginal authority and, unlike many CPA Orders, IGC resolutions were never considered law per se.⁴²

On June 28, 2004, the IGC was dissolved and the CPA transferred sovereignty to the Iraqi Interim Government, which was replaced in May 2005 by the Iraqi Transitional Government, the political body that drafted the Constitution of Iraq.⁴³ The Constitution of Iraq was approved by referendum in October 2005, and in 2006, elections were held and the GOI was established. The Constitution does not explicitly mention the CPA Orders or Regulations, but Article 130 of the Constitution perpetuates the validity of existing laws, "presumably including CPA

³¹ CPA Official Documents, *supra* note 23, at Order 54 (Apr. 4, 2004).

³² *Id.* at Order 56.

³³ *Id.* at Order 74.

³⁴ *Id.* at Order 95.

³⁵ *Id.* at Order 36.

³⁶ CPA Regulation No. 6 outlined the anticipated authority of the IGC. It states: "The CPA recognized the formation of the Governing Council as the principal body of the Iraqi interim administration, pending the establishment of an internationally recognized, representative government by the people of Iraq, consistent with Resolution 1483." CPA Official Documents, *supra* note 23, at Regulation No. 6 (July 13, 2003).

³⁷ S.C. Res. 1483, U.N. Doc. S/RES/1483 (May 22, 2003) [hereinafter Resolution 1483].

³⁸ S.C. Res. 1511, U.N. Doc. S/RES/1511 (Oct. 16, 2003).

³⁹ CPA Official Documents, *supra* note 23, at Regulation No. 6.

⁴⁰ Gregory H. Fox, *The Occupation of Iraq*, 36 GEO. J. INT'L L. 195, n.285 (2005) ("Acknowledgment of consultations was mostly limited to the economic reforms and usually consisted of the same general boilerplate rather than specific delineations of a legislative path for a given reform.").

⁴¹ See, e.g., L. PAUL BREMER, MY YEAR IN IRAQ 292-93 (2006) (Ambassador Bremer vetoed the IGC's decision to make Shari'ah Law the basis for personal status legal matters); Jordan E. Toone, *Occupation Law During and After Iraq: The Expedience of Conservatism Evidenced in the Minutes and Resolutions of the Iraqi Governing Council*, 24 FLA. J. INT'L L. 470, 485 (2012).

⁴² Toone, *supra* note 41, at 481-85.

⁴³ See generally MALLAT, *supra* note 20, at 27-34.

Orders that were not rescinded by the Interim and Transitional Governments.”⁴⁴ Indeed, the GOI’s express repeal of certain CPA Orders, including Order 39 (repealed by the new Investment Law of 2006), reinforces the notion that non-repealed CPA Orders remain valid.⁴⁵ Many CPA Orders have also been expressly adopted by the GOI.⁴⁶ Although the Constitution of Iraq does not articulate specific provisions relating to the Iraqi economy, it does provide for economic liberties.⁴⁷ Thus, the current Iraqi legal framework governing FDI includes pre-Saddam and Saddam-era legislation, CPA Orders, the Iraqi Constitution, and GOI legislation. The specific laws governing FDI in Iraq will be examined in more detail below.⁴⁸

B. Overview of Literature on FDI in Iraq

The existing body of literature that examines in some form the post-2003 legal framework governing FDI in Iraq can be roughly divided into three categories. The first category includes scholarly articles that examine the legal components of FDI in Iraq from a theoretical standpoint. Authors of these articles argue, for example, that the reforms instituted by the CPA following the U.S. invasion of Iraq were either positive or negative from a political, economic, or legal perspective.⁴⁹ The second category includes articles written by scholars or practicing attorneys who provide general overviews of the legal framework for FDI in Iraq, but who conducted their analyses at a relatively early point following the 2003 U.S. invasion of Iraq.⁵⁰ The third category includes non-academic articles written or studies performed by governmental or international organizations that provide information regarding foreign investment in Iraq, but with limited references to the legal framework

⁴⁴ Arts. 22–36, Doustour Joumhouriat al-Iraq [The Constitution of the Republic of Iraq] of 2005, available at Constitution of Iraq, at Republic of Iraq, National Investment Commission, <http://www.investpromo.gov.iq/index.php?id=16> [hereinafter Iraqi Constitution]; AMERELLER ET AL., *supra* note 17, at 3.

⁴⁵ Zahawi, *supra* note 30, at 2329.

⁴⁶ Toone, *supra* note 41, at n.262. (“Many CPA Orders have . . . been officially incorporated by the GOI, most of which relate to economic matters. Among the CPA Orders related to economic matters in Iraq that remain valid are Order 54 (Trade Liberalization Policy, amended per Order 70), Order 56 (Central Bank Law), Order 64 (Amendment to Iraqi Company Law No. 21 of 1997), Order 74 (Interim Law on Securities Markets), Order 80 (Amendment to the Trademarks and Descriptions Law No. 21 of 1957), Order 81 (Patent, Industrial Design, Undisclosed Information, Integrated Circuits and Plant Variety Law), and Order 94 (Banking Law of 2004).”)

⁴⁷ Iraqi Constitution, *supra* note 44.

⁴⁸ See *infra* Part III.

⁴⁹ E.g., Melissa A. Murphy, *A “World Occupation” of the Iraqi Economy? How Order 39 will Create a Semi-Sovereign State*, 19 CONN. J. INT’L L. 445, 446 (2004).

⁵⁰ E.g., Bart S. Fisher, *Investing in Iraq: Legal and Political Aspects*, 18 TRANSNAT’L LAW 71, 73–74 (2004); 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 (2004); Theodore W. Kassinger & Dylan J. Williams, *Commercial Law Reform Issues in the Reconstruction of Iraq*, 33 GA. J. INT’L & COMP. L. 217 (2004).

governing such investments.⁵¹ The following is a brief examination of each of these categories in turn.

1. Articles Examining the Legal Structure for FDI in Iraq from a Theoretical Perspective

Several scholars have either praised or criticized the CPA-led reforms relating to FDI in Iraq without providing substantive analyses of the practical effects of such reforms. Scholars who critique the CPA's reformist agenda in Iraq rely primarily on international law or other theoretical considerations. One scholar, for example, argues that "the CPA, as a temporary occupying force, does not possess adequate authority to institute the reforms in [CPA] Order 39."⁵² This argument rests on the proposition that in advancing the transformational economic agenda in Iraq, the United States acted beyond the authority granted under U.N. Resolution 1483 and the international law of occupation.⁵³ Similarly, another scholar argues that the provision in CPA Order 39 allowing for one hundred percent foreign ownership of Iraqi companies "will result in a semi-sovereign Iraq, unable to achieve true autonomy."⁵⁴ These scholars focus on the lawfulness of the CPA-instituted changes to Iraqi law rather than the practical effects that the law engendered.⁵⁵

Other academics have advanced theoretical arguments in support of the transformational economic agenda adopted by the United States in Iraq. One scholar argued in 2004 that FDI is emerging "as a linchpin of modern international economics."⁵⁶ According to this scholar, the international law of occupation, which prohibits the occupying power from instituting changes to the legal or economic makeup of the occupied state unless absolutely necessary,⁵⁷ is an "obstacle to protecting the foreign investment that is so desperately needed in Iraq's transitional economy."⁵⁸ On the other hand, other scholars have argued that international law did in fact "permit reformation of Iraq's commercial

⁵¹ E.g., INVESTMENT CLIMATE STATEMENT, *supra* note 8; International Trade Administration, Iraq Investment and Reconstruction Task Force, <http://trade.gov/iraq/> (last visited Jan. 15, 2013).

⁵² Nicole Glum, *Liberalization or Economic Colonization: The Legality of the Coalition Provisional Authority's Structural Investment Law Reforms in Post-Conflict Iraq*, 2 S.C. J. INT'L L. & BUS. 49, 52 (2006).

⁵³ *Id.* at 53. The *jus in bello* obligations pertaining to the rights and responsibilities of an occupying power are codified in the Hague Convention of 1907 and the Fourth Geneva Convention of 1949 and its Additional Protocols. *Id.*

⁵⁴ Murphy, *supra* note 49, at 446.

⁵⁵ *Id.* at 457-59.

⁵⁶ Robert Tadlock, *Occupation Law and Foreign Investment in Iraq: How an Outdated Doctrine Has Become an Obstacle to Occupied Populations*, 39 U.S.F. L. REV. 227, 228 (2004).

⁵⁷ An occupant must "ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." Hague Convention (IV) Respecting the Laws and Customs of War on Land, art 43, Oct. 18, 1907, 36 Stat. 2227, T.S. No. 539 [hereinafter Hague Convention].

⁵⁸ Tadlock, *supra* note 56, at 231-32.

law”⁵⁹ and that CPA Order 39 was a “significant step” toward “stimulat[ing] investment and economic recovery” in Iraq.⁶⁰

To be sure, the purpose behind the work of scholars writing from a theoretical perspective was not to definitively evaluate the legal framework governing FDI in Iraq. And nor could they, considering the relatively early period in which they conducted their analyses. Indeed, the examination of the practical impact of the evolving legal framework governing FDI in Iraq made by these scholars was only speculative in nature, and therefore does not assist scholars or businesses in making sense of the various legal requirements associated with FDI in Iraq.

2. General Academic Overviews

In 2005, James Rayis, one of several practicing attorneys to provide insights into the legal framework governing FDI in Iraq,⁶¹ provided a practical overview of the then-current legal framework for doing business in Iraq.⁶² Rayis touched on a variety of issues facing foreign investors, including contractual agreements,⁶³ financing,⁶⁴ agency and distributorship agreements,⁶⁵ and subcontracting.⁶⁶ Nonetheless, Rayis admits that “[i]ssues such as the extent to which Shari’a Islamic law will be applied, the continued openness of the economy to foreign investors, regulation of trade and banking laws and other critical factors in determining Iraq’s future economic health and legal structure are [still] in debate.”⁶⁷

In 2004, Alan Audi provided an overview of the legal framework governing FDI in Iraq and examined the early CPA reforms pertaining to foreign investment, reconstruction levies, taxes, and banking.⁶⁸ Audi outlines *inter alia* significant changes in Iraq’s foreign investment laws, noting that the new reforms allowed for one hundred percent private foreign ownership,⁶⁹ eliminated the screening mechanisms for investments,⁷⁰ provided for equal treatment of foreign investors,⁷¹ and

⁵⁹ Judith Hope & Edward Griffin, *The New Iraq: Revisiting 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, 879 (2004).

⁶⁰ *Id.*

⁶¹ E.g., Tim Mills in *Panel 3: The Development of A Market Democracy*, 33 GA. J. INT’L & COMP. L. 195 (2004).

⁶² James Rayis, *Business Law in Iraq? Yes, But Be Careful*, BUS. L. TODAY (July/Aug. 2005), available at <http://apps.americanbar.org/buslaw/blt/2005-07-08/rayis.shtml>.

⁶³ *Id.* at 28.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 29.

⁶⁷ *Id.*

⁶⁸ *Iraq’s New Investment Laws and the Standard of Civilization: A Case Study on the Limits of International Law*, 93 GEO. L. J. 335, 346 (2004).

⁶⁹ *Id.* at 347.

⁷⁰ *Id.* at 348–49.

⁷¹ *Id.* at 350.

allowed for immediate remittance of profits, dividends, interest, and royalties.⁷² The new reforms also suspended tariffs and trade restrictions for 2003,⁷³ provided for certain tax exemptions,⁷⁴ liberalized the banking sector,⁷⁵ and altered regulations for “the establishment of branches and trade representation offices by foreign companies.”⁷⁶ To be sure, Audi was using Iraq as a case study to further his broader thesis, which is that “liberal, free market economic dogma” is being continually absorbed into, and therefore transforming, international law.⁷⁷ His writing nonetheless provides one of the few academic—albeit outdated—overviews of the legal framework governing FDI in Iraq.

Although the general academic overviews outlined above provide some detail on the legal framework governing FDI in Iraq, they were largely published prior to several significant developments in Iraq, including the signing of the Transitional Administrative Law, the drafting and signing of the Constitution, the election of a permanent government, and the passage of legislation modifying or revoking laws in existence in 2004 and 2005 when these overviews were published. Moreover, these studies lack the practical insights that have naturally arisen as foreign investors have attempted to navigate the legal requirements of FDI in Iraq since the laws were passed or formally adopted.

3. *Other Contributions*

Various non-academic efforts have been made to provide insights into FDI in Iraq, many of which touch upon the legal components to engaging in FDI in Iraq. For-profit organizations, including think tanks and law firms, have contributed to the existing literature surrounding FDI in Iraq.⁷⁸ Governments, including Iraq,⁷⁹ have provided a wide array of information relating to investing in Iraq.⁸⁰ International organizations such as the International Monetary Fund,⁸¹ the Organisation for Economic Co-operation and Development,⁸² and the United Nations⁸³

⁷² *Id.* at 350–51.

⁷³ *Id.* at 351.

⁷⁴ *Id.*

⁷⁵ *Id.* at 351–52.

⁷⁶ *Id.* at 352.

⁷⁷ *Id.* at 337.

⁷⁸ *See, e.g.*, DUNIA FRONTIER CONSULTANTS, *supra* note 7; *see also* AMERELLER ET AL., *supra* note 17.

⁷⁹ NATIONAL INVESTMENT COMMISSION, REPUBLIC OF IRAQ, INVESTOR GUIDE TO IRAQ, available at http://trade.gov/static/inv_guide_2009.pdf [hereinafter NIC].

⁸⁰ *See, e.g.*, INVESTMENT CLIMATE STATEMENT, *supra* note 8; International Trade Administration, *supra* note 51.

⁸¹ International Monetary Fund, Iraq (Oct. 5, 2012), available at <http://www.imf.org/external/np/country/notes/iraq.htm>.

⁸² AGENDA, MENA-OECD, ENABLING AND SUSTAINING PRIVATE FOREIGN INVESTMENT IN IRAQ (July 6–8, 2010), <http://www.oecd.org/dataoecd/47/45/45726064.pdf>.

⁸³ United Nations Conference on Trade and Development, World Investment Report 2010 (June 2010), available at http://www.unctad.org/en/docs/wir2010_en.pdf.

have also provided information. In addition, the media has played and continues to play an important role in examining relevant legal issues relating to FDI in Iraq.⁸⁴ While useful and often more current than academic articles, these non-academic sources do not consistently incorporate the nuanced legal analysis nor provide the legal context requisite for successful business practices in Iraq.

Overall, the existing literature surrounding the legal framework for FDI in Iraq is incomplete and fragmented. The scholarly analyses that have been undertaken are largely outdated, and such analyses are primarily theoretical in nature and short on practical recommendations for understanding or navigating the legal landscape governing FDI in Iraq. Nor do they account for regional variations in the legal framework for FDI between the Kurdish region and the central government, to the extent that such differences arise. Moreover, these analyses were conducted at a time when the United States was firmly entrenched as an occupying power in Iraq. Since 2006, the GOI has gradually assumed more of its sovereign responsibilities related to Iraqi security and governance. Given the withdrawal of U.S. troops from Iraq and the rapid increase in foreign interest in the post-War Iraqi market, the need to examine the current legal framework for FDI in Iraq has increased. Perhaps most importantly, the analyses outlined above do not consistently account for SMEs and non-MNC foreign investors seeking to enter the post-War Iraqi market.

III. CONTEMPORARY LEGAL FRAMEWORK FOR FDI IN IRAQ

The current legal framework governing FDI in Iraq incorporates several sources of law.⁸⁵ Section A introduces the current sources of law that govern FDI in Iraq. Section B outlines several prominent legal issues that foreign investors are likely to encounter when doing business in Iraq.

A. Current Sources of Law Governing FDI in Iraq

The laws governing FDI in Iraq can be divided into three categories: (1) Pre-CPA laws; (2) CPA Orders and Regulations; and (3) GOI Laws, Regulations, and Administrative Requirements. This Section briefly assesses each of these in turn.

⁸⁴ E.g., Charles Levinson, *Safer Iraq Draws Foreign Investors*, USA TODAY, Sept. 10, 2008, available at http://www.usatoday.com/news/world/iraq/2008-09-09-iraqinvestment_N.htm.

⁸⁵ For an overview of sources of Iraqi law, see Library of Congress, *Iraq*, available at <http://www.loc.gov/law/help/guide/nations/iraq.php> (last visited Apr. 11, 2013).

1. Pre-CPA Laws

The Iraqi Civil Code (ICC), Law No. 40/1951,⁸⁶ continues to provide the basic framework for regulating contracts, torts, property, and commercial transactions in Iraq.⁸⁷ The Iraqi Commercial Law No. 30 of 1984 governs trading activities undertaken by public and private entities in Iraq.⁸⁸ CPA Orders amended other Saddam-era laws, but they otherwise remain in effect. For example, CPA Order 64 amended Iraqi Companies Law No. 21 of 1997, but it otherwise remains valid law.⁸⁹ Article 130 of the new Constitution of Iraq states that all existing laws will continue to remain valid.⁹⁰ Thus, all Saddam-era or pre-Saddam laws that were in effect when the Constitution was ratified remain valid today. Only a few of these laws, two of which were mentioned above, pertain to FDI in Iraq.

2. CPA Orders and Regulations

As indicated above, the CPA was established on May 16, 2003, by CPA Regulation No. 1.⁹¹ The legal basis for the establishment of the CPA was, according to the United States and the United Kingdom, Resolution 1483,⁹² which called upon the administrative authority in Iraq “to promote the welfare of the Iraqi people through the effective administration of the territory, including, in particular, working towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future.”⁹³

Among the CPA Orders related to FDI in Iraq that remain valid are Order 54 (Trade Liberalization Policy, amended per Order 70),⁹⁴ Order 56 (Central Bank Law),⁹⁵ Order 64 (Amendment to Iraqi Company Law No. 21 of 1997),⁹⁶ Order 74 (Interim Law on Securities Markets),⁹⁷ Order 80 (Amendment to the Trademarks and Descriptions Law No. 21 of 1957),⁹⁸ Order 81 (Patent, Industrial Design, Undisclosed Information,

⁸⁶ Iraqi Civil Code. Text of ICC code available in NICOLA H. KARAM, BUSINESS LAWS OF IRAQ (Graham & Trotman, eds., 1990). This law became effective in 1953.

⁸⁷ See MALLAT, *supra* note 15, at ch. 8.

⁸⁸ See KARAM, *supra* note 86.

⁸⁹ CPA Official Documents, *supra* note 23, at Order 64.

⁹⁰ Iraqi Constitution, *supra* note 44.

⁹¹ CPA Official Documents, *supra* note 23, at Regulation 1.

⁹² See *Letter from the Permanent Representatives of the U.K. and U.S.*, *supra* note 199.

⁹³ Resolution 1483, *supra* note 37.

⁹⁴ CPA Official Documents, *supra* note 23, at Order 54.

⁹⁵ *Id.* at Order 56.

⁹⁶ *Id.* at Order 64.

⁹⁷ *Id.* at Order 74.

⁹⁸ *Id.* at Order 80.

Integrated Circuits and Plant Variety Law),⁹⁹ and Order 94 (Banking Law of 2004).¹⁰⁰

3. *GOI Laws, Regulations, and Administrative Requirements*

The Iraqi Constitution was adopted by referendum in October 2005. The first national parliamentary elections in Iraq under the new Iraqi Constitution were held in December 2005 and a government was formed in May 2006.¹⁰¹ The GOI passed the Insurance Regulatory Law No. 10 of 2005¹⁰² and, as indicated above, repealed¹⁰³ CPA Order 39 (as amended by CPA Order 46) by passing the new Investment Law No. 13 of 2006 (Investment Law).¹⁰⁴ The Investment Law continued the trends initiated by the CPA in Order 39 by further opening Iraq to FDI. The Investment Law and its 2009 amendment constitute the principal pieces of legislation relating to FDI in Iraq. The GOI also passed the Private Investment in Crude Oil Refining Law No. 64 of 2007¹⁰⁵ and the Investment Regulation No. 2/2009.

The second national parliamentary elections were held in March of 2010, although disputes among the various parties prevented the formation of a new government until November 2010. In early 2011, the parliament passed Regulation No. 1/2011, which amended regulations for selling and leasing public sector properties for investment purposes. Although burdened by lingering security concerns, the current GOI has not provided any indication that it will diverge from the progressive economic policies of the preceding parliament.

In addition to passing legislation, the GOI has also promoted several initiatives that signal an increased opening of Iraq to FDI.¹⁰⁶ For example, Prime Minister Al-Maliki launched the International Compact with Iraq, a “five-year national plan that includes benchmarks and mutual commitments from both Iraq and the international community, all with the aim of helping Iraq on the path towards . . . economic reconstruction.”¹⁰⁷ Iraq has also instigated the National Development Strategy, a detailed plan to encourage foreign investment in Iraq “in a

⁹⁹ *Id.* at Order 81.

¹⁰⁰ *Id.* at Order 94.

¹⁰¹ AMERELLER ET AL., *supra* note 17, at 4.

¹⁰² Available at <http://www.iraqinsurance.org/pdf/SA%20Iraq%20Law%20March%202005%20%20unofficial%20v1f%206%20March%2006.pdf> (unofficial translation).

¹⁰³ *Iraq MPs Pass Law to Encourage Foreign Investment*, AFX NEWS LTD. (Oct. 11, 2006), available at http://www.accessmylibrary.com/coms2/summary_0286-19843380_ITM.

¹⁰⁴ Iraqi Constitution, *supra* note 44.

¹⁰⁵ Available at <http://www.iraqoilforum.com/wp-content/uploads/2012/05/Law-of-Private-Investment-in-Crude-Oil-Refining.pdf> (unofficial translation).

¹⁰⁶ *E.g.*, NIC, *supra* note 79.

¹⁰⁷ U.N. Assistance Mission for Iraq (UNAMI), *Fact Sheet on the International Compact with Iraq (ICI)*, <http://www.uniraq.org/ici.asp>.

manner that ensures the flow of foreign capital, modern technology, and management expertise.”¹⁰⁸

Variations exist between FDI laws in Kurdistan and those in Baghdad. The Constitution of Iraq recognizes Kurdistan as a “federal region”¹⁰⁹ and “legislation enacted in the region of Kurdistan since 1992 shall remain in force . . . provided that they do not contradict with the Constitution.”¹¹⁰ The semi-autonomous Kurdistan Regional Government has enacted various laws governing FDI in the Kurdistan region that differ from the federal laws promulgated by the GOI. The most prominent of these laws is the Kurdistan Regional Investment Law No. 4 of 2006.¹¹¹ Thus, SMEs and non-MNC foreign investors seeking to invest in post-War Iraq should take note of differing legal requirements when doing business in Kurdistan.¹¹²

B. Topical List of Prominent Legal Issues Related to FDI in Iraq

Foreign entities seeking to invest in Iraq have a wide variety of business interests that, in turn, invoke differing legal obligations. While not exhaustive,¹¹³ the following nine Sections outline several of the prominent legal issues that SME’s and non-MNC foreign investors are likely to encounter when investing in Iraq.¹¹⁴

1. Tax Considerations

CPA Orders 37¹¹⁵ and 49,¹¹⁶ and the subsequent amendments in CPA Order 84¹¹⁷ revised the tax rates and tax exemptions of Income Tax Law No. 113/1982 and the Real Estate Rent Tax Law No. 162/1959 and have been applied since January 1, 2004. These provisions stipulate that Iraqi and foreign companies doing business in Iraq must pay a flat tax of fifteen percent of their net income to the GOI.¹¹⁸ Also notable is CPA Order 49, which provides that “[i]ncome tax paid to a foreign country on income earned in that country may be credited against tax paid to

¹⁰⁸ USAID TIJARA PROVINCIAL ECONOMIC GROWTH PROGRAM, INVESTOR GUIDE TO IRAQ 9 (2010) [hereinafter USAID INVESTOR GUIDE TO IRAQ].

¹⁰⁹ Iraqi Constitution, *supra* note 44, at art. 117.

¹¹⁰ *Id.* at art. 141.

¹¹¹ Available at <http://www.krg.org/p/p.aspx?l=12&s=020000&r=315&p=293>.

¹¹² Several issues remain unresolved, including issues relating to a national census and, of course, the division of oil revenue. 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, 1577–78 (2009).

¹¹³ For practical reasons, this Section does not examine other increasingly relevant issues, such as intellectual property, free trade zones, and bankruptcy.

¹¹⁴ The following are federal legal obligations, although many are applicable to the Kurdistan region as well.

¹¹⁵ CPA Official Documents, *supra* note 23, at Order 37.

¹¹⁶ *Id.* at Order 49.

¹¹⁷ *Id.* at Order 84.

¹¹⁸ *Id.*

Iraq.”¹¹⁹ However, “in practice there exists considerable uncertainty about the manner in which they should be applied.”¹²⁰ SMEs are advised to seek competent local counsel on all tax issues that arise when entering into and conducting business within Iraq.

2. *Establishment of Business Entities and Foreign Ownership*

Trade Law No. 30 (1984) and Law Nos. 21/1997¹²¹ (Companies Law) and 22/1997¹²² (Public Companies Law) constituted the basic legal framework for the establishment and operation of companies in Iraq. Sections of the Companies Law were amended by CPA Order 64.¹²³ Although controversial, Order 64 drastically altered the Iraqi Companies Law by opening Iraq to foreign investment. Given the *casus belli* of the Iraq War—namely, regime change and the democratization of Iraq—such a drastic revamping of the Iraqi economy was not surprising.¹²⁴ Order 64 was later modified by the Investment Law, which allows both foreigners and Iraqis to invest in all sectors and activities in Iraq except those relating to two sectors: oil extraction and production, and banking and insurance.¹²⁵ The Investment Law also prohibits foreign ownership of land.¹²⁶

The Companies Law provides for two types of companies in Iraq: (1) private companies in which public sector ownership of the company does not exceed twenty-five percent of the capital; and (2) mixed companies, in which the total percentage of ownership by public sector entities is at least twenty-five percent of the share capital.¹²⁷ Joint companies may take the form of either a limited liability company (LLC) or a joint stock company.¹²⁸ Private companies may take the form of an LLC, a joint stock company, a general partnership, an individual enterprise, or a simple company.¹²⁹

3. *Registration of Branches, Companies, or Partnerships*

The Commercial Law No. 30 of 1984 regulates all types of trading among public and private actors in Iraq.¹³⁰ The Commercial Law

¹¹⁹ *Id.* at Order 49.

¹²⁰ AMERELLER ET AL., *supra* note 17, at 70.

¹²¹ Iraqi Constitution, *supra* note 44.

¹²² *Id.*

¹²³ CPA Official Documents, *supra* note 23, at Order 64.

¹²⁴ The *casus belli* of the U.S. invasion of Iraq was regime change and the “democratization” of Iraq. Fox, *supra* note 40. *But see* Bremer, *supra* note 41, at 25 (stating that the *casus belli* of the Iraq War was weapons of mass destruction).

¹²⁵ Iraqi Constitution, *supra* note 44.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*; AMERELLER ET AL., *supra* note 17, at 46.

¹²⁹ Iraqi Constitution, *supra* note 44; AMERELLER ET AL., *supra* note 17, at 46.

¹³⁰ KARAM, *supra* note 86.

distinguishes between retail traders, namely natural persons who conduct commercial activities under their own names as sole traders, and legal traders, which are legal entities or companies.¹³¹ Retail traders are governed by Commercial Law No. 30 of 1984; legal traders are governed by Companies Law No. 21 of 1997 as amended by CPA Order 64. As per Ministerial Instruction No. 149, foreign investors seeking to register in Iraq must pay a single registration processing fee of 200,000 Iraqi Dinars.¹³²

Agency and distributor agreements are governed by the Law on Registration of Agents No. 4 of 1991. Other notable components to the legal framework registration in Iraq include the development of a “one-stop-shop,” enabling the NIC and the related Provincial Investment Commissions (PIC) to handle all investment-related issues, including licenses and permits,¹³³ immigration, customs, land, and utilities.¹³⁴ Currently, the NIC and PIC only handle investment applications and facilitate visa issuance for foreign investors, although it is anticipated that they will continue to assume more responsibilities as development in Iraq continues.¹³⁵ Also, the Iraqi Companies Law has an interesting and unique requirement that all companies registered in Iraq be named using a meaningful Arabic name. Thus, foreign investors may not simply transliterate the name of the company into Arabic; the Arabic name itself must have meaning in Arabic.¹³⁶ The NIC has outlined the basic requirements for registration online.¹³⁷

4. *Contract Law*

As indicated above, the ICC governs contracts. Like many legal codes throughout the Arab world, the ICC was inspired by the Egyptian Civil Code, although there are also traces in the ICC of Islamic law as it was codified in the now-obsolete Ottoman Civil Code *Majella* and a number of now-outdated Ottoman laws that were based on European codes.¹³⁸ Although civil law differs in many respects from the common law tradition, there are many similarities between Iraqi contract law and the common law principles of contract law prevalent in Western legal systems.¹³⁹ For example, the ICC upholds the principles of freedom to contract, capacity to consent, choice of law, duress, undue influence,

¹³¹ USAID INVESTOR GUIDE TO IRAQ, *supra* note 108, at 28.

¹³² AMERELLER ET AL., *supra* note 17, at 56.

¹³³ For more on establishing a business in Iraq, see USAID INVESTOR GUIDE TO IRAQ, *supra* note 108; NIC, *supra* note 79.

¹³⁴ INVESTMENT CLIMATE STATEMENT, *supra* note 8.

¹³⁵ The NIC and the PICs currently do not perform all of these functions, although it is anticipated that they will do so in time. USAID INVESTOR GUIDE TO IRAQ, *supra* note 108, at 21.

¹³⁶ KARAM, *supra* note 86.

¹³⁷ Republic of Iraq National Investment Commission, *Registering Companies in Iraq*, <http://www.investpromo.gov.iq/index.php?id=121> (last visited Apr. 17, 2013).

¹³⁸ AMERELLER ET AL., *supra* note 17, at 16; MALLAT, *supra* note 15, at ch. 8.

¹³⁹ See generally, S.E. RAYNER, *THE THEORY OF CONTRACTS IN ISLAMIC LAW* 102–115 (1991).

mistake, assignment, damages, force majeure, agency law, warranty, frustration, limitations, and termination.¹⁴⁰

The Iraqi Commercial Code provides further guidance on contractual issues, specifically in regards to commercial registration, trade names, banking transactions, letters of credit, bank guarantees, and international sales.¹⁴¹ Regarding international sales, section five of the Commercial Code defines terms similar to those commonly used in international business transactions, including cost, insurance, and freight; cost and freight; free alongside ship; and free on board.¹⁴²

5. *Privileges and Guarantees Offered to Investors*

The Investment Law and its 2009 amendment provide several notable privileges and guarantees to foreign investors, including repatriation of profits and capital brought into Iraq, the ability to trade on the Iraq Stock Exchange, the ability to obtain insurance for the investment project from any national or foreign insurance company, the ability to open accounts using Iraqi Dinars or foreign currency at either Iraqi or foreign banks, the ability to obtain Iraqi residency, freedom to enter and depart Iraq, protection of the investment project from confiscation and nationalization, the ability for non-Iraqi workers to transfer their salaries and indemnities outside Iraq, and the exemption from taxes and fees for investment projects for ten years beginning from the starting date of the project.¹⁴³

SMEs and non-MNC foreign investors should be aware that Iraq has attempted to position itself as a market of preference for foreign investors. Iraq is signatory to thirty-two bilateral treaties and nine multilateral agreements related to the promotion of foreign investment with member states of the Arab League.¹⁴⁴ Iraq also has bilateral agreements with the following states: India, Iran, Japan, Jordan, Kuwait, Mauritania, the Republic of Korea, Sri Lanka, Syria, Tunisia, Turkey, the United Kingdom, Vietnam, and Yemen, among others.¹⁴⁵ Further, Iraq has bilateral Free Trade Area agreements with several Arab countries¹⁴⁶ and is in the process of attaining World Trade Organization membership. In an attempt to foster trade and investment with the United States, Iraq

¹⁴⁰ Iraqi Commercial Code Law No. 30/1984, arts. 25, 362–74.

¹⁴¹ See KARAM, *supra* note 86.

¹⁴² *Id.*

¹⁴³ Iraqi Constitution, *supra* note 44.

¹⁴⁴ Republic of Iraq National Investment Commission, *Iraq's Bilateral and Multi-Party Agreements*, <http://www.investpromo.gov.iq/index.php?id=123> (last visited Apr. 17, 2013) [hereinafter Republic of Iraq National Investment Commission, *Agreements*]; see also USAID INVESTOR GUIDE TO IRAQ, *supra* note 108, at 16.

¹⁴⁵ USAID INVESTOR GUIDE TO IRAQ, *supra* note 108, at 16. Iraq is party to a total of 32 bilateral investment treaties, which provide market-comparable protections to foreign investors. Republic of Iraq National Investment Commission, *Agreements*, *supra* note 144.

¹⁴⁶ USAID INVESTOR GUIDE TO IRAQ, *supra* note 108, at 16.

also signed a trade agreement with the United States to provide U.S. SMEs and non-MNC foreign investors with added privileges and protections.¹⁴⁷

6. *Banking Law*

The Banking Law¹⁴⁸ was published on September 9, 2003, dramatically altering banking practices in Iraq and bringing Iraq's legal framework for banking in line with international standards.¹⁴⁹ The Banking Law, in connection with the Investment Law, stipulates certain requirements for foreign entities to have ownership in Iraqi banks. The Banking Law also outlines the licensing, registration, lending, and administration requirements of Iraqi banks.¹⁵⁰

On March 6, 2004, the CPA issued the Central Bank Law, which aims to "achieve and maintain domestic price stability and to foster and maintain a stable and competitive market-based financial system."¹⁵¹ The Central Bank Law endows the Central Bank of Iraq (CBI) with the power to issue regulations and licenses in furtherance of the objectives of the Central Bank Law. The Central Bank Law also lays out the principal obligations of the CBI in terms of capital, reserve, ownership, and management.¹⁵²

In addition to the CBI, the Iraqi banking system consists of seven state-owned banks, twenty-three private banks, nine Islamic banks, and fifteen foreign banks.¹⁵³ The CBI "does not encourage consumer finance . . . and real estate lending is confined to the Real Estate Bank."¹⁵⁴ It is expected, however, that such practices will evolve as Iraq continues to develop.¹⁵⁵ Regardless, as a practical matter, most foreign investors must rely on non-Iraqi sources of funding for their investment activities in Iraq. Iraq currently has nine banks with full electronic funds transfer capabilities "including SWIFT, domestic payments systems, and core banking systems."¹⁵⁶

The Trade Bank of Iraq (TBI) governs Iraq's international trade. CPA Order 20 established the TBI as an independent government entity.¹⁵⁷ The TBI has signed agreements with seventeen of the largest Export Credit Agencies around the world in addition to receiving lines of credit

¹⁴⁷ Republic of Iraq National Investment Commission, *Agreements*, *supra* note 144.

¹⁴⁸ The Banking Law is the name given to CPA Order 40, which CPA Order 94 rescinded. CPA Official Documents, *supra* note 23.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at Order 56, art. 3.

¹⁵² *Id.*

¹⁵³ See The Central Bank of Iraq, <http://www.cbi.iq/index.php?pid=IraqFinancialInst> (last visited Apr. 11, 2013).

¹⁵⁴ USAID INVESTOR GUIDE TO IRAQ, *supra* note 108, at 18.

¹⁵⁵ *Id.*

¹⁵⁶ Republic of Iraq National Investment Commission, *Iraq's Banking System and Currency*, <http://www.investpromo.gov.iq/index.php?id=126> (last visited Apr. 17, 2013).

¹⁵⁷ CPA Official Documents, *supra* note 23, at Order 20.

from many major international financial institutions.¹⁵⁸ While banking services have greatly improved since 2003, the banking system, overall, is one of the weakest components to Iraq's post-War FDI framework.

7. *Oil and Gas*

Oil and gas lie at the heart of foreign investment and economic development in Iraq. Article 111 of the Constitution of Iraq stipulates that “[o]il and gas are owned by all the people of Iraq in all the regions and governorates.”¹⁵⁹ Article 112 of the Constitution states that “[t]he federal government, with the producing governorates and regional governments, shall undertake the management of oil and gas extracted from present fields.”¹⁶⁰ Needless to say, oil constitutes the most important commodity in the Iraqi economy, and will continue to function as the foundation for Iraq's economic development for years to come.

As of late 2011, there were a total of sixteen State-owned oil companies operating directly under the Ministry of Oil. These companies form the backbone of oil industry. As indicated above, the Investment Law allows both foreigners and Iraqis to invest in all sectors and activities in Iraq except those relating to two sectors: oil extraction and production, and banking¹⁶¹ and insurance.¹⁶² Thus, while oil constitutes a strategic and lucrative market for foreign investors, FDI in the oil sector is unique in comparison to other sectors of the Iraqi economy insofar as there are a variety of additional legal requirements that foreign investors must meet in order to participate in oil and gas extraction and its attendant industries.

A central—and still unsettled—issue relating to the management and development of Iraq's oil and natural gas resources is the so-called Hydrocarbons Law. This law and its accompanying legislation will, once passed, dictate how oil revenue will be shared among Iraq's various regions and ethnic groups. A draft law was approved by the Council of Ministers in February 2007 and sent to the Council of Representatives for approval.¹⁶³ Due to concerns over potential foreign and private takeovers of the exploration and production of oil, a revised draft of the Hydrocarbons Law was resubmitted in April 2007.¹⁶⁴ For various reasons, the Kurdish government was displeased with the revised draft.

¹⁵⁸ AMERELLER ET AL., *supra* note 17, at 61–62.

¹⁵⁹ Iraqi Constitution, *supra* note 44, at art. 111.

¹⁶⁰ *Id.* at art. 112.

¹⁶¹ As indicated above, FDI in the banking sector is governed by Banking Law No. 94/2004.

¹⁶² Branches of foreign insurance companies are governed by Insurance Regulatory Law No. 10/2005.

¹⁶³ See Robert Bejesky, *Geopolitics, Oil Law Reform, and Commodity Market Expectations*, 63 OKLA. L. REV. 193, 238–50 (2011).

¹⁶⁴ See Susan L. Sakmar, *The Status of the Draft Iraq Oil and Gas Law*, 30 Hous. J. INT'L L. 289 (2008).

The Hydrocarbons Law draft remains unsigned.¹⁶⁵ If passed, however, it will significantly impact foreign investment in Iraq in the oil and gas sectors.

Kurdistan has taken an active approach in luring foreign oil companies into the northern oil fields, despite the absence of a federal hydrocarbons law.¹⁶⁶ The central government has responded by blacklisting foreign oil companies that conduct business in Kurdistan.¹⁶⁷ The ongoing impasse has left many foreign oil companies hesitant to pursue oil operations in Iraq.¹⁶⁸ It is unclear how or to what extent the ongoing impasse between the Kurdistan Regional Government and the Iraqi central government will impact SMEs and other non-MNC foreign investors seeking to take advantage of Iraq's post-War oil industry.

8. Labor Law

The basic provisions of the Iraqi labor law are embodied in Labor Law No. 71/1987¹⁶⁹ and in ICC Articles 900 to 926.¹⁷⁰ Other relevant laws relating to labor include the Law on the Unionization of Workers No. 52/1987,¹⁷¹ the Implementation of Development Major Projects Law No. 60/1985,¹⁷² the Machine Registration Law No. 7/1999,¹⁷³ and the Organization of the Industrial Services Law No. 30/2000.¹⁷⁴ Iraqi labor law provides that employees should not work more than eight hours per day for six days per week; additional hours are treated as overtime (which are compensated at 150% to 200% of the regular pay per hour). Moreover, terminations of employment contracts are comparatively difficult for employers under Iraqi labor law. In addition, foreign workers require work permits. Unlike other Middle Eastern countries,¹⁷⁵ Iraq does

¹⁶⁵ See, e.g., Adam B. Felsenthal, *Is Iraq the Next Nigeria?: Revenue Sharing and the Natural Resource Curse*, 27 ARIZ. J. INT'L & COMP. L. 787, 809 (2010); Ahmed Rasheed, *Iraq Oil Law Deal Feters as Crisis Drags On*, REUTERS (Jan. 26, 2012, 7:10 AM), available at <http://www.reuters.com/article/2012/01/26/us-iraq-oil-law-idUSTRE80POS720120126>; Julia Payne, *Iraq has Little Interest in Pushing Oil Law Forward – Janabi*, REUTERS (Feb. 7, 2013), <http://www.reuters.com/article/2013/02/07/iraq-oil-idUSL5N0B790Z20130207>.

¹⁶⁶ Patrick Cockburn, *From Death to Dollars – How Kurds Struck it Rich* (Apr. 23, 2013), <http://www.independent.co.uk/news/world/middle-east/from-death-to-dollars--how-kurds-struck-it-rich-8525346.html>.

¹⁶⁷ Ahmed Rasheed, *Iraq Blacklists Chevron for Kurdish Oil Deals*, REUTERS (Jul. 24, 2012), <http://www.reuters.com/article/2012/07/24/us-iraq-chevron-idUSBRE86N12A20120724>.

¹⁶⁸ Guy Chazan, *Iraq's Appeal Wanes for Oil Majors*, FINANCIAL TIMES (Mar. 17, 2013), <http://www.ft.com/intl/cms/s/0/c51d29fc-85c4-11e2-9ee3-00144feabdc0.html#axzz2QaIDQJ4>.

¹⁶⁹ Iraqi Constitution, *supra* note 44.

¹⁷⁰ Iraqi Civil Code, *supra* note 86.

¹⁷¹ Iraqi Constitution, *supra* note 44.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ See, e.g., *Labor Ministry outlines Saudization percentage*, ARAB NEWS (June 13, 2011, 11:42 PM), <http://www.arabnews.com/node/380653>. Saudi Arabia is currently adjusting its requirements for companies regarding the percentage of employees employed by the company that must be Saudi nationals. See NASRA M. SHAH, RECENT LABOR IMMIGRATION POLICIES IN THE OIL RICH GULF: HOW EFFECTIVE ARE THEY LIKELY TO BE?, 9-11 (2008), available at <http://www.ilo.org/public/english/region/asro/bangkok/library/download/pub08-12.pdf>.

not require employers to employ a certain percentage of Iraqi nationals, unless the employer is conducting an investment project under a foreign investment license. In such cases, the Investment Law No. 13/2006 mandates that "Iraqi nationals must be given priority over foreign workers, unless it can be shown that there are no Iraqi nationals with the skills and qualifications to fill the relevant positions."¹⁷⁶

All companies conducting business in Iraq must register with the Iraqi Ministry of Labor Worker's Retirement and Social Pension Organization before conducting any business operations.¹⁷⁷ Companies must also reserve funds equal to three months of estimated social security deductions for all employees.¹⁷⁸ According to the NIC, "Social Security dues equal to 17% of an employee's wages shall be paid quarterly," only five percent of which is paid by the employee.¹⁷⁹ Although labor law will normally not be a pressing issue for SMEs seeking to do business in Iraq, Iraqi labor law is unique enough to warrant careful consideration when seeking to conduct business in Iraq.

9. Dispute Resolution

The Iraqi judiciary functions as an important component to Iraq's FDI regime.¹⁸⁰ Contrary to what is perhaps popular perception, the post-2003 Iraqi judicial system has been described as providing "measured and careful jurisprudence" and functioning as "a reliable, independent and neutral arbiter of disputes."¹⁸¹ The Investment Law provides for a number of dispute resolution mechanisms for certain types of disputes, such as "disputes between the investor and the Investment Authority, between the investor and its employees, or different authorities involved in the licensing process."¹⁸² In late 2010, the Supreme Judicial Council of Iraq established the First Commercial Court of Iraq, a court specializing in disputes involving foreign investors. This court began hearing cases in early 2011. As it stands, Iraqi courts offer a promising, yet largely untested forum for dispute resolution involving foreign SMEs and non-MNCs.

To be sure, most foreign investors, including SMEs, include or should include choice of law provisions in their contracts that subject disputes

¹⁷⁶ AMERELLER ET AL., *supra* note 17, at 58.

¹⁷⁷ Republic of Iraq National Investment Commission, *Worker's Retirement and Social Pension Organization*, <http://www.investpromo.gov.iq/index.php?id=129> (last visited May 2, 2013).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ See generally, U.S. Courts, The Third Branch, *Rule of Law Program Brings Federal Judge to Iraq* (July 2010), http://www.uscourts.gov/news/TheThirdBranch/10-07-01/Rule_of_Law_Program_Brings_Federal_Judge_to_Iraq.aspx.

¹⁸¹ Charles P. Trumbull IV & Julie B Martin, *Elections and Government Formation in Iraq: An Analysis of the Judiciary's Role*, 44 VAND. J. TRANSNAT'L L. 331, 331 (2011). For more on the history of the Iraqi judicial system, see MALLAT, *supra* note 200. The Iraqi Judiciary is governed by Law No. 160/1979.

¹⁸² AMERELLER ET AL., *supra* note 17, at 58.

between the parties to international arbitration and similar dispute resolution mechanisms. However, Iraqi law does not provide the same degree of support to international arbitration as it does to domestic litigation and arbitration.¹⁸³ Although Iraq is a signatory to the Arab League Convention on Commercial Arbitration (1987) and the Riyadh Convention on Judicial Cooperation (1983), it has not ratified the New York Convention (1958),¹⁸⁴ the Washington Convention (1966),¹⁸⁵ or the attendant rules established by the U.N. Commission on International Trade Law.

IV. NON-LEGAL CONSIDERATIONS

In addition to navigating multiple legal requirements, SMEs and non-MNC foreign investors also face various socioeconomic, political, and cultural hurdles that arise when investing in Iraq. An appreciation for these non-legal factors will help foreign SMEs and non-MNC foreign investors to understand and contextualize some of the legal requirements attendant to FDI in Iraq and upon entering the Iraqi market, to successfully expand their business operations. This Section briefly examines the unique sociocultural attributes of the Iraqi market and the role of Islamic Law in contemporary Iraqi business, corruption, and security.

To begin with, SMEs and non-MNCs seeking to invest in Iraq often express hesitation regarding what is perceived by Western audiences as the draconian requirements associated with Islamic Law. While Islam is, constitutionally speaking, “the official religion of the State [of Iraq]” and constitutes a foundational legislative source,¹⁸⁶ Islamic law is largely silent on commercial matters. The notable exception to this is Islamic banking and Islamic finance, which, if pursued, require nuanced legal advice. The Iraqi Civil Code states that “statutes are the primary source of law, followed by custom and then by Islamic law.”¹⁸⁷ As outlined above, business activity in Iraq is largely governed by statutory law.¹⁸⁸ Islamic Law is more apparent in Iraqi legal issues related to family and inheritance law.¹⁸⁹

A more pressing concern, especially for SMEs, is the fact that despite recent efforts to streamline the investment process, foreign investors continue to face frustrating bureaucratic hurdles and rampant corruption. In the World Bank 2010 Doing Business Report, Iraq ranked 165 out of

¹⁸³ USAID INVESTOR GUIDE TO IRAQ, *supra* note 108, at 15.

¹⁸⁴ Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T 2517, 330 U.N.T.S. 38, available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html.

¹⁸⁵ Also known as The International Centre for Settlement of Investment Disputes (ICSID).

¹⁸⁶ Iraqi Constitution, *supra* note 44, at art. 2.

¹⁸⁷ AMERELLER ET AL., *supra* note 17, at 13.

¹⁸⁸ See *supra*, Part III.

¹⁸⁹ *Id.*

185 on the ease of doing business.¹⁹⁰ Transparency International ranked Iraq 175 out of 178 countries in its 2010 corruption perception index.¹⁹¹ Corruption places obvious stress on SMEs and non-MNC foreign investors accustomed to industrialized markets, especially those subject to the Foreign Corrupt Practices Act, which continues to exert considerable influence on global business practices.¹⁹²

Iraq, of course, also faces continuous security threats. Although security in general has improved dramatically during the past four to five years, recent events indicate that the ethnic, tribal, religious, and political divisions continue to permeate Iraqi society, thereby destabilizing the Iraqi market and dissuading foreign investors from seriously considering the opportunities that otherwise exist in Iraq.¹⁹³ For most SMEs, such security concerns are often the principal determinant when contemplating investment in Iraq. Like MNCs, some SMEs and non-MNC foreign investors may want to consider private security as a temporary work-around to some of the ongoing security concerns in Iraq.

Finally, Iraqis still possess a degree of mistrust for Western companies and Westerners in general. Companies that do establish meaningful business relationships often discover that maintaining those relationships involves much more effort than typically required in Western business settings. SMEs and non-MNC foreign investors are likely to experience the sociocultural peculiarities of conducting business in Iraq on a more intimate level than MNCs. Although many MNCs operating in, for example, the oil industry, interact with relatively sophisticated Iraqi companies, many domestic or regional companies operating in Iraq are not accustomed to many business practices that are common in Western markets. SMEs unaccustomed to the Iraqi market may want to utilize the expertise of local legal counsel or trained cultural advisors when contemplating some of the non-legal aspects of business activity in Iraq.

Overall, the post-War Iraqi market stands in stark contrast from the bureaucratic, tyrannical, and economically stagnated Iraq of just ten years ago. Iraq has made significant progress in improving its legal requirements for FDI and reducing bureaucratic hurdles, thereby improving and streamlining the FDI process in Iraq. The consensus

¹⁹⁰ International Finance Corporation & World Bank, *Doing Business: Measuring Business Regulations*, available at <http://www.doingbusiness.org/rankings> (last visited May 2, 2013).

¹⁹¹ *Corruption Perceptions Index 2010*, TRANSPARENCY INTERNATIONAL, http://www.transparency.org/policy_research/surveys_indices/cpi/2010/results (last visited July 8, 2011). To be sure, the Iraqi Commission on Public Integrity (CPI) was established via CPA Order 55 as an independent, autonomous Iraqi governmental agency charged with fighting corruption. Yet, needless to say, its work remains incomplete. *Id.*

¹⁹² See, e.g., Peter J. Henning, *Dealing with the Foreign Corrupt Practices Act*, NY TIMES (Mar. 4, 2013), <http://dealbook.nytimes.com/2013/03/04/dealing-with-the-foreign-corrupt-practices-act/>.

¹⁹³ Mohammed Tawfeeq, *Deadly Wave of Bombings Across Iraq Ahead of Elections*, CNN (Apr. 15, 2013), <http://www.cnn.com/2013/04/15/world/meast/iraq-violence/index.html>.

among many scholars is that the economic potential in Iraq—due primarily to oil—is nearly unmatched.¹⁹⁴ Lingering bureaucratic hurdles, nascent experience in governance and the rule of law, and corruption continue to plague Iraq, and such hurdles make FDI in Iraq uniquely difficult for SMEs and non-MNCs seeking to enter the post-War Iraqi market.

V. CONCLUSION

The foregoing analysis has sought to fill a void in the scholarly literature on the legal framework governing FDI in Iraq, providing SMEs and non-MNC foreign investors with an introductory overview of some of the principal legal and non-legal considerations attendant to investing in the post-War Iraqi market. The preceding analysis suggests on the one hand that Iraq is, as U.S. soldiers stated at the outset of the war, “open for business.”¹⁹⁵ Security concerns aside, foreign entities can invest in Iraq knowing that the legal framework for FDI in Iraq has been established. Whether or not this legal framework and the accompanying systems of governance will consistently function correctly, efficiently, and fairly remains to be seen. As it stands, the uncertainty inherent in various components of the post-War Iraqi market has not prevented dozens of MNCs from investing in a variety of Iraq’s economic sectors. As alluded to above, the NIC has reported that over 350 companies have filed for investment licenses in Iraq—178 licenses alone in 2010 totaling roughly \$10.5 billion.¹⁹⁶ In addition to the oil sector, Iraq boasts many attractive investment opportunities in sectors such as transportation infrastructure, electricity, communications, and industry, and continues to attract the attention of professionals searching for opportunities in international project and asset finance, mergers and acquisitions, and private equity.¹⁹⁷

On the other hand, the foregoing analysis of the legal framework and non-legal considerations attendant to investing in the post-War Iraqi market indicates that many challenges remain, especially for SMEs and non-MNCs with little or no experience operating in a market like Iraq’s. Bureaucratic hurdles, corruption, security concerns, and a nascent judicial system are only a few of the challenges facing SMEs and non-MNC foreign investors seeking to enter the post-War Iraqi market.

With the recent pullout of U.S. troops from Iraq, the GOI is destined to embark on a new phase of governance—one fraught with economic,

¹⁹⁴ E.g., Christopher Helman, *Iraq’s Oil Potential ‘Eyepopping’*, FORBES (Jan. 24, 2010), <http://www.forbes.com/sites/energysource/2010/01/24/iraqs-oil-potential-eyepopping/>.

¹⁹⁵ 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, n.68 (2007); see also Kassinger & Williams, *supra* note 50.

¹⁹⁶ INVESTMENT CLIMATE STATEMENT, *supra* note 8. To be sure, “the granting of a license by the NIC or a PIC does not guarantee that the proposed investment will be implemented. In many cases, it takes months or years for projects to materialize, if they do at all.” *Id.*

¹⁹⁷ *Id.*

political, and sectarian difficulties. The degree to which the GOI can successfully navigate these challenges will correspond in large part to the extent to which it facilitates FDI in Iraq. Much of the legal framework governing FDI has been laid, and it appears that Iraq has embraced a very liberal FDI policy. The real barriers for foreign investment lay not in the legal framework itself, but in the security conditions in place and the uncertainty surrounding the specifics of domestic dispute resolution. As indicated above, many MNCs have assessed the risk and determined that investment in Iraq should proceed. SMEs and non-MNCs are now contemplating investment in the post-War Iraqi market. Although time will tell whether the risks attendant to FDI in Iraq will subside, understanding the legal framework governing FDI in Iraq will become increasingly important for SMEs and non-MNC foreign investors as the GOI continues its efforts to integrate the Iraqi market into the global economy.