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# The Coalition Provisional Authority and Iraq: A Case Study on International Investment Law and Policy

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# OSGOODE HALL REVIEW OF LAW AND POLICY

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ARTICLE

THE COALITION PROVISIONAL AUTHORITY AND IRAQ;  
INVESTMENT LAW AND POLICY IN ACTION

Fahad Siddiqui<sup>♦</sup>

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*Following the invasion of Iraq, the American-run Coalition Provisional Authority (“CPA”) introduced a series of Orders and Regulations that restructured the foreign investment landscape in that country. Some of these regulations, and the political story behind their implementation, have received scholarly attention. However, few commentators have analyzed the body of CPA-issued regulations for provisions relevant to foreign investment. This paper traces the evolution of investment law in occupied Iraq through a detailed evaluation of CPA-issued Orders and Regulations. Analysis of these regulations, of pre-existing US policy on foreign investment, and of criteria used to measure foreign investment regulation reveals the extent to which the CPA regime installed in Iraq is intensely pro-foreign investor and reflects a policy commitment to opening developing markets to foreign investment.*

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## INTRODUCTION

As early as 2002, the *National Security Strategy of the United States* (“NSS”) proclaimed the promotion of economic freedom “beyond America’s shores” as a pillar of its defense policy. Specifically, the US asserted that it would engage with other countries to promote “pro-growth legal and regulatory policies to encourage business investment.”<sup>277</sup> Following the invasion of Iraq, the American-run Coalition Provisional Authority (“CPA”) introduced a series of Orders and Regulations that restructured the foreign investment landscape in that country. Some of these laws, and the political story behind their implementation, have received scholarly attention.<sup>278</sup> However, few commentators have analyzed the body of CPA-issued regulations for provisions relevant to foreign investment.

This paper traces the evolution of investment law in occupied Iraq through a detailed analysis of CPA-issued Orders and Regulations. I argue that the legal regime installed in this period is pro-foreign investor and reflects a US policy commitment to opening developing markets to foreign investment. Part One lays out the policy context in which the CPA operated. Part Two illustrates the investment picture established through CPA laws on de-Ba’athification, tax, immunities, and foreign investment. Part Three compares the CPA investment scheme with pre-invasion US policy and addresses the international law of occupation. Part Four tests the extent to which the package of incentives and restrictions contained in CPA-issued laws represent an investor-friendly scheme using three measures of the treatment of foreign investment.

It is worth noting that there may be some debate as to whether non-Iraqi companies contracted to provide services in Iraq should be considered foreign investors.<sup>279</sup> However, the CPA, which

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<sup>277</sup> “The National Security Strategy of the United States of America”, The White House (September 2002) at 17 [NSS].

<sup>278</sup> See e.g. Nicole Marie Crum, “Liberalization or Economic Colonization: The Legality of the Coalition Provisional Authority’s Structural Investment Law Reforms in Post-Conflict Iraq” (2005) 2 South Carolina Journal of International Law and Business 49; See also Naomi Klein, *The Shock Doctrine: The Rise of Disaster Capitalism* (New York: Metropolitan Books, 2007).

<sup>279</sup> See, e.g. Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford: 2007, Oxford University Press) at 73-80.

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was the body that concluded agreements with foreign contractors on behalf of Iraq, came to define “foreign investment” as “investment in any kind of asset in Iraq” including “technical expertise.”<sup>280</sup> International Centre for Settlement of Investment Disputes (“ICSID”) jurisprudence also supports the position that contracts for the provision of services constitute international investments, so long as the contracting party has made contributions in the host country that are certain in duration, of economic value (such as labour and services), and involve some risk for the contractor.<sup>281</sup> For the purposes of this paper, it is assumed on that basis that foreign contractors providing services in Iraq constitute foreign investors.

## 1. THE POLICY CONTEXT

A brief review of US policy on international investment will help set the context in which the CPA operated. Before the invasion of Iraq, the White House established the liberalization of investment law in developing markets as a pillar of US defense policy. The US State Department agreed and made recommendations on how to implement this policy in Iraq. Both sets of documents are reviewed below.

### *1.1 International Investment and US Foreign Policy before the Occupation of Iraq*

The Bush administration’s *National Security Strategy of the United States* of 2002 has featured prominently in political and legal scholarship because of its articulation of the doctrine of preemptive self-defense.<sup>282</sup> However, another defense policy commitment articulated in that White House-issued document has proven extremely relevant for Iraq: promoting law reform in emerging markets to encourage international flows of investment capital. “The lessons of history are clear,” the NSS proclaims, “market economies ...

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<sup>280</sup> *Order Number 39 (Foreign Investment)*, Coalition Provisional Authority (19 September 2003), s 1(3) [*Order 39*].

<sup>281</sup> See e.g. *L.E.S.I. S.p.A. et ASTALDI S.p.A. v Republique Algerienne Democratique et Populaire* (2006), ICSID Case No. ARB/05/3 (International Centre for Settlement of Investment Disputes).

<sup>282</sup> See e.g., Colin L. Powell, “A Strategy of Partnerships” (2004) 83 *Foreign Affairs* 22.

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are the best way to promote prosperity and reduce poverty.”<sup>283</sup> The organizing principle would be “a world in which all countries have investment-grade credit ratings that allow them access to international capital markets and to invest in their future.”<sup>284</sup> One of the featured methods of achieving this goal was the promotion of “pro-growth legal and regulatory policies to encourage business investment” and “tax policies—particularly lower marginal tax rates—that improve incentives for work and investment.”<sup>285</sup> International investment was seen as one of the primary means of encouraging development, which, in turn, would encourage stability and enhance US security. The importance of international investment to US defense policy was thus identified before the invasion of Iraq: “Free markets and free trade are key priorities of our national security strategy.”<sup>286</sup>

This position was echoed by a collection of several hundred government officials and Iraqi exiles gathered by the US State Department to form *The Future of Iraq Project* (“FIP”). Between July 2002 and April 2003, the group held dozens of meetings to discuss the needs of post-invasion Iraq.<sup>287</sup> The subject-specific working group reports, completed in 2003 and declassified in 2005, are consistent in their support for reducing barriers to foreign investment in Iraq. For example, the Oil and Energy Working Group report asserts that “Iraq’s economy upon liberation will be in need of billions of dollars of foreign direct investment” and encourages the establishment of new “terms” and “conditions” to induce such funds.<sup>288</sup> The Economy and Infrastructure Working Group struck a similar tone, insisting on “creating a favorable investment climate for foreign investors” as a first step to encourage growth.<sup>289</sup> International investment was seen as the key to “invigorate Iraq’s economy and lift the Iraqi people out of a

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<sup>283</sup> NSS, *supra* note 1 at 17.

<sup>284</sup> *Ibid* at 18.

<sup>285</sup> *Ibid* at 17.

<sup>286</sup> NSS, *supra* note 1 at 23.

<sup>287</sup> Robert Bejesky, “Geopolitics, Oil Law Reform, and Commodity Market Expectations” (2011) 63 Oklahoma Law Review 193 at 216-218.

<sup>288</sup> “Oil & Energy Working Group: The Future of Iraq Project”, US Department of State (2003, declassified in part on June 22, 2005) at 9 [FIP—Oil & Energy].

<sup>289</sup> “Economy and Infrastructure (Public Finance) Working Group: The Future of Iraq Project”, US Department of State (2003, declassified in part on June 22, 2005) at 5 [FIP—Economy & Infrastructure].

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future of impoverishment.”<sup>290</sup> The invasion of Iraq was considered an appropriate method to implement the necessary reforms: “regime change provides the opportunity to liberate not only the country but also the economy.”<sup>291</sup> In effect, the FIP was a practical application to Iraq of the NSS defense policy commitment to encouraging international investment in developing economies.

## 2. THE COALITIONAL PROVISIONAL AUTHORITY

A full picture of the legal regime governing international investment in Iraq emerges from a detailed review of the Orders issued by the CPA while it was in power (12 April 2003 – 28 June 2004). Few, if any studies, have examined these regulations in detail. Although only one Order governs international investment directly (Order 39), a number of other Orders contain provisions that are relevant to international investors. This section focuses on regulation in four areas. First, “De-Ba’athification” (Order 1) resulted in a purge of many technical experts from the Iraqi public sector and created a range of opportunities for the provision of services and expertise by foreign investors. Second, legal immunity from US judicial process was extended to international investors with interests in Iraqi petroleum products (US Executive Order 13303) and to foreign contractors operating in Iraq from Iraqi judicial process (Order 17). Third, tax provisions (Order 37 and Order 49) protected foreign contractors and investors in Iraq from all tax liability. And finally, Order 39 (“Foreign Investment”) provided additional incentives specifically designed to induce foreign investment in Iraq.

At the outset, it is worth noting that, although many CPA Orders discussed below specify the period of time in which they would be in force, the final Order issued before the CPA’s dissolution and the governing document of the Iraqi Interim Government that took the CPA’s place extended the validity of CPA provisions until they are specifically contradicted by Iraqi law. The transition from CPA authority to Iraqi sovereignty is discussed further at 2.5.

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<sup>290</sup> *Ibid.*

<sup>291</sup> *Ibid.*

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### 2.1 De-Ba'athification and Foreign Expertise

The first Order issued by the CPA, once it assumed authority in Iraq, mandated the removal of members of the Ba'ath Party from public sector jobs.<sup>292</sup> On its face, the motivation behind the move was a concern with the re-emergence of elements of the previous regime in the post-invasion political order.<sup>293</sup> The Order therefore expelled anyone holding the rank of “Regional Command Member,” “Branch Member,” or “Section Member” in the Ba'ath Party from public office.<sup>294</sup> However, Order 1 also applied to “individuals holding positions in the top three layers of management in every national government ministry, affiliated corporations and other government institutions (e.g., universities and hospitals).”<sup>295</sup> Such individuals were to be interviewed for “possible affiliation” with the Ba'ath Party. This provision excluded both senior members of the Ba'ath Party and those holding the more junior ranks of “Member” and “Active Member” from management positions in the public sector.<sup>296</sup>

Targeting junior Ba'ath Party members in the public service resulted in a “crippling” purge of management and technical specialists from a number of ministries and public institutions.<sup>297</sup> In turn, the need for technical expertise throughout the Iraqi public sector represented an opportunity for foreign investors. Three months after Order 1 was issued, the CPA published a memorandum on contract and grant procedures that lists “technical expertise” as one of the factors used to evaluate prospective contractors.<sup>298</sup> A CPA Inspector General audit notes that offers by foreign contractors responding to CPA-issued Requests for Proposals were evaluated primarily on the basis of “the offerors’ experience and expertise.”<sup>299</sup> The CPA would later include “technical expertise” in its definition of

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<sup>292</sup> *Order Number 1 (De-Ba'athification of Iraqi Society)*, Coalition Provisional Authority (16 May 2003) [*Order Number 1*].

<sup>293</sup> *Ibid.*, s 1(1).

<sup>294</sup> *Ibid.*, s 1(2).

<sup>295</sup> *Ibid.*, s 1(3).

<sup>296</sup> *Ibid.*

<sup>297</sup> Greg Muttitt, *Fuel on the Fire: Oil and Politics in Iraq* (London: The Bodley Head, 2011) at 86.

<sup>298</sup> *Memorandum Number 4 (Contract and Grant Procedures)*, Coalition Provisional Authority (19 August 2003), s 7(3)(c).

<sup>299</sup> “Award of Sector Design-Build Construction Contracts: Report Number 04-005”, Office of the Inspector General Coalition Provisional Authority (23 July 2004) at 16.

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“foreign investment” which brought foreign experts within the ambit of provisions designed to induce foreign investors in Iraq (discussed at 2.4).<sup>300</sup>

Consulting contracts with foreign companies were eventually concluded in the areas of local governance, democracy building, agriculture, banking, public health, airport and seaport administration, education, housing, and the development of civil society.<sup>301</sup> Although the precise value of these contracts is unknown, the relatively small number of Iraqis hired by the CPA to work for the reconstruction is a reflection of the scale of the opportunity the “De-Ba’athification” of Iraq represented for foreign investors.<sup>302</sup>

## *2.2 Immunity for Foreign Investors*

The second aspect of the investment regime that warrants scrutiny is the provision of immunity to foreign entities with interests in Iraq. These protections granted near-total immunity to international investors from US and Iraqi judicial process. In the early days of the occupation (May 2003), the White House issued a presidential Executive Order protecting international investors in Iraqi petroleum products from judicial proceedings in the US. The order provided immunity against “any attachment, judgment, decree, lien, execution, garnishment, or other judicial process.”<sup>303</sup> The protection was extended to the Development Fund of Iraq and to:

all Iraqi petroleum and petroleum products, and interests therein, and proceeds, obligations, or any financial instruments of any nature whatsoever arising from or related to the sale or marketing thereof, and interests therein, in which any foreign country or a national thereof has any interest, that are in the United States, that hereafter come

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<sup>300</sup> See the introduction for a discussion of the provision of services as international investment.

<sup>301</sup> See e.g. Honourable Frank R. Wolf, “Remarks in the House of Representatives” (June 10, 2003) in 149 *Congressional Record* Part II at 1457; See also Shane Harris, “Outsourcing Iraq” (2004) 36 *Government Executive* 11.

<sup>302</sup> Rajiv Chandasekaran, *Imperial Life in the Emerald City: Inside Iraq’s Green Zone* (New York: Alfred A. Knopf, 2006) at 326.

<sup>303</sup> “Executive Order Protecting the Development Fund of Iraq and Certain other Property in Which Iraq Has an Interest (13303)”, The White House (22 May 2003), s 1.



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within the United States, or that are or hereafter come within the possession or control of United States persons.<sup>304</sup>

Because of the significance of oil to the Iraqi economy—oil represents 70 percent of Iraq’s Gross Domestic Product and 95 percent of Iraqi government revenue—this measure appears to shield a range of foreign investors in Iraq from judgments issued in US legal system.<sup>305</sup>

Shortly after, the CPA granted international investors broad immunity from Iraqi law. Order 17 applies to both foreign contractors (defined as “non-Iraqi business entities or individuals not normally resident in Iraq supplying goods and/or services to or on behalf of Coalition Forces or the CPA under contractual obligations”) and foreign sub-contractors (defined as “non-Iraqi business entities or individuals not normally resident in Iraq supplying goods and/or services to or on behalf of Coalition contractors and in respect of Coalition or CPA activities under contractual arrangements”), among others.<sup>306</sup> The Order provides that foreign contractors, sub-contractors, and their employees are not subject to Iraqi laws or regulations “in matters relating to the terms and conditions of their contracts in relation to the Coalition Forces or the CPA,” for actions with respect to “licensing and registration of employees, businesses and corporations in relation to such contracts,” and for “acts performed ... within their official activities pursuant to the terms and conditions of a contract ... and any sub-contract thereto.”<sup>307</sup> With respect to actions and omissions by contractors, sub-contractors and their employees not performed pursuant to contracts, no Iraqi legal process could be commenced “without the written permission of the CPA.”<sup>308</sup> This latter provision effectively shields foreign contractors in Iraq from Iraqi jurisdiction, subject to CPA authorization to the contrary. These immunities were to last only for the period of authority of the CPA, however, later provisions issued by the CPA

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<sup>304</sup> *Ibid*, s 1(a).

<sup>305</sup> Daniel Behn, “Sharing Iraq’s Oil: Analyzing Production-Sharing Contracts Under the Final Draft Petroleum Law” (2007) 4 *Oil, Gas and Energy Law* (no pagination in journal).

<sup>306</sup> *Order Number 17 (Status of the Coalition, Foreign Liaison Missions, Their Personnel, and Contractors)*, Coalition Provisional Authority (26 June 2003), s 1(3), 1(5).

<sup>307</sup> *Ibid*, ss 3(1), 3(2).

<sup>308</sup> *Ibid*, s 3(3).

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and the Iraqi interim government stipulated that CPA Orders would remain in force unless specifically overturned by Iraqi law (discussed at 2.5).

### *2.3 Limited Tax Liability for Foreign Investors*

The CPA issued two tax-specific Orders, one for calendar year 2003 (Order 37) and a second for calendar year 2004 and beyond (Order 49), both of which contain provisions relevant to international investors. Order 37, issued on September 15, applied retroactively from date of issuance to the whole calendar year and outlines a number of incentives designed to attract foreign capital to post-invasion Iraq. The Order defines tax broadly as “any tax or charge having the effect of a tax” including, without limitation, any tax or “levy, duty, withholding, or fee.”<sup>309</sup> It goes on to suspend all income tax for assessed income sources enumerated in the Iraqi Income Tax Law (113) of 1982.<sup>310</sup> Moreover, no Iraqi tax would apply to the contractors and sub-contractors of the CPA or to the contractors and sub-contractors of any department or agency of Coalition Forces’ governments.<sup>311</sup> All Iraqi law inconsistent with the Order was suspended.<sup>312</sup> In addition, the Order mandated that individual and corporate income tax rate for the years following (meaning 2004 and beyond) would not exceed 15 percent.<sup>313</sup> Through these provisions, foreign investors in Iraq were effectively protected from tax or other government-imposed liabilities for 2003, and provided with a guaranteed ceiling of 15 percent on any future tax liability in the country. Few jurisdictions in the region offer foreign investors the same certainty against short or medium-term encumbrances on revenue: even though many Middle Eastern economies are ranked amongst the lowest-taxing countries in the world, the average total tax rate remains 25.4%.<sup>314</sup>

Order 49 for 2004 introduced a more specific tax regime while maintaining many of the incentives for foreign investors introduced

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<sup>309</sup> *Order Number 37 (Tax Strategy for 2003)*, Coalition Provisional Authority (15 September 2003).

<sup>310</sup> *Ibid*, s 2(a).

<sup>311</sup> *Ibid*, s 3(2).

<sup>312</sup> *Ibid*, s 7.

<sup>313</sup> *Ibid*, s 4.

<sup>314</sup> “Paying Taxes 2012: The Global Picture”, PricewaterhouseCoopers (2011) at 82.

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in Order 37. The suspension of Iraqi tax laws was lifted with two modifications to the domestic tax scheme. First, Order 49 codifies the guarantee in Order 37 that no tax rate in the country would exceed 15 percent by introducing language to this effect in the domestic Iraqi tax code.<sup>315</sup> Second, foreign companies that are “registered in Iraq or otherwise have a permanent establishment in Iraq” would enjoy a fixed 15 percent tax rate, well below the previously established rate in Iraq or the average rate in the region.<sup>316</sup> The Order also grants tax-exempt status to a broad range of foreign investors. Foreign contractors and subcontractors who have concluded agreements with the CPA, foreign countries cooperating with Coalition Forces, or departments and agencies of Coalition Forces’ governments are eligible for exemption from any tax “or similar charge” in Iraq.<sup>317</sup> Any foreign contractors “providing technical, financial, logistical, administrative, or other assistance to Iraq” qualify for the exemption.<sup>318</sup> The immunity from tax liability applies to income earned from foreign sources and from sources in Iraq, and extends to all non-Iraqi employees of said contractors and subcontractors.<sup>319</sup> Although issued at the end of February 2004, the Order stipulates that its’ provisions would apply retroactively from the beginning of that year. No end date is enumerated.

Order 49 establishes a two-tier tax system in Iraq with foreign investors securing better than national treatment. While Iraqi entities were liable for assessment under the reinstated Iraqi tax scheme, foreign contractors (and their employees) that concluded agreements with the CPA or other governments cooperating with Coalition Forces were guaranteed immunity from tax liability so long as they were deemed to be providing “assistance to Iraq.” Although Iraq is not alone in granting tax incentives to foreign investors unavailable to national investors, Order 49 is unique in the region for immunizing most foreign investors indefinitely from all tax liability.<sup>320</sup>

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<sup>315</sup> *Order Number 49 (Tax Strategy of 2004)*, Coalition Provisional Authority (29 February 2004), s 3(1).

<sup>316</sup> *Ibid*, s 3(3).

<sup>317</sup> *Ibid*, s 4(3).

<sup>318</sup> *Ibid*.

<sup>319</sup> *Ibid*.

<sup>320</sup> See e.g. A. Rohan Perera, “The Role and Implications of Bilateral Investment Treaties” (2000) 26 *Commonwealth Law Bulletin* 607 at 621.

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#### 2.4 Provisions Specific to International Investors (Order 39)

While the immunity and tax provisions issued by the CPA provide strong incentives to foreign investors, Order 39 is the heart of the CPA-designed foreign investment scheme in Iraq. Its provisions, reviewed below in detail, structured the foreign investment environment in Iraq until 2006, when the first permanent government of Iraq passed a new investment law.

Order 39 is the only CPA-issued order that defines “foreign investment” in post-invasion Iraqi law. “Foreign investment” is said to include investment by a foreign investor “in *any kind of asset in Iraq*, including tangible and intangible property, and related property rights, shares and other forms of participation in a business entity, and intellectual property rights and technical expertise...”<sup>321</sup> The inclusion of technical expertise brought the array of international service providers and consultants contracted during the reconstruction period (discussed at 2.1) under the umbrella of these foreign investment provisions. Second, foreign investment is permitted in all regions and economic sectors of Iraq with the exception of banking and primary extraction and initial processing in natural resources.<sup>322</sup> Many Iraqi government officials assert that closing the oil and gas sector to international investors resulted only from protests by Iraqi advisors appointed by the CPA.<sup>323</sup> Third, the Order purports to grant national treatment to foreign investors, and where an international treaty signed by Iraq provides more favorable terms for foreign investors, those terms apply.<sup>324</sup> It is worth recalling that the CPA-introduced provisions granting foreign investors immunity from Iraqi law and tax liability (discussed at 2.2 and 2.3 respectively) provided foreign investors with privileges unavailable to national investors. Fourth, the Order grants foreign investors broad ownership and management rights, including the right to 100 percent ownership of Iraqi assets and to establish wholly foreign-owned businesses in Iraq.<sup>325</sup> Fifth, the order permits tax-free remittances of profits earned in Iraq, including profits from disposition of the entire foreign investment.<sup>326</sup> Sixth, the

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<sup>321</sup> *Order 39*, *supra* note 4 at 1(3) (emphasis mine).

<sup>322</sup> *Ibid* at 6(1).

<sup>323</sup> Klein, *supra* note 2 at 361.

<sup>324</sup> *Order 39*, *supra* note 4, ss 4(1), 14.

<sup>325</sup> *Ibid*, ss 7(1)(a), 7(2)(b).

<sup>326</sup> *Order 39*, *supra* note 4, s 7(2)(d)(i).

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Order prohibits foreign ownership of real property, but permits the assignment of licenses to use such property for 40-year terms.<sup>327</sup> Seventh, foreign investors have the option to designate the dispute settlement mechanism of their choice in any contract concluded with Iraqi entities, including international arbitration.<sup>328</sup> Because the Order holds that all conflicting legal texts are deemed to be void and that dispute settlement mechanisms under Iraqi law are optional, the Order appears to limit resort to domestic Iraqi remedies unless a foreign investor and local entity agree to this option in writing.<sup>329</sup> Finally, the Order purports to replace all existing foreign investment law in Iraq, which underscores the sweeping nature of the reforms it introduced.<sup>330</sup>

### *2.5 The CPA Investment Regime after Occupation*

The regime discussed above continued to influence the foreign investment climate in Iraq beyond the dissolution of the CPA on 28 June 2004. The final order issued by the CPA stipulated that anti-Ba'ath, tax, and foreign investment provisions would remain in force “unless and until rescinded or amended by legislation duly enacted and having the force of law...”<sup>331</sup> The CPA also revised Order 17 to ensure that foreign contractors would continue to enjoy immunity in matters relating to their contracts, duty-free imports and exports, and exemptions from Iraqi tax on local purchases and income earned in Iraq “until the departure of the final element of the [Multi-National Force] from Iraq, unless rescinded or amended by legislation duly enacted and having the force of law.”<sup>332</sup> Through a combination of UN Security Council resolutions recognizing the interim Iraqi government that succeeded the CPA and provisions in the concomitant interim Iraqi constitution, the CPA’s extension of the applicability of regulations it had issued beyond its dissolution was

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<sup>327</sup> *Ibid*, ss 8(1) and 8(2).

<sup>328</sup> *Ibid*, s 10.

<sup>329</sup> *Ibid*, ss 10, 13.

<sup>330</sup> *Ibid*, s 3(1).

<sup>331</sup> *Order Number 100: Transition of Laws, Regulations, Orders, and Directives Issued by the Coalition Provisional Authority* (28 June 2004) at preamble.

<sup>332</sup> *Order Number 17 (Revised): Status of the Coalition Provisional Authority, MNF-Iraq, Certain Missions and Personnel in Iraq*, Coalition Provisional Authority (June 27, 2004), ss 4, 8(a), 8(b), 10, 20.

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confirmed in international and Iraqi law.<sup>333</sup>

Many incentives foreign investors enjoyed under the CPA investment scheme were also either continued or broadened under the Iraqi investment law that eventually replaced Order 39 in 2006.<sup>334</sup> That law guaranteed national treatment of foreign investors, permitted 100 percent foreign ownership of Iraqi assets, allowed for international arbitration, and provided a range of exemptions from tax and import / export fees.<sup>335</sup> Unlike the CPA scheme, the Iraqi law that replaced Order 39 permitted both foreign ownership of Iraqi land for the purpose of executing housing projects, and foreign leasing of lands for 50-year terms with the possibility of renewal, which is 10 years more than was permitted under CPA regulations.<sup>336</sup>

### 3. ASSESSING THE CPA INVESTMENT SCHEME: US POLICY AND INTERNATIONAL LAW

The CPA investment scheme is now compared to US policy pronouncements to test the extent to which it reflects ideological commitments articulated before the war (discussed at 1.1). This section also introduces the question of whether the CPA had the legal authority to reform Iraqi investment law in the manner and to the extent that it did (at 3.2).

#### *3.1 Order 39 and US Foreign Policy*

As early as 2002, US policy was committed to the view that

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<sup>333</sup> *Resolution 1511 (2003)*, UNSC, 2003, S/RES/1511; *Resolution 1546 (2004)*, UNSC, 2004, S/RES/1546; *Law of Administration for the State of Iraq for the Transitional Period*, Iraqi Governing Council (in force 28 June 2004), s 26(c). The arrangements relating to legal immunities were eventually superseded by the 2008 US—Iraq Status of Forces Agreement that maintained the immunity of US forces acting in their official capacity from Iraqi legal procedure, but established Iraqi jurisdiction over US contractors operating in Iraq. See *Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq*, 17 November 2008, Article 12 (Jurisdiction).

<sup>334</sup> *Law No (13) of 2006: The Investment Law*, Republic of Iraq (2006) as amended in 2010 [*Law No (13)*].

<sup>335</sup> *Ibid*, ss 10(1), 10(3)(c), 15, 27, 17.

<sup>336</sup> *Ibid*, ss 10(2), 10(3)(a).

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international investment was a key to development. “Market economies” were seen as the “best way to promote prosperity and reduce poverty” and foreign investment was necessary to “invigorate Iraq’s economy and lift the Iraqi people out of a future of impoverishment.”<sup>337</sup> The opening words of Order 39 demonstrate how the CPA applied these commitments to law reform in Iraq: “*Determined* to improve the conditions of life, technical skills, and opportunities for all Iraqis and to fight unemployment with its associated deleterious effect on public security...”<sup>338</sup>

The CPA investment regime also reflects more specific assertions by the US State Department that Iraq’s infrastructure “upon liberation will be in need of billions of dollars of foreign direct investment” and that “creating a favorable investment climate for foreign investors” would be a necessary first step.<sup>339</sup> Order 39 declares that “facilitating foreign investment will help to develop infrastructure, foster the growth of Iraqi business, create jobs, raise capital, result in the introduction of new technology into Iraq and promote the transfer of knowledge and skills to Iraqis...”<sup>340</sup> Most significantly, the US pledge to promote liberal investment laws in host states—“pro-growth legal and regulatory policies”—is clearly reflected in Order 39:

This Order promotes and safeguards the general welfare and interests of the Iraqi people by promoting foreign investment through the protection of the rights and property of foreign investors in Iraq and the regulation through transparent processes of matters relating to foreign investment in Iraq. This Order specifies the terms and procedures for making foreign investments and is intended to attract new foreign investment to Iraq.<sup>341</sup>

Order 39 thereby mirrors a pre-invasion US policy commitment to encourage foreign investment in developing economies through law reform.

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<sup>337</sup> NSS, *supra* note 1 at 17; FIP—Economy & Infrastructure, *supra* note 13 at 5.

<sup>338</sup> *Order 39*, *supra* note 4 at preamble.

<sup>339</sup> FIP—Oil & Energy, *supra* note 12 at 9; FIP—Economy & Infrastructure, *supra* note 13 at 5.

<sup>340</sup> NSS, *supra* note 1 at 17.

<sup>341</sup> *Order 39*, *supra* note 4, s 2.

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### 3.2 CPA Reforms and International Law

The manner in, and extent to which, the CPA reformed Iraqi investment law may have been in contravention of international law. Although a conclusive determination of whether the CPA had the authority under international law to introduce the regulations discussed in Part 2 is beyond the scope of this paper, the question may be of interest to both foreign investors and the state of Iraq, and either may wish to seek remedies for investment agreements concluded in this period.

The parameters for the exercise of authority by occupying forces in Iraq are grounded in Security Council Resolutions and international humanitarian law. There appears to be consensus among the small number of scholars who have analyzed this issue that the CPA exercised authority pursuant to, and within the boundaries of, applicable international humanitarian law, customary international law and relevant Security Council resolutions.<sup>342</sup> The CPA itself claimed the authority to govern occupied Iraq on the basis of Security Council resolutions and the laws of war. *Regulation Number 1* asserts that the CPA exercises authority “under relevant U.N. Security Council resolutions, including Resolution 1483 (22 May 2003), and the laws and usages of war.”<sup>343</sup> All CPA Orders begin with a similar declaration in the name of Paul Bremer, Administrator of the CPA. Order 1, for example, opens with the following: “Pursuant to my authority as Administrator of the Coalition Provisional Authority (CPA), relevant U.N. Security Council resolutions, and the laws and usages of war ...”<sup>344</sup>

Although similar provisions from other Orders do not include the reference to “the laws and usages of war,” all CPA orders refer either to “relevant U.N. Security Council resolutions” or to Resolution 1483. This resolution, which predates all but the first CPA Order and Regulation, refers to the CPA as the unified command of the “occupying powers” and calls for the CPA to “comply fully with [its] obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907.”<sup>345</sup> The CPA

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<sup>342</sup> See e.g. Crum, *supra* note 2.

<sup>343</sup> *Regulation Number 1*, Coalition Provisional Authority (16 May 2003), s 1(2).

<sup>344</sup> *Order 1*, *supra* note 16 at preamble.

<sup>345</sup> *Resolution 1483 (2003)*, UNSC, 2003, S/RES/1483 at preamble, 5 [Resolution 1483].



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therefore appears bound as an occupying power by applicable international humanitarian law irrespective of whether its Orders and Regulations refer explicitly to “the laws and usages of war.”

International law constrained the CPA’s ability to issue investment laws. For example, Resolution 1483 and the fourth Hague Convention of 1907 [*Hague IV*] limit the authority of occupying powers to alter the legal framework of the jurisdiction being occupied.<sup>346</sup> Article 43 notes that once an occupier assumes authority, it “shall take all the measures in his [sic] power to restore, and ensure, as far as possible, public order and safety, *while respecting, unless absolutely prevented, the laws in force in the country.*”<sup>347</sup> Similarly, operative paragraph 4 of Resolution 1483 calls on the CPA to work towards “the creation of conditions in which the Iraqi people can freely determine their own political future.”<sup>348</sup> These provisions appear to limit CPA authority with respect to international investment in three ways. First, the CPA could not alter domestic Iraqi law unless absolutely prevented from doing so. Second, any such changes would have to be made in accordance with Iraqi law already in force.<sup>349</sup> And third, the CPA would arguably be barred from issuing provisions on international investment (such as guarantees against expropriation) if this would limit the purview of future Iraqi governments to “freely determine their own political future.”

*Hague IV* and Resolution 1483 also appear to limit the exercise of CPA authority by circumscribing the permissible uses of Iraqi assets. Article 55 of *Hague IV* limits the use of “public buildings, real estate, forests, and agricultural assets” in the occupied country by requiring the occupying power to “safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.”<sup>350</sup> Similarly, Resolution 1483 calls on the CPA to “promote the welfare of the Iraqi people through the effective administration of the territory.”<sup>351</sup> It appears that the CPA was, therefore, limited in its

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<sup>346</sup> *Hague Convention (IV) Respecting the Laws and Customs of War on Land and its annex: Regulations Concerning the Laws and Customs of War on Land*, International Conferences (The Hague) 18 October 1907 [*Hague Convention IV*].

<sup>347</sup> *Ibid* at article 43 (emphasis mine).

<sup>348</sup> Resolution 1483 *supra* note 70 at 4.

<sup>349</sup> Crum, *supra* note 2 at 72, 115.

<sup>350</sup> *Hague Convention IV*, *supra* note 71 at 55.

<sup>351</sup> Resolution 1483, *supra* note 70 at 4.

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ability to enter into agreements with foreign investors that would result in Iraqi state assets being disposed of in a manner not in the best interest or for the welfare of Iraqis.

Whether the CPA violated international law either by reforming Iraqi investment law in the manner or to the extent that it did, or by concluding agreements under those investment laws that disposed of Iraqi assets improperly is beyond the scope of this paper. However, because of the potential implications for foreign investors and for the state of Iraq, the question warrants further study.

#### 4. ASSESSING THE CPA INVESTMENT SCHEME: THREE FRAMEWORKS

The combination of CPA tax, immunity, and foreign investment provisions presented a number of incentives for, and few restrictions on, foreign investment in post-invasion Iraq. However, analysis of the CPA investment scheme to date has either been general and categorical (“an anti-Marshall Plan”) or limited to a particular CPA Order.<sup>352</sup> Few if any studies have assessed the CPA investment scheme as a whole or with reference to objective criteria. Three frameworks of analysis prove useful in this regard: the United Nations Conference on Trade and Development (“UNCTAD”) framework on “host country operational measures” (“HCOMs”); the UNCTAD framework on foreign investment policy instruments (“PIs”); and the World Bank International Finance Corporation (“World Bank”) framework for investment law reform. The goal of this part of the paper is to test objectively the extent to which CPA-issued regulations on foreign investment represent a pro-investor legal regime.

##### *4.1 Assessing the CPA Investment Regime: The Host Country Operational Measures Framework*

The CPA-instituted foreign investment scheme ranks among the most investor-friendly possible according to the UNCTAD

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<sup>352</sup> Klein, *supra* note 2 at 347; See e.g. Crum, *supra* note 2; See also Clarence M. Dass, “Adventure Capitalizing in Baghdad: An Entrepreneurial Approach to Reconstructing Iraq” (2009) 4 Entrepreneurial Business Law Journal 157.

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categorization of HCOMs.<sup>353</sup> The HCOM framework evaluates measures that target international investment directly through restrictions or performance requirements. “Red light” HCOMs, including local content or trade-balancing requirements, foreign exchange restrictions, or export controls are considered the most restrictive and the least foreign investor-friendly.<sup>354</sup> The CPA issued no such restrictions or requirements. “Yellow light” or intermediate category HCOMs include common requirements or standards imposed on foreign investment.<sup>355</sup> As Table 1 below demonstrates, the CPA investment scheme contains none of these typical requirements or standards:

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<sup>353</sup> “The Development Dimension of FDI: Policy and Rule-Making Perspectives”, United Nations Conference on Trade and Development, UNCTAD/ITE/IIA/2003/4 (2003) at 6 [UNCTAD Development].

<sup>354</sup> *Ibid* at 5.

<sup>355</sup> *Ibid*.

*Table 1: CPA Investment Scheme and Typical Host Country Operational Measures*

“Yellow Light” Host Country Operational Measures <sup>356</sup>	CPA Investment Scheme (Orders 17, 37, 39, 49)
-Requirements to locate headquarters for a specific region	No
-Employment performance requirements	No
-Export performance requirements	No
-Restrictions on sales of goods or services in the territory where produced or provided	No
-Requirements to supply goods or services to specific region exclusively from a territory	No
-Requirements to act as the sole supplier of goods produced or services provided	No
-Requirements to transfer technology, production processes or other proprietary knowledge	No
-Research and development requirements	No
-Measures contrary to the principle of fair and equitable treatment	No (better of national or other treatment provided by treaty)
-Requirements to establish a joint venture with domestic participation	No (full foreign ownership permitted)
-Requirements for a minimum level of domestic equity participation	No (full foreign ownership permitted)

All measures not categorized as “red light” or “yellow light” HCOMs fall into the “green light” category. The right of host countries to impose such measures is uncontested in international investment agreements.<sup>357</sup> However, the CPA scheme includes only one “green light” HCOM: a prohibition on foreign investment in the banking and hydrocarbon sectors.<sup>358</sup> As discussed above (at 2.4), this measure was only introduced as a result of Iraqi pressure on the CPA. In sum, the HCOM framework demonstrates the extent to which the CPA investment scheme is pro-foreign investor: it includes no “red

<sup>356</sup> All “Yellow Light’ Host Country Operational Measures” from UNCTAD Development, *supra* note 78 at 6.

<sup>357</sup> “Host Country Operational Measures”, United Nations Conference on Trade and Development, UNCTAD/ITE/IIT/26 (2001) at 48.

<sup>358</sup> *Order 39, supra* note 4, s 6(1).

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light” or “yellow light” restrictions typically imposed on foreign investment, and the sole “green light” restriction it does include was not a CPA initiative.

#### *4.2 Assessing the CPA Investment Regime: The Policy Instruments Framework*

The CPA-instituted foreign investment scheme also rates among the most investor-friendly according to the UNCTAD framework on foreign investment PIs. Unlike the HCOM framework that focuses only on restrictions and performance requirements, the foreign investment PI analysis considers all regulatory and incentive measures relevant to foreign investment. As Table 2 below shows, CPA PIs contain only two regulatory measures among those typically available to policy makers: restrictions on foreign investment in banking and hydrocarbons, and limitations of foreign land ownership. However, as discussed above, the former was not part of the initial foreign investment scheme and was introduced only at the insistence of the CPA’s Iraqi advisors; the latter is mitigated by the fact that Order 39 authorizes the leasing of Iraqi land to foreign investors for up to 40 years with the possibility of renewal. At the same time, CPA PIs provide many of the fiscal, financial, and other incentive measures available to policy makers. The PI analysis therefore also demonstrates the extent to which the CPA investment scheme is intensely pro-foreign investor.

Table 2: CPA Investment Scheme and Typical Foreign Investment Regulatory Measures and Incentives

<i>Admission and Establishment Regulatory Measures</i> <sup>359</sup>		<i>Ownership and Control Regulatory Measures</i>	
Possible Measures	CPA Investment Scheme	Possible Measures	CPA Investment Scheme
-Restrictions on numbers of multinationals	No	-Equity limits on foreign ownership (e.g. less than 50 per cent)	No
-Minimum capital requirements	No	-Mandatory transfer of ownership	No
-Subsequent additional capital inputs	No	-Nationality limitation on equity held	No
-Screening, authorization, registration	No	-Restrictions on foreign loans (bonds)	No
-Entry conditions – Meeting criteria (environment)	No	-Restrictions on stocks and share types held by foreign investor	No
-Legal form requirements of FDI	No	-Restrictions on types of share transfers	No
-Restrictions on entry modalities	No	-Restrictions on foreign share holders (dividend, capital)	No
-Special requirements for non-equity	No	-‘Golden’ shares held by host	No
-FDI to specific locations (moderate urban drift)	No	-Government appoint reservations to board	No
-Restrictions of imported input factors	No	-Restrictions on nationality of directors	Yes (no foreign ownership of land, 40-year leases only)
-Deposit requirements prior to FDI	No	-Government reserves right to veto certain decisions	
-Admission to hosts privatization deals restricted	No	-Government reserves rights to be consulted prior to decisions	
-Admission and incorporation fees (taxes)	Yes (banking, hydrocarbons)	-Restrictions on land rights transfers	
-Compliances with norms (customs, public morals)			
-Sectors ring-fenced from FDI			

<sup>359</sup> All “possible measures” from “FDI Policy Instruments: Advantages and Disadvantages”, United Nations Industrial Development Organization, Research and Statistics Branch Working Paper 01/2009 (2009) at 20.

<i>Operations Regulatory Measures</i>		<i>Foreign Direct Investment Incentive Measures</i>	
Possible Measures	CPA Investment Scheme	Possible Measures	CPA Investment Scheme
-Employment restrictions on foreign staff	No	<b>Fiscal Incentives</b>	
-Performance requirements (local sourcing, employment, training)	No	-Losses against future profits	Yes
-Import, export, sales, foreign exchange earnings	No	-Accelerated capital depreciation	Yes
-Restrictions on public procurement	No	-Investment / Reinvestment permits	(not addressed)
-Restricted access to local factors inputs	No	-Lower social security payments	Yes (none)
-Restrictions on diversification, on access to communications	No	-Tax reductions based on staff and marketing expenses	No
-Restrictions on free flow of government data	No	-Import-based incentives (duty exemptions)	Yes
-Operation restriction on public utilities	No	-Export-based incentives (duty exemptions)	Yes (max15%) / No
-Restrictions on access to local credit	No	-Reductions in corporate tax rates & holidays	No
-Restrictions on foreign exchange, capital repatriation	No	<b>Financial Incentives</b>	Available
-“Cultural” restrictions	Yes (banking, hydrocarbons)	-Loan guarantees and public venture capital availabilities	No
-Information disclosure requirements		-Guaranteed export credits and Government insurance	Yes
-Operational permits / licenses, technical standards, royalty ceilings		-Direct subsidies and subsidized loans	
-Advertising restrictions on foreign multinationals		<b>Other Incentives</b>	
-Special restrictions on sector operations (banks)		-Subsidized dedicated infrastructure, services, government contracts	

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### *4.3 Assessing the CPA Investment Regime: The Investment Law Reform Framework*

Evaluating the CPA investment scheme according to the World Bank framework for investment law reform yields a similar result. The Bank's blueprint for domestic investment laws is designed to attract foreign investment:

As stated above, conducive investment policies are those that support and enable private investment, including foreign investment. They ensure ease of market entry and exit and access to inputs investors need. They impose few restrictions on sectors in which investors can invest, how they can invest, and how much they can invest.<sup>1</sup>

As Table 3 below shows, the CPA investment scheme includes all of the substantive and nonsubstantive qualities advocated for by the Bank for inclusion in investment codes designed to attract foreign investment. On flexibility in investor entry, the Bank notes that none of the world's largest foreign investment recipients has "a completely open entry regime."<sup>2</sup> However, "the ideal framework is a liberal entry regime" with no minimum capital requirements for investors.<sup>3</sup> The CPA investment scheme contains no such requirements. On investors' rights and guarantees, the Bank asserts that "most investors expect a country to guarantee them, at a minimum, the rights and protections listed below."<sup>4</sup> The CPA investment scheme guarantees foreign investors all of the rights and protections outlined by the Bank. Finally, the Bank argues that "good investment policies" are characterized by clarity, stability, and transparency as defined by the Bank. The CPA investment scheme also reflects these features. In short, the CPA-installed investment scheme includes all of the features that are advocated for by the World Bank into domestic law and more closely resembles the Bank's ideal "liberal entry regime" than any of the world's largest recipients of foreign investment.

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<sup>1</sup> "Investment Law Reform: A Handbook for Development Practitioners", Investment Climate Advisory Services of the World Bank Group (June 2010) at 8 [World Bank].

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*



*Table 3: CPA Investment Scheme and World Bank Guidelines for Investment Law*

<b>World Bank Guidelines on Best Practices for Investment Law to Promote Investment and Protect Investors<sup>5</sup></b>	<b>CPA Investment Scheme</b>
<b><i>Substantive Qualities of Conducive Policies</i></b>	
<b>Flexibility in Investor Entry</b>	
-No mandatory minimum capital requirement for investors	Yes
-No requirement for governmental institutional screen in foreign investment	Yes
<b>Investors' Rights and Guarantees</b>	
-Nondiscrimination (national or equal treatment)	Yes (national or treaty treatment)
-Right to ownership	Yes (full foreign ownership)
-Convertibility and repatriation of capital and earnings	Yes (full repatriation of profit)
-Alternative dispute resolution mechanisms	Yes (up to contracting parties)
-Expatriate labour	Yes (no local employment req'd)
-Security of investment (no arbitrary nationalization or unlawful expropriation or confiscation)	Constructive (Order 39 protects investments and overrules any conflicting law; the Iraqi constitution of 2006 guarantees against expropriation)

<sup>5</sup> All "guidelines" from World Bank, *supra* note 85 at 8-10.

<i>Nonsubstantive Qualities of Conducive Policies</i>	
<b>Transparency</b>	
-Public documentation of investment laws	Yes
-Nondiscretionary—decisions made on objective criteria	Yes
<b>Clarity</b>	
-Simply stated so understandable by everyone	Yes
-Unambiguous language to avoid disputes	Yes
<b>Stability</b>	
-Predictable (avoid jeopardizing legitimate expectations)	Yes (fixed by transitional laws)
-Comprehensive and complete to avoid “surprises”	Yes (replaces all conflicting law)

Evaluating CPA provisions on tax, immunities, and foreign investment using these three frameworks confirms that the CPA introduced a highly pro-foreign investor legal regime in post-invasion Iraq. The UNCTAD and World Bank criteria also show how foreign investors in post-invasion Iraq faced few of the typical restrictions on foreign investment while benefitting from a broad range of incentive measures.

#### CONCLUSION

A detailed analysis of CPA Orders on de-Ba’athification, immunities, tax, and foreign investment demonstrates the extent to which the CPA introduced a highly pro-investor legal regime in Iraq starting in 2003, as hypothesized. Applying the UNCTAD and World Bank frameworks for assessing host country foreign investment policies and laws, it is difficult to imagine a more investor-friendly collection of incentives and restrictions than those issued by the CPA. This appears to validate the common perception, although not based on a detailed analysis of CPA regulations, that Iraqi investment law in this period embodied “the kind of wish-list that foreign investors and

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donor agencies dream of for developing markets.”<sup>6</sup>

Much of the legal regime governing foreign investment in Iraq remains to be explored. For example, the manner in and extent to which the CPA reformed Iraqi investment law may not have been authorized by international law. A finding of illegality would have significant implications for foreign investors who concluded contracts under the CPA regime and the Iraqi state. Moreover, the current regulations on foreign investment in Iraq remain understudied. This paper hopes to contribute to future study by establishing a detailed picture of the legal regime governing foreign investment in Iraq installed in the aftermath of the invasion of 2003.

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<sup>6</sup> “Let’s All Go to the Yard Sale”, *The Economist* (25 September 2003).