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### **Reformist framework of the foreign investment environment in the post-conflict : critical appraisal of Iraq case**

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**Reformist Framework of the Foreign Investment Environment in  
the Post-Conflict: Critical Appraisal of Iraq Case**

**Nidham Gabbar T Al Abasey**

**A thesis submitted for the degree of Doctor of Philosophy  
School of Law  
Bangor University**

**September 2014**

# Abstract

The main purposes of this thesis are to examine the possibility of establishing a safe and attractive investment climate in post-conflict countries, and to delineate the role of governmental and political systems in those countries with regard to the restoration of the investor confidence and rehabilitation of damaged public investment institutions. The thesis reviews the enormous challenges facing the host countries as they seek to determine optimal strategies for reforming the post-conflict environment. It emphasises the importance of attracting the large-scale foreign investment that is so urgently needed in the interest of rebuilding what was destroyed in the conflict. The research to date has tended to focus on partial remedies, rather than on an integrated approach to reform. This study seeks to bridge the gap in the legal literature through an accurate exploration of the impact of conflicts and wars on foreign investments. It also presents a comprehensive programme of reform.

Iraq, after decades of wars and conflict, provides a case study that demonstrates the need for better strategies for rehabilitation of the investment environment. The conceptual argument provided herein is that, despite the efforts of the US civil administration authority and Iraqi regime to encourage foreign investment, it has failed to do so, and foreign investment in Iraq remains quite limited. Consequently, this study analyses the reasons why foreign investors are reluctant to come to Iraq, and classifies the relevant reasons into a group of determinants, together with an examination of the risks that still exist. Although there have been several studies of foreign investment in Iraq, none yet has comprehensively examined the obstacles within Iraq's investment environment. Some writers have argued that efforts to reform the Iraqi investment environment have already succeeded to some extent, and that there are sufficient justifications for foreign investors to come to Iraq and begin harvesting dividends from the many attractive investment opportunities, such as those in the oil and energy sectors, housing, banks, etc. The present study, however, demonstrates that the path to investment in Iraq is still full of obstacles, because the necessary reforms have been far from fully addressed.

While taking full account of various bleak scenarios, this study provides a roadmap for addressing existing limitations. Key lessons regarding previously unsuccessful reform efforts having been learned, it is now possible to create a new scenario aimed at rehabilitating the investment climate in Iraq and providing a deeper understanding of the problems involved.

# **Dedication**

**To the memory of Iraqi children who died as they dreamed of peace and play**

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# List of Abbreviations

ATMs	Automated Teller Machines
BFM	Baghdad Financial Market
BIT	Bilateral Investment Treaty
BOT	Build, Operate & Transfer
CBI	Central Bank of Iraq
CCP	Code of Civil Procedure
CoI	Commission of Integrity
CPA	Coalition Provisional Authority
DIFC	Dubai International Financial Centre
ECI	Energy Charter Treaty
FBSA	Federal Board of Supreme Audit
FDI	Foreign Direct Investment
GATT	General Agreement on Tariffs and Trade
GCC	Gulf Cooperation Council
GDP	Gross Domestic Product
ICC	International Chamber of Commerce
ICI	International Compact with Iraq
ICRG	International Country Risk Guide
ICSID	International Centre for Settlement of Investment Disputes
ICT	Information and Communication Technology
IFC	International Finance Corporation
IOCs	International Oil Companies
ISX	Iraqi Stock Exchange
LN	League of Nations
MENA	Middle East and North Africa
MIGA	Multilateral Investment Guarantee Agency
MoI	Ministry of Interior
NAFTA	North American Free Trade Agreement
NGOs	Non- Governmental Organizations
NIC	National Investment Commission
NOCs	National Oil Companies
OECD	Organisation for Economic Co-operation and Development
OSS	One- Stop Shop
PRS	Political Risk Services
SJC	Supreme Judicial Council
SSC	State Shura Council
TBI	Trade Bank of Iraq

TI	Transparency International
TRIPS	Trade Related Aspects of Intellectual Property Rights
UNCTAD	United Nations Conference on Trade and Development
URNG	Unidad Revolucionaria Nacional Guatemalteca
USSR	United States of Soviet Russia
WBG	World Bank Group
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

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# Chapter I: Introduction

## 1.1 The Context within Which this Thesis is Located

### 1.1.1 Investment Environment in Post-Conflict: Risks and Opportunities

The influx of foreign investors into post-conflict environments has been a major theme in the literature of law and of international institutions.<sup>1</sup> This study further provides additional evidence on how challenging and detrimental some limitations are to creating a foreign-investor-attracting climate. The limitations covered herein are the legal framework, which is discouraging to foreign investors, the dictatorships and the impact they have had upon the stability of the investment climate, wars, domestic political conflicts, terrorism, financial and administrative corruption, red tape, and the deteriorated infrastructure. The twentieth century and the early part of the present century have witnessed innumerable wars and conflicts across the world.<sup>2</sup> Since the so-called Arab Spring of 2010, Arab states have provided prime examples of investment environments stricken by instability.<sup>3</sup> In fact, wars leave behind only destruction and vulnerability across all institutions at all levels, political, legal, social and economic, with a continuing probability of a recurrence of conflict. Furthermore, armed conflicts and wars result in the destruction or damage of the national infrastructure, and lack of investments

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<sup>1</sup> Kojo Yelapaala, 'Rethinking the Foreign Direct Investment Process and Incentives in Post-Conflict Transition Countries' (2010) 30 *Nw J Int'l L & Bus* 23; Virtus C Igbokwe, Nicholas Turner, Obijiofor Aginam(eds), *Foreign Direct Investment in Post-Conflict Countries: Opportunities and Challenges* (Adonis & Abbey 2010) 3 (Pointing out that the United Nations, the World Bank and its affiliate institutions, donor agencies and international NGOs have shouldered a large portion of the responsibility for rebuilding in post conflict countries. This is certainly true in cases where international agencies have acted as initiators in the post-conflict reconstruction process. However, despite the efforts of international agencies to assist post-conflict societies, but these countries have been prefer to benefit more of a design the efficient strategy to attract foreign investment). See also Rahim Moloo and Alex Khachaturian, 'Foreign Investment in a Post-Conflict Environment' (2009) 10 *J World Investment & Trade* 341.

<sup>2</sup> Virtus C Igbokwe, Nicholas Turner, Obijiofor Aginam (eds), *Foreign Direct Investment in Post-Conflict Countries: Opportunities and Challenges* (Adonis & Abbey 2010) 1.

<sup>3</sup> Omnia Taha, 'The Arab Spring: Potential and Challenges' (2012) 23 *Sec & Hum Rts* 233(The 'Arab Spring' revolutions began with huge popular protests in some Arab countries in late 2010 and early 2011. The Arab Spring started in Tunisia, then moved to Egypt, from where it spread to Libya, Yemen, Syria, Bahrain, and elsewhere. These revolutions managed to topple dictatorial regimes in Tunisia, Egypt, Libya and Yemen. However, because of continuing insecurity and political instability, these countries have become very unattractive to foreign investors) *ibid*, 233-235.

worsens the situation.<sup>4</sup> Conflicts take a deep negative toll on investment climate, creating a reluctance to invest that may well continue into the post-conflict era.<sup>5</sup> In post-conflict countries, corruption in many cases is inherent. Judicial independence and the rule of law, in turn, are either absent or extremely weak.<sup>6</sup> International companies are reluctant to invest for a variety of reasons. They may, for example, be influenced by the security risks, or the ambiguity of new local laws and non-compliance with international standards.<sup>7</sup> The national laws of investment-hosting countries generally allow governments the right to amend contractual obligations concluded with foreign investors.<sup>8</sup> A contractual violation, therefore, may sometimes lead to expropriation of an investment through either nationalisation or confiscation.<sup>9</sup> Further, there is always the concern that the judicial bodies of the hosting country may not adopt fair legal means to secure foreign investors' rights or to settle investment-related disputes; and that if such situations materialise, investors' rights might be jeopardised by locally adopted judicial bureaucratic measures that require years to settle.<sup>10</sup> The high risks and lack of guarantees in post-conflict states serve to discourage foreign investors, despite the great number of promising investment opportunities existing there.<sup>11</sup>

To enable an investment environment to be categorised as safe or risky, however, it is necessary to consider various legal and political factors within the host country.<sup>12</sup> However, there are investments that offer opportunities to realise high profits.<sup>13</sup> A post-conflict country may have ample natural resources, as the case is in Iraq, thus providing lucrative investment

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<sup>4</sup> Christopher J Coyne and Adam Pellillo, 'Economic Reconstruction amidst Conflict: Insights from Afghanistan and Iraq' (2011) 22 *Defence Peace Econ* 627.

<sup>5</sup> Rahim Mooloo and Alex Khachaturian, 'Foreign Investment in a Post-Conflict Environment' (2009) 10 *J World Investment & Trade* 341.

<sup>6</sup> Richard Sannerholm, 'Legal, Judicial and Administrative Reforms in Post-Conflict Societies: Beyond the Rule of Law Template' (2007) 12 *J Conflict & Sec L* 65.

<sup>7</sup> Anne van Aaken, 'International Investment Law between Commitment and Flexibility: A Contract Theory Analysis' (2009) 12 *J Int'l Econ L* 507.

<sup>8</sup> Linnet Mafukidze, 'Legislative Drafting Tools for Stabilization Provisions and Economic Balancing Provisions' (2010) 12 *Eur J L Reform* 58.

<sup>9</sup> Stephen Olynyk, 'A Balanced Approach to Distinguishing between Legitimate Regulation and Indirect Expropriation in Investor-State Arbitration' (2012) 15 *Int'l Trade & Bus L Rev* 254.

<sup>10</sup> Tai-Heng Cheng, 'Law on Loan: Legal Reconstruction after Armed Conflict' in Virtus C Igbokwe, Nicholas Turner, Obijiofor Aginam (ed), *Foreign Direct Investment in Post-Conflict Countries: Opportunities and Challenges* (Adonis & Abbey 2010) 81-83.

<sup>11</sup> Ali Al-Sadig, 'The Effects of Corruption on Fdi Inflows' (2009) 29 *Cato J* 267.

<sup>12</sup> Paul E Comeaux, N Stephan Kinsella, *Protecting Foreign Investment Under International Law: Legal Aspects of Political Risk* (Oceana Publications Inc Dobbs Ferry, New York. 1997) 3; Nancy Reichman, 'Regulating Risky Business: Dilemmas in Security Regulation' (1991) 13 *Law & Pol'y* 263.

<sup>13</sup> Kojo Yelapaala, 'Rethinking the Foreign Direct Investment Process and Incentives in Post-Conflict Transition Countries' (2010) 30 *Nw J Int'l L & Bus* 23.

opportunities. Success in the exploitation of these opportunities requires a favourable legal framework,<sup>14</sup> and so the study will deal with the creation of such frameworks.<sup>15</sup>

### **1.1.2 Reform Seeds towards Post-Conflict Environment**

When a conflict is over and the door is open to remedying its effects on the investment environment, the degree of damage should be determined and an appropriate plan developed to restore the war-torn country to its place in the international community. One of the most difficult issues is the rehabilitation of the investment environment and the recovery of foreign investors' confidence. Decisions need to be made as to the kinds of reforms that are necessary in the transitional post-conflict period in order to create an environment that is attractive to foreign investment. In this study, the issue has been tackled within a broad framework to draw attention to certain priorities for the development of reform policies. It is argued that the reform efforts in post-conflict countries must aim at enhancing the legal framework of investment and boosting the same with appropriate international instruments. The materialization of this aim would have a positive effect on reconstruction in post-conflict countries, contributing economic growth and pushing forward the peace process in war-torn societies.<sup>16</sup> However, such remedies are country-specific, that is, they vary according to the type of investments a country is seeking, the objectives desired from those investments and the time span involved. Therefore, different foreign investment policy objectives are examined.<sup>17</sup>

Much has been debate<sup>18</sup> over the possibility of establishing a safe and attractive investment climate and the role of the government and political systems of post-conflict countries in relation to the restoration of the rule of law and rehabilitation of damaged or outdated public institutions.<sup>19</sup> Recently, much of the legal and economic<sup>20</sup> literature has been

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<sup>14</sup> Ryan Frei, 'Extracting Oil from Turmoil: The Iraqi Oil Industry and Its Role as a Promising Future Player in the Global Energy Market' (2004) 4 Rich J Global L & Bus 147.

<sup>15</sup> See Chapter Six of this study 'Roadmap to Reform the Investment Environment'.

<sup>16</sup> Rahim Moloo and Alex Khachaturian, 'Foreign Investment in a Post-Conflict Environment' (2009) 10 J World Investment & Trade 341; Anne van Aaken, 'International Investment Law between Commitment and Flexibility: A Contract Theory Analysis' (2009) 12 J Int'l Econ L 507.

<sup>17</sup> See Chapter Five, Section 3.2.3.

<sup>18</sup> See eg, Rahim Moloo and Alex Khachaturian, 'Foreign Investment in a Post-Conflict Environment' (2009) 10 J World Investment & Trade 341; Virtus C Igbokwe, Nicholas Turner, Obijiofor Aginam (ed), *Foreign Direct Investment in Post-Conflict Countries: Opportunities and Challenges* (Adonis & Abbey 2010) 3-10.

<sup>19</sup> Kojo Yelapaala, 'Rethinking the Foreign Direct Investment Process and Incentives in Post-Conflict Transition Countries' (2010) 30 Nw J Int'l L & Bus 23.

<sup>20</sup> See eg, Harry Blair, 'Rebuilding and Reforming Civil Services in Post-Conflict Societies' in Derick W Brinkerhoff (ed), *Governance in Post-Conflict Societies: Rebuilding Fragile States* (New York: Routledge 2007) 261; Paul Collier, *Post-Conflict Recovery: How Should Policies be Distinctive?* (Centre for the Study of African Economies, Department of Economics, Oxford University, May 2007) 2-6.

concerned with defining the key objectives of post-conflict efforts to reform the investment environment.<sup>21</sup> While there are, huge differences regarding the priorities of national and international bodies<sup>22</sup> concerned with reform, there is agreement in principle on the need for direct foreign investment in the interest of reconstruction and economic development.<sup>23</sup> Clearly, a foreign direct investment (FDI) strategy is an essential component in terms of the capital in-flows needed to create job opportunities, and the transference of skills and technology. FDI-generated job opportunities are of great importance in helping to achieve peace, or at least to minimise the chance of a further outbreak of conflict.<sup>24</sup> FDI-generated job opportunities direct groups emerging from a war-economy towards legitimate economic activities, and are also intended to provide job opportunities for ex-combatants.<sup>25</sup>

Although there have been some studies on how to create a healthy post-conflict investment environment, there are still broad areas for discussion that remain unexplored. The purpose of this thesis is to determine the optimal strategy for post-conflict countries in need of major foreign investment and it will concentrate on the attributes necessary for the creation of a safe and profitable investment environment. The study describes the effects of conflicts on foreign investment, determines a general framework of reform for policy-makers and discusses the mechanisms involved in adopting an economic approach that is based on the provision of investment opportunities. Further, these conclusions will serve as a basis for those interested in foreign investments, particularly in Iraq, as this study features an analysis of the investment climate in Iraq in terms of old and new advantages and risks, followed by a review of the investment climate rehabilitation efforts that have failed to meet expectations. Accordingly, the study analyses the reasons behind the failures and identifies the serious obstacles to investment

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<sup>21</sup> Päivi Lujala, Sandra S Nichols and & Carl Bruch, 'When Peacebuilding Meets the Plan: Natural Resource Governance and Post-Conflict Recovery' (2011) 12 *Whitehead J Dipl& Int'l Rel* 11.

<sup>22</sup> Virtus C Igbokwe, Nicholas Turner, Obijiofor Aginam (eds), *Foreign Direct Investment in Post-Conflict Countries: Opportunities and Challenges* (Adonis & Abbey 2010) 3 (asserting that '[i]ndeed, international aid agencies have acted as first responders in the post-conflict conflict reconstruction process, providing immediate relief, restoration of law and order, establishment of interim governance institutions, resettlement of refugees and internally displaced persons, demobilization and reintegration of ex-combatants, and reconstruction of security institutions') *ibid*, 3.

<sup>23</sup> Estelle Bierman and Henri Beziidenhout, 'FDI in the Economic Transformation of the Post-civil war Economies of Angola and Mozambique' in Virtus C. Igbokwe, Nicholas Turner, Obijiofor Aginam (eds), *Foreign Direct Investment in Post Conflict Countries Opportunities and Challenges* (2010) 266 (concluding that '[a]fter Angola and Mozambique gained their independence in 1975, long periods of civil war followed, leaving their respective economies in distress. Over the years their FDI policies have become more inviting to foreign investors, as they realised the importance of FDI for their countries').

<sup>24</sup> Päivi Lujala, Sandra S Nichols and & Carl Bruch, 'When Peace building Meets the Plan: Natural Resource Governance and Post-Conflict Recovery' (2011) 12 *Whitehead J Dipl& Int'l Rel* 11.

<sup>25</sup> J Culain Fripp, 'Reconstruction of Post-Conflict Societies: Social Dynamics, Democracy, and Institution-Building' (2005-2007) 18 *LBJ J Pub Aff* 9.

in Iraq. Finally, the study reaches definite conclusions that can be channelled into a roadmap for investment reforms in Iraq.

## 1.2 Contextual Analysis

### 1.2.1 Thesis Statement

The main objective for post-conflict countries is economic development and the rehabilitation of what has been destroyed during the conflict, by means of attracting international companies.<sup>26</sup> Therefore, these countries need to rectify the deep, negative effects of conflict on the investment environment and to provide incentives and profitable investment opportunities.<sup>27</sup> Although this is the most comprehensive method so far produced for attracting foreign investors to countries emerging from conflict, it does suffer from a number of difficulties. One of the most difficult issues is to develop an effective and enforceable roadmap with a view to creating a pro-foreign investment environment.<sup>28</sup> The research to date has tended to focus on partial remedies, rather than on an integrated approach to reform. This indicates a need to gain a comprehensive understanding of the legal and economic literature concerned with the reform of the post-conflict investment environment.

Iraq offers a unique example<sup>29</sup> of a strategy for reforming the post-conflict investment environment.<sup>30</sup> The country optimistically prepared itself to become an “investment cake”<sup>31</sup> under the new Investment Law and, following the reforms to the investment environment, to open its doors to foreign investors. Some foreign investors, however, arrived and began to “eat the cake,” only to find it sugar-free, whereas these guests had wanted a sweeter variety. The

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<sup>26</sup> Kojo Yelapaala, 'Rethinking the Foreign Direct Investment Process and Incentives in Post-Conflict Transition Countries' (2010) 30 *Nw J Int'l L & Bus* 23; Virtus C Igbokwe, Nicholas Turner, Obijiofor Aginam(eds), *Foreign Direct Investment in Post-Conflict Countries: Opportunities and Challenges* (Adonis & Abbey 2010). See also Rahim Moloo and Alex Khachaturian, 'Foreign Investment in a Post-Conflict Environment' (2009) 10 *J World Investment & Trade* 341.

<sup>27</sup> Christopher J Coyne and Adam Pellillo, 'Economic Reconstruction amidst Conflict: Insights from Afghanistan and Iraq' (2011) 22 *Defence Peace Econ* 627. (Claiming that the positive aspect of a post-conflict environment is due to the various investment opportunities, since the armed conflict causes destruction, thus necessitating re-building, and results in new demands for commodities and services which were missing during the conflict). *ibid.*

<sup>28</sup> Rahim Moloo and Alex Khachaturian, 'Foreign Investment in a Post-Conflict Environment' (2009) 10 *J World Investment & Trade* 341.

<sup>29</sup> See the history of conflicts in Iraq and its impact on foreign investment at 3.1. and 3.2. of the thesis.

<sup>30</sup> Judith Richards Hope & Edward N Griffin, 'The New Iraq: Revising Iraq's Commercial Law Is a Necessity for Foreign Direct Investment and the Reconstruction of Iraq's Decimated Economy' (2004) 11 *Cardozo J Int'l & Comp L* 875.

<sup>31</sup> Nidham G Al Abasey, 'Cakes without Sugar: Reasons behind Foreign Investor Reluctance to Enter Mesopotamia' (2013) 41 *Syracuse J Int'l L & Com* 145.

result was that other investors received a warning notice that Iraqi “cake” was not only sugar-free but in many cases distinctly salty. Accordingly, despite the efforts of the US civil administration authority and Iraqi regime to encourage foreign investment,<sup>32</sup> it has failed to do so. Foreign investment remains quite limited<sup>33</sup> because reforms have been far from completely addressed and Iraq is still in constant danger of a return to conflict.

However, some writers argue that sufficient justification already exists for foreign investors to come to Iraq and to begin harvesting dividends.<sup>34</sup> The reconstruction efforts are part of the reason why international investors are trooping into the country: it is estimated that Iraq’s reconstruction effort is going to cost more than USD 100 billion,<sup>35</sup> and international companies are coming into Iraq to get a share of this money. Another reason for such a view is the amount of support Iraq has been receiving from international organisations and governments. Since 2003, Iraq has been a recipient of aid, in the form of technical and legislative “know how,” from the Organisation for Economic Co-operation and Development (OECD).<sup>36</sup> Political developments in the country are seen as remarkable progress in that MENA-OECD deemed it necessary to help hold competitive elections as part of the democratic transition. However, Iraq’s political and economic improvements are still seen as a small part of the overall government strategy for reform in the years ahead. At an international conference concerning development in Iraq, the representatives of the International Compact with Iraq (ICI) recognised the importance of the reforms that should be supported by the MENA-OECD; these should centre on governance and investment for development. The structural reforms

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<sup>32</sup> The Iraqi Government is at the forefront in spearheading reconstruction efforts in Iraq, but support is being provided by other investment partners such as the US through the US Chamber of Commerce, which is also channeling funds toward improving reconstruction efforts in Iraq. OECD, *Supporting Investment Policy and Governance Reforms in Iraq* (OECD 2010) 8.

<sup>33</sup> Foreign investment in Iraq remains limited to the extent of foreign investment flows amounting to USD 2.852 billion, as of 2013. See UNCTAD, *World Investment Report 2014* (United Nation, 2014) 207.

<sup>34</sup> David Brent Grantham, 'Calculated Risk: The Advance of IOCs and NOCs into the Iraqi Investment Theater' (2010) 3(3) J World Energy Law Bus 315. (Grantham argues that the calculations profits outweigh risks for foreign investment companies in Iraq). While the title of his previous article was 'Caveat Investor: Assessing the Risks and Rewards of IOCs Entry into Iraq', which won the spring 2009 AIPN Student Writing Competition. David Brent Grantham, 'Caveat Investor: Assessing the Risks and Rewards of IOCs Entry into Iraq' (2010) 3 J World Energy Law Bus 304. See also Judith Richards Hope & Edward N Griffin, 'The New Iraq: Revising Iraq’s Commercial Law Is a Necessity for Foreign Direct Investment and the Reconstruction of Iraq's Decimated Economy' (2004) 11 Cardozo J Int'l & Comp L 875; Robert D. Tadlock, 'Occupation Law and Foreign Investment in Iraq: How an Outdated Doctrine Has Become an Obstacle to Occupied Populations' (2004) 39 USF L Rev 227.

<sup>35</sup> See The Iraqi Ministry of Planning, Development Plan 2010 -2014 (319/12, 2009) 73. (Translated from Arabic Language by Author).

<sup>36</sup> OECD may be broadly defined as an economic forum which seeks to promote policies for improving the economic and social well-being of the world. See The Organisation for Economic Co-operation and Development. 'About the OECD' (2014) <<http://www.oecd.org/about/>> accessed 27 February 2014.

proposed included the promotion of sector development, attracting foreign investment, and governance. All these aspects, according to the representatives, affect the business environment.<sup>37</sup>

The present study, however, argues that Iraq's efforts at reform are merely a white point on a blackboard, and are still insufficient to affect a revival of the investment environment, and that the path for investors in Iraq remains full of obstacles. However, the study provides a roadmap for reform of the investment environment of Iraq and recommends its adoption, while taking into account the peculiarities of the prevailing obstacles and limitations. This roadmap would serve as a flexible paradigm, taking account of the prevailing conditions and contributing to the rehabilitation of Iraq as a safe, growth-enabling environment.

### **1.2.2 Research Questions and Hypothesis**

This study presents one main question and several secondary questions. The main question is: Has Iraq's strategy actually frustrated rather than encouraged foreign investment, and will the situation get better or worse, and for what reasons? This question will be addressed with an emphasis on the hypothesis of the thesis. The hypothesis that has been tested is that despite the efforts of the Iraqi legislator and regime to encourage foreign investment, it has failed to do so, and foreign investment in Iraq remains quite limited.

The secondary questions constitute the general statement of purpose, which supports the central direction of the study. In particular, this dissertation will examine five secondary research questions. The first question is: What are the mechanisms required to reform the post-conflict investment environment? The answer to this question will be reached by considering this hypothesis: the reform efforts in post-conflict countries must aim at enhancing the investment legal framework and boosting the same with appropriate international instruments.

The second question will ask: What is the impact of conflict on the investment environment? The answer to this question will take into account the conflict's impact on all institutions at all levels, including the political, legal, social, and economic ones, with a continuing probability of a recurring conflict or conflicts.

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<sup>37</sup> OECD, *Supporting Investment Policy and Governance Reforms in Iraq* (OECD 2010) 14, 34 (stating that '[u]nder the ICI, and through the Iraqi government-led Task Force for Economic Reforms and Private Sector Capacity, the MENA-OECD Initiative is continuing implementation of an ongoing programme of training and policy advice intended to strengthen private sector development and improve the investment climate and governance in Iraq') *ibid*, 34.



The third question is: What is the nature and scope of the strategies employed by the Iraqi regime and its legislators to encourage foreign investment? This question would be answered with a hypothesis that new legislation provides an optimistic view to attract foreign investors and reviews the new look of the investment environment after the reform efforts.

The fourth question will ask: How can it be demonstrated that the Iraqi government's strategy has not worked to attract foreign investors, and what are the reasons? Although this strategy for attracting foreign investors is the most comprehensive yet devised, it does suffer from a number of flaws. This represents a central question for the hypothesis of the study.

The final question—still existing optimistically and to be tested within the thesis—is: Can we approach the thesis question within the optimal strategy to develop Iraq's investment environment?

### **1.3 Significance of this Study**

#### **1.3.1 To Knowledge**

With regard to the international law on foreign investment, it is becoming increasingly difficult to ignore the consequences of the conflict on the investment environment.<sup>38</sup> There have been many studies and analyses dealing with foreign investment in post-conflict countries and the most suitable environments for growth therein.<sup>39</sup> In contrast, there have been few studies of foreign investment in Iraq,<sup>40</sup> and so far no comprehensive treatment of the determinants of

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<sup>38</sup> Rob Mills & Qimiao Fan, *The Investment Climate in Post-Conflict Situations* (The International Bank for Reconstruction and Development, 2006) 5 (arguing that '[a] good investment climate provides a platform for vibrant private sector activity. Conflict corrodes this platform. It reduces physical security, undermines macroeconomic stability, threatens the rule of law, dries up access to credit and financial services, destroys infrastructure, distorts labour markets, disables the regulatory framework, and dismantles the tax system'). *ibid.*

<sup>39</sup> Virtus C Igbokwe, Nicholas Turner, Obijiofor Aginam (eds), *Foreign Direct Investment in Post-Conflict Countries: Opportunities and Challenges* (Adonis & Abbey 2010) 3-10. *See also* Graciana del Castillo, 'Economic Reconstruction of War-Torn Countries: The Role of the International Financial Institutions' (2008) 38 *Seton Hall L Rev* 1265; Rahim Molloo and Alex Khachaturian, 'Foreign Investment in a Post-Conflict Environment' (2009) 10 *J World Investment & Trade* 341; Christina C Benson, 'Jus Post Bellum in Iraq: The Development of Emerging Norms for Economic Reform in Post Conflict Countries' (2011-2012) 11 *Rich J Global L & Bus* 315.

<sup>40</sup> Sami Shubber, *The Law of Investment in Iraq* (New York, Brill 2009) 15; OECD, *Supporting Investment Policy and Governance Reforms in Iraq* (OECD 2010). *See also* Alan K Audi, 'Iraq's New Investment Laws and the Standard of Civilization: A Case Study on the Limits of International Law' (2004-2005) 93 *Geo L J* 335; Bart S Fisher, 'Investing in Iraq: Legal and Political Aspects' (2004-2005) 18 *Transnat'l Law* 71; Jordan E Toone, 'Foreign Direct Investment in Post-War Iraq: An Investor's Introductory Guide to the Legal Framework' (2013) 9 *BYU Int'l L & Mgmt R* 141; US Department of State, '2013 Investment Climate Statement-Iraq' (February 2013) <<http://www.state.gov/e/eb/rls/othr/ics/2013/204661.htm>> accessed 12 Jan 2014.

investment in that country, viewed<sup>41</sup> as an example of a post-conflict environment. As a consequence, some of the obstacles to investment in Iraq have been generally neglected. In addition, with no other academic study having tackled the present issues in the manner this study has, this study will constitute indispensable material for European libraries.

This thesis seeks to remedy the reasons for investors' reluctance to enter into the post-conflict environment<sup>42</sup> by analysing the literature dealing with repair mechanisms for the investment environment. Further, it aims to define its own rehabilitation mechanisms for the Iraq investment environment, an objective to be achieved through discussion of the available solutions and by recommending means of rectifying defects in the overall investment process. One of the most significant discussions in post-conflict Iraq is the impact of the democratic transformation of the country after 2003, when the fall of the Ba'ath regime, brought about by Anglo-American forces, led to drastic changes to its political, legal and economic structures.<sup>43</sup> Afterwards, the new Iraqi government sought to rebuild its war-torn economy, hence the decision to hold the doors wide open for investors. Iraq has embarked on a transition from a central economy to an open-market economy.<sup>44</sup> For that purpose, a number of laws have been enacted, most notably Investment Law No. 13 of 2006, which provides for guarantees, together with the prohibition of nationalisation and expropriation, the adoption of stable legislation and the provision of international arbitration as one of the mechanisms of dispute settlement.<sup>45</sup> A host of incentives and exemptions have been provided under the terms of Investment Law No. 13 of 2006, the most important of which is the ten-year tax-free period for investments.<sup>46</sup> The question arises as to why reform efforts did not succeed in rehabilitating the investment

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<sup>41</sup> Jordan E Toone, 'Foreign Direct Investment in Post-War Iraq: An Investor's Introductory Guide to the Legal Framework' (2013) 9 *BYU Int'l L & Mgmt R* 141 (stating that '...no serious academic study of the issue has been undertaken to date') *ibid*.

<sup>42</sup> Rahim Mooloo and Alex Khachaturian, 'Foreign Investment in a Post-Conflict Environment' (2009) 10 *J World Investment & Trade* 341. (concluding that '[i]n post-conflict states, concerns related to physical safety and investment security, combined with a general distrust of post-conflict governments, are among the key considerations for foreign investors') *ibid*, 341.

<sup>43</sup> Antonio F Perez, 'Legal Frameworks for Economic Transition in Iraq-Occupation under the Law of War vs Global Governance under the Law of Peace' (2004-2005) 18 *Transnat'l Law* 53.

<sup>44</sup> Sami Shubber, *The Law of Investment in Iraq* (New York, Brill 2009) 5 (stating that '[i]t was also envisaged to promote foreign investment in Iraq, in view of the need for the development of Iraq and its transition from a non-transparent centrally planned economy to a market economy characterised by sustainable economic growth through the establishment of a dynamic private sector, and the need to enact institutional and legal reforms to give it effect') *ibid*, 5.

<sup>45</sup> Jordan E Toone, 'Foreign Direct Investment in Post-War Iraq: An Investor's Introductory Guide to the Legal Framework' (2013) 9 *BYU Int'l L & Mgmt R* 141.

<sup>46</sup> Sami Shubber, *The Law of Investment in Iraq* (New York, Brill 2009) 6.

environment in Iraq, and why the entry of foreign investors remained quite limited, amounting USD 2.9 billion of foreign investment flow in 2013.<sup>47</sup>

A key aspect of this study is to try to determine the causes for the failure of efforts to rehabilitate the investment environment in Iraq,<sup>48</sup> and to re-design the reformist framework that needs to be adopted in order for the country to move forward.<sup>49</sup> This reconstruction involves a new strategy for reform based on the strengthening of safeguards, while avoiding the mistakes that bedevilled previous reforms.<sup>50</sup> It is argued that the will to reform should be strengthened at all levels of legislative and government institutions. A key aspect of the reform policy for the investment environment is to adopt a 'comprehensive reform' at both higher and lower levels of legislation and of those sectors related to the investment process. A reformist approach, based on sound economic and legal knowledge, is at the heart of the thesis and of its understanding of what constitutes a successful strategy for the reconstruction of Iraq's investment environment. Thus, a prioritisation of the amendment and/or abolition of obsolete legislation, and the establishment of some chock institutions, such as investment promotion agencies is an important area of the reforms to be applied. This study seeks to ameliorate these problems by treating the reasons behind foreign investor reluctance to enter Iraq.

### 1.3.2 To Practice

In line with the increasing foreign interest in business in Iraq since 2003,<sup>51</sup> the conclusions herein will contribute to identifying the nature of risks facing foreign investors willing to come to, or already operating in, Iraq. The objective of this study is to shed light on the potential of the Iraqi economy to attract foreign investment. Iraq is a part of the strategically important Middle East region and is crucial to global security, bearing in mind the threat of terrorism and the negative impact it has had on the region as a producer of oil, which is the source of growth for the world economy.<sup>52</sup> Scholars have also argued that, after years of conflict, the focus of

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<sup>47</sup> UNCTAD, *World Investment Report 2014* (United Nation, 2014) 58.

<sup>48</sup> See Chapter Five of the thesis.

<sup>49</sup> See Chapter Six of the thesis.

<sup>50</sup> Christopher J Coyne, 'The Economic Reconstruction of Iraq' (2010) SSRN <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1550867](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1550867)> accessed 15 Jan 2014; Christopher J Coyne and Adam Pellillo, 'Economic Reconstruction amidst Conflict: Insights from Afghanistan and Iraq' (2011) 22 *Defence Peace Econ* 627.

<sup>51</sup> National Investment Commission. 'Top Ten Reason to Invest in Iraq' (2014) <<http://www.investpromo.gov.iq/index.php?id=2>> accessed 5 Jan 2014.

<sup>52</sup> Johnny West, *Iraq's Last Window: Diffusing the Risks of a Petro-State* (Center for Global Development 1800 Massachusetts Ave, NW Washington Working Paper 266, September 2011) 10; Ryan Frei, 'Extracting Oil from Turmoil: The Iraqi Oil Industry and Its Role as a Promising Future Player in the Global Energy Market' (2004) 4 *Rich J Global L & Bus* 147 (claiming that 'Iraq has emerged as the most viable oil project in the world, having the second-largest proven oil reserves out of all oil-exporting countries') *ibid*, 148.

attention for investors has been the investment opportunities and profit-taking issuing from reconstruction operations in the Iraqi economy,<sup>53</sup> and that more needs to be known about the risks before investment is made in this transitional environment.<sup>54</sup> Further, this study seeks to review the reactions of foreign investors as they attempt to strike a balance between risk and profitability. It will do so by analysing the amount of investment flow into Iraq.<sup>55</sup> Despite the challenges that remain, there has been a slight improvement of inflows of foreign investment, a fact supported by a review of the relevant statistics and comparison with their earlier counterparts.<sup>56</sup>

This study also seeks to examine changes introduced to the political, economic and social system and the impact they will have on the investment environment within the next few years. Iraq witnessed major changes after 2003 when the US-led coalition forces entered Baghdad and toppled the dictatorial regime.<sup>57</sup> The study seeks to highlight the rationale behind the establishment of national democratic institutions as one of a number of factors that attract foreign investors. Clearly, this step would boost Iraq's competitive edge. The question then arises as to whether Iraq could lead the way as an example for other Middle Eastern countries for the adoption of the best foreign trade terms.<sup>58</sup>

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<sup>53</sup> US Department of State. '2013 Investment Climate Statement–Iraq' (February 2013) <<http://www.state.gov/e/eb/rls/othr/ics/2013/204661.htm>> accessed 12 Jan 2014 (concluding that, due to the need for investment, there are myriad opportunities across the Iraqi economy. In this respect, the Iraqi Government has provided investment opportunities across various sectors including construction, industry, agriculture, tourism, housing, communications and health care). See also David Brent Grantham, 'Calculated Risk: The Advance of IOCs and NOCs into the Iraqi Investment Theater' (2010) 3(3) J World Energy Law Bus 315 (reporting that leading international companies still have the desire to invest in the energy sector, particularly as proven Iraqi reserves of oil stand at 115 billion barrels. Based on these figures, Iraq ranks as number 2 or 3 worldwide among countries with the largest proven reserves) *ibid*.

<sup>54</sup> David Brent Grantham, 'Caveat Investor: Assessing the Risks and Rewards of IOCs Entry into Iraq' (2010) 3 J World Energy Law Bus 304 (arguing that '[t]he IOCs must determine if they have the patience, understanding and determination to succeed in this unique investment theater'); Ned Parker, 'Iraq We Left Behind: Welcome to the World's Next Failed State' (2012) 91(2) Foreign Aff 94. See also Sameeksha Desai, 'Post-conflict Microfinance: Assessment and Policy Notes for Iraq' (September 2007) (060) Jena Economic Research Papers <[http://zs.thulb.uni-jena.de/servlets/MCRFileNodeServlet/jportal\\_derivate00047002\\_/wp\\_2007\\_060.pdf](http://zs.thulb.uni-jena.de/servlets/MCRFileNodeServlet/jportal_derivate00047002_/wp_2007_060.pdf)> accessed 25 February 2014; Clarence M Dass, 'Adventure Capitalizing in Baghdad: an Entrepreneurial Approach to Reconstructing Iraq' (2009-2010) 4 Entrepreneurial Bus L J 157 (stating that '[f]oreign direct investment has been an uneasy and often controversial concept for Iraq's new economy since the fall of the Ba'ath Party in 2003'). *ibid*.

<sup>55</sup> David Brent Grantham, 'Calculated Risk: The Advance of IOCs and NOCs into the Iraqi Investment Theater' (2010) 3(3) J World Energy Law Bus 315 (pointing out that '[m]any foreign oil and gas companies have made the calculation that the potential rewards of investing in Iraq outweigh the risks and have entered into Technical Service Contracts that, while far from ideal for either party, provide the framework for the development of Iraq's energy resources and infrastructure') *ibid*, 315.

<sup>56</sup> FDI flows to Iraq, (Millions of dollars): 972 of 2007; 1.856 of 2008; 1.598 of 2009; 1.396 of 2010; 1.617 of 2011; 2.549 of 2012 and 2.852 of 2013. UNCTAD, *World Investment Report 2014* (United Nations, 2014) 207.

<sup>57</sup> Adeer Dawisha, *Iraq a Political History from Independence to Occupation* (Princeton University Press 2009) 5.

<sup>58</sup> See the massive post 2003 change in the investment climate in Iraq, at Chapter Four of the thesis.

This study also covers the mechanisms for the settlement of foreign investment disputes, and takes into account the fact that Iraq is still suffering as a result of the discouragement of foreign investment in terms of international arbitration practices. At the same time, national courts have been assigned unprecedented authorities and powers to interfere with international arbitration procedures.<sup>59</sup> Accordingly, this study aims at conducting a comprehensive discussion regarding the determinants of Iraq's strategy for attracting foreign investors, accompanied by an assessment of the changes and amendments introduced to Iraqi law in terms of how effective they have been in attracting new foreign investors and upgrading the Iraqi investments to international standards.<sup>60</sup> This will form the cornerstone of the study. It will look into the general challenges facing investment and a complete chapter will be dedicated to an account of the major challenges being encountered by the nascent Iraqi investment environment. The account is particularly relevant because of the very real risks threatening the investment process—fragile security, financial and administrative corruption, administrative red tape and obsolete laws applying to investment.<sup>61</sup> A part of the methodology, therefore, is to analyse such obstacles and to explore the negative effects thereof on the emerging Iraqi investment environment.<sup>62</sup> Evidence will then be presented to demonstrate the validity of the thesis, together with an analysis of the reasons for such defects in the environment.

The review aims furthermore at discovering how efficient the Iraq investment laws are in terms of providing a safe and encouraging framework for foreign investments. For example, Iraq has given foreign investors preferential treatment in the form of incentives, by guaranteeing them the avoidance of subjection to Iraqi laws and by referring them instead to international arbitration for the settlement of investment disputes.<sup>63</sup> Thus, there is room for

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<sup>59</sup> Saleh Majid, 'arbitration In Iraq' (2004) 19 Arab L Q 267.

<sup>60</sup> James Dobbins, Seth G Jones, Benjamin Runkle, Siddharth Mohandas, *Occupying Iraq: a History of the Coalition Provisional Authority* (New York, Rand Corporation 2009) 213 (The new legislations, both those issued by the US Civil Administration Authority and those enacted by the Iraqi government, have brought liberalisation of commercial rules, foreign investments, arbitration and the entire business environment).

<sup>61</sup> Rahim Moloo and Alex Khachaturian, 'Foreign Investment in a Post-Conflict Environment' (2009) 10 J World Investment & Trade 341. (arguing that '[s]ecurity remains the primary concern for interested foreign investors. Law enforcement is limited and attacks against military and civilian targets persist throughout Iraq, including in the purportedly safe International Zone') *ibid*, 353.

<sup>62</sup> Jordan E Toone, 'Foreign Direct Investment in Post-War Iraq: An Investor's Introductory Guide to the Legal Framework' (2013) 9 BYU Int'l L & Mgmt R 141 (Asserting that the path to investment in Iraq is still full of obstacles because reforms are far from having been addressed. For example, a number of old laws do not meet minimum international standards but nonetheless remain in force. Moreover, the national infrastructure is not of an acceptable standard, and there is inherent administrative red tape with which foreign investors need to comply) *ibid*.

<sup>63</sup> Sami Shubber, *The Law of Investment in Iraq* (New York, Brill 2009) 63.

comparison between challenges and incentives, allowing a clearer interpretation of both progress and setbacks in the Iraqi investment environment. In this regard, deductive reasoning is employed in this study to clarify the outlook for a better investment future in Iraq and to advise on areas where it is believed defects are to be found, while pointing out the best way to address challenges to investments by proposing problem-solving strategies. Naturally, such advice is based on the assessment of the prevalent hypotheses regarding the future of foreign investments, particularly as current conditions in Iraq are likely to last for some time.<sup>64</sup>

#### **1.4 Literature Review**

The literature on the determinants of foreign investment is wide in its range and nuanced in its varied foci.<sup>65</sup> It is therefore useful to put the literature on this topic in perspective by situating it in relation to works dealing with determinants of foreign investment in post-conflict countries, both in common determinants with Iraq or dissimilar.<sup>66</sup> This study not only reiterates former literature on the importance of regulating a safe environment free from traditional risks facing foreign investors, but provides an additional answer to the emerging challenges that can materialise when conducting business in Iraq over the coming years given the blurry solutions for the conflict environment. These challenges are the outcome of political and ethnic conflicts exerted by the Iraqi community which blames security deterioration, growing poverty rates, and public services deterioration on government and the parties competing for power. Therefore, addressing such conflicts, which have emerged afresh through the mechanics of rebuilding the Iraqi economy, requires further detailed studies on how Iraqi law can operate within such developments.

Perhaps the most comprehensive history of International Investment Law looks set to be M Sornarajah's forthcoming account of the non-specificity in time or place of certain investment determinants. In M Sornarajah's words: '[i]n the past, it was thought that risks to foreign investment arose only in developing states and socialist states. The experience of

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<sup>64</sup> An indirect objective includes using an explanatory methodology in terms and concepts, and expounding on the same for non-Middle Eastern and non-Arab jurists.

<sup>65</sup> M Sornarajah, *The International Law on Foreign Investment* (3rd edn, Cambridge University Press, New York 2011) 1 (describing that '[f]ew areas of international law excite as much controversy as the law relating to foreign investment') *ibid*, 1.

<sup>66</sup> Rob Mills & Qimiao Fan, *The Investment Climate in Post-Conflict Situations* (The International Bank for Reconstruction and Development, 2006) ix (asserting that '[w]hile building a good investment climate is important in any developing country, it takes on particular importance in post-conflict situations...'). *ibid*.

disputes under NAFTA belies this belief'.<sup>67</sup> An example of a useful work in this area is one by Virtus C Igbokwe, Nicholas Turner and Obijiofor Aginam, on Foreign Direct Investment in Post Conflict Countries, which evaluates the risks faced by foreign investors in the post-conflict environment, and is a sourcebook which in part comprises an analysis of the mechanism for creating a secure and attractive investment environment.<sup>68</sup> Although this sourcebook has covered most of the limitations and risks in post-conflict environment, it has condoned the impact of corruption on reform efforts. The aforesaid reference argues for the importance of replacing domestic investment legislation with international rules and agreements.<sup>69</sup> However, while accepting the importance of adopting such international structures, this study argues for the importance of domestic legislation for the regulation of inbound investments, considering that they provide the foremost guarantees for foreign investors. As regards these regulations, they should be employed to the greatest possible extent in preference to their counterparts under international law.

Another useful work for contextualising the obstacles that impact on foreign investment is Rahim Moloo and Alex Khachaturian's disquisition on Foreign Investment in a Post-Conflict Environment, which brings an international perspective to some of the material on Iraq's investment environment, and also presents an analysis of key issues involved in bringing foreign investment to post-conflict countries.<sup>70</sup> The Moloo and Khachaturian article provides in-depth analysis in terms of its international perspective,<sup>71</sup> but as far as Iraq is concerned, and despite the diagnosis of the security status and of the means of creating investment opportunities,<sup>72</sup> it ignores the crucial limitations that have served as obstacles to the inflow of the desired investments. Foremost among these obstacles are internal disputes over oil

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<sup>67</sup> M Sornarajah, *The International Law on Foreign Investment* (3rd edn, Cambridge University Press, New York 2011) 34.

<sup>68</sup> Virtus C Igbokwe, Nicholas Turner, Obijiofor Aginam (eds), *Foreign Direct Investment in Post-Conflict Countries: Opportunities and Challenges* (Adonis & Abbey 2010) 1-10.

<sup>69</sup> *ibid* 81-82 (arguing that "[t]he government may instead 'borrow law'. When borrowing law, a post-conflict government need not confine itself to borrowing the laws of another legal system. It may also borrow its expertise and infrastructure, such as the services of lawyers, judge and arbitrators, as well as physical courthouses and tribunals. It may borrow law through investment contracts and treaties, which can help to rapidly establish a legal framework acceptable to foreign investors...') *ibid*, 82.

<sup>70</sup> Rahim Moloo and Alex Khachaturian, 'Foreign Investment in a Post-Conflict Environment' (2009) 10 *J World Investment & Trade* 341.

<sup>71</sup> *ibid* (concluding that '[f]oreign investors considering investing in post-conflict environments should weigh the earning potential from investment opportunities against the serious possibility of threats that may endanger that investment') *ibid*, 358.

<sup>72</sup> *ibid* (concluding that '[i]n the case of Iraq, there are two related issues that are critical to that country's evolution from a post-conflict environment to a site for successful foreign investment: (1) security and (2) economic recovery and development') *ibid*, 358.

investments, red-tape and insufficient protective measures for Iraq-approved foreign investments.

Kojo Yelapaala has also analysed post-conflict conditions and suggested means of creating effective mechanisms for the rehabilitation of the investment environment and for attracting foreign investors.<sup>73</sup> However, the work that devotes itself most comprehensively to the subject of rebuilding the economies of war-ravaged countries is that of Christopher J Coyne and Adam Pellillo. These authors reach different conclusions, finding no increase in the flow of investors without mitigation of traps that accompany reform process.<sup>74</sup> It is now possible to state that the gap in the legal literature of foreign investment includes studies of the post-conflict government's responsibility with regard to their planning, and of the degree of inclusiveness of the reforms and their enforcement.

The reform of the investment environment in Iraq has inspired a collection of studies with disparate views of an environment largely agreed to be filled with promising investment opportunities.<sup>75</sup> The structural principles under discussion include the country's decision to open its doors widely to investors and the liberalising laws enacted to enable this shift; the incentives and guarantees to be provided; and the adoption of international arbitration,<sup>76</sup> all of which have been intensively analysed. The most important synthesis of these themes was written by Judith Hope and Edward Griffin and deals with an early stage of the post-2003 reforms, involving the U.S. civil administrator in Iraq, Paul Bremer.<sup>77</sup>

David Grantham's work, 'Calculated risk: The advance of IOCs and NOCs into the Iraqi investment theater,' takes a more optimistic approach, deploying legal arguments to conclude that the risks of the Iraqi environment do not hamper the flow of foreign investors.<sup>78</sup> As well as justifying long-term investment in Iraq despite the existing risks, this conclusion was based

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<sup>73</sup> Kojo Yelapaala, 'Rethinking the Foreign Direct Investment Process and Incentives in Post-Conflict Transition Countries' (2010) 30 *Nw J Int'l L & Bus* 23.

<sup>74</sup> Christopher J Coyne and Adam Pellillo, 'Economic Reconstruction amidst Conflict: Insights from Afghanistan and Iraq' (2011) 22 *Defence Peace Econ* 627.

<sup>75</sup> National Investment Commission. 'Top Ten Reason to Invest in Iraq' (2014) <<http://www.investpromo.gov.iq/index.php?id=2>> accessed 5 Jan 2014; Alan K Audi, 'Iraq's New Investment Laws and the Standard of Civilization: A Case Study on the Limits of International Law' (2004-2005) 93 *Geo L J* 335; James Holbrook, 'Reports from Baghdad' (2010) 351 *Legal Stud F* 34.

<sup>76</sup> Jordan E Toone, 'Foreign Direct Investment in Post-War Iraq: An Investor's Introductory Guide to the Legal Framework' (2013) 9 *BYU Int'l L & Mgmt R* 141.

<sup>77</sup> Judith Richards Hope & Edward N Griffin, 'The New Iraq: Revising Iraq's Commercial Law Is a Necessity for Foreign Direct Investment and the Reconstruction of Iraq's Decimated Economy ' (2004) 11 *Cardozo J Int'l & Comp L* 875. (Pointing out that '[a]great deal of work must be done to revive Iraq's economy, and foreign direct investment (FDI) will play an important role in that rebirth') *ibid*, 875.

<sup>78</sup> David Brent Grantham, 'Calculated Risk: The Advance of IOCs and NOCs into the Iraqi Investment Theater' (2010) 3(3) *J World Energy Law Bus* 315.



on the high level of support that the country receives from governments, intergovernmental organisations and non-governmental organisations around the world.<sup>79</sup> This analysis turned out to be overly optimistic,<sup>80</sup> since the performance of the investment environment in Iraq is not going as was planned when the reforms were adopted.<sup>81</sup> Grantham's optimistic article is based on the expectation of positive outcomes following the 2009 elections and the formation of a national unity government by the previously warring opponents.<sup>82</sup> However, the political alliances proved fragile in the face of deep and myriad disputes, not to speak of other limitations. Thus, Grantham's arguments concerning the promotion of investment in Iraq were based on fragile foundations.

Sami Shubber's work, *The Law of Investment in Iraq*, is an excellent, comprehensive outline, and it interrogates all the issues relating to the legal framework for investment in Iraq and the various aspects of transacting business there.<sup>83</sup> It analyses the Iraqi legal system with reference to investment and international law. This source book is a combination of the analytical and the practical (in that it aims to dispense advice to investors); its methodologies are aimed at substantiating its conclusions, and it offers an outstanding account of the role of investment committees, the establishment of the investment project, incentives and guarantees, taxes, the obligations and rights of investors, and the modes of settlements of disputes under the Federal Investment Law, which offers to investors a number of possibilities for the settlement of disputes arising from their investment in Iraq.<sup>84</sup> Shubber's syncretism is exemplified by his view of the relation between Iraqi and international law, viz:

Law varies according to the nature of the dispute and the parties thereto. Moreover, while in principle Iraqi law is the applicable law, and Iraqi courts have jurisdiction over such disputes, the Federal Investment Law permits the parties to choose

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<sup>79</sup> OECD, *Supporting Investment Policy and Governance Reforms in Iraq* (OECD 2010) 14.

<sup>80</sup> David Brent Grantham, 'Calculated Risk: The Advance of IOCs and NOCs into the Iraqi Investment Theater' (2010) 3(3) *J World Energy Law Bus* 315 (claiming that '[a]lthough at times still quite painful, Iraq is experiencing widespread positive growth in its efforts to rebuild its country and economy') *ibid*, 315.

<sup>81</sup> Ned Parker, 'Iraq We Left Behind: Welcome to the World's Next Failed State' (2012) 91(2) *Foreign Aff* 94 (asserting that 'NINE YEARS after US troops toppled Saddam Hussein and just a few months after the last US soldier left Iraq, the country has become something close to a failed state') *ibid*, 94.

<sup>82</sup> David Brent Grantham, 'Calculated Risk: The Advance of IOCs and NOCs into the Iraqi Investment Theater' (2010) 3(3) *J World Energy Law Bus* 315.

<sup>83</sup> Sami Shubber, *The Law of Investment in Iraq* (New York, Brill 2009) xv (describing that '[t]he Iraqi Federal Investment Law came into being in 2006. This is the first time that Iraq has adopted a proper framework for the promotion and encouragement of investment in the country. The adoption of this Law came after the fall of the Ba'ath regime in 2003, and marks the policy of free market economy adopted by the government of the New Iraq') *ibid*, xv.

<sup>84</sup> *ibid*, xv & 158.

another applicable law and jurisdiction. It also permits the parties to disputes to resort to arbitration for their settlement.<sup>85</sup>

According to this analysis, the application of Iraqi law is primary, and is followed by the second choice, that of foreign law, and after that a choice of arbitration — although this is perhaps too idealised a depiction of this topic and omits much of the ambiguity, instability and the continuing conflict between the parties.

There has been a backlash in Iraq against the way in which the reforms to the investment environment have been carried out. Furthermore, this environment has been shaken to the roots by political rifts at the borders, where the volcano of terrorism has erupted, with the intended but unachieved aim of negating the efforts at reform.<sup>86</sup> A critique of the mismanagement of the state is also at the fore of Ned Parker's paper 'The Iraq We Left Behind, Welcome to the World's Next Failed State.'<sup>87</sup> Such a critique is also a central theme of 'Is Iraq on Track? Democracy and Disorder in Baghdad,' which focusses on the weak rule of law, and on the extreme ineffectiveness (or even absence) of an independent and efficient judiciary.<sup>88</sup> David Brent Grantham's research in 'Caveat investor: Assessing the risks and rewards of IOCs entry into Iraq' describes in detail the pervasive risks involved in carrying out an investment project in Iraq.<sup>89</sup> As he explains:

The risks are great for both the host government and the foreign investor, but the rewards can be even greater with the proper alignment of goals. Iraq must create meaningful incentives and assurances if it hopes to attract the type of investors that can help it achieve its revenue and reconstruction goals. The IOCs must determine if they have the patience, understanding and determination to succeed in this unique investment theater.<sup>90</sup>

The reasons given in Grantham's account for the failure of the policy of reform in Iraq are strikingly similar to those of researchers such as Christopher J Coyne & Adam Pellillo, who conclude that they '...identify four main 'reconstruction traps' which often hamper efforts to

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<sup>85</sup> *ibid* 129.

<sup>86</sup> Fatiha Dazi-Héni & Vincent Vulin, 'Investir en Irak: Risques et Opportunités' (September 2010) *capmena* <<http://www.capnouveau monde.org/capmena/pdf/20100920%20DaziHeni%20Vulin.pdf>> accessed 27 September 2013.

<sup>87</sup> Ned Parker, 'Iraq We Left Behind: Welcome to the World's Next Failed State' (2012) 91(2) *Foreign Aff* 94.

<sup>88</sup> Antony Blinken, 'Is Iraq on Track: Democracy and Disorder in Baghdad-Morning in Mesopotamia' (2012) 91(4) *Foreign Aff* 152 (noting that '[f]or the past two years, critics repeatedly and mistakenly warned that a string of political crises, over the election law, the de-Baathification process, the election itself, and the formation of a government, would lead to renewed sectarian violence') *ibid*, 153.

<sup>89</sup> David Brent Grantham, 'Caveat Investor: Assessing the Risks and Rewards of IOCs Entry into Iraq' (2010) 3 *J World Energy Law Bus* 304.

<sup>90</sup> *ibid*, 304.

rebuild economies amidst conflict. These traps include: (1) the credible commitment trap, (2) the knowledge trap, (3) the political economy trap, and (4) the bureaucracy trap'.<sup>91</sup>

Another work that treats of aspects of foreign investment in Iraq with suggested remedies for some of the obstacles is Dass Clarencem's 'Adventure capitalizing in Baghdad: An entrepreneurial approach to reconstructing Iraq.'<sup>92</sup> Unlike the foregoing, however, the Iraq-specific detail given focus in Clarencem's article consists of ways of bringing life to the investment environment in Iraq.<sup>93</sup> Clarencem's conclusions as to the future of foreign investment in Iraq entail the necessity to start a new era of adventure capitalism.<sup>94</sup>

Although extensive legal literature has been carried out on the possibility of establishing a safe and attractive investment climate and the role of government and political system in post-conflict countries concerning the restoration of the rule of law and rehabilitation of public institutions damaged, no single study exists which adequately determine the optimal strategy for Iraq which is in a bad need to attract huge foreign investments. This study seeks to bridge the gap in the legal literature through a comprehensive and accurate analysis of the impact of conflicts and wars on foreign investments in Iraq. The study reviews the efforts at reform and demonstrates how unsuccessful Iraq has been in attracting investors. Having delineated the main general obstacles to attracting foreign investors it remains to identify and evaluate those with a particular relevance, and to advocate certain reforms that may alleviate these obstacles and establish a sustainable investment-friendly environment. For the conclusion, the study offers a detailed roadmap towards resolution of the inherent problems of the Iraqi investment environment.

## **1.5 Research Strategy**

### **1.5.1 Research Methodology**

For the methodology of this study, a critical theoretical approach will be adopted in examining the Iraqi investment environment, and suggestions will be offered for the rehabilitation of that

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<sup>91</sup> Christopher J Coyne and Adam Pellillo, 'Economic Reconstruction amidst Conflict: Insights from Afghanistan and Iraq' (2011) 22 Defence Peace Econ 627.

<sup>92</sup> Clarence M Dass, 'Adventure Capitalizing in Baghdad: an Entrepreneurial Approach to Reconstructing Iraq' (2009-2010) 4 Entrepreneurial Bus L J 157.

<sup>93</sup> "In order to engage American entrepreneurialism as a vehicle for Iraqi economic reconstruction, US entrepreneurs must foster 'adventure capitalism' by taking advantage of Iraq's National Investment Law through the facilitation of foreign direct investment". *ibid*, 158.

<sup>94</sup> *ibid*.

environment in order to render it attractive to foreign investors. Further, such critical assessment will focus on the challenges and risks, which abound in the Iraqi investment environment with a view to offering effective solutions. It was decided that the best method to enable study to see the detailed hypotheses, the questions were designed to function as a means of providing answers to essential hypotheses related to the investment environment, thus enhancing the critical appraisal of a given defect in the environment under study and proposing solutions that meet the relevant international standards.

The study will also take into account the views of writers encouraging or warning against investment in Iraq under the current circumstances, and will use research and qualitative analysis of primary and secondary legal sources. A systematic literature review is conducted of studies related to the post-conflict investment environments, in order to explore the consequences of conflict on the investment environment and to devise common solutions for dealing with the determinants of the influx international companies. The time scale of the thesis extends to the inclusion of a history of foreign investment in Iraq. The above approach has a number of features that will help to give an understanding of the full landscape of the Iraqi investment environment, past and present, and its future prospects. Economic statistics and political reports from international centres and organisations, such as the indices of the international investment climate, were chosen because they will testify to the existence of the many obstacles, which remain within the Iraqi investment environment. The fact that these have not been addressed by the government reforms reinforces the argument of the thesis.

### **1.5.2 Limitations of the Study**

A number of methodological limitations need to be noted. The main restraint of the research in this thesis is due to the paucity of existing empirical studies; and moreover, the complexity of security measures prevented the author from conducting interviews with a number of foreign companies wishing to invest in Iraq.<sup>95</sup> These empirical studies fail to reveal the foreign ownership of investments, particularly in cases where a person holds foreign citizenship in addition to Iraqi citizenship. Seemingly, such individuals are afraid of declaring their ownership lest they should be potential targets for armed groups. Planned interviews aimed at identifying the obstacles that had the biggest impact on investors and discovering any other limitations did not take place. Interviews have therefore been replaced with correspondence.

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<sup>95</sup> These companies are: Panel Sistem Soğutma Sanayi AŞ, Ecompactünitesive RO, Hempel Protective Coatings, John Deere-Iraq, Aritma Teknolojisi, X-RAY Medical Products, GEM machines for lifts.

Even then, several companies contacted by the present author declined to reply. Others claimed to be purely national despite the foreign citizenships held and the commercial registration of their respective projects as foreign projects.

The author blames this dissimulation on security measures, which prevent information disclosure by such companies. Similar the limitations are associated with responses of the Iraqi National Commission for Investment and the Governorates Commissions. This authority, although granting the author an interview, did not provide accurate answers concerning the limitations hindering their work. Moreover, investment authorities do not have studies or reports concerning the limitations on foreign investment in Iraq, except for correspondence, narrow in its scope, with the Ministerial Cabinet. Further to the above, investment authorities declined to offer any figure-based information about foreign investors, such as their numbers, the nature of the investments they operate, capital size, operation period, investors' nationalities and other information necessary for the purposes of this study. Some investment authorities justified their attitudes by stating that, for security reasons, they are not authorized to provide such details, even for academic purposes. Governorate-based investment authorities do not have e-archives to answer the questions raised, but rather keep a paper file for each project. The other key limitation has been the failure to obtain from security bodies accurate information on foreign investors who have been terrorised, the number of projects removed from Iraq due to deteriorating security conditions, the locations of those projects, and governmental responses, such as criminal investigations. The present study, due to the lack of sufficient data, is in no position to analyse the following variables: the nature of the investments targeted, an investor's citizenship in relation to targeting, the relation between political changes and terrorist attacks against investments, etc.

Finally, there are a number of key limitations related to financial and administrative corruption affecting foreign investors in Iraq. Information related to the numbers of investors coming under pressure to pay bribes has not been available. Even if made available, they would not be usable because of uncertainties in the discredited. Such information would have made it easier to identify the periods of greatest pressure related to bribery. Theoretical inferences, however, indicate two key stages for exercising such pressures: the application for the investment licence and the project handover.

### **1.5.3 Thesis Outline**

This study comprises seven chapters. Chapter One features the introduction, in which the statement of the thesis study is provided, including the rationale thereof, the roadmap to the sought-after objectives and the central research question of this study, as well as other questions raised throughout which address separate problems independently. The methodology and literature review is dealt with in Chapter One. Further, the importance of this study will be explained.

Chapter Two provides an outline of the special nature of foreign investment in the post-conflict environment, and discusses the optimal strategy for the remedy of risks and obstacles in the host country in order to create a safe environment for investors. Accordingly, it describes the legal investment environment and its regulating mechanisms and the guarantees given by state legislation to ensure the fair and just treatment of foreigners. Such information enables an investor to understand the framework of such guarantees and the risks that are a factor of investment in the host-countries, as well as those legal and circumstantial considerations capable of impacting on investors and investments. The chapter also discusses the justifications for adopting instruments of international investment law within the reform mechanisms of the post-conflict investment environment.

Chapter Three of the study provides an analysis of the consequences of conflict on the structures of the investment environment and an anatomy of the elements of the investment environment in Iraq as a case study. Key guidelines defined by such historical development are further detailed, and the current organisational structure of investments is described. The objective of this chapter is to expound on the anti-foreign investment legislative policy which has been so detrimental to the Iraqi economy in the past. The chapter also features an analysis of the desirability of learning from the lessons of the past and adopting a legislative policy that is protective and investment-friendly in relation to foreigners. Chapter Three also sheds light on the general framework of foreign investment in Iraq. This is a key chapter, since it details the main tools required to initiate the investment project, such as the financial markets. It further discusses the current situation concerning the protection of intellectual property in Iraq, as this constitutes a source of concern to foreign investors.

Chapter Four reviews the reformist strategy aimed at rehabilitating the investment environment in Iraq, post-2003. An appraisal is made of the guarantees and incentives offered by the relevant Iraqi laws, analysing the effectiveness of such guarantees and the impacts

they are having on foreign investors' decisions to step into the Iraqi markets. Iraq's efforts to join the World Trade Organisation (WTO) are also described in this chapter and, in this context, reference is made to attractive features of the Iraqi investment environment.

Chapter Five demonstrates how the Iraqi government's strategy has failed to attract foreign investors. This argument is supported by a reality analysis of the Iraqi investment environment, and examines the reports and statistics of international organisations, as well as the views of some scholars who have warned foreign investors against entering the Iraqi market. This chapter also defines the key landmarks of the challenges facing foreign investments in the Iraqi environment. It explains the reasons behind foreign investors' reluctance to step into the Iraqi markets, despite the rich advantages of such markets.

Chapter Six begins by laying out a roadmap for reforms to the Iraqi investment environment, and examines means of ensuring the application and success of this strategy.

In Chapter Seven, the study states its conclusions and offers solutions which, if adopted, may well contribute to the development of the investment environment in a country seeking economic growth through foreign investment.

## Chapter II: The Uniqueness of the Post-Conflict Investment Environment

### 2.1 Introduction

The investment-related challenges in a post-conflict situation are different from foreign investment limitations in developing countries, and the risks facing foreign investors are generally higher, owing to the direct consequences of the conflict and the limitations that were inherent in the pre-conflict investment environment. These limitations render investments during the transitional phase between war and peace especially complex.<sup>1</sup>

The first essential for any reform policy-maker, whether on the domestic or international level, is to have a clear vision. Attracting foreign investors into post-conflict markets is part of a more general reformation taking place in a special environment.<sup>2</sup> The prevailing climate suffers from failures of the rule of law, together with weak public institutions, a destroyed infrastructure and deep political, economic, legal and social problems.<sup>3</sup> Experience has shown, however, that political will, when combined with sound planning, will provide a sufficient ground to realise the objectives sought after.<sup>4</sup> In a post-conflict context, a conflict arises between the initiatives for immediate transformation to market-based economy

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<sup>1</sup> This is evident in the case of the fear of renewed conflict, in addition to the consequences of the conflict on all public institutions in the state. Nancy Reichman, 'Regulating Risky Business: Dilemmas in Security Regulation' (1991) 13 L & Pol'y 263.

<sup>2</sup> Virtus C Igbokwe, Nicholas Turner, Obijiofor Aginam (eds), *Foreign Direct Investment in Post-Conflict Countries: Opportunities and Challenges* (Adonis & Abbey 2010) 301.

<sup>3</sup> Rahim Molloo and Alex Khachaturian, 'Foreign Investment in a Post-Conflict Environment' (2009) 10 J World Investment & Trade 341.

<sup>4</sup> Christopher J Coyne and Adam Pellillo, 'Economic Reconstruction amidst Conflict: Insights from Afghanistan and Iraq' (2011) 22 Defence Peace Econ 627.



(the ‘shock treatment’)<sup>5</sup> versus the gradual transformation under transitional conditions.<sup>6</sup> Consequently, a knowledge-based approach on the part of reformists is a key requirement for the successful planning, with detailed initiatives based on the available investment opportunities and circumstances.<sup>7</sup>

This chapter aims to analyse the rules and practices involved in providing a safe legal framework for the attraction and retention of foreign investment. Further, the chapter seeks to identify gaps and risks challenging the regulation of a safe and secure foreign investment environment. It also gives an understanding of the legal regulation necessary for the development of a secure foreign investment environment that conforms to the rules of international law. Building on the recommendations made in the chapter, subsequent chapters will attempt to formulate the requirements of a secure post-conflict investment environment in the context of recommended reforms to Iraq’s investment environment, and in doing so to provide an example to be followed by other countries emerging from conflict.

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<sup>5</sup> The term Shock Method refers to the strategy that calls for swift disposal of the public sector and state ownership through adopting measures that amount almost to ‘free distribution’ of property. Advocates of this method stress the importance of seizing the opportunity to enforce quick privatisation by dealing a striking blow to governmental bureaucracy when the latter is stricken and incapable of resistance. The aim is to enlarge the ownership base by means of equal distribution of governmental assets to all citizens. Its advocates provide assurances based on standard ethical criteria. Opponents of this strategy claim that this kind of (fair) distribution of property never lasts for long because high incomes and wealth concentrations are magnetised towards such property. Thus, selling governmental properties at fair prices would not necessarily result in redistribution of wealth or income. Generally speaking, one may say that the organic development strategy has proved to be successful, since its arguments take account of considerations of economic efficiency. See Mark Baker, 'Privatization in the Developing World; Panacea for the Economic Ills of the Third World or Prescription Overused' (1998-1999) 18 NYL Sch J Int'l & Comp L 233; E S Savas, *Privatization and public-private partnerships* (Chatham House 2000) 25-27 (The gradual development strategy is another mechanism that has been described: this strategy calls for a higher relative contribution of the private sector to the GDP with a view to allowing a gradual emergence of new private companies, provided that such a trend is coupled with liquidation or sale of public companies and the establishment of an investment-friendly climate that allows the private sector into advanced positions in the economic hierarchy by encouraging the establishment of companies, eliminating obstacles to investment and new projects, applying tax policies and motivating credit schemes. Advocates of this strategy stress strict restriction of budgets and the application of accounting rules and bankruptcy laws in order to achieve the so-called ‘natural selection’ process. Based on objective economic and social considerations, this strategy aims to adopt a free market economy, providing appropriate conditions for the middle class to flourish by obtaining properties previously owned by the state). *ibid*; Mark Baker, 'Privatization in the Developing World; Panacea for the Economic Ills of the Third World or Prescription Overused' (1998-1999) 18 NYL Sch J Int'l & Comp L 233.

<sup>6</sup> Chad P Bown & Joost Pauwelyn (eds), *The Law, Economics and Politics of Retaliation in WTO Dispute Settlement* (Cambridge University Press 2010) 155; Michael Pugh, 'Postwar Political Economy in Bosnia and Herzegovina: The Spoils of Peace' (2002) 8 GLOB GOV 467.

<sup>7</sup> Christopher J Coyne, 'The Economic Reconstruction of Iraq' (2010) SSRN <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1550867](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1550867)> accessed 15 Jan 2014.

## 2.2 Examining the Investment Environment in the Post-Conflict Era

### 2.2.1 The Political and Security Situation

First of all, a reference must be made to the direct and inseparable relation between political stability and foreign investments.<sup>8</sup> Foreign investments do not flow freely when there is a background of political risk.<sup>9</sup> All political instability strongly inhibits foreign investments, whatever the type of instability, which may differ from one country to another.<sup>10</sup> It is beyond question that political instability serves as a critical discouragement to foreign investment if manifested in a developing country,<sup>11</sup> especially when it takes the form of terrorist attacks.<sup>12</sup> By contrast, it has a lesser effect if it takes place in a democracy, where it would be temporary and due to particular circumstances.<sup>13</sup>

Political instability may take several forms, such as armed conflicts and civil wars, as well as other less severe forms, such as political profiteering and so on.<sup>14</sup> An investor's ability to predict the future is weakened amidst political instability, there may be a danger to personnel and assets, and a partial or full lack of control on the investment within the host country.<sup>15</sup> Consequently, political instability, no matter what form it takes, has ramifications and complications that negatively affect economic performance, crippling investment and development opportunities.<sup>16</sup> Likewise, persistent negative political phenomena damage the

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<sup>8</sup> Leon E Trakman, 'Foreign Direct Investment: Hazard or Opportunity?' (2009-2010) 41 *Geo Wash Int'l L Rev* 11.

<sup>9</sup> Edward E Greene, 'Beyond Borders: Time to Tear Down the Barriers to Global Investing' (2007) 48 *Harv Int'l L J* 85.

<sup>10</sup> Edward Crenshaw, 'Foreign Investment as a Dependent Variable: Determinants of Foreign Investment and Capital Penetration in Developing Nations, 1967-1978' (1990-1991) 69 *Soc F* 1169.

<sup>11</sup> Evaristus Oshionebo, 'Stabilization Clauses in Natural Resource Extraction Contracts: Legal, Economic and Social Implications for Developing Countries' (2010) 10 *Asper Rev Int'l Bus & Trade L* 1 (Noting the problems of when a country decides to adopt sociology ideologies, there arise threats to both the private capital as well as foreign investors) *ibid*.

<sup>12</sup> Frederick Perry, 'Multinationals at Risk: Terrorism and the Rule of Law' (2011) 7 *FIU L Rev* 43 (Showing that political risks may take the form of wars, ethnic armed conflicts, anti-foreign actions, and terrorist activities which are the most serious and dangerous as they threaten human and non-human capital) *ibid*.

<sup>13</sup> James M Zimmerman, 'Political Risk Assessment and the Expanding Role of the International Practitioner' (1987) 11 *Suffolk Transnat'l L J* 1 (While developed countries have the right to change their economic policies, an ever increasing number of global investment and trade treaties circumscribe this right as a condition of involvement with them. The right to change political, economic or other policies depends on respect for international law, particularly those aspects of it which are intended to regulate and guide cooperation among countries and to ensure the rights of foreign investors). *ibid*.

<sup>14</sup> Nalaka Senaratne, 'Now What-Coping Strategies for Post-Conflict Countries' (2009-2010) 18 *Currents: Int'l Trade L J* 58.

<sup>15</sup> Frederick Perry, 'Multinationals at Risk: Terrorism and the Rule of Law' (2011) 7 *FIU L Rev* 43.

<sup>16</sup> Rahim Moloo and Alex Khachaturian, 'Foreign Investment in a Post-Conflict Environment' (2009) 10 *J World Investment & Trade* 341.

fabric of the nation and lead to instability.<sup>17</sup> Another measure of political stability is the compatibility of the legislative and executive powers, since this relation is crucial to governmental performance, especially in the regulation of public spending and the enactment of appropriate foreign investment laws in the interests of economic development.<sup>18</sup> Repeated government reshuffles and frequent parliamentary changes are another aspect of political instability. Government resignations and dissolutions of parliament<sup>19</sup> are usually accompanied by the freezing of former ministerial decrees and the postponed settlement of decisions on investment projects, leading to uncertainties and delays, sometimes with a crippling effect on performance and projects.<sup>20</sup> In such a situation, investors lose trust in a government's ability to honour its obligations towards investors, and the incentives and laws most favourable to development and a desirable business climate become unattainable.

Negative examples of the correlation between political and economic stability are to be found in some contemporary Arab countries, where financial markets and stock exchanges have suffered recently from swift deteriorations due to political conflict.<sup>21</sup> It is self-evident that financial markets are reflections of the economy,<sup>22</sup> that is, they reflect the extent to which the economy is trusted and the confidence it inspires.<sup>23</sup> The rapid deterioration of Arab stock markets revealed the fragility of investors' trust and how quickly capital moves away from countries to escape adverse political conditions, thus confirming the 'cowardly' nature of capital, its habit of taking flight when faced with political instability.<sup>24</sup> The political transformations in Iraq since 2003 and the revolutions following from the 'Arab Spring' demonstrate the risks of political instability. The changes may have disastrous consequences

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<sup>17</sup> *ibid.*

<sup>18</sup> Ndiva Kofele-Kale, 'Host-Nation Regulation and Incentives for Private Foreign Investment: A Comparative Analysis and Commentary' (1990) 15 N C J Int'l L & Com Reg 361.

<sup>19</sup> Adam B Jaffe, Steven R Peterson, Paul R Portney and Robert N Stavins, 'Environmental regulation and the competitiveness of US manufacturing: What does the evidence tell Us?' (1995) 33 JEL 132. (In a situation where groups holding anti-globalisation beliefs and opposed to foreign investments are elected to government they will in most cases seek to reverse the previous regime's policies in relation to foreign investors, and to dismantle the foreign investments which had been permitted by the previous regime. It may be that the incoming government perceives the terms granted to foreign investors as too favourable to the latter, and it will therefore alter those terms) *ibid.*

<sup>20</sup> Graham Mayeda, 'Investing in Development: The Role of Democracy and Accountability in International Investment Law' (2008-2009) 46 Alta L Rev 1009.

<sup>21</sup> Alper Y Dede, 'The Egyptian Spring: Continuing Challenges a Year after the Arab Spring' (2012) 5 USAK Y B Int'l Pol & L 99; Peter Jones, 'The Arab Spring: Opportunities and Implications' (2011-2012) 67 Int'l J 447.

<sup>22</sup> Joanna Benjamin and David Rouch, 'The International Financial Markets as a Source of Global Law: The Privatisation of Rule-Making' (2008) 2 Law & Fin Mkt Rev 78.

<sup>23</sup> *ibid.*

<sup>24</sup> Peter Jones, 'The Arab Spring: Opportunities and Implications' (2011-2012) 67 Int'l J 447.

for state assets and economic interests due to insecurity and political instability.<sup>25</sup> Instability and conflict in those countries have caused investors to leave, resulting in a huge loss of foreign capital and severe damage to the investment environment.<sup>26</sup>

In contrast, a respected democratic system that enshrines civic liberties contributes to political stability.<sup>27</sup> Further, national unity within a society is a prerequisite for political stability and protects against sectarianism and ethnic conflicts,<sup>28</sup> and even moderates nationalistic sentiments.<sup>29</sup> Therefore, a legitimate rotation of power is a mainstay of political stability and is a measure of a regime's capability in providing protection for society and for its own sovereignty.<sup>30</sup> Investment-hosting countries therefore seek to make their national investment environments more attractive by making long-term efforts to create stability and foster liberal policies. Accordingly, political stability is a key driver of economic growth.<sup>31</sup> It is the inevitable foundation for national economic restructuring and the provision of an environment suited to the exploitation of economic resources, and for developmental schemes for achieving economic stability and sustainable development.<sup>32</sup>

Reaching a more friendly investment environment requires an established political system that places high among its priorities strategic planning and economic development, while having the power to address crises successfully. Once such political stability is realised in the society, it would serve as a good soil for policies aimed at attracting foreign investment to grow and achieve sustainable development.<sup>33</sup> As part of the reformative approach, investment-hosting countries must achieve comprehensive political democracy through

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<sup>25</sup> Alper Y Dede, 'The Egyptian Spring: Continuing Challenges a Year after the Arab Spring' (2012) 5 USAK Y B Int'l Pol & L 99; Omnia Taha, 'The Arab Spring: Potential and Challenges' (2012) 23 Sec & Hum Rts 233.

<sup>26</sup> *ibid.*

<sup>27</sup> Nalaka Senaratne, 'Now What-Coping Strategies for Post-Conflict Countries' (2009-2010) 18 Currents: Int'l Trade L J 58.

<sup>28</sup> M Sornarajah, *The International Law on Foreign Investment* (3rd edn, Cambridge University Press, New York 2011) 73 (Stressing that the ethnic structures of the host country are a current focus of attention as these, like nationalist factors, play a significant role in the foreign investment environment) *ibid.*

<sup>29</sup> (Nationalism is a term commonly used to refer to a political ideology whereby a collection of individuals strongly identify themselves with a certain country. The accompanying nationalistic sentiments may pose a threat to foreign investors, especially in a situation where the host country is in decline. Foreign investors are perceived as controlling the host country's economy and enriching themselves through the repatriation of their profits. Such investors, during the period of a state's decline, become targets of xenophobic nationalism. In addition, opportunistic politicians in the host countries see these foreign investors as easy targets and take advantage of the situation in order to change the system of government) *ibid.* 71-72.

<sup>30</sup> Frederick Perry, 'Multinationals at Risk: Terrorism and the Rule of Law' (2011) 7 FIU L Rev 43.

<sup>31</sup> M Sornarajah, 'Protection of Foreign Investment in the Asia-Pacific Economic Co-operation Region' (1995) 29 J World Trade 105.

<sup>32</sup> Ndiva Kofele-Kale, 'Host-Nation Regulation and Incentives for Private Foreign Investment: A Comparative Analysis and Commentary' (1990) 15 N C J Int'l L & Com Reg 361.

<sup>33</sup> Graham Mayeda, 'Investing in Development: The Role of Democracy and Accountability in International Investment Law' (2008-2009) 46 Alta L Rev 1009.

adopting good governance and enhancing social responsibility. Civil peace must be maintained by the prevention of extremism and terrorism and the fostering of civil liberties to their fullest extent within the boundaries of law.

### **2.2.2 The Legal Status of Investment Environment after Conflict**

This section examines one of the key challenges faced by the government in the post-conflict era, that is, the lack of a fair, stable and enforceable legal framework that is attractive to Foreign Direct Investment (FDI). Often the investment environment of a post-conflict government faces serious obstacles due to deficiencies in the rule of law.<sup>34</sup> The situation may be aggravated by a damaged physical infrastructure, affecting courts and other judicial buildings, not to speak of the wider legal gap due to the large-scale killings or the flight of judges, advocates and law enforcement personnel.<sup>35</sup> In some cases, such personnel may have sided with one of the militia groups involved in the conflict. The result of these deficits is a scarcity of jurists capable of providing advice and consultation to the legislative power for purposes of enacting new legislation. By the same token, a post-conflict government may lack the necessary resources and knowledge to train new judges, advocates and police officers. There may be a slow rate of activity in the construction of new courts and the provision of IT necessities for vital computerised networks and legal libraries. New laws may have to be explained and translated for the benefit of the wider public, as well as local and foreign investors. All such measures are time-consuming.<sup>36</sup> Even if a post-conflict government were able to re-build a sound legal environment, this would not necessarily provide sufficient guarantees to foreign investors, who may harbour a fear that, in practice, judicial bodies and law enforcement will be biased against them and their rights.<sup>37</sup> Moreover, new national investment laws may not be familiar to foreign investors, who may regard these laws as unpredictable when it comes to enforcement mechanisms in cases of investment-related disputes.<sup>38</sup> The lack of an effective legal system

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<sup>34</sup> Jenia Iontcheva Turner, 'Justice, Rule of Law, and Economic Reconstruction in Post-Conflict States' (2007) 8 *Stud Int'l Fin Econ & Tech L* 253.

<sup>35</sup> Tai-Heng Cheng, 'Law on Loan: Legal Reconstruction after Armed Conflict' in Virtus C Igbokwe, Nicholas Turner, Obijiofor Aginam (ed), *Foreign Direct Investment in Post-Conflict Countries: Opportunities and Challenges* (Adonis & Abbey 2010) 83.

<sup>36</sup> *ibid* 83-84.

<sup>37</sup> Jenia Iontcheva Turner, 'Justice, Rule of Law, and Economic Reconstruction in Post-Conflict States' (2007) 8 *Stud Int'l Fin Econ & Tech L* 253.

<sup>38</sup> *ibid*.

would hold back foreign investment even in cases where other attractive privileges and incentives exist.<sup>39</sup>

In addition, settlement of legal obligations stemming from agreements concluded with the previous government is a key priority for a post-conflict government. However, the new government may choose not to honour previous legal obligations, which, if now regarded as illegitimate, will act as a further stumbling block.<sup>40</sup> Moreover, foreign investors face the risk that post-conflict regimes may alter contracts agreed between previous governments and the foreign investors, especially if there were allegations of corruption during the time these contracts were entered into.<sup>41</sup> In addition, the incoming regime may cancel contracts in cases where the previous government's legitimacy is subject to doubt according to the standards established by the succeeding governing body.<sup>42</sup> There have been instances of disputes that have resulted in the creation of a new country established within the geographical area in which the contract was entered into and in which it is required to be carried out. However, the newly created country may refuse to accept the inheritance of obligations undertaken by the previous regime, which controlled that geographic area at the time the contracts were entered upon. In such circumstances, the rules relating to the succession of the duties assumed by individuals is not available, and international law does not provide a remedy in such a situation.<sup>43</sup>

In some cases, a foreign investor may enter into an investment contract in a host country with an unrepresentative government. In such a case, if a government with democratic attributes is subsequently elected, it may exercise its right to rescind contracts entered into by the previous, unrepresentative regime. It does this by denying the legitimacy of the previous regime along with the contracts it entered into.<sup>44</sup> The newly elected democratic government has the power to take this course of action, and its credibility in doing so will be greater if it becomes evident that the terms and conditions of the contracts are disadvantageous to the

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<sup>39</sup> W Paatii Oforu-Amaah, 'Legal and Judicial Reform in Developing Countries: Reflections on World Bank Experience' (2002) 8 *Law & Bus Rev Am* 551.

<sup>40</sup> Sandra T Vreedenburgh, 'The Saddam Oil Contracts and What Can Be Done' (2004) 2 *DePaul Bus & Comm L J* 559.

<sup>41</sup> Lyuba Zarsky, *Stuck In the Mud? Nation-States, Globalization and the Environment* (OECD Economics Division The Hague, The Netherlands 1997) 56.

<sup>42</sup> M Sornarajah, *The International Law on Foreign Investment* (3rd edn, Cambridge University Press, New York 2011) 75.

<sup>43</sup> Esa Paasivirta, 'Internationalisation and Stabilisation of Contracts Versus State Sovereignty' (1989) 60 *BYIL* 315; Nagla Nassar, *Sanctity of Contracts Revisited: A Study in the Theory and Practice of Long-term Commercial Transactions* (Martinus Nijhoff, Dordrecht 1995) 27.

<sup>44</sup> Joseph L Sax, 'Takings and the Police Power' (1994) 36 *YJIL* 74.

country.<sup>45</sup> Sornarajah argues that international law has taken a path whereby it recognises investment agreements signed by democratic governments.<sup>46</sup> If so it is essential this kind of a view should be extended to include contracts entered into by investors from countries with unrepresentative governments.<sup>47</sup> It is also important to reject systems of law that provide a justification for expropriation by legal and administrative action in undemocratic countries.<sup>48</sup> When a newly elected government assumes office, it may declare that contracts entered into by a military regime are not binding upon the government.<sup>49</sup> It is now being perceived that the extent to which self-determination as well as democracy are normative factors capable of affecting how the governments exercise power during the time the contracts are being concluded is not yet settled.<sup>50</sup>

Sornarajah asserts that foreign investors who entered into agreements with totalitarian governments were conscious of the risks involved. They were aware that the agreement's validity was contentious, especially where a democratic government was involved, and so for that reason, protection of the agreement is not necessary.<sup>51</sup> However, if the incoming government was a democratic one, it would derive the benefits obtained from the foreign investments.<sup>52</sup> The incoming government would protect the investments, guided by international law, especially in cases where the foreign investments proved to be of great benefit to the country. In the extraction industry, the instance of contract invalidity may be perceived as great. This is because the unrepresentative government is usually unable to act on

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<sup>45</sup> M Sornarajah, *The International Law on Foreign Investment* (3rd edn, Cambridge University Press, New York 2011) 242.

<sup>46</sup> *ibid* 39.

<sup>47</sup> A M Wimmer, 'The Impact of the General Agreement on Trade in Services on the OECD Multilateral Agreement on Investment' (1995-1996) 19 *World Competition* 109.

<sup>48</sup> In Iraq's post-Saddam administration the validity of the oil contracts came into question. The post-Saddam administration was installed by the US government and it was not legitimate, since the United Nations was not involved, nor was it consulted. According to industrial analysts, the oil industry contracts that Iraq entered into with foreign investors are subject to instability, and the validity of those oil contracts is questionable. Another source of problems is the contracts entered into by military regimes. These problems are not only illegitimate but were designed for the benefit of the junta that took over the Iraqi governance system. Sandra T Vreedenburgh, 'The Saddam Oil Contracts and What Can Be Done' (2004) 2 *DePaul Bus &Comm L J* 559.

<sup>49</sup> Nicholas A DiMascio & Joost Pauwelyn, 'Non-Discrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin' (2008) 102 *Am J Int'l L* 48.

<sup>50</sup> Jason Webb Yackee, 'Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence' (2010-2011) 51 *Va J Int'l L* 397.

<sup>51</sup> M Sornarajah, *The International Law on Foreign Investment* (3rd edn, Cambridge University Press, New York 2011) 74.

<sup>52</sup> *ibid*, 74-75.

behalf of the individuals in whom the sovereignty of natural resources is vested under international law.<sup>53</sup>

Another challenge is that a foreign investor may achieve windfall profits, for then there is some likelihood that the host country will intervene in an effort to seek change with regard to the terms of the original contract.<sup>54</sup> This intervention is more likely where the windfall profits accumulate due to external events, rather than to the skill of the foreign investor.<sup>55</sup> Generally, where windfall profits occur, especially in industries characterised by forms of extraction, governments perceive them as benefits to themselves, since there is no inherent merit in the part played by the foreign investor. Governments may decide to expropriate these types of industry so as to secure all the profits emanating from them, especially when they feel confident of being able to run these enterprises themselves.<sup>56</sup> Another resort available to these governments is to seek other forms of contract, whereby only a small amount of profit is repatriated by foreign companies, while most remains in the host country.<sup>57</sup>

In some forms of contract, the costs associated with the fulfilment of the terms as well as the conditions of the contract may exceed the amount of financial benefit to be derived from its execution.<sup>58</sup> Such contracts involving foreign investors may be perceived as too onerous to perform and, as a result, there is a risk of government intervention. When a government intervenes in contracts through the use of its legislative powers, the loss that otherwise could have been suffered by a state agency or even the state itself is greatly mitigated.<sup>59</sup> An illustration of such an intervention is to be found in the case of *Settebello vs BancoTotta* and

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<sup>53</sup> Philip M Nichols, 'Regulating Transnational Bribery in Times of Globalisation and Fragmentation' (1999) 24 YJIL 257.

<sup>54</sup> M Sornarajah, *The International Law on Foreign Investment* (3rd edn, Cambridge University Press, New York 2011) 75-76.

<sup>55</sup> Jorgen Voss, 'The Protection and Promotion of Foreign Direct Investment in Developing Countries: Interests, Interdependencies, Intricacies' (1982) 31 Int'l & Comp L Q 686 (mentioning that Canada and the United Kingdom also had to reform or restructure existing contracts during this time, in the interests of obtaining benefits arising from the production of oil. This transpired after these two countries realised that the amount of oil being produced exceeded their expectations). See also M Sornarajah, *The International Law on Foreign Investment* (3rd edn, Cambridge University Press, New York 2011) 75 (mentioning that at a time when high profits were being experienced by foreign investors in Venezuela, the Venezuelan government resorted to restructuring the oil industry. Several disputes subsequently arose, despite the fact that the foreign investors complied with these changes) *ibid*.

<sup>56</sup> Mark A Edwards, 'Nationalization, De-Nationalization, Re-Nationalization: Some Historical and Comparative Perspective' (2009-2010) 30 Pace L Rev 124.

<sup>57</sup> M Sornarajah, *The International Law on Foreign Investment* (3rd edn, Cambridge University Press, New York 2011) 75.

<sup>58</sup> Michael Joachim Bonell, 'International Investment Contracts and General Contract Law: A Place for the UNIDROIT Principles of International Commercial Contracts' (2012) 17 Unif L Rev 141.

<sup>59</sup> *ibid*.



Acores.<sup>60</sup> A state-owned shipyard in Portugal had entered into a contract to build a large oil tanker. A penalty for late completion was included in the conditions of the contract. The shipyard company was unable to meet the specified deadline and was therefore in danger of incurring a considerable financial penalty. However, the Portuguese government used its legislative power to intervene and alter the provisions for a penalty stipulated in the contract.<sup>61</sup> The other party to the contract sought to seek remedy with regard to this situation, first in Portugal and then, when no remedy was forthcoming, outside Portugal. However, even outside Portugal the company's efforts to find a remedy were unsuccessful.<sup>62</sup>

A broad consideration is given to the permissibility of the regulations and also to the ecological characteristics that make them compensable. With regard to the environmental field, it is, according to Muchlinski, Fortino and Schreuer, the source of major disputes is intervention through the power of legislation.<sup>63</sup> For example, the dispute may centre on the question of whether intervention by use of regulations could amount to expropriation or the violation of investment treaties. Such disputes will always be subject to settlement by arbitration tribunals. As a result, more varied types will emerge with regard to situations perceived as regulatory expropriation.<sup>64</sup>

### **2.2.3 Investors Confidence and Economic Fluctuations**

In a post-conflict era, the local economy and markets in turn suffer from lack of confidence. Consequently, profit rates are affected negatively in the present and the future. Long-term negative consequences pile up through lack of confidence in the conflict environment in the light of political, economic and legal post-conflict uncertainty.<sup>65</sup> The impact of conflicts and wars is not restricted to direct consequences, such as destroyed roads, bridges, buildings, etc., but also includes many indirect malformations in the economic environment, including the failure of economic and administrative structures of the country, the flight of capital due to high risks and higher poverty levels due to increasing numbers of refugees and the displaced.<sup>66</sup>

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<sup>60</sup> *Settebello Ltd v BancoTotta & Acores* 04 Jul 1985 148 i-law 19 Jun 1985 (Sir John Donaldson M R, Neill L J and Sir John Megaw).

<sup>61</sup> *ibid.*

<sup>62</sup> *ibid.*

<sup>63</sup> Michael K Addo, *Human Rights Standard and the Responsibility of Transnational Corporation* (Routledge, London 1999) 154.

<sup>64</sup> *Barcelona Traction Company (Belgium v Spain)* (1970) ICJ Reps 3, 46-7.

<sup>65</sup> Rahim Molloo and Alex Khachaturian, 'Foreign Investment in a Post-Conflict Environment' (2009) 10 J World Investment & Trade 341.

<sup>66</sup> Virtus C Igbokwe, Nicholas Turner, Obijiofor Aginam (eds), *Foreign Direct Investment in Post-Conflict Countries: Opportunities and Challenges* (Adonis & Abbey 2010) 2.

The point here is that some indirect conflict-generated impacts have been more serious than the direct impacts, with the first of these engulfing the country in the post-conflict era. Conflict and wars affect economic behaviour by shifting it away from public services to military expenditure.<sup>67</sup> In addition, changes in economic organisation and patterns of industrial production create an economic instability which affects foreign investors.<sup>68</sup> Despite the fact that post-conflict governments adhere to the open economy, industrial analysts claim that they are constituted with regulatory mechanisms through which the economy is controlled.<sup>69</sup>

Economic protectionism, according to Ado, is a phenomenon increasingly being exercised by many countries.<sup>70</sup> Control over the foreign investor's entry into a country are imposed not only through the laws already in place but also through national security measures, or even through the adoption of newly established investment control methods. Sornarajah asserts that such investment controls have been exercised in developing countries and that they may be on the increase as a viable measure to respond to economic crisis.<sup>71</sup>

Sometimes the changes made to a particular industry by the new post-conflict government are likely to have an adverse effect on the interests of foreign investors.<sup>72</sup> For example, the oil crisis of the early 1970s is perceived to have originated from the concerted effort of the oil producing countries to take control of the oil industries in their respective states and to take over the responsibility for fixing oil prices.<sup>73</sup> Foreign investors entered into the oil producing countries by means of legal instruments, namely concession agreements. The latter committed the foreign investors to handing over large monetary payments in the form of royalties. The royalties received were disproportionate to the oil extracted in the host country.<sup>74</sup> Substantial changes took place in the oil industry when, in many countries, representative governments began taking office, replacing authoritarian governments. The authoritarian governments were said to rely too much on the imperialistic powers in their efforts to ensure

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<sup>67</sup> Anne-Marie Johnson, 'Financial and Economic Consequences of the Gulf War: Iraqi Responses' (1987) 11 Fletcher F Wld Aff 51.

<sup>68</sup> Jenia Iontcheva Turner, 'Justice, Rule of Law, and Economic Reconstruction in Post-Conflict States' (2007) 8 Stud Int'l Fin Econ & Tech L 253.

<sup>69</sup> A Ramasastry, 'Secrets and Lies: Swiss Banks and International Human Rights' (1998) 31 VJTL 325.

<sup>70</sup> Michael K. Addo, *Human Rights Standard and the Responsibility of Transnational Corporations* (Routledge, London 1999) 154.

<sup>71</sup> M Sornarajah, *The International Law on Foreign Investment* (3rd edn, Cambridge University Press, New York 2011) 77.

<sup>72</sup> WD Verwey & NJ Schrijver, 'The Taking of Foreign Property under International Law: A New Legal Perspective?' (1984) 15 Neth Yb Int'l L 3.

<sup>73</sup> M Sornarajah, *The International Law on Foreign Investment* (3rd edn, Cambridge University Press, New York 2011) 1, 39.

<sup>74</sup> *ibid* 74.

their continued rule. The new politicians became increasingly vocal in demanding cancellation of the concession agreements.<sup>75</sup> The use of military pressure to force the host countries to abide by the concession agreements, became no longer feasible, since its motives would come under the scrutiny of the international community.<sup>76</sup> Internationally, concerted efforts were made by the former colonies to create new doctrines whereby the act of cancelling the concession agreements would be justified. The permanent sovereignty doctrine concerning the natural resources of a country was proclaimed through a resolution passed by the national assembly. Later, this doctrine became the means by which the effectiveness of this transformation would be enforceable by law. The measures taken by the oil-rich countries with the aim of changing the rules governing the oil industry and fixing the selling price of the oil were successful and their efforts were facilitated by the formation of the Organisation of the Petroleum Exporting Countries. The concession agreements that had been entered into previously were no longer and there was need to replace them with different agreements.<sup>77</sup> Major product-sharing agreements were signed by oil companies. This type of agreement subsequently became widely used in the oil industry replacing the old concession agreements. It reflected the changes that had been implemented in the industry. The product-sharing agreement passed the risk as well as the opportunity of oil exploitation to the foreign investors. In addition to this, this agreement made it easier for the national oil industry to would regulate oil exploitation.<sup>78</sup>

#### **2.2.4 The Level of Transparency**

In post-conflict periods, corruption in many cases is inherent. Transparency and the rule of law, in turn, are either absent or extremely weak.<sup>79</sup> Despite the fact that drivers and incubators of

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<sup>75</sup> *ibid.*

<sup>76</sup> *ibid.*

<sup>77</sup> See United Nations Economic and Social Council, *Critical trends: Global Change and Sustainable Development* (United Nations Economic and Social Council, New York 1997) 5.

<sup>78</sup> M Sornarajah, *The International Law on Foreign Investment* (3rd edn, Cambridge University Press, New York 2011) 74.

<sup>79</sup> Examples include Guatemala, Angola, Kosovo and Iraq. See Päivi Lujala, Sandra S Nichols and Carl Bruch, 'When Peacebuilding Meets the Plan: Natural Resource Governance and Post-Conflict Recovery' (2011) 12 *Whitehead J Dipl & Int'l Rel* 11 (Corruption in Guatemala is manifested in the Guatemalan National Revolutionary Unity (in Spanish: Unidad Revolucionaria Nacional Guatemalteca, URNG-MAIZ or most commonly URNG) keeping a share of influence in the country in the aftermath of the 1996 Peace Agreement, which brought to an end a 32 year conflict. However, the Peace Agreement has not ended the prevalent corrupt practices in Guatemala before and during the armed conflict, even taking new forms of forced threats, extortion, large scale bribery and fraud). See also Virtus C Igbokwe, Nicholas Turner, Obijiofor Aginam (eds), *Foreign Direct Investment in Post-Conflict Countries: Opportunities and Challenges* (Adonis & Abbey 2010) 229-230. The Angolan case is similar to that of Guatemala, but the former is different from the latter in that it has oil; a large sector rich in foreign currency but lacking transparency in terms of controlling the inflow and outflow of revenues, which are mostly directed to private bank accounts. These revenues are not fairly distributed among the general population, and drug trafficking thrives under the protection of the wealthy and

corruption exist in all societies, they are a larger presence in post-conflict countries, where their impacts are all the more destructive due to weak supervisory or controlling institutions and the existence of large-scale impunity.<sup>80</sup> The crippled status of supervisory and controlling institutions is not limited to the executive power but also includes the legislative and judicial powers. A post-conflict government may not encourage the development of transparent and accountable institutions, particularly when some members of a government are proven to be profiteers who have transacted corrupt deals under the umbrella of conflict.<sup>81</sup> On lower levels of the social hierarchy, citizens may resort to the bribery of employees to circumvent 'red tape' in situations where the administrative procedures lack transparency.<sup>82</sup> Corruption may also be driven by eclectic law enforcement, including failure to arrest criminals or enforce taxation rules. Further, a government may be mindful of the need for reform but lack the capacity to ensure institutional integrity, especially in the area of law enforcement.<sup>83</sup>

The impact of top-level government corruption remains heavily destructive to a country, especially when it involves planning, governmental purchases, privatisation or governmental contracts.<sup>84</sup> Moreover, in post-conflict environments with deep levels of corruption, public properties may be subject to seizure by a ruling junta. This phase is termed *seizure of state* – a situation where a large part of state capabilities and resources is retained to serve the interests of a limited group of businessmen and politicians, either individually or on behalf of the ruling party or parties.<sup>85</sup> Unless stringent protective measures are taken, these

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the powerful). Susan Rose-Ackerman, 'Corruption and Post-Conflict Peace-Building' (2008) 34 Ohio N U L Rev 405; Ali Al- Sadig, 'The Effects of Corruption on FDI Inflows' (2009) 29 Cato J 267. Kosovo is to some extent different. In 1999, the war in Kosovo was brought to an end and independence was brought about under UN-led international supervision on February 17<sup>th</sup>, 2008 despite the objections of Serbia and Russia. The post-conflict Kosovan government is dominated by ex-combatants and their supporters. Meanwhile, the international bodies involved hold a vast amount of power, as they offer aid and contribute to maintaining political stability. Corruption in Kosovo is linked to the inflow of money for reconstruction and humanitarian aid. However, a positive start has been made in combatting corruption: public opinion towards elected governments changed in proportion to the efforts made by these governments to pull Kosovo back from the abyss of political corruption) *ibid*, 267-269.

<sup>80</sup> Rahim Mooloo and Alex Khachaturian, 'Foreign Investment in a Post-Conflict Environment' (2009) 10 J World Investment & Trade 341.

<sup>81</sup> Robert E Looney, 'Reconstruction and Peacebuilding under Extreme Adversity: The Problem of Pervasive Corruption in Iraq' (2008) 15 Int'l Peacekeeping 424.

<sup>82</sup> Susan Rose-Ackerman, 'Corruption and Post-Conflict Peace-Building' (2008) 34 Ohio N U L Rev 405

<sup>83</sup> Päivi Lujala, Sandra S Nichols and & Carl Bruch, 'When Peacebuilding Meets the Plan: Natural Resource Governance and Post-Conflict Recovery' (2011) 12 Whitehead J Dipl& Int'l Rel 11.

<sup>84</sup> Charles Tiefer, 'The Iraq Debacle: The Rise and Fall of Procurement-Aided Unilateralism as A Paradigm of Foreign War' (2008) 29 U Pa J Int'l L 1.

<sup>85</sup> The World Bank Institute describes this phenomenon as a "crony capitalism" or "state capture." Susan Rose-Ackerman, 'Corruption and Post-Conflict Peace-Building' (2008) 34 Ohio N U L Rev 405.

corrupt mafias pervading the top levels of government, and may encourage instability and violence or the return of a state of conflict in order to preserve their previous financial gains.<sup>86</sup>

Political change may generate new and more honest political leaders, but strong lobbies may buy them, either with money or through the threat of physical liquidation.<sup>87</sup> This is a real and imminent long-term risk since a ruling junta is usually able to exploit its controlling position to eliminate or pressurise potential competitors.<sup>88</sup>

The financial support of international bodies for the rehabilitation of a post-conflict country is very important when financial resources for reconstruction are absent or insufficient. A key requirement is to ensure that the money is used for its intended purposes. The programmes and schemes of international bodies may be undermined by corrupt practices,<sup>89</sup> thus tarnishing the international reform efforts. International aid may produce adverse results, caused by the corruption of the representatives or managers of the programmes of international bodies, as is the case with Kosovo.<sup>90</sup>

Post-conflict countries differ from each other in the extent to which any one of them is affected by corruption. The degree of corruption may be positively influenced by social factors such as legal traditions, heritage and religion. Reform measures will be ineffective unless they are employed wisely by reformers and at the appropriate time and place.<sup>91</sup> It is equally important to make use of these factors to fight corruption and to help honest persons to assume power. Reform efforts can end in failure if powerful, influential lobbies maintain control over the new government.<sup>92</sup> The failure to establish the rule of law and good governance will result in corruption scandals or vicious circles of violence, combined with a state of frustration and uncertainty among the population.<sup>93</sup>

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<sup>86</sup> Rahim Mooloo and Alex Khachaturian, 'Foreign Investment in a Post-Conflict Environment' (2009) 10 *J World Investment & Trade* 341.

<sup>87</sup> Susan Rose-Ackerman, 'Corruption and Post-Conflict Peace-Building' (2008) 34 *Ohio N U L Rev* 405.

<sup>88</sup> *ibid.*

<sup>89</sup> Bertram I Spector, 'Negotiating Anti-Corruption Reforms in Post-Conflict Societies: The Case of Afghanistan' (2011) 18 *Brown J World Aff* 45.

<sup>90</sup> Susan Rose-Ackerman, 'Corruption and Post-Conflict Peace-Building' (2008) 34 *Ohio N U L Rev* 405.

<sup>91</sup> Bertram I Spector, 'Negotiating Anti-Corruption Reforms in Post-Conflict Societies: The Case of Afghanistan' (2011) 18 *Brown J World Aff* 45.

<sup>92</sup> Philippe Le Billon, 'Securing Transparency: Armed Conflicts and the Management of Natural Resource Revenues' (2006-2007) 62 *Int'l J* 93.

<sup>93</sup> Susan Rose-Ackerman, 'Corruption and Post-Conflict Peace-Building' (2008) 34 *Ohio N U L Rev* 405.

## 2.3 Investment Environment Reform under the Host Country Strategies

### 2.3.1 Launch of the Comprehensive Reform Programme

The chaos affecting a country moving out of conflict requires those concerned to act urgently to eliminate obstacles to full recovery in the investment climate. Given the incentives, the rapid creation of a pro-foreign investment environment may be an objective within reach. With the post-conflict environment being high-risk by nature, the reforms plan must be dealt with seriously to establish stability.<sup>94</sup> Theoretical aspects, such as the introduction of reforms to the investment environment, may be in competition with practical needs involving security and public order and the provision of health and other basic services.<sup>95</sup> Swift reformative actions do not extend to the re-structuring of courts, the training and rehabilitation of judges and lawyers, and there will also be shortages of necessary equipment, such as computers and legal libraries.<sup>96</sup> Both theorists and practitioners often cast doubts on the effectiveness of internal legislative reforms, since they are insufficiently accompanied by the training of the personnel such as judges and lawyers.<sup>97</sup> In post-conflict countries, investors both local and foreign inevitably require certain pre-conditions before taking their investment decisions.<sup>98</sup>

An acceptable level of stability in the operating environment, along with medium to long term predictability of the basic market conditions, available investment opportunities, transparency and sufficient guarantees under enforceable laws, are factors that must be provided and ensured by a post-conflict government to achieve success in the rehabilitation of the local investment climate.<sup>99</sup> It goes without saying that an investment hosting country must establish a stable environment to boost foreign investments and mitigate the post-conflict challenges faced by investors, a commitment that goes hand in hand with various other tasks

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<sup>94</sup> Rahim Moloo and Alex Khachaturian, 'Foreign Investment in a Post-Conflict Environment' (2009) 10 J World Investment & Trade 341.

<sup>95</sup> *ibid.*

<sup>96</sup> Tai-Heng Cheng, 'Law on Loan: Legal Reconstruction after Armed Conflict' in Virtus C Igbokwe, Nicholas Turner, Obijiofor Aginam (ed), *Foreign Direct Investment in Post-Conflict Countries: Opportunities and Challenges* (Adonis & Abbey 2010) 81.

<sup>97</sup> Richard Sannerholm, 'Legal, Judicial and Administrative Reforms in Post-Conflict Societies: Beyond the Rule of Law Template' (2007) 12 J Conflict & Sec L 65.

<sup>98</sup> Matthew T Simpson, 'Mitigating Volatility: Protecting Chinese Investment in Post-Conflict Regions' (2008) 9 JWIT 317 (noting that '[g]iven the highly volatile nature of the political and economic environments in post-conflict states, Chinese investors would be wise to look for certain mechanisms and protections to ensure the safety of both their initial investment and return. Though these investments often offer high potential rates of return, they are accompanied by considerable risk, and several safeguards would provide an added level of protection in the event of political and economic deterioration').

<sup>99</sup> Jenia Iontcheva Turner, 'Justice, Rule of Law, and Economic Reconstruction in Post-Conflict States' (2007) 8 Stud Int'l Fin Econ & Tech L 253.

including, but not limited to, consolidating government, enforcing the rule of law, reconstruction and the generation of job opportunities.<sup>100</sup> Consequently, countries more often than not establish a legal framework through the enactment of liberal legislation at a local level.

In practice, these legal reforms may not provide sufficient assurance to investors.<sup>101</sup> Further, the relevant administrative institutions do not receive the necessary upgrades, thus causing more confusion and conflict between the old guard and the new, and resistance to change.<sup>102</sup> Therefore, Tai-Heng Cheng argued that:

The government may instead “*borrow law*” When borrowing law, a post-conflict government need not confine itself to borrowing the laws of another legal system. It may also borrow its expertise and infrastructure, such as the services of lawyers, judge and arbitrators, as well as physical courthouses and tribunals.<sup>103</sup> Hence, one justification for ‘borrowing’ international investment law to bridge the local legal gap in a post-conflict environment would be its capacity to establish an acceptable legal system to regulate foreign investments.<sup>104</sup>

An additional level of protection for foreign investors is necessary under international conventions in order to mitigate the effects of actions taken by the investment host countries, such as the expropriation or nationalisation of an investment or their adoption of any other measure that may cause damage to foreign investors or limit their expected revenues.<sup>105</sup> To ensure the rights of investors the international legal investment framework therefore places restrictions on the measures that may be adopted by a host country.<sup>106</sup> Therefore, governments in this situation seek to boost investors’ confidence through the ratification of bilateral or multilateral investment treaties.<sup>107</sup>

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<sup>100</sup> Virtus C Igbokwe, Nicholas Turner, Obijiofor Aginam (eds), *Foreign Direct Investment in Post-Conflict Countries: Opportunities and Challenges* (Adonis & Abbey 2010) 303-304.

<sup>101</sup> Richard Sannerholm, 'Legal, Judicial and Administrative Reforms in Post-Conflict Societies: Beyond the Rule of Law Template' (2007) 12 J Conflict & Sec L 65.

<sup>102</sup> *ibid.*

<sup>103</sup> Tai-Heng Cheng, 'Law on Loan: Legal Reconstruction after Armed Conflict' in Virtus C Igbokwe, Nicholas Turner, Obijiofor Aginam (ed), *Foreign Direct Investment in Post-Conflict Countries: Opportunities and Challenges* (Adonis & Abbey 2010) 81.

<sup>104</sup> *ibid.*

<sup>105</sup> Matthew T Simpson, 'Mitigating Volatility: Protecting Chinese Investment in Post-Conflict Regions' (2008) 9 J World Investment & Trade 317.

<sup>106</sup> Tai-Heng Cheng, 'Law on Loan: Legal Reconstruction after Armed Conflict' in Virtus C Igbokwe, Nicholas Turner, Obijiofor Aginam (ed), *Foreign Direct Investment in Post-Conflict Countries: Opportunities and Challenges* (Adonis & Abbey 2010) 84.

<sup>107</sup> Virtus C Igbokwe, 'ICSID Jurisdiction and the Legal Security of Foreign Investment in Post-Conflict Countries' in Virtus C Igbokwe, Nicholas Turner, Obijiofor Aginam (eds), *Foreign Direct Investment in Post-Conflict Countries: Opportunities and Challenges* (Adonis & Abbey 2010) 113-114.

This study claims that establishing a sound domestic legal environment allows foreign investors to benefit from the nationally applicable protective measures when they are boosted with international agreements.

### **2.3.2 Create Investment Opportunities- An Economic Strategy**

Given the factors that govern the movement of capital, it is clearly possible for post-conflict countries to attract investment, providing that the rewards to investors are more lucrative than those offered elsewhere.<sup>108</sup> In rating profits from investments, various factors affecting the investment environment must be considered, for example, the level of economic activity and the present and expected taxation levels. The commercial prospects of the host country will depend on whether it decides to adopt a *laissez faire* or a protective policy, and the degree of protection given by the latter policy, particularly with regard to custom tariffs, and also the general circumstances of the host country, especially in terms of stability and security.<sup>109</sup>

One positive factor in a post-conflict environment is the existence of various investment opportunities for re-building what was destroyed, not to mention the demand for commodities and services that were missing during the conflict.<sup>110</sup> Generally speaking, the infrastructure destroyed during the conflict and (or) the natural resources may serve as the most important and attractive investment opportunities.<sup>111</sup> A key driver for foreign investors in high-risk environments is the high revenue expected from natural resources and investment in exploration industries, such as oil, natural gas and other minerals, these industries account for the greater part of the FDI flow to post-conflict countries, such as Angola, the Democratic Republic of Congo, Gabon, Nigeria, Cameroon, Sudan, Sierra Leone and Iraq.<sup>112</sup> These investment contracts have a powerful attraction for investors. In addition, rising oil prices may

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<sup>108</sup> Ted G Telford and Heather A Ures, 'The Role of Incentives in Foreign Direct Investment' (2001) 23 Loy L A Int'l & Comp L Rev 605.

<sup>109</sup> Philippe De Lombaerde and Luis Jorge Gamy, 'FDI Policies in Times of Conflict: The Case of Colombia' in Virtus C Igbokwe, Nicholas Turner, Obijiofor Aginam (ed), *Foreign Direct Investment in Post-Conflict Countries: Opportunities and Challenges* (Adonis & Abbey 2010) 272.

<sup>110</sup> Virtus C Igbokwe, Nicholas Turner, Obijiofor Aginam (eds), *Foreign Direct Investment in Post-Conflict Countries: Opportunities and Challenges* (Adonis & Abbey 2010) 308.

<sup>111</sup> *ibid* 305.

<sup>112</sup> Ryan Frei, 'Extracting Oil from Turmoil: The Iraqi Oil Industry and Its Role as a Promising Future Player in the Global Energy Market' (2004) 4 Rich J Global L & Bus 147; PäiviLujala, Sandra S Nichols and Carl Bruch, 'When Peacebuilding Meets the Plan: Natural Resource Governance and Post-Conflict Recovery' (2011) 12 Whitehead J Dipl& Int'l Rel 11.



have a positive impact on economic growth, especially for countries which are dependent on oil as a primary source of income.<sup>113</sup>

In addition to the above mentioned opportunities, privileges may be offered to foreigners investing in the host country. In most developing countries, labour costs are comparatively low, which means lower costs for production and operation.<sup>114</sup> By the same token, an investment environment may have competitive advantages resulting from the emergence of new post-conflict markets, with attractive features at every stage of the investment lifecycle.<sup>115</sup> In addition, it is in the interests of the governments of the host countries to devise and enforce support mechanisms that enable investors to benefit from the opportunities available. Such enablement may be achieved in various ways, but chiefly through the adoption of an open economic policy and privatisation of the public sector.<sup>116</sup>

One of the most important corrective tasks confronting these governments is therefore to determine the privatisation strategy that is the most appropriate to the conditions of the economy.<sup>117</sup> The process of determination will in turn be conditioned by various criteria, including the nature of the political system, the size of the companies to be privatised, the market potential, and financial and investment capabilities of the private sector in terms of its capacity to accommodate the companies involved.<sup>118</sup> Therefore, the government should upgrade the role of the private sector with a view to allowing the gradual emergence of new private companies, provided that such a strategy is coupled with the liquidation or sale of public companies and establishing an investment-friendly climate that allows the private sector into advanced positions in the economic hierarchy. These goals can be achieved by encouraging the establishment of companies, eliminating the obstacles to investment and new projects, applying tax policies and motivating credit schemes.<sup>119</sup>

With regard to the mechanisms for creating investment opportunities and opening the door to the private sector in the post-conflict environment, it may adopt the following measures:

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<sup>113</sup> Christopher J Coyne, 'The Economic Reconstruction of Iraq' (2010) SSRN <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1550867](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1550867)> accessed 15 Jan 2014.

<sup>114</sup> Kojo Yelapaala, 'Rethinking the Foreign Direct Investment Process and Incentives in Post-Conflict Transition Countries' (2010) 30 Nw J Int'l L & Bus 23.

<sup>115</sup> Virtus C Igbokwe, Nicholas Turner, Obijiofor Aginam (eds), *Foreign Direct Investment in Post-Conflict Countries: Opportunities and Challenges* (Adonis & Abbey 2010) 307-308.

<sup>116</sup> *ibid* 310.

<sup>117</sup> Mark Baker, 'Privatization in the Developing World; Panacea for the Economic Ills of the Third World or Prescription Overused' (1998-1999) 18 NYL Sch J Int'l & Comp L 233.

<sup>118</sup> *ibid*.

<sup>119</sup> *ibid*.

Firstly, the sale of public sector units, which is the prevailing technique worldwide. This can be carried out in several ways; for example, the sale may be partial, offering only part of a given institution's capital for sale, or it may be offered for sale in full.<sup>120</sup> Secondly, through Build, Operate & Transfer (BOT): This model allows the private sector to conduct a certain project without payment, in return for a time-bound use followed by handover to the government.<sup>121</sup> An investor under this model, however, may not care about training employees,<sup>122</sup> and may neglect maintenance efforts as the handover deadline closes in. Yet, this model ensures non-permanent control over strategic projects and further relieves the state from new project costs.<sup>123</sup>

### 2.3.3 Revise Investment Laws – A Legal Strategy

In a post-conflict environment, it is vital to establish an explicit and transparent legal system in order to boost foreign investor flow and to win foreign investors' trust in the effectiveness of the government-initiated reforms to the investment climate.<sup>124</sup> It may be necessary to abolish or amend certain investment and commercial laws in order to produce a set of laws that are capable of protecting the interests of the various ventures at every stage of their investment.<sup>125</sup> Delay in carrying out legislative reforms in the post-conflict environment is one reason among others for foreign investors' reluctance to enter transitional environments. The unreformed laws may be a deterrent to the large-scale investment needed by post-conflict states, and will prevent the investment environment from developing the necessary competitive edge.<sup>126</sup> It is important that legislation and institution-based procedures should provide a broad legal

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<sup>120</sup> Direct sales to the private sector: the government conducts direct negotiations with an investor or a number of investors willing to buy units in the course of biddings or tenders and offers up to reaching an appropriate price approved by parties concerned, while adhering to the relevant state laws. This is the so-called 'sale to a key/strategic investor'. Mary M Shirley, 'The What, Why, and How of Privatization: A World Bank Perspective' (1991-1992) 60 *Fordham L Rev* S23; Mark Baker, 'Privatization in the Developing World; Panacea for the Economic Ills of the Third World or Prescription Overused' (1998-1999) 18 *NYL Sch J Int'l & Comp L* 233

<sup>121</sup> Kojo Yelpaala, 'Rethinking the Foreign Direct Investment Process and Incentives in Post-Conflict Transition Countries' (2010) 30 *Nw J Int'l L & Bus* 23.

<sup>122</sup> Rahim Moloo and Alex Khachaturian, 'Foreign Investment in a Post-Conflict Environment' (2009) 10 *J World Investment & Trade* 341.

<sup>123</sup> Kojo Yelpaala, 'Rethinking the Foreign Direct Investment Process and Incentives in Post-Conflict Transition Countries' (2010) 30 *Nw J Int'l L & Bus* 23.

<sup>124</sup> Rahim Moloo and Alex Khachaturian, 'Foreign Investment in a Post-Conflict Environment' (2009) 10 *J World Investment & Trade* 341.

<sup>125</sup> Judith Richards Hope & Edward N Griffin, 'The New Iraq: Revising Iraq's Commercial Law Is a Necessity for Foreign Direct Investment and the Reconstruction of Iraq's Decimated Economy' (2004) 11 *Cardozo J Int'l & Comp L* 875.

<sup>126</sup> Ndvai Kofele-Kale, 'Host-Nation Regulation and Incentives for Private Foreign Investment: A Comparative Analysis and Commentary' (1990) 15 *N C J Int'l L & Com Reg* 361.

protection to foreign investors so that they can be confident of obtaining effective legal redress.<sup>127</sup> Such a degree of protection can only be realised when investment laws are both liberal and enforceable, and when there is protection for intellectual property rights and an independent judiciary.<sup>128</sup> Local courts play an essential role in providing protection for investors against potential infringements of rights by local parties.<sup>129</sup> Should such local courts deny a foreign investor due legal redress, the host country can be held accountable for the acts of such courts under the appropriate provisions of international law.<sup>130</sup>

Foreign investors may be denied justice in lawsuits when only the jurisdiction of local courts is available, particularly when local laws provide for avoidance of liability, for example, by reason of sovereignty issues.<sup>131</sup> In cases where choice is allowed regarding the law governing an investment agreement, it is generally recommended to exclude the jurisdiction of local courts, as the judicial infrastructure of a post-conflict country will for the most part still be under reconstruction.<sup>132</sup> The argument for ‘exclusion of local court jurisdiction’ is derived from the fact that post-conflict reforms are usually aimed at adopting urgent measures to ensure the rule of law with a view to establishing peace and preserving stability. Unlike such urgent measures, enactments, amendments and re-organisation of local law and the judiciary take a relatively long time.<sup>133</sup>

This study argues that there is unquestionably an urgent need for swift action to establish sound frameworks in order to ensure a better level of protection for investors’ rights and properties. A host country’s legal system should have laws with explicit provisions for protecting investors. Further, such provisions should be easily enforceable in cases of violation. This requires wider reforms, including, but not limited to, a review of investment and trade laws with a view to bringing them in line with international standards of law enforcement, international agreements and the provision of training services for judges and lawyers. In fact, foreign investors will seek local guarantees for the protection of their investments before

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<sup>127</sup> Michael J Stepek, 'The Importance of Commercial Law in the Legal Architecture of Post-Conflict "New" States' (2008) 60 Me L Rev 487.

<sup>128</sup> Rahim Molloo and Alex Khachaturian, 'Foreign Investment in a Post-Conflict Environment' (2009) 10 J World Investment & Trade 341.

<sup>129</sup> Richard Sannerholm, 'Legal, Judicial and Administrative Reforms in Post-Conflict Societies: Beyond the Rule of Law Template' (2007) 12 J Conflict & Sec L 65.

<sup>130</sup> *ibid.*

<sup>131</sup> *ibid.*

<sup>132</sup> Tai-Heng Cheng, 'Law on Loan: Legal Reconstruction after Armed Conflict' in Virtus C Igbokwe, Nicholas Turner, Obijiofor Aginam (ed), *Foreign Direct Investment in Post-Conflict Countries: Opportunities and Challenges* (Adonis & Abbey 2010) 82-83.

<sup>133</sup> *ibid.*

resorting to international laws or conventions.<sup>134</sup> A key consideration here is that only a few post-conflict countries are participants in international forums or are willing to allow international protection to foreign investors.<sup>135</sup> In addition to the establishment of an environment favourable to investment, it is beneficial to provide equal incentives for both national and foreign investors, but to offer a preferential status to foreign investors in cases where this is an urgent need for foreign capital and / or expertise. It would also be of benefit to establish an investment committee to lead service planning, promotion and management in the form of a 'one-stop shop'.

Such changes to legal institutions and structures may well give momentum to economic recovery through making commercial and investment activities easier. They would also ensure stability and continuity in the long term, thus mitigating at least some of investors' concerns about a post-conflict environment.<sup>136</sup> The situation in a post-conflict environment may remain volatile for a while, with a potential for the re-eruption of conflicts. Therefore, foreign investors need some certainty, prior to initiating an investment, that the environment wherein they plan to invest has transparent investment laws meeting international standards.<sup>137</sup> As to the short term, legislation should bring about drastic changes to the investment climate, involving such measures as privatisation and the creation of a free market.<sup>138</sup> These short-term targets are attainable through abrogation of those existing laws which serve as obstacles, rather than attractions, to the foreign investments needed for reconstruction.<sup>139</sup> In addition, equal treatment of local and foreign investors, should be exercised.<sup>140</sup> The knowledge that national and foreign investors are on an equal footing generates a feeling among investors that markets are truly open and viable for growth.<sup>141</sup> A process of legal review should aim to abrogate the provision that requires each foreign investor to have a national partner in order to obtain an investment licence, as well as those provisions on preferential treatment for governmental companies at

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<sup>134</sup> *ibid.*, 83.

<sup>135</sup> *ibid.*

<sup>136</sup> Richard Sannerholm, 'Legal, Judicial and Administrative Reforms in Post-Conflict Societies: Beyond the Rule of Law Template' (2007) 12 *J Conflict & Sec L* 65.

<sup>137</sup> Rahim Molloo and Alex Khachaturian, 'Foreign Investment in a Post-Conflict Environment' (2009) 10 *J World Investment & Trade* 341.

<sup>138</sup> Matthew T Simpson, 'Mitigating Volatility: Protecting Chinese Investment in Post-Conflict Regions' (2008) 9 *J World Investment & Trade* 317.

<sup>139</sup> Richard Sannerholm, 'Legal, Judicial and Administrative Reforms in Post-Conflict Societies: Beyond the Rule of Law Template' (2007) 12 *J Conflict & Sec L* 65.

<sup>140</sup> The World Bank Group, *World Bank Guidelines on the Treatment of Foreign Direct Investment* (1992) 3 (The Principle of Equal Treatment when dealing with investors, regardless of their respective nationalities, goes in line with the World Bank Guidelines on the Treatment of Foreign Direct Investment).

<sup>141</sup> Matthew T Simpson, 'Mitigating Volatility: Protecting Chinese Investment in Post-Conflict Regions' (2008) 9 *J World Investment & Trade* 317.

the expense of their private counterparts. Clearly, such preferential treatment or provisions fall foul of joint international practices, such as the WTO Multilateral Trading System.<sup>142</sup>

A key consideration when it comes to an investment law review is to ensure the necessary compatibility between newly enacted laws and the economic policy to be adopted, and to ensure that legal provisions reflect, in the most explicit manner, the economic objectives. Accordingly, investment laws should allow the private sector, within the framework of the overall objectives, to import, export and transfer cash.<sup>143</sup> Such a legal review should also effectively organise the rules and incentives for providing production requirements at competitive prices on the one hand, and, on the other, ensuring the promotion of markets and an adequate demand for products.<sup>144</sup>

Furthermore, the legal framework should be required, in the interests of competitiveness and transparency, to guard against the dominant companies gaining a monopoly. This particularly holds true for countries with governmental companies.<sup>145</sup> By the same token, a prerequisite for investment attractiveness is to provide a reasonable level of intellectual property rights, in accordance with the Trade Related Aspects of Intellectual Property Rights (TRIPS)<sup>146</sup> rules.<sup>147</sup> Membership of the WTO would serve as an enabling factor for states wishing to meet the international requirements regarding foreign investments, and would assist in the establishment of an open customs markets, since import freedom and reasonable customs tariffs are attractions that boost the competitiveness of local markets, so further encouraging the flow of foreign investment.<sup>148</sup> As far as labour laws are concerned, the obligations imposed on foreign companies, which will inevitably employ labour drawn in part from the local population, must be modified or even replaced with more flexible legislation,

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<sup>142</sup> Judith Richards Hope & Edward N Griffin, 'The New Iraq: Revising Iraq's Commercial Law Is a Necessity for Foreign Direct Investment and the Reconstruction of Iraq's Decimated Economy ' (2004) 11 *Cardozo J Int'l & Comp L* 875.

<sup>143</sup> Matthew T Simpson, 'Mitigating Volatility: Protecting Chinese Investment in Post-Conflict Regions' (2008) 9 *J World Investment & Trade* 317.

<sup>144</sup> Rahim Mooloo and Alex Khachaturian, 'Foreign Investment in a Post-Conflict Environment' (2009) 10 *J World Investment & Trade* 341.

<sup>145</sup> Ndiva Kofele-Kale, 'Host-Nation Regulation and Incentives for Private Foreign Investment: A Comparative Analysis and Commentary' (1990) 15 *N C J Int'l L & Com Reg* 361.

<sup>146</sup> The Agreement on Trade-Related Aspects of Intellectual Property Rights, (TRIPS Agreement), is an international agreement administered since April 1994 by the WTO in accordance with the Marrakesh Agreement and signed by more than 115 States. See WTO. 'Uruguay Round Agreement: TRIPS Trade-Related Aspects of Intellectual Property Rights' (2014) <[http://www.wto.org/english/docs\\_e/legal\\_e/27-trips\\_01\\_e.htm](http://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm)> accessed 12 Mar 2014.

<sup>147</sup> M Sornarajah, *The International Law on Foreign Investment* (3rd edn, Cambridge University Press, New York 2011) 66.

<sup>148</sup> Surya P Subedi, *International Investment Law: Reconciling Policy and Principle* (Hart Publishing 2008) 37.

while taking into account the interests of the national labour force. These laws should regulate the rights and conditions of the workforce in a manner compatible with international standards. Regarding taxation, fair policies must be developed towards foreign investors.<sup>149</sup> A positive advantage is to be gained from a policy of equal taxation for domestic and foreign companies operating in the same host country, as this approach boosts a country's efforts to conclude bilateral double tax prevention agreements.<sup>150</sup> These bilateral or multilateral investment agreements are a positive and attractive factor for an investment environment, as they give foreign investors effective guarantees in accordance with the rules set out by the international law on foreign investment.<sup>151</sup>

### **2.3.4 The Transplanting of Dispute Settlement Clauses**

Despite legal protection and the guarantees provided by a post-conflict government to foreign investors, political fluctuations and the potential for a re-eruption of conflict in such an environment will serve as a continuing threat to the integrity of an investment.<sup>152</sup> In addition, the local regulatory framework of investments is the object of increasing criticism on the part of international investors due to the bias exercised by national courts, as well as the procedural flaws relating to the treatment of foreign investments.<sup>153</sup> Furthermore, worldwide economy dictates that an international body recognised by organisations and States should be at the forefront of international arbitration.<sup>154</sup> Foreign investments are distributed in many parts of the world.<sup>155</sup> Business organisations and individuals conduct business with many countries. Needless to say that there comes a time that disputes arise out of these agreements in international business.<sup>156</sup>

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<sup>149</sup> S K Date-Bah, 'Facilitating and Regulating Private Investment in a Developing Economy' (2003) 3 Penn St Int'l L Rev 22.

<sup>150</sup> Lingguang Bao, 'China's Tax Policy toward Enterprises with Foreign Investment: A Comprehensive Appraisal' (2003) 31 Intertax 66.

<sup>151</sup> Deborah L Swenson, 'Why Do Developing Countries Sign BITs' (2005-2006) 12 U C Davis J Int'l L & Pol'y 131.

<sup>152</sup> Rahim Moloo and Alex Khachaturian, 'Foreign Investment in a Post-Conflict Environment' (2009) 10 J World Investment & Trade 341.

<sup>153</sup> Tai-Heng Cheng, 'Law on Loan: Legal Reconstruction after Armed Conflict' in Virtus C Igbokwe, Nicholas Turner, Obijiofor Aginam (ed), *Foreign Direct Investment in Post-Conflict Countries: Opportunities and Challenges* (Adonis & Abbey 2010) 83-84.

<sup>154</sup> Nina Vilikova, 'Arbitration Agreements and Their Impact upon the Efficiency of Dispute Resolution in International Commercial Arbitration' (2008) 67 Baltic Y B Int'l L 8.

<sup>155</sup> Bungenberg M, Griebel J and Hindelang S (ed), *International Investment Law and EU Law* (Springer-Verlag Berlin Heidelberg 2011) 29.

<sup>156</sup> Stephan W Schill, 'The Multilateralization of International Investment Law: Emergence of a Multilateral System of Investment Protection on Bilateral Grounds' (2010) 2 Trade L & Dev 59.

International arbitration is now a growing trend in international dispute settlement. However, international investors are worried of the arbitration framework existing in different countries.<sup>157</sup> They want a strong and recognised arbitral body, one that is bound by multilateral treaties and followed by the Contracting Parties.<sup>158</sup> Moreover, the lack of a meaningful arbitration framework hinders international trade or international investment.<sup>159</sup> Investors' decision to finance a business project in a foreign country is influenced by the existence of an international investment arbitration framework. In business contracts, disputes usually occur. The lack of a framework limits the increase of international investments. Traditionally, foreign investors seek diplomatic protection when faced with disputes in a foreign country.<sup>160</sup>

The most important steps, which should be adopted by post-conflict countries, are to ratify the New York Convention 1958 on the Recognition and Enforcement of Foreign Arbitral Awards (henceforth, the "New York Convention") and the Washington Convention 1965 On The Settlement Of Investment Disputes (henceforth, the "Washington Convention").<sup>161</sup> The New York Convention and the Washington Convention contribute to establishing integrated mechanisms to settle investment disputes and guarantee the enforcement of international arbitration awards as handed down by any court of the member countries to the New York Convention.<sup>162</sup> The New York Convention makes arbitral awards legally immune to national court review in investment disputes, and further excludes such disputes from the jurisdiction of such national courts which are required, pursuant to the New York Convention, to refer parties of any such disputes, should they are brought thereto, to arbitration upon the request of any party to such disputes.<sup>163</sup> Moreover, the New York Convention regulates issues of recognising and enforcing awards of foreign arbitration tribunals. According to the New York Convention, once an international arbitration award is handed down, the judgment-creditor; ie, in whose favour the award has been handed down, may request enforcement of the same before

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<sup>157</sup> Michael McIlwraith, John Savage, *International Arbitration and Mediation: A Practical Guide* (Kluwer Law International, 2010) 101.

<sup>158</sup> Karl-Heinz Böckstiegel, 'Commercial and Investment Arbitration: How Different are they today?' (2012) 38 *Arb Int'l* 577.

<sup>159</sup> Olynyk S, 'A Balanced Approach to Distinguishing between Legitimate Regulation and Indirect Expropriation in Investor-State Arbitration' (2012) 15 *Int'l Trade & Bus L Rev* 254.

<sup>160</sup> M Sornarajah, *The International Law on Foreign Investment* (3rd edn, Cambridge University Press, New York 2011) 18.

<sup>161</sup> Tai-Heng Cheng, 'Law on Loan: Legal Reconstruction after Armed Conflict' in Virtus C Igbokwe, Nicholas Turner, Obijiofor Aginam (ed), *Foreign Direct Investment in Post-Conflict Countries: Opportunities and Challenges* (Adonis & Abbey 2010) 86.

<sup>162</sup> M Sornarajah, *The International Law on Foreign Investment* (3rd edn, Cambridge University Press, New York 2011) 219.

<sup>163</sup> See Article 2, Paragraph 3 of the New York Convention.

courts of any member country to the New York Convention.<sup>164</sup> It is worthy to mention that the exceptions to enforcement of an arbitration award, as per Article 5 of the New York Convention, are restricted to serious procedural flaws in arbitration or to cases where a flagrant violation of the public order in the enforcement country is anticipated.<sup>165</sup> Yet, most courts narrow down the scope of interpretation and enforcement of the public order-related exceptions, and allow only for cases wherein the dismissal of an arbitration award would not violate the simplest concepts of ethics and justice.<sup>166</sup> Therefore, a post-conflict country ratifying the New York Convention would be thereby sending an assurance message to foreign investors that arbitration awards made in their favour against the investment hosting country will be enforceable.

In 1965, the Executive Directors of the *International Bank for Reconstruction and Development* (the World Bank), met and formed the International Centre for the Settlement of Investment Disputes (ICSID).<sup>167</sup> It is an international agency responsible for conducting arbitrations of international investments between investors and member States, which are called Contracting Parties because they enter into an agreement to conduct a project.<sup>168</sup> The ICSID is an autonomous agency formulated under a multilateral treaty by the Executive Directors and was signed by member States in 1965.<sup>169</sup> It has a current membership of 158.<sup>170</sup>

The Contracting Parties enter into an arbitration proceeding when the terms of their agreement are perceived violated by one of the parties. They then agree to settle their dispute through the arbitration body such as the ICSID.<sup>171</sup> Any legal dispute that is a result of foreign investment can be brought to the ICSID for arbitration. However, a condition should first be present and that is, the parties to the dispute that include the host state and the investor have

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<sup>164</sup> See Article 1 of the New York Convention.

<sup>165</sup> Tai-Heng Cheng, 'Law on Loan: Legal Reconstruction after Armed Conflict' in Virtus C Igbokwe, Nicholas Turner, Obijiofor Aginam (ed), *Foreign Direct Investment in Post-Conflict Countries: Opportunities and Challenges* (Adonis & Abbey 2010) 87.

<sup>166</sup> *ibid.*

<sup>167</sup> International Centre for the Settlement of Investment Disputes (ICSID). 'About ICSID' (2014) <[https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=AboutICSID\\_Home](https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=AboutICSID_Home)> accessed 21 Jan 2014.

<sup>168</sup> *ibid.*

<sup>169</sup> *ibid.*

<sup>170</sup> International Centre for the Settlement of Investment Disputes (ICSID). 'Member States' (2013) <[https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=MemberStates\\_Home](https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=MemberStates_Home)> accessed 16 Jan 2014.

<sup>171</sup> Virtus C Igbokwe, 'ICSID Jurisdiction and the Legal Security of Foreign Investment in Post-Conflict Countries' in Virtus C Igbokwe, Nicholas Turner, Obijiofor Aginam (eds), *Foreign Direct Investment in Post-Conflict Countries: Opportunities and Challenges* (Adonis & Abbey 2010) 114.



consented in writing in bringing the case to the ICSID for arbitration.<sup>172</sup> The rules and the proceeding have been formulated by the Executive Directors. The Executive Directors devised a system that balances the interests of investors and Contracting States. However, before going to ICSID for settlement, it is required that parties concerned should exhaust all possible local remedies.<sup>173</sup> The primary objective of the Convention that created the ICSID was to remove the obstacles to provide free flows of investment between member States and to provide an investment disputes settlement. It also aimed to provide a mechanism by way of arbitration procedures for the resolution of legal disputes between organisations and member States.<sup>174</sup> The parties have the option to choose which place to start the proceeding, or what is termed the seat of arbitration where arbitration can be said as “delocalized”, and the place should have no impact on the proceedings. However, in the determining the arbitral seat, the legal framework can be determined; so it has a role to play in the arbitration.<sup>175</sup> The Centre sees to it that appointed arbitrators to the tribunal are well-qualified according to its regulation; an ad-hoc committee is appointed to conduct the annulment process; and the awards are properly enforced and binding on the Contracting Parties.<sup>176</sup>

The system that provides for either party to request for annulment, as cited in the above reasons, strengthens the ICSID. The procedures and rules emphasise the rights of the Contracting Parties. For instance, Article 52 will surely be used by future losers in the arbitrations considering that this will give them another chance to win the award. Ethical counsels will recommend to their client organisations to exploit this provision.<sup>177</sup> The Centre has also increased transparency in its proceedings. Before, proceedings used to be private and confidential, but in 2006, there were amendments introduced to the ICSID Arbitration Rules, allowing non-disputing parties to observe and submit written comments.<sup>178</sup> ICSID arbitrations

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<sup>172</sup> Campbell C (ed), *Legal Aspects of Doing Business in Latin America* (Yorkhill Law Publishing 2007) 55.

<sup>173</sup> Christoph H Schreuer, Loretta Malintoppi, August Reinisch 'and others', *The ICSID Convention: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (2nd edn, Cambridge University Press 2009) 80.

<sup>174</sup> International Centre for the Settlement of Investment Disputes (ICSID). 'About ICSID' (2014) <[https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=AboutICSID\\_Home](https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=AboutICSID_Home)> accessed 21 Jan 2014.

<sup>175</sup> Ibironke T Odumosu, 'The Antinomies of the (Continued) Relevance of ICSID to the Third World' (2006-2007) 8 San Diego Int'l L J 345.

<sup>176</sup> *ibid.*

<sup>177</sup> CHRISTOPH H SCHREUER, LORETTA MALINTOPPI, AUGUST REINISCH 'and others', *The ICSID Convention: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (2nd edn, Cambridge University Press 2009) 898-899.

<sup>178</sup> Mabel I Egonu, 'Investor-State Arbitration under ICSID: A Case for Presumption against Confidentiality' (2007) 24 J Int'l Arb 479.

have been considered public documents and should be made public.<sup>179</sup> This is embodied in Article 48 of the Convention which allows publishing of awards but only when both parties give their consent to publish them. Excerpts of the proceedings should also be made public.<sup>180</sup>

Nation states also formed trade blocks (NAFTA, ASEAN, ECI, etc.) because these trading blocs can obligate the member countries to properly deal with foreign investors operating within their territories, through multilateral treaties. Trade agreements provide for correct and proper treatment of foreign investors.<sup>181</sup> Investors and contracting States are bound by international treaties signed by the member states themselves and also those formed by regional groupings or blocs such as the North American Free Trade Agreement (NAFTA), the Association of Southeast Asian Nations (ASEAN), and the Energy Charter Treaty (ECT). The regional groupings bind the conduct of countries and foreign investors or institutions that operate in the States. The trade agreements provide for how foreign investors are treated.<sup>182</sup> Countries are bound by investment treaties which differ from each other.

Another mechanism, which is simple to undertake dispute resolution procedures by different Bilateral Investment Treaties (BIT) and most of them often, differs with each other.<sup>183</sup> The first BIT was signed between West Germany and Pakistan, in the fifties, but since then, there has been a proliferation of investment treaties around the globe because countries have realised their importance in international trade and international dispute resolution.<sup>184</sup> There are currently approximately 3000 BITs covering the large part of the global investment activity and offering investors and host country a reliable international dispute resolution mechanism to enforce their rights under investment contract.<sup>185</sup>

Bilateral investment agreements do provide huge protection for foreign investments in post-conflict countries through the objective obligations due on host governments.<sup>186</sup> Such

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<sup>179</sup> Ibiroko T Odumosu, 'The Antinomies of the (Continued) Relevance of ICSID to the Third World' (2006-2007) 8 *San Diego Int'l L J* 345.

<sup>180</sup> CHRISTOPH H SCHREUER, LORETTA MALINTOPPI, AUGUST REINISCH 'and others', *The ICSID Convention: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (2nd edn, Cambridge University Press 2009) 807.

<sup>181</sup> Clarisse Ribeiro(ed), *Investment Arbitration and the Energy Charter Treaty* (JurisNet, LLC, 2006) 7.

<sup>182</sup> *ibid.*

<sup>183</sup> Jason Webb Yackee, 'Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence' (2010-2011) 51 *Va J Int'l L* 397.

<sup>184</sup> Jeswald W Salacuse, 'BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries' (1990) 24 *Int'l L* 655.

<sup>185</sup> Barnali Choudhury, 'International Investment Law as a Global Public Good' (2013) 17 *Lewis & Clark L Rev* 481.

<sup>186</sup> Jeswald W. Salacuse, 'BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries' (1990) 24 *Int'l L* 655.

bilateral agreements contribute to the creation of sound foundations to attract transnational investments via agreeing on transparent transactions, fair treatment as per the international law, while ensuring means of legal redress to settle investment-related disputes regarding expropriation of foreign investors' property.<sup>187</sup> By the same token, national treatment of a foreign investor must not be in any way less favourable than that of a local investor or investors from any other country.<sup>188</sup> In addition, bilateral investment agreements may provide for provisions ensuring investors' right to free cash transfer from the host country, tax regulation, land ownership and investment in certain sectors with sovereign significance.<sup>189</sup>

For a bilateral investment agreement to come to fruition in terms of protectionism, it must be designed to suit the nature of relevant limitations within the investment hosting country in its post-conflict era.<sup>190</sup> Points of agreement in such agreements are usually controversial.<sup>191</sup> In spite of the fact that capital-exporting countries do have tremendous amounts of power and influence regarding provisions and terms of an agreement, largely due to the host country's post-conflict reconstruction needs, such capital exporting countries, meanwhile, seek to exploit profitable investment opportunities available in post-conflict environments.<sup>192</sup> Therefore, drafting an investment agreement with a view to materialization of mutual interests of both parties thereto is of outstanding importance to avoid 'agreement traps' in terms of capital-exporting countries' exploitation and manoeuvres to default on the enforcement of agreement terms by the investment hosting party.<sup>193</sup> Other advantages of good bilateral agreement drafting include the conclusion of fair terms and conditions for both parties to allow a room for a fully enforceable and long-lasting agreement.

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<sup>187</sup> Jason Webb Yackee, 'Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Iternative Evidence' (2010-2011) 51 Va J Int'l L 397.

<sup>188</sup> Barnali Choudhury, 'International Investment Law as a Global Public Good' (2013) 17 Lewis & Clark L Rev 481.

<sup>189</sup> Matthew T Simpson, 'Mitigating Volatility: Protecting Chinese Investment in Post-Conflict Regions' (2008) 9 J World Investment & Trade 317.

<sup>190</sup> Tai-Heng Cheng, 'Law on Loan: Legal Reconstruction after Armed Conflict' in Virtus C Igbokwe, Nicholas Turner, Obijiofor Aginam (ed), *Foreign Direct Investment in Post-Conflict Countries: Opportunities and Challenges* (Adonis & Abbey 2010) 91.

<sup>191</sup> Barnali Choudhury, 'International Investment Law as a Global Public Good' (2013) 17 Lewis & Clark L Rev 481.

<sup>192</sup> Jason Webb Yackee, 'Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Iternative Evidence' (2010-2011) 51 Va J Int'l L 397.

<sup>193</sup> *ibid.*

## 2.4 Host Country-Foreign Investor Cooperate in Establishing Systems of Protectionism

### 2.4.1 Protection against Legal Action

Enshrining individual ownership does not provide sufficient protection for a foreign investor, since the right to such ownership is always vulnerable to a state-initiated infringement by means of internal legal systems, particularly where there is a conflict of interests between the parties concerned (ie, the investor and the state).<sup>194</sup> If a state finds the investor's full or partial ownership of a concern to be a threat to its own interests, or that it is contributing insufficient benefits, that state may opt for such an infringement.<sup>195</sup> Accordingly, concerns about expropriation pose a key hurdle to attracting foreign investors, even when lucrative opportunities are on offer.<sup>196</sup> Consequently, a state seeking an inflow of investment should seek to alleviate or remove such concerns.<sup>197</sup> This is attainable through placing all possible restrictions on the seizure of foreign investment seizures, restricting any such action to a minimum and making a commitment to appropriate compensations should it occur.<sup>198</sup>

There is more than one form of expropriation by which foreign investor's ownership may be threatened. For instance, taking private property for the purpose of public benefit means transferring private property to the control of the state in return for an appropriate value paid to the proprietor.<sup>199</sup> Such an act of sovereignty by a state within its own borders affects citizens and foreigners alike,<sup>200</sup> and when it occurs there should be fair compensation for proprietors in accordance with national laws.<sup>201</sup> Some writers<sup>202</sup> argue that such compensation is an essential

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<sup>194</sup> Youssef I Kouatly, 'Issues in Private Property and Nationalization' (1975) 42 *Ins Counsel J* 386 (The most important transformation affecting the right to individual property was the one following the Russian Revolution of 1917, which embodied socialist ideals. Other forms of proprietorship have emerged, including collective and co-operative ones) *ibid*, 386-387.

<sup>195</sup> George III Kahale, 'Characterizing Nationalizations for Purposes of the Foreign Sovereign Immunities Act and the Act of State Doctrine' (1982-1983) 6 *Fordham Int'l L J* 391.

<sup>196</sup> *Bernardus Henricus Funnekotter and ors v Zimbabwe*, Award, 19 April 2009 (ICSID Case No ARB/05/6); Richard J Jr Hunter, 'Property Risks in International Business' (2006) 15 *Currents: Int'l Trade L J* 23; Andrew M De Neuman, 'Some Economic Aspects of Nationalization' (1951) 16 *Law & Contemp Probs* 702.

<sup>197</sup> Katharina A Byrne, 'Regulatory Expropriation and State Intent' (2000) 38 *Can Yb Int'l L* 89.

<sup>198</sup> John Murphy, 'Compensation for Nationalization in International Law' (1993) 110 *S African L J* 79.

<sup>199</sup> Tarcisio Gazzini, 'Drawing the Line between Non-Compensable Regulatory Powers and Indirect Expropriation of Foreign Investment-An Economic Analysis of Law Perspective' (2010) 7 *Manchester J Int'l Econ L* 36.

<sup>200</sup> *ibid*.

<sup>201</sup> *ibid*.

<sup>202</sup> F V García-Amador, 'The Proposed New International Economic Order: A New Approach to the Law Governing Nationalization and Compensation' (1980) 12 *Law Am* 1; Janusz Gilas, 'The Problem of the Appropriate Compensation Currency in International Law' (1983) 12 *Polish Y B Int'l L* 141.

element of the administrative decision to expropriate,<sup>203</sup> and thus the lack of a provision for compensation in such cases would render the transaction null and void. State compensation is typically made in full and paid prior to expropriation.<sup>204</sup>

Another example of expropriation is a state-enforced punishment, by virtue of which partial or complete confiscation is carried out, without compensation to the persons concerned, by reason of their violation of the law.<sup>205</sup> This type of confiscation may be judicial or administrative.<sup>206</sup> In either case, the judicial or executive power should use a legal provision authorising the confiscation.<sup>207</sup> Judicial confiscation may be an expropriation ordered by the civil judiciary as a punishment provided by law for a criminal offence, or by a tribunal concerned with a particular matter.<sup>208</sup> Administrative confiscation is different in that it is usually enforced in the aftermath of social revolutions, political change or wars, with a view to denying financial capability to certain social classes.<sup>209</sup> Confiscation targeting specific matters is called private confiscation.<sup>210</sup> If it targets a person's money, wholly or to a substantial degree, it is known as public confiscation.<sup>211</sup> If proven to be in violation of the law, national or foreign investors may be expropriated without any compensation by the country concerned, generally speaking.<sup>212</sup> In principle, expropriation may be a penalty enforced against crimes or illegal acts. Therefore, denial of compensation is a key characteristic of expropriation as a penalty.<sup>213</sup> Yet, some jurists<sup>214</sup> deny a country its right to expropriate foreign investments without compensation on the grounds that it would be a violation of well-established principles of international law.<sup>215</sup> The predominant juristic opinion, however, is that it is permissible for a

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<sup>203</sup> Roy Jr Whitehead and Lu Hardin, 'Government Theft: The Taking of Private Property to Benefit the Favored Few' (2004-2005) 15 *Geo Mason U CRL J* 81.

<sup>204</sup> John Murphy, 'Compensation for Nationalization in International Law' (1993) 110 *S African L J* 79.

<sup>205</sup> Hanri Mostert, 'The Distinction between Deprivations and Expropriations and the Future of the Doctrine of Constructive Expropriation in South Africa' (2003) 19 *S Afr J on Hum Rts* 567.

<sup>206</sup> *ibid.*

<sup>207</sup> Z Douglas, *The International Law of Investment Claims* (CUP, Cambridge 2009) 69.

<sup>208</sup> *ibid.*

<sup>209</sup> Stephen Olynyk, 'A Balanced Approach to Distinguishing between Legitimate Regulation and Indirect Expropriation in Investor-State Arbitration' (2012) 15 *Int'l Trade & Bus L Rev* 254.

<sup>210</sup> Hanri Mostert, 'The Distinction between Deprivations and Expropriations and the Future of the Doctrine of Constructive Expropriation in South Africa' (2003) 19 *S Afr J on Hum Rts* 567.

<sup>211</sup> *ibid.*

<sup>212</sup> Ruslan Mirzayev, 'International Investment Protection Regime and Criminal Investigations' (2012) 29 *J Int'l Arb* 71.

<sup>213</sup> *ibid.*

<sup>214</sup> Richard W Barrett, 'Avoiding the Expropriation Nightmare-Tax Consequences and Asset Protection Techniques' (1997-1998) 52 *U Miami L Rev* 831; Stephen Olynyk, 'A Balanced Approach to Distinguishing between Legitimate Regulation and Indirect Expropriation in Investor-State Arbitration' (2012) 15 *Int'l Trade & Bus L Rev* 254; Ben Mostafa, 'The Sole Effects Doctrine, Police Powers and Indirect Expropriation under International Law' (2008) 15 *Austl Int'l L J* 267.

<sup>215</sup> *ibid.*

country to expropriate a foreign commercial project if its owners are proved to be involved in illegal acts.<sup>216</sup> According to this view, such state action does not violate the general principles of public international law.<sup>217</sup> In other words, for an expropriation to be in violation of international principles it must be arbitrary or without legal grounds.<sup>218</sup> An example of the latter would be a case where some shareholders or partners in a foreign company had committed illegal acts and the government of the host country decided to expropriate the company by alleging their collective criminal responsibility. If some of the partners or shareholders had nothing to do with the illegal acts in question, then the expropriation would be an arbitrary action that violated well-established rules of international law.<sup>219</sup> Therefore, the equitable principle would be to entrust expropriation decisions to the national judiciary only if its laws can prevent the expropriation of foreign projects.<sup>220</sup> This would protect foreign investors from arbitrary and illegal actions of the public authority in a country.<sup>221</sup>

Nationalisation is a relatively old legal mechanism, the first instance of which dates back to 1917,<sup>222</sup> when the principle of individual proprietorship was entirely abandoned in Russia<sup>223</sup> and Mexico.<sup>224</sup> This signified a profound development in the concept of

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<sup>216</sup> Leon E Trakman, 'Foreign Direct Investment: Hazard or Opportunity?' (2009-2010) 41 *Geo Wash Int'l L Rev* 11.

<sup>217</sup> Matthew C Porterfield, 'State Practice and the (Purported) Obligation under Customary International Law to Provide Compensation for Regulatory Expropriations' (2011-2012) 37 *N C J Int'l L & Com Reg* 159.

<sup>218</sup> *ibid.*

<sup>219</sup> Ruslan Mirzayev, 'International Investment Protection Regime and Criminal Investigations' (2012) 29 *J Int'l Arb* 71.

<sup>220</sup> Stephen Olynyk, 'A Balanced Approach to Distinguishing between Legitimate Regulation and Indirect Expropriation in Investor-State Arbitration' (2012) 15 *Int'l Trade & Bus L Rev* 254.

<sup>221</sup> SP Subedi, 'The Challenge of Reconciling the Competing Principles within the Law of Foreign Investment with Special Reference to the Recent Trend in the Interpretation of the term "Expropriation"' (2006) 40 *Intl Law* 121.

<sup>222</sup> Ignaz Seidl-Hohenveldern, 'Communist Theories on Confiscation and Expropriation-Critical Comments' (1958) 7 *Am J Comp L* 541.

<sup>223</sup> *ibid.* (Nationalisation in Russia dates back to the October Revolution of 1917, when the Bolshevik faction took power and adopted the doctrine of compensation-free takeover of all production, whether owned by nationals or by foreigners. The ideology was based on a new perception of the right to property as a social function. Accordingly, no proprietorship may be conceived beyond the economic, social and legal rules governing the whole society. Therefore, socialist (collective) ownership is to predominate over private ownership. Hence, Article 4 of the Soviet Union Constitution of 1936, which read 'The socialist system of economy and the socialist ownership of the means and instruments of production firmly established as a result of the abolition of the capitalist system of economy, the abrogation of private ownership of the means and instruments of production and the abolition of the exploitation of man by man, constitute' the economic foundation of the USSR').

<sup>224</sup> Clayton R Koppes, 'The Good Neighbor Policy and the Nationalization of Mexican Oil: A Reinterpretation' (June 1982) 69 *Journal of American History* 62 (The early stages of the Mexican experience involved a constitutional provision, enacted in 1917, allowing the State the right to nationalise in return for fair compensation. Reporting that Article 27 of the Mexican Constitution of 1917 stipulates that 'Ownership of the lands and waters within the boundaries of the national territory is vested originally in the Nation, which has had, and has, the right to transmit title thereof to private persons, thereby constituting private property. Private property shall not be expropriated except for reasons of public use and subject to payment of indemnity. The

proprietorship, which moved from being an absolute enshrined right to being a socially functioning one,<sup>225</sup> in terms of which proprietorship is a tool given by the society to an individual in order to realise the public interest.<sup>226</sup> This newly developing legal concept involved a relativist view of the rights of property ownership: social needs and historical circumstances might render it necessary to replace individual property with a new type of collective proprietorship to the benefit of the whole nation.<sup>227</sup> This doctrine confirmed the need for nationalisation, which came to be the technical and legal instrument for enforcing such replacement.<sup>228</sup> The Russian and Mexican experiences influenced many countries after the Second World War, particularly developing countries, where nationalisation was used as a means of freeing them from their status as economic satellites.<sup>229</sup> Investigating nationalisation as an obstacle to foreign investment requires investigating the legal significance of the concept of nationalisation.<sup>230</sup>

#### **2.4.1.1 Protectionism Available to the Investor**

Some investment laws ban expropriation of foreign investments with a view to reassuring and encouraging investors. Such a ban may be absolute or conditional, and may involve an entitlement to compensation.<sup>231</sup> An absolute expropriation ban is a provision of the investment

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Nation shall at all times have the right to impose on private property such limitations as the public interest may demand, as well as the right to regulate the utilisation of natural resources which are susceptible of appropriation, in order to conserve them and to ensure a more equitable distribution of public wealth'. *See also* Lorenzo Meyer, *Mexico and the United States in the Oil Controversy, 1917-1942* (Muriel Vasconcellostr, El Colegio de Mexico 1972) 19,57 (The nation shall also have the right to regulate the exploitation of proprietary natural resources to ensure preservation and fair distribution thereof. However, Article 27, Paragraph 4 provided for the non-assignment to the nation of individual proprietorship of natural resources). Clayton R Koppes, 'The Good Neighbor Policy and the Nationalization of Mexican Oil: A Reinterpretation' (June 1982) 69 JAmH 62. (These provisions of the Mexican Constitution embodied national objectives involving the freeing of natural resources and key economic resources from the control of foreign companies. Therefore, the Mexican perspective for nationalisation was not based on an anti-individual ownership ideology, but rather based on a nationalist outlook and opposition to foreign influence, which was viewed as a barrier to national economic independence. Such attempts first came to fruition in 1938 when the petroleum-based industries were nationalised in Mexico by virtue of a law enacted on 18 Dec 1938).

<sup>225</sup> Youssef I Kouatly, 'Issues in Private Property and Nationalization' (1975) 42 Ins Counsel J 386.

<sup>226</sup> Roy Jr Whitehead and Lu Hardin, 'Government Theft: The Taking of Private Property to Benefit the Favored Few' (2004-2005) 15 Geo Mason U CRL J 81.

<sup>227</sup> Ignaz Seidl-Hohenveldern, 'Communist Theories on Confiscation and Expropriation-Critical Comments' (1958) 7 Am J Comp L 541.

<sup>228</sup> Malgorzata Czapiewska, 'General Principles of International Responsibility of the State for Nationalization of Foreign Investments as one of the Means of their Protection' (1990) 2 Sri Lanka J Int'l L 59.

<sup>229</sup> Eduardo Jimenez de Arechaga, 'State Responsibility for the Nationalization of Foreign Owned Property' (1978-1979) 11 NYU J Int'l L & Pol 179.

<sup>230</sup> Malgorzata Czapiewska, 'General Principles of International Responsibility of the State for Nationalization of Foreign Investments as one of the Means of their Protection' (1990) 2 Sri Lanka J Int'l L 59.

<sup>231</sup> Barry Appleton, 'Colloquium Article: Regulatory Takings: The International Law Perspective' (2002) 11 NYU Env'tl LJ 35.

laws explicitly prohibiting the expropriation of a foreigner's property. This provision also applies to any expropriation or nationalisation that takes place in the future.<sup>232</sup> Accordingly, if a public expropriation law is enacted it will not apply to foreign projects.<sup>233</sup> This exemption is a key factor in making a country attractive to foreign investors.<sup>234</sup> Some observers,<sup>235</sup> however, view the assurance it offers to foreign investors as deceptive. They point out that it is unnecessary for a country to waive its right to expropriate foreign projects, since such a right is well-established in international law and is recognised as an element of state sovereignty in its support of the national interest.<sup>236</sup> In other words, it is a right conceded to all as long as it is combined with the appropriate compensation for those affected thereby.<sup>237</sup>

The popular legal literature generally does not favour absolute expropriation bans in dealing with foreign investments because, although they encourage foreign investment, they involve a limitation of the power of the state, and of its right to regulate economic and social life.<sup>238</sup> However, providing for protection of investments against nationalisation, expropriation and confiscation does not entail a denial of a country's public jurisdiction, including the jurisdiction to make expropriation decisions in the public interest.<sup>239</sup> Further, an investment law, like any other internal law, is subject to amendments or revocation without legal liability on the part of the legislating country, as such amendments and revocations do not infringe the rules of international law unless there is a Legislation Constancy Condition.<sup>240</sup> Otherwise, any legal change shall not apply to prior investment.<sup>241</sup>

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<sup>232</sup> Tarcisio Gazzini, 'Drawing the Line between Non-Compensable Regulatory Powers and Indirect Expropriation of Foreign Investment-An Economic Analysis of Law Perspective' (2010) 7 *Manchester J Int'l Econ L* 36.

<sup>233</sup> Barry Appleton, 'Colloquium Article: Regulatory Takings: The International Law Perspective' (2002) 11 *NYU Env'tl LJ* 35.

<sup>234</sup> Philip R Stansbury, 'Planning against Expropriation' (1990) 24 *Int'l L* 677.

<sup>235</sup> Stephen Olynyk, 'A Balanced Approach to Distinguishing between Legitimate Regulation and Indirect Expropriation in Investor-State Arbitration' (2012) 15 *Int'l Trade & Bus L Rev* 254.

<sup>236</sup> *ibid.*

<sup>237</sup> Barry Appleton, 'Colloquium Article: Regulatory Takings: The International Law Perspective' (2002) 11 *NYU Env'tl LJ* 35. (This trend is further strengthened by virtue of several international decisions, most importantly the UN General Assembly's Decision No. 1803 of 14 Oct. 1962, which endorses every country's right to nationalise internal foreign property in return for appropriate compensation) *ibid.*

<sup>238</sup> Stephen Olynyk, 'A Balanced Approach to Distinguishing between Legitimate Regulation and Indirect Expropriation in Investor-State Arbitration' (2012) 15 *Int'l Trade & Bus L Rev* 254; *See also* Stephen Fietta, 'Expropriation and the Fair and Equitable Standard: The Developing Role of Investors Expectations in International Investment Arbitration' (2006) 23 *J Int'l Arb* 375.

<sup>239</sup> *ibid.*

<sup>240</sup> Matthew C Porterfield, 'State Practice and the (Purported) Obligation under Customary International Law to Provide Compensation for Regulatory Expropriations' (2011-2012) 37 *N C J Int'l L & Com Reg* 159.

<sup>241</sup> *ibid.*



The decision regarding expropriation must be in accordance with national laws. This condition provides a key guarantee for foreign investors, as it requires the expropriation decision to take account of legal guarantees set forth in locally applicable laws, as well as the minimum requirements set forth in international laws pertaining to foreigners.<sup>242</sup> This condition, on the one hand, protects investments from arbitrary measures that may be taken by a public authority in violation of national laws, and from inequitable treatment in terms of the established rules of the international law.<sup>243</sup> On the other hand, it ensures that the decision issues from a competent authority in pursuance of applicable national laws; thus foreign investments are protected against arbitrary measures taken by a non-competent authority.<sup>244</sup> Legalized expropriation refers to the fact that the law may allow expropriation of foreign investments, provided that certain conditions are fulfilled. The legal action of seizing control of a foreign project should be justified in terms of the public interest or the interests of a department of government of that country.<sup>245</sup> A move aimed solely at realising a benefit apart from the public interest may not be considered a legal justification.<sup>246</sup> The interests of the nation must be integral to the state's legal decision to expropriate foreign investment properties, hence the relevant provisions in many expropriation laws.<sup>247</sup>

International law obliges a country, when dealing with foreign investments, to observe the principles of equality and non-discrimination,<sup>248</sup> otherwise, the country concerned will be held internationally accountable. Generally speaking, a discriminatory expropriation will consist of expropriation of foreign commercial or industrial projects by any legal means, without imposing the same measures on national projects of the same kind; or expropriation of

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<sup>242</sup> See the principle of the legality of the expropriation in *ADC Affiliate Ltd and ADC & ADMC Management Ltd v Hungary*, Final award on jurisdiction, merits and damages 2006 (ICSID Case No ARB/03/16).

<sup>243</sup> Evaristus Oshionebo, 'Stabilization Clauses in Natural Resource Extraction Contracts: Legal, Economic and Social Implications for Developing Countries' (2010) 10 *Asper Rev Int'l Bus & Trade L* 1.

<sup>244</sup> *ibid.*

<sup>245</sup> Barry Appleton, 'Colloquium Article: Regulatory Takings: The International Law Perspective' (2002) 11 *NYU Env'tl LJ* 35.

<sup>246</sup> Srishti Jha, 'Expropriation: A Crisis in International Law' (2001) 13 *Student Advoc* 123.

<sup>247</sup> *Ethyl Corporation v Canada*, Decision on Jurisdiction, 24 June 1998, 7 *ICSID Reps* 12; *Methanex Corporation v United States*, Final Award on Jurisdiction and Merits, 3 August 2005 (Ad hoc—UNCITRAL Arbitration Rules) (2005) 44 *ILM* 1345; *Chemtura Corporation v Canada*, Award, 2 August 2010 (Ad hoc—UNCITRAL Arbitration Rules). For discussion, See also Joel P Trachtman, 'Foreign Investment, Regulation and Expropriation: A Debtor's Jubilee' (1995) 89 *Am Soc'y Int'l L Proc* 103.

<sup>248</sup> Joel P Trachtman, 'Foreign Investment, Regulation and Expropriation: A Debtor's Jubilee' (1995) 89 *Am Soc'y Int'l L Proc* 103.

commercial and industrial projects owned by foreigners of a particular nationality while exempting similar economic projects with owners of other nationalities.<sup>249</sup>

The question is: how may the judiciary and jurisprudence provide a legal foundation basis for the non-discriminatory treatment of foreign investments? Does nationalisation or expropriation of foreign projects compromise the principle of equal treatment for foreign investments? According to one view, the principle of non-discrimination requires a country to bestow on investors therein the same protection guaranteed for its citizens by locally applicable laws.<sup>250</sup> Therefore, for a country to expropriate only foreign projects is an illegal act, incurring international liability, since there has been a failure to observe the principles of equitable treatment and non-discrimination against foreign investments.<sup>251</sup> This view has had its effect on some judgments. For example, the nationalisation by Libya of British Petroleum, where an arbitral tribunal upheld the principle that laws featuring discrimination and forcible expropriation against foreigners, or persons of a given social segment, race or of a certain political or social status, shall not be regarded as valid, due to their violation of the internationally established principle that laws should not be of a discriminatory nature.<sup>252</sup> However, the non-discrimination principle was susceptible to violation, especially when many developing countries achieved economic independence by choosing to nationalise and expropriate foreign projects developed during the colonialist period.<sup>253</sup> There is an alternative opinion that for an investment-attracting country to nationalise properties of owners of a certain nationality is not to violate the equality principle, as long as the country conducts such measures to ensure or preserve economic independence.<sup>254</sup> This analysis makes sense: for a result: to say otherwise would result in legitimising ideological forms of nationalisation that aim to abolish private ownership and to target economic projects solely in the name of equality. Reformative nationalisation, particularly when conducted by developing countries, is not

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<sup>249</sup> Jack Baranson, 'Changes in the Investment Climate in Developing Nations' (1973-1974) 7 Vand J Transnat'l L 569.

<sup>250</sup> Malgorzata Czapiewska, 'General Principles of International Responsibility of the State for Nationalization of Foreign Investments as one of the Means of their Protection' (1990) 2 Sri Lanka J Int'l L 59.

<sup>251</sup> This is the approach expressed by Samuel K B Asante: 'requirements as to fair and equitable treatment, full protection and security and non-discriminatory treatment all underscore the general obligation of the host state to exercise due diligence in protecting foreign investment in its territories, an obligation that derives from customary international law' in *Asian Agricultural Products Limited v Sri Lanka*, Final Award on Merits and Damages, 21 June 1990 (ICSID Case No ARB/87/3) (1991) 30 ILM 577, para 14; Adeoye Akinsanaya, 'International Protection of Direct Foreign Investment in the Third World' (1987) 36 Int'l & Comp L Q 58.

<sup>252</sup> *British Petroleum v Libyan Arab Republic* (1979) 53 ILR 297, 329.

<sup>253</sup> Mark A Edwards, 'Nationalization, De-Nationalization, Re-Nationalization: Some Historical and Comparative Perspective' (2009-2010) 30 Pace L Rev 124.

<sup>254</sup> Andrew M De Neuman, 'Some Economic Aspects of Nationalization' (1951) 16 Law &Contemp Probs 702.

intended to wipe out private ownership.<sup>255</sup> Instead, it aims at ensuring state control over economic wealth and natural resources.<sup>256</sup> In other words, if the above interpretation is adopted, then such reformative actions would be illegitimate as they would violate the principle of equality, and to say this would be to endorse an outcome incompatible with the values of liberal states, since such an outcome would be an explicit invitation to bring about more widespread nationalisation, and would involve an implicit encouragement of socialism.<sup>257</sup> The conclusion to be drawn here is that there is no single legal concept of equality in dealing with foreign investments.<sup>258</sup> Rather, this concept has developed in juristic literature in a way that allows a country to adopt various treatments of investments, based on several factors, chief among which is the achievement of economic independence or its preservation.<sup>259</sup> A country seeking to attract investment has the absolute right to select its socio-economic system and its manner of distributing income.<sup>260</sup> Further, it has the right to decide whether or not to entrust its natural resources and local means of production to foreign investors; such a matter is governed by economic, political and social interests, as determined by that country.<sup>261</sup> These are commonly accepted principles across the international community.<sup>262</sup> Many countries prevent foreigners from investing in some key economic fields, such as exploitation of natural resources.<sup>263</sup> In order to satisfy its major necessities, a country may seize foreign commercial entities operating within it, keeping them under national ownership in the public interest without being accused of infringement of the principle of equality.<sup>264</sup> Expropriation justified in the name of the latter principle is not necessary to secure economic needs and national requirements.<sup>265</sup>

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<sup>255</sup> Mark A Edwards, 'Nationalization, De-Nationalization, Re-Nationalization: Some Historical and Comparative Perspective' (2009-2010) 30 Pace L Rev 124.

<sup>256</sup> *ibid.*

<sup>257</sup> Eduardo Jimenez de Arechaga, 'State Responsibility for the Nationalization of Foreign Owned Property' (1978-1979) 11 NYU J Int'l L & Pol 179.

<sup>258</sup> Mark A Edwards, 'Nationalization, De-Nationalization, Re-Nationalization: Some Historical and Comparative Perspectives' (2009-2010) 30 Pace L Rev 124.

<sup>259</sup> Andrew M De Neuman, 'Some Economic Aspects of Nationalization' (1951) 16 Law &Contemp Probs 702; F V García-Amador, 'The Proposed New International Economic Order: A New Approach to the Law Governing Nationalization and Compensation' (1980) 12 Law Am 1.

<sup>260</sup> *ibid.*

<sup>261</sup> F V García-Amador, 'The Proposed New International Economic Order: A New Approach to the Law Governing Nationalization and Compensation' (1980) 12 Law Am 1.

<sup>262</sup> Fabio Bassan, 'Host States and Sovereign Wealth Funds, between National Security and International Law' (2010) 21 Eur Bus L Rev 165; Tania Voon, 'Multinational Enterprises and State Sovereignty under International Law' (1999) 21 Adel L Rev 219; Mathias Audit, 'Is the Erecting of Barriers against Foreign Sovereign Wealth Funds Compatible with International Investment Law' (2008) 5 US-China L Rev 1.

<sup>263</sup> *ibid.*

<sup>264</sup> Fabio Bassan, 'Host States and Sovereign Wealth Funds, between National Security and International Law' (2010) 21 Eur Bus L Rev 165.

<sup>265</sup> *ibid.*

### 2.4.1.2 Compensation as a Legal Guarantee

Commitment to compensation is actually a key legal guarantee for foreign investments in an investment attracting country.<sup>266</sup> The host country, despite being entitled to expropriate foreign commercial projects by means of various legal tools, is bound under locally and internationally applicable laws to compensate a foreign investor for damages due to direct or indirect deprivation of the investment.<sup>267</sup> This compensation is generally achievable, but a country's obligation to provide it differs according to the legal tool adopted for expropriation.<sup>268</sup> The provision of compensation is not sufficient to 'legitimise' an expropriation decision.<sup>269</sup> Moreover, where compensation is involved, a number of conditions need to be fulfilled. The compensation should be sufficient, a condition that may be realised only if compensation is fully compatible with the value of foreign economic interests affected by expropriation.<sup>270</sup> A foreigner's real loss is usually matched by the gains realised by the hosting state,<sup>271</sup> therefore sufficient compensation should be determined according to the current market value of the confiscated ownership.<sup>272</sup> Should such a market value prove impossible to define, a sufficient compensation should be determined in the light of international standards of justice, that is, by reference to the value the purchaser would have been expected to realise.<sup>273</sup>

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<sup>266</sup> Matthew C Porterfield, 'State Practice and the (Purported) Obligation under Customary International Law to Provide Compensation for Regulatory Expropriations' (2011-2012) 37 N C J Int'l L & Com Reg 159; John Murphy, 'Compensation for Nationalization in International Law' (1993) 110 S African L J 79.

<sup>267</sup> *ibid.*

<sup>268</sup> F V García-Amador, 'The Proposed New International Economic Order: A New Approach to the Law Governing Nationalization and Compensation' (1980) 12 Law Am 1.

<sup>269</sup> John Murphy, 'Compensation for Nationalization in International Law' (1993) 110 S African L J 79.

<sup>270</sup> The fair market value of an investment project contained in the tribunal decision in *Azurix Corp v Argentina*, Award, 23 June 2006 (ICSID Case No ARB/01/12).

<sup>271</sup> Frank G Dawson and Burns H Weston, 'Prompt, Adequate and Effective: A Universal Standard of Compensation' (1961-1962) 30 Fordham L Rev 727.

<sup>272</sup> Lake R B and Reitsema D R, 'The Iraqi Nationalization of the Iraq Petroleum Company: Implications for the International Law of Expropriation' (1972) 2 Denv J Int'l L & Pol'y 217 (Other methods for the calculation of sufficient compensation include net book value-based evaluation. This method is characterised by simplicity, as properties are evaluated according to the amounts recorded in books of the company or project that has been nationalised). *See also* Marion Farouk-Sluglett & Peter Sluglett, *Iraq Since 1958: From Revolution to Dictatorship* (IB Tauris & Co Ltd 2001) 228 (It is worth mentioning that Iraqi legislators adopted this criterion in the nationalisation of the Basra Oil Operation Ltd under Law No. 200 of 1975, Article 2 of which provides that 'the State shall pay compensation for properties, rights and assets acquired thereby under Article 1 hereof pursuant to the following rules: (a) The value of such properties, rights and assets shall be determined against the net book value thereof, according to which the compensation amount shall be determined; and (b) Amounts needed to meet any tax, complementary payments, charges, salaries, claims and any other payments due to the Government or any institution thereof, including local claims, shall be deducted from the compensation amount). *See* Nationalisation Law of the Basra Petroleum Company No. 200 of 1975 published in the Official Gazette, issue 2502 of 1975.

<sup>273</sup> F V García-Amador, 'The Proposed New International Economic Order: A New Approach to the Law Governing Nationalization and Compensation' (1980) 12 Law Am 1.

It is important to note, however, that a country seldom pays a full amount of compensation to a foreign investor.<sup>274</sup> The study of cases of nationalisation in different countries reveals that in many cases the compensation paid was partial for economic reasons; ie, full compensation would have resulted in national bankruptcy.<sup>275</sup> Some jurists reject the notion of partial compensation.<sup>276</sup> They argue that full compensation is a legitimate right for foreign investors. Inability to provide full compensation requires a state to refrain from nationalisation.<sup>277</sup> However, this study argues that a country wishing to attract investment should guarantee full compensation for all forms of property deprivation involving foreign investors. Moreover, traditional international rules require compensation to be paid at a reasonable pace. Once administrative and judicial proceedings are finalised, the resultant expropriation decision should provide for the payment method, the period of time allowed for payment and the method of calculating the amount.<sup>278</sup> International law customarily upholds fast-paced payment of compensation, providing procedures for estimating amounts of compensation and for its payment in terms that do not violate the rules of international law.<sup>279</sup> The host country's procedures for regulating payment of compensation in instalments over very long periods of time do not offer an appropriate compensation for expropriation.<sup>280</sup> Accordingly, the rules of international law provide for fast-paced payment of compensation for foreign investments affected by expropriation decisions.<sup>281</sup> The term 'fast-paced payment', as traditionally interpreted in international law, simply means a legal term included in the expropriation decision defining the methods of calculation and payment methods and provides that the calculation and payments are undertaken within a reasonable period,<sup>282</sup> otherwise, the

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<sup>274</sup> Janusz Gilas, 'The Problem of the Appropriate Compensation Currency in International Law' (1983) 12 Polish Y B Int'l L 141.

<sup>275</sup> Roger C Wesley, 'Establishing Minimum Compensation Criteria for Use in Expropriation Disputes' (1972) 25 Vand L Rev 939.

<sup>276</sup> John Murphy, 'Compensation for Nationalization in International Law' (1993) 110 S African L J 79; F V García-Amador, 'The Proposed New International Economic Order: A New Approach to the Law Governing Nationalization and Compensation' (1980) 12 Law Am 1.

<sup>277</sup> *ibid.*

<sup>278</sup> Frank G Dawson and Burns H Weston, 'Prompt, Adequate and Effective: A Universal Standard of Compensation' (1961-1962) 30 Fordham L Rev 727.

<sup>279</sup> Matthew C Porterfield, 'State Practice and the (Purported) Obligation under Customary International Law to Provide Compensation for Regulatory Expropriations' (2011-2012) 37 N C J Int'l L & Com Reg 159.

<sup>280</sup> Frank G Dawson and Burns H Weston, 'Prompt, Adequate and Effective: A Universal Standard of Compensation' (1961-1962) 30 Fordham L Rev 727.

<sup>281</sup> *ibid.*

<sup>282</sup> It is worth mentioning that Iraqi legislators have adopted this method for the provision of compensation to the insurance, re-insurance, cement and textile companies nationalised under Law No. 99 of 1964 where Article 2 thereof provides for: 'A. Shares and capitals of the establishments referred to shall be transferred into nominal bonds on State payable fifteen years after the date of promulgation of this Law with an annual interest of 3%. The aforesaid bonds shall be tradable. The Government may pay off such bonds, whether wholly or partially, in the nominal value thereof in the course of a public voting session. In case of partial payment, this

investor shall be entitled to interest on account of the delay.<sup>283</sup> In the case of non-tradable government bonds or government bonds with no market value, the country in question shall be deemed to have failed to honour its compensation-related obligation unless it defines a reasonable time for payment of such bonds.<sup>284</sup>

In addition, compensation should be of a real economic value for the foreign investor, that is, it must be effective in order to be fair. Generally speaking, effectiveness can be realised if the compensation is cash or a cash-transferable value. If liquidity is adopted, it shall be in the currency of the investor's nationality or in another currency transferable thereto.<sup>285</sup> Further, transfers to foreign countries must be allowed. The country carrying out the expropriation may delay such foreign transfers to ensure its supply of hard currency, provided that such delay is kept to the minimum.<sup>286</sup> It is acceptable that compensation may be a combination of cash and assets.<sup>287</sup> The currency condition, however, ensures the most accurate evaluation of losses,<sup>288</sup> and the compensation given to a foreign investor upon expropriation must be in a form that ensures effective economic use.<sup>289</sup> It is important to state here that a country's commitment to provide compensation for the acquisition of foreign investments is a legal imperative,<sup>290</sup> since such a commitment demonstrates good faith and respect for the rules of international law, which entail the non-derogation of the rights of foreign investors.<sup>291</sup>

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shall be announced in the Official Gazette at least two months prior to the date specified. B. 25% of the net annual profits shall be dedicated to the aforesaid companies and establishments under Article 1 to compensate bond holders. Holders of bonds with a nominal value up to 500 Dinars shall be prioritised. The economic institution defined as the Economic Establishment Law shall provide for necessary instructions.' The Iraqi law has adopted this way regarding nationalisation of banks and commercial banks under Law No. 100 of 1964. Ralph B Lake; David R Reitsema, 'The Iraqi Nationalization of the Iraq Petroleum Company: Implications for the International Law of Expropriation' (1972) 2 *Denv J Int'l L & Pol'y* 217.

<sup>283</sup> F V García-Amador, 'The Proposed New International Economic Order: A New Approach to the Law Governing Nationalization and Compensation' (1980) 12 *Law Am* 1.

<sup>284</sup> Janusz Gilas, 'The Problem of the Appropriate Compensation Currency in International Law' (1983) 12 *Polish Y B Int'l L* 141.

<sup>285</sup> Frank G Dawson and Burns H Weston, 'Prompt, Adequate and Effective: A Universal Standard of Compensation' (1961-1962) 30 *Fordham L Rev* 727.

<sup>286</sup> Janusz Gilas, 'The Problem of the Appropriate Compensation Currency in International Law' (1983) 12 *Polish Y B Int'l L* 141.

<sup>287</sup> Frank G Dawson and Burns H Weston, 'Prompt, Adequate and Effective: A Universal Standard of Compensation' (1961-1962) 30 *Fordham L Rev* 727.

<sup>288</sup> F V García-Amador, 'The Proposed New International Economic Order: A New Approach to the Law Governing Nationalization and Compensation' (1980) 12 *Law Am* 1.

<sup>289</sup> *ibid.*

<sup>290</sup> Matthew C Porterfield, 'State Practice and the (Purported) Obligation under Customary International Law to Provide Compensation for Regulatory Expropriations' (2011-2012) 37 *N C J Int'l L & Com Reg* 159.

<sup>291</sup> Tarcisio Gazzini, 'Drawing the Line between Non-Compensable Regulatory Powers and Indirect Expropriation of Foreign Investment-An Economic Analysis of Law Perspective' (2010) 7 *Manchester J Int'l Econ L* 36.

Compensation, however, should not be coerced to the detriment of the country and its financial status.<sup>292</sup> Instead, the conditions of the host country should be taken into consideration, especially as the UN General Assembly has confirmed in its Decision No. 3171 of 1973 that nationalisation adopted by a country on the grounds of sovereignty and preservation of natural resources shall be implicitly inclusive of each and every country's right to define potential compensation and payment method thereof.<sup>293</sup> However, a host country should seriously consider fair compensation whereby a form of guarantee for foreign investment is secured.

## **2.4.2 Legislative Stability**

### ***2.4.2.1 The Concept***

Law is a phenomenon that emerges in human society for the regulation of diverse areas of behaviour.<sup>294</sup> Since societies are dynamic rather than static, the law must in like manner accommodate new phenomena and define obligatory legal courses of action for individuals to follow.<sup>295</sup> However, in international trade in general and in investment contracts in particular, there is an opposite trend towards constancy, that is, maintaining the law under which the contract was concluded so that the legal provisions in force at the time should not be subjected to amendment.<sup>296</sup> In order to a guarantee a stability that would motivate foreign investors to direct their investments to economically and politically important sectors, such as the oil sector, a host country may waive its sovereignty over its own territories.<sup>297</sup> An investor may not choose to operate in such sectors unless they are assured about their legal and economic position.<sup>298</sup> To this end, a contracting country may opt to undertake, under a legal provision or condition set forth in the relevant investment contract, to maintain the constancy of all the rules of the

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<sup>292</sup> Matthew C Porterfield, 'State Practice and the (Purported) Obligation under Customary International Law to Provide Compensation for Regulatory Expropriations' (2011-2012) 37 N C J Int'l L & Com Reg 159.

<sup>293</sup> UN General Assembly. Permanent Sovereignty Over Natural Resources No. 3171 (17 December 1973) XXVIII.

<sup>294</sup> Anthony Lynch and Peter Ziegler, 'The Amendment of Legislation' (1991) 12 Stat L Rev 48.

<sup>295</sup> As illustrated in the tribunal decision *AES Summit Generation Limited and AES-Tisza EröműKft v Hungary*, Award, 17 September 2010 (ICSID Case No ARB/07/22).

<sup>296</sup> A F M Maniruzzaman, 'National Laws Providing for Stability of International Investment Contracts: A Comparative Perspective' (2007) 8 J World Investment & Trade 233.

<sup>297</sup> Esa Paasivirta, 'Internationalisation and Stabilisation of Contracts versus State Sovereignty' (1989) 60 BYIL 315.

<sup>298</sup> *ibid.*

legal, economic and financial system under which the project was contracted.<sup>299</sup> In fact, the legislative constancy condition obliges a contracting country to keep constant the investment legal system under which the contract was agreed.<sup>300</sup> This condition of legislative constancy condition is an exception to the general rule that makes a contracted investor subject to the laws of the investment hosting state, and also subject to all legislative amendments to such laws during the contract term.<sup>301</sup> The obligation of constancy indemnifies a contracting investor against any subsequent legislative amendment that may be made to the rules of investment.<sup>302</sup> This condition draws its legal force from investment laws enacted by the legislative body of the contracting state.<sup>303</sup> The state in question thereby undertakes not to amend the local laws applicable to contracted investors, so as to provide appropriate guarantees and to encourage investment.<sup>304</sup>

Such constancy, however, may apply to all legal rules governing an investment or to some of them only. For example, constancy may be limited to the taxation system of an investment, so that rules of tax calculation, collection and the rate thereof may not be changed once the contract in question is concluded. It also provides for non-application of any taxes or charges introduced to the project at a later date.

#### ***2.4.2.2 Discussion of the Purposes***

The legislative constancy condition yields a stable contractual relation between an investor and the country. It allows an investor to take informed investment decisions and helps to maintain the expected profit rates of the business.<sup>305</sup> Economic variables and state sovereignty are factors that may threaten the legislative stability of the investment contracts and result in changes to the advantage of the host country, with the possibility of a diminution of the investors' rights or an increase in their obligations.<sup>306</sup> This accounts for the utmost importance of constancy in

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<sup>299</sup> Peter D Cameron, 'Stability of Contract in the International Energy Industry' (2009) 27 J Energy & Nat Resources L 305.

<sup>300</sup> Jean-Marc Loncle and Damien Philibert-Pollez, 'Stabilisation Clauses in Investments Contracts' (2009) 2009 Int'l Bus L J 267.

<sup>301</sup> Nagla Nassar, *Sanctity of Contracts Revisited: A Study in the Theory and Practice of Long-term Commercial Transactions* (Martinus Nijhoff, Dordrecht 1995) 28.

<sup>302</sup> *ibid.*

<sup>303</sup> Linnet Mafukidze, 'Legislative Drafting Tools for Stabilization Provisions and Economic Balancing Provisions' (2010) 12 Eur J L Reform 58.

<sup>304</sup> *ibid.*

<sup>305</sup> Jean-Marc Loncle and Damien Philibert-Pollez, 'Stabilisation Clauses in Investments Contracts' (2009) 2009 Int'l Bus L J 267.

<sup>306</sup> Linnet Mafukidze, 'Legislative Drafting Tools for Stabilization Provisions and Economic Balancing Provisions' (2010) 12 Eur J L Reform 58.



guaranteeing investors' rights in their relations with the host country. The enforcement of contract law is generally based on the will of the contracting parties, that is to say, the contract law is the one desired and agreed to by those parties. Consequently, legislative amendments introduced at a later date may lead to points of disagreement.<sup>307</sup> Conversely, enforcement of the new amendments entails subjection to a law other than the law agreed upon, and promotes the contractual disputes prospect under conflict of laws.<sup>308</sup> The legislative constancy condition may offer several advantages to a country seeking to attract investment, even though the condition infringes upon state sovereignty and may produce some legal disadvantages resulting from similar subjects being governed by different rules.<sup>309</sup> Further, it may prove harmful to the economic interests of such a country, since for a particular investment to be spared from the enforcement of legislative amendments could lead to discrimination between one incoming investment and another.<sup>310</sup>

Despite the fact that the legislative constancy condition, generally speaking, ensures benefits to the investor, since it indemnifies such an investor against legislative amendments that may be introduced to the investment law in the host country, it may deny investors other benefits that may be bestowed by legislation after the conclusion of the contract, for example, lower taxes. In such cases, can the investor be permitted to benefit from the newly adopted incentives? If they do so, they fall foul of the legislative constancy conditions.<sup>311</sup> Therefore, the author suggests that investment contracts should include an additional clause that ensures flexibility in the form of an option to be governed by the law most favourable to investment. This would certainly be more attractive to investors. A further question arises when the new law contains provisions featuring more benefits or incentives for investors, while having other provisions that diminish investors' rights.<sup>312</sup> If so, would it be legal to demand partial application of the law in question so that investors can select desirable provisions and decline others? The answer must be no, as investors must adopt both new incentives and obligations, that is, they must select the best law for their purposes.<sup>313</sup>

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<sup>307</sup> Jean-Marc Loncle and Damien Philibert-Pollez, 'Stabilisation Clauses in Investments Contracts' (2009) 2009 Int'l Bus L J 267.

<sup>308</sup> With regard to the internationalisation theory. *Aminoil v Kuwait* (1982) 21 ILM 1024.

<sup>309</sup> Esa Paasivirta, 'Internationalisation and Stabilisation of Contracts versus State Sovereignty' (1989) 60 BYIL 315.

<sup>310</sup> Linnet Mafukidze, 'Legislative Drafting Tools for Stabilization Provisions and Economic Balancing Provisions' (2010) 12 Eur J L Reform 58.

<sup>311</sup> Nagla Nassar, *Sanctity of Contracts Revisited: A Study in the Theory and Practice of Long-term Commercial Transactions* (Martinus Nijhoff, Dordrecht 1995) 97.

<sup>312</sup> *ibid.*

<sup>313</sup> S K C, 'The Stabilisation Clause Myth in Investment Agreements' (1988) 5 J Int'l Arb 97.

Overall, however, the constancy condition is favourable in its effect on the attraction of foreign capital.<sup>314</sup> In addition, the protection of the legal position of an investment that is particularly important to the nation's development can be extended, in terms of enforcement, to a large number of foreign projects that are less important.<sup>315</sup> Such 'reaching out', as part of the legislative constancy condition, conforms to the requirements for most-favoured nation status that may be set forth in an international agreement to which the country in question is a party.<sup>316</sup> Moreover, this condition can establish stability and trust between the country and the contracting investor as it allows an opportunity for inclusion within the framework a treatment not less than the level granted to any investor from another country.<sup>317</sup>

#### ***2.4.2.3 The Existing Debates of State Responsibility***

Some writers<sup>318</sup> regard a country's responsibility for the stability of investment-related legislation towards investors as a moral, rather than a legal, one. In explanation, they say that when a country contracts a natural or legal person, its national sovereignty does not become a point of potential waiver.<sup>319</sup> Additionally, every country is responsible for protecting the public interest, and so it should not be restricted in its power to take any action that ensures such interest, even if in doing so it runs counter to an investment contract.<sup>320</sup>

In fact, this opinion does not stand up to scrutiny, and lacks legal justification, since when a country is a party to a contract, even when there are legal problems regarding enforcement, such as state judicial immunity and the impartibility of enforcement, it nonetheless cannot evade its legal obligations.<sup>321</sup> The dominant juristic opinion is that a country is committed to fulfil the guarantees it offers to investors.<sup>322</sup> Violation of such obligations

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<sup>314</sup> Nagla Nassar, *Sanctity of Contracts Revisited: A Study in the Theory and Practice of Long-term Commercial Transactions* (Martinus Nijhoff, Dordrecht 1995) 63.

<sup>315</sup> *ibid.*

<sup>316</sup> Alejandro Escobar, 'An Overview of the International Legal Framework Governing Investment' (1997) 91 *Am Soc'y Int'l L Proc* 488.

<sup>317</sup> *ibid.*

<sup>318</sup> Peter D Cameron, 'Stability of Contract in the International Energy Industry' (2009) 27 *J Energy & Nat Resources L* 305; Linnat Mafukidze, 'Legislative Drafting Tools for Stabilization Provisions and Economic Balancing Provisions' (2010) 12 *Eur J L Reform* 58.

<sup>319</sup> Esa Paasivirta, 'Internationalisation and Stabilisation of Contracts versus State Sovereignty' (1989) 60 *BYIL* 315.

<sup>320</sup> *ibid.*

<sup>321</sup> Nagla Nassar, *Sanctity of Contracts Revisited: A Study in the Theory and Practice of Long-term Commercial Transactions* (Martinus Nijhoff, Dordrecht 1995) 94; Peter D Cameron, 'Stability of Contract in the International Energy Industry' (2009) 27 *J Energy & Nat Resources L* 305.

<sup>322</sup> Linnat Mafukidze, 'Legislative Drafting Tools for Stabilization Provisions and Economic Balancing Provisions' (2010) 12 *Eur J L Reform* 58.

would render the country internationally liable towards foreign investors.<sup>323</sup> A country that violates investment law and the rights of the foreign investor may choose to compensate the investor for the damage sustained in order to avoid political, economic and legal consequences.<sup>324</sup>

This study argues that a country has an obligation not to violate its commitments to a foreign investor. To argue otherwise is to abandon the principles of trust and good faith, which are vital components of a successful investment environment.

## 2.5 Conclusion

This chapter provides a description of investment in post-conflict countries and the reasons behind the reluctance of foreigners to invest in them. Further, it describes the consequences of conflicts from an analytical perspective: the high degree of risk due to political instability, the insecurity resulting from the fragility of peace, the legal uncertainty due to changing legislation and weakened judicial institutions, the huge failures throughout the market, and the damaged economic institutions. Consequently, post-conflict countries can be described as countries with abnormal economies. Research indicates<sup>325</sup> that foreign investors do calculate risks in a post-conflict environment and balance them against the potential revenues from investment opportunities. A foreign investor studies the human and material factors available to protect his investments, including the legal guarantees against risks in the host country. Often, the physical safety of the investment is the first of their many concerns. The investor will conduct an accurate analysis of the effect of the various risks, and a prioritised list of them will enable the foreign investor to make decisions on whether or not to proceed.

This chapter argues that attracting FDIs to post-conflict countries is a realistic possibility, given an appropriate reform plan and a credible peace. The reform team should determine the necessary investment rehabilitation objectives from the very beginning. Therefore, a post-conflict government should address risks by adopting laws and policies that send messages of assurance and encouragement to foreign investors in relation to reforms and investment opportunities. Throughout this study, the main object has been to indicate that

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<sup>323</sup> Jean-Marc Loncle and Damien Philibert-Pollez, 'Stabilisation Clauses in Investments Contracts' (2009) 2009 Int'l Bus L J 267.

<sup>324</sup> Nagla Nassar, *Sanctity of Contracts Revisited: A Study in the Theory and Practice of Long-term Commercial Transactions* (Martinus Nijhoff, Dordrecht 1995) 112.

<sup>325</sup> Rahim Mooloo and Alex Khachaturian, 'Foreign Investment in a Post-Conflict Environment' (2009) 10 J World Investment & Trade 341; Virtus C Igbokwe, Nicholas Turner, Obijiofor Aginam (eds), *Foreign Direct Investment in Post-Conflict Countries: Opportunities and Challenges* (Adonis & Abbey 2010) 301-303.

reforms must be accompanied with a political will to ensure the continuity and enforcement of reform processes, and by overall knowledge and priority-based planning. Over-hasty, uncharted reforms are vulnerable to ineffectiveness or total failure. Partial reforms may lead to results which are below expectations. Hasty decisions on political and security risks may involve instigating short-term reforms while neglecting a long-term plan for stability. The other option is well-planned reform policies leading to better benefits from FDIs in terms of economic development, higher government revenues and exports, goals that are achievable when there is a flow of capital into the sectors which need them most, especially the IT sector. The arguments of this chapter indicate that provision of guarantees against expropriation and stable national legislations will establish a pro-investment environment. However, the legal literature suggests that an investment environment requires further action to ensure a safe and attractive environment. This chapter also argues in favour of international agreements as being the most credible and acceptable, compared to guarantees at a national level offered by the host country. These conclusions point to the need for several courses of action for understanding and addressing the environment of foreign investments in the post-conflict countries.

The clear conclusion is that the private sector can assume a vital role in determining and prioritising reform objectives through the contribution of the business community to the development of the reform agenda. A government cannot on its own divine the needs of investment; this is rather the responsibility of the private sector in terms of prioritisation and scheduling of the reform agenda. In addition, provision of investment incentives and privatisation are useful to attract foreign investors into a high-risk environment.

Clearly, this chapter has thrown up many perceptions about the optimal strategy for reforming the post-conflict investment environment. The next chapters will assess the applicability to Iraq of the foundations for reform that have been outlined here, and these will require further investigation.

## Chapter III: Consequences of Conflicts on Foreign Investment: Matrix of Problems within Iraqi Environment

### 3.1 Introduction

To understand and study the conflict impact on the elements of foreign investment and investment environment in Iraq, a glimpse of the conflicts in Iraq's modern history is required. The modern history of Iraq starts in 1921 following the First World War and the formation of the League of Nations (LN).<sup>1</sup> Iraq became under the administrative mandate of the United Kingdom.<sup>2</sup> In 1932, Iraq won its independence and became a kingdom.<sup>3</sup> After the Second World War, Iraq participated in creating the United Nations in 1945.<sup>4</sup> Following the transformation into a republic after toppling the royal regime in the 14 July 1958 Revolution, the Ba'ath Party led a coup d'état in 1963, only to be followed by a period of coups and political turmoil up to 1968 when the Ba'ath Party again assumed power.<sup>5</sup> The Ba'ath Party retained power up to the military ousting of it and its then president, Saddam Hussein, by the Anglo-American invasion on 9 April 2003.<sup>6</sup>

This study analyses inherent limitations of the present Iraqi foreign investment environment, and aims at finding a roadmap for future reform and investment attraction. So what benefit might be derived from studying the history of foreign investment in Iraq? And how may such study serve the objective of this thesis?

The historical approach is not a major objective in itself in this chapter. However, the first purpose is to identify reasons and factors that led, over various eras, to a flourishing or diminishing foreign investment environment in Iraq. This will, in turn, provide an essential basis to interpret the current characteristics of the Iraqi investment environment. Second, no

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<sup>1</sup> Adeed Dawisha, *Iraq a Political History from Independence to Occupation* (Princeton University Press 2009) 11.

<sup>2</sup> *ibid* 8.

<sup>3</sup> William R. Polk, *Understanding Iraq: A Whistlestop Tour from Ancient Babylon to Occupied Baghdad* (IB Tauris & Co Ltd 2006) 67-68.

<sup>4</sup> UN. 'Growth in United Nations membership, 1945-present' (2014) <<http://www.un.org/en/members/growth.shtml>> accessed on 31 July 2014.

<sup>5</sup> Adeed Dawisha, *Iraq a Political History from Independence to Occupation* (Princeton University Press 2009) 172.

<sup>6</sup> James Dobbins, Seth G Jones, Benjamin Runkle, Siddharth Mohandas, *Occupying Iraq: a History of the Coalition Provisional Authority* (New York, Rand Corporation 2009) xiv.

future cures for current defects can be devised unless the foundations and reasons behind such defects over the past years are identified.

In fact, this chapter is necessary to understand the legal regulation of investment in Iraq, with a view to developing a secure foreign investment environment that complies with the rules of international law. In this chapter, focus has been given to the era before Saddam's fall (2003) as several legal foreign investment frameworks remain in force.<sup>7</sup> Further, the said era has taken its toll on Iraq at various legal, economic, and social levels.<sup>8</sup> Iraq went to three wars between 1980 and 2003, not to mention there being internal unrest and international economic sanctions.<sup>9</sup> Attempts for economic reforms and investment attraction were present, nonetheless, but never on a scale commensurate with the considerable problems. Reforms and implementation methods were equally inadequate.<sup>10</sup> This is a key chapter, since it details the main tools required to initiate the investment project, such as the financial markets. It further discusses the current situation concerning the protection of intellectual property and investment disputes settlement, as this constitutes a source of interest to foreign investors.

## **3.2 Legislative Volatility: A Political Analysis**

### **3.2.1 In General**

Investment, be it national or foreign, is linked to the political philosophy adapted by a state and adherence of the same to sovereignty. Some states believe that allowing a foreign investor to operate within the hosting country's territory causes infringement upon sovereignty and hence investment prevention or restriction due to strict adherence to such belief.<sup>11</sup> Iraq, from the introduction of the modern state in 1921 up to the massive change in 2003, has adopted the aforesaid belief.<sup>12</sup> Foreign investment has never received due attention. Iraq has in the past experienced a weakness in the attractiveness of the investment environment due to its history,

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<sup>7</sup> Jordan E Toone, 'Foreign Direct Investment in Post-War Iraq: An Investor's Introductory Guide to the Legal Framework' (2013) 9 *BYU Int'l L & Mgmt R* 141.

<sup>8</sup> Aeed Dawisha, *Iraq a Political History from Independence to Occupation* (Princeton University Press 2009) 240.

<sup>9</sup> *ibid* 230-133.

<sup>10</sup> Jordan E Toone, 'Foreign Direct Investment in Post-War Iraq: An Investor's Introductory Guide to the Legal Framework' (2013) 9 *BYU Int'l L & Mgmt R* 141.

<sup>11</sup> M Sornarajah, *The International Law on Foreign Investment* (3rd edn, Cambridge University Press, New York 2011) 72.

<sup>12</sup> Abbas Alnasrawi, *The economy of Iraq: Oil, Wars, Destruction of Development and Prospects, 1950-2010* (Westport, Connecticut London 2010) 62.

and the present status reflects a history of conflict, of ethnic rivalry, and of oppression of people seeking peace.<sup>13</sup>

Before the US-led invasion, Iraq's economy was fairly stable and run by the central government, but the most prominent feature of the Iraq economy was its strict prohibition of foreign business ownership of Iraqi companies.<sup>14</sup> Generally, the Iraqi government did not favour international investments, with the exception of Arab investors, because its local companies were predominantly state-owned, and in order to safeguard the domestication of the Iraq economy, heavy tariffs and penalties were imposed on foreign goods.<sup>15</sup>

After the US-led invasion, Iraq witnessed a turn of events because the interim government issued several binding regulations to privatise its local enterprises—a move which opened up the Iraqi economy to foreign investments.<sup>16</sup> It also has been fully legally considered when the newly formed legislators and government<sup>17</sup> attempted to introduce foreign capital into Iraq for a better economic situation after long-standing inflation and lack of resources as a result of consecutive events, wars, and economic sanctions imposed by international resolutions, especially the post-1991.<sup>18</sup> Economic reforms were not the only kind of reforms being undertaken in the Middle Eastern nation; it was affirmed that, for the country to sufficiently sustain its international investments, it had to reform its legislative laws and government institutions to attract more international investments.<sup>19</sup>

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<sup>13</sup> Adeed Dawisha, *Iraq a Political History from Independence to Occupation* (Princeton University Press 2009) 1.

<sup>14</sup> Abbas Alnasrawi, *The economy of Iraq: Oil, Wars, Destruction of Development and Prospects, 1950-2010* (Westport, Connecticut London 2010) 145.

<sup>15</sup> *ibid* 146.

<sup>16</sup> Christina C Benson, 'Jus Post Bellum in Iraq: The Development of Emerging Norms for Economic Reform in Post Conflict Countries' (2011-2012) 11 *Rich J Global L & Bus* 315.

<sup>17</sup> "Foreign Investment Order" This legislation, which was part of the 100 orders issued by the former US civilian administrator, Paul Bremer, when he was head of the Coalition Provisional Authority (CPA) during the first year occupation, has provided US groups a multitude of benefits. These benefits include: the full repatriation of profits earned in Iraq by foreign companies, the sale to foreign groups of all Iraqi companies, including banks, the privatisation of the entire Iraqi public sector, the total legal immunity occupants and their subcontractors in Iraq and the "national treatment" of foreign investment. The full text of these orders is available at the coalition Provisional Authority. 'CPA Official Documents' (2013) <<http://www.iraqcoalition.org/regulations/>> accessed 2 Feb 2014.

<sup>18</sup> Christina C Benson, 'Jus Post Bellum in Iraq: The Development of Emerging Norms for Economic Reform in Post Conflict Countries' (2011-2012) 11 *Rich J Global L & Bus* 315.

<sup>19</sup> Christopher J Coyne and Adam Pellillo, 'Economic Reconstruction amidst Conflict: Insights from Afghanistan and Iraq' (2011) 22 *Defence Peace Econ* 627.

### 3.2.2 The Promising Beginnings

The beginnings of foreign investment in Iraq date back to oil exploration in 1927.<sup>20</sup> Given Iraq's weak capabilities back then, it used foreign investments for oil exploration and marketing.<sup>21</sup> The fifty-fifty oil profit agreement with foreign oil companies increased investment projects.<sup>22</sup> Upon creation of the Construction Board by virtue of Law No 23 of 1950, Iraq used foreign companies to execute Iraq-based development projects by way of direct contracts with those companies.<sup>23</sup>

When the Iraqi state took shape in 1921, the government enacted the Industrial Project Promotion Law No 14 of 1929 that provided for a number of incentives and privileges including 15-year exemption from custom duties on equipment and machinery, 10-year exemption from income and property taxes, and export duty exemption. The Law was the first pro-investment Iraqi law.<sup>24</sup> During the royal era, that is, during the time of the Construction Board (1950–1958), the first Industrial Project Promotion Law No 43 of 1950<sup>25</sup> was enacted to provide for several advantages for investors, yet being the same ones provided for by the earlier Law No 14 of 1929. The same era witnessed the enactment of the Industrial Project Regulation No 18 of 1957,<sup>26</sup> which provided for some administrative measures as regards approvals and regulation. After the 14 July 1958 Revolution,<sup>27</sup> the Industrial Development Law No 31 of 1961 was enacted to attract private capital to the industrial sector.<sup>28</sup> However, this Law did not provide any additional privileges to the private industrial sector. It even stipulated at least 60% Iraqi capital in any project.<sup>29</sup>

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<sup>20</sup> Abbas Alnasrawi, *The economy of Iraq: Oil, Wars, Destruction of Development and Prospects, 1950-2010* (Westport, Connecticut London 2010) 2 (The first concession for oil exploration and production (duration of 75 years) was given to the Turkish Petroleum Company 'which later renamed the Iraq Petroleum company').

<sup>21</sup> Rex J Zedalis, *The Legal Dimensions of Oil and Gas in Iraq: Current Reality and Future Prospects* (Cambridge University Press 2009) 6.

<sup>22</sup> Abbas Alnasrawi, *The economy of Iraq: Oil, Wars, Destruction of Development and Prospects, 1950-2010* (Westport, Connecticut London 2010) 7.

<sup>23</sup> The Construction Board Law No 23 of 1950 published in the Official Gazette, issue 2836 of 27/05/1950.

{قانون إنشاء مجلس البناء رقم 33 لعام 1950 الملغي}

<sup>24</sup> See Article 3 of the Industrial Project Promotion Law No 14 of 1929.

{قانون تشجيع المشاريع الصناعية رقم 14 لعام 1929 الملغي}

<sup>25</sup> The Industrial Project Promotion Law No 43 of 1950 published in the Official Gazette, issue 2841 of 06/06/1950. {قانون تشجيع المشاريع الصناعية الأولى رقم 43 لعام 1950 الملغي}

<sup>26</sup> The Industrial Project Regulation Law No 18 of 1957 published in the Official Gazette, issue 3997 of 05/06/1957. {قانون تنظيم تأسيس المشاريع الصناعية رقم 18 لعام 1957 الملغي}

<sup>27</sup> Adeer Dawisha, *Iraq a Political History from Independence to Occupation* (Princeton University Press 2009) 63.

<sup>28</sup> The Industrial Development Law No 31 of 1961 published in the Official Gazette, issue 520 of 04/05/1961.

{قانون التنمية الصناعية رقم 31 لعام 1961 الملغي}

<sup>29</sup> See Article 9 paragraph 2 of the Industrial Development Law No 31 of 1961.

{ ان يكون (60%) على الاقل من رأسمال المشروع الاسمي والمدفوع عراقيا }



Iraq's early experience in the field of attracting foreign investment, particularly the oil investment as a milestone in investments during the early twentieth century, cannot be separated from the international effects and the politics. The main attributes of this period, and since 1921, were formed with the dominance of Britain in the administration of Iraq until the 1958 Revolution.<sup>30</sup> British support contributed to the formation of a better environment to attract investment, particularly oil, but eventually clashed with nationalisation procedures.

### 3.2.3 Disappointing End

From 1963, Iraq started to uphold the philosophy of the Socialist Camp, and prevented foreign companies and investments, even embarking on nationalisations and using public sector companies to directly execute state and infrastructure projects.<sup>31</sup> This trend was purely politically driven under the pretences of preservation of national independence, disengagement from Western countries, protection for national wealth, and ensuring protection for national industries.<sup>32</sup> Given such trend, several decrees and laws were enacted on foreign investments in Iraq including Arab Investment Law No 46 of 1988<sup>33</sup> and Arab Investment Law No 62 of 2002,<sup>34</sup> all of which aimed at attracting Arab investment and capital, giving Arab investments large exemptions.<sup>35</sup> The said laws and decrees were in line with the then nationalistic trends adopted by the Iraqi government to gain Arab favour for political, rather than economic reasons,<sup>36</sup> a condition dictated by the then prevalent political conditions. For the same reasons, these very decrees and laws were revoked by virtue of Decree No 23 of 1994 that put an end to Arab investments in Iraq as a message of protest against the Arab stance on the economic blockade against Iraq since 1990.<sup>37</sup>

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<sup>30</sup> BBC News Middle East, 24 June, 2014, 15:20 GMT, available at <<http://www.bbc.co.uk/news/world-middle-east-14546763>> accessed 25 March 2014.

<sup>31</sup> Abbas Alnasrawi, *The economy of Iraq: Oil, Wars, Destruction of Development and Prospects, 1950-2010* (Westport, Connecticut London 2010) 43-44.

<sup>32</sup> *ibid.*

<sup>33</sup> Arab Investment Law No 46 of 1988 published in the Official Gazette, issue 3199 of 25/04/1988.

{ قانون الاستثمارات العربية رقم 46 لسنة 1988 }

<sup>34</sup> Arab Investment Law No 62 of 2002 published in the Official Gazette, issue 3959 of 02/12/2002.

{ قانون الاستثمار العربي رقم (62) لسنة 2002 }

<sup>35</sup> Abdul-Hussein Tariq, *Economic Development and Workforce Planning in Iraq* (2nd edn, Dar Al Adalah 2013) 50. (Translated from Arabic Language by Author)

<sup>36</sup> *ibid.*

<sup>37</sup> Decree of the Revolutionary Command Council No. 23 of 1994, published in the Official Gazette, issue 3501 of 14/03/1994.

{ قرار مجلس قيادة الثورة المنحل بإيقاف العمل بالقوانين والقرارات التي تجيز تملك غير العراقي او استثمار امواله في الشركات داخل العراق }

As for foreign investment, it was officially prevented by virtue of Article 2, Paragraph 3 of Arab Investment Law No 46 of 1988.<sup>38</sup> This was sufficient to prevent the incorporation of/ or contribution by, any Iraqi joint venture with an Arab company with a foreign capital share irrespective of share percentage. This prevention was further established by Law No 25 of 1991 that prevented any expatriate Iraqi from having investment(s) in Iraq. The same applied to any Arab company regardless of how small their share capital in a company might be.<sup>39</sup>

Growing economic burdens forced the state to allow room for the private sector to assume some of such burdens, and hence the government's creation of free zones by virtue of Law No 3 of 1996<sup>40</sup> in a bid to attract Arab, foreign, and Iraqi capital. Many facilities were offered to achieve such attraction. These included Decree No 170 of 1998<sup>41</sup> to exempt free-zone working capitals from income tax. Further, and to the same end, a decree was issued in 1999 to create the Supreme Investment Authority in Iraq headed by the Minister of Planning with a mission to look into investment ventures proposed to the Iraqi government.<sup>42</sup> All such facilities were due to the extreme economic crisis, the loosening of which was the prime goal. However, such attempts never came to fruition.<sup>43</sup>

Enacting laws and decrees only to later revoke the same is a clear indication of the lack of vision, flounder, and political control over economic or reformatory considerations.<sup>44</sup> Despite facilities provided for by such laws/decrees, they failed to attract Arab and foreign capital into Iraq due to lack of trust in the former Iraqi regime and the hasty and floundering decisions thereof that ran counter to international laws and traditions. Accordingly, Iraq remained out of the foreign investment attraction area, and therefore lacked all potential technical and financial support at a time when the Iraqi economy needed it most.<sup>45</sup> Policies of

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<sup>38</sup> See Article 2, paragraph 3 of the Arab Investment Law No 46 of 1988.

<sup>39</sup> {المادة 2/ثالثا: - لا يجوز تأسيس المشاريع او المساهمة فيها من بل شركات يساهم فيها راس مال اجنبي مهما كانت نسبة مساهمته} Essam Al Tamimi and Adil Sinjakli, 'Legal Aspects of Setting up Business in Iraq and Iraqi Company Regulations' (1999) 14 Arab L Q 320.

<sup>40</sup> Law of the General Authority for Free Zones No. 3 of 1998 published in the Official Gazette, issue 3586 of 18/05/1998. {قانون الهيئة العامة للمناطق الحرة رقم 3 لسنة 1998}

<sup>41</sup> See Exemption of Investment Projects in the Free Zones and Capital Invested from the Income Tax and Stamp Duty Decree No. 170 of 1998 published in the Official Gazette, issue 4537 of 16/11/1998.

{قرار مجلس قيادة الثورة بمنح إعفاء مشاريع الاستثمار في المناطق الحرة ورؤوس الاموال المستثمرة فيها من ضريبة الدخل ورسم الطابع رقم 170 في 19/ 10/ 1998}

<sup>42</sup> Abdul-Hussein Tariq, *Economic Development and Workforce Planning in Iraq* (2nd edn, Dar Al Adalah 2013) 63. (Translated from Arabic Language by Author)

<sup>43</sup> *ibid.*

<sup>44</sup> Antonio F. Perez, 'Legal Frameworks for Economic Transition in Iraq-Occupation under the Law of War vs. Global Governance under the Law of Peace' (2004-2005) 18 *Transnat'l Law* 53.

<sup>45</sup> Essam Al Tamimi and Adil Sinjakli, 'Legal Aspects of Setting up Business in Iraq and Iraqi Company Regulations' (1999) 14 Arab L Q 320.

the former regime denied Iraq investment opportunities and capital accumulation, particularly when it squandered the cash surpluses realised during the 1970s in wars and political adventures that resulted in accumulating debts.<sup>46</sup> Therefore, Iraq became in dire need of foreign investment, and is still today, due to backward production methods, falling infrastructure, and the lack of sufficient finance to address such weaknesses.<sup>47</sup>

### 3.2.4 Analytical Interpretation

A fact that has become apparent over recent decades due to the actions of former regimes is that deterioration of the investment environment is the product of a negative political scene. This means that a dynamic kind of interaction and interdependent effect between reluctance of investors on one hand and slowing economic and social development on the other.<sup>48</sup>

Iraq has for decades, and is still, suffering under the crises effects as a result of failing development plans and programmes. Wrong policies, mismanagement of the national economy, excessive centralism, totalitarian way of thinking, militarised economy, political persecution, internal turmoil, and pointless wars over three decades of attrition, along with the blockade, have shackled Iraq with considerable problems.<sup>49</sup> The prevailing ideologies, which served as the framework for the political system particularly after the 1964 nationalisations, added insult to injury and frightened away the then newly rising private sector. Post-nationalisations Iraqi oil sector decision of 1972 brought great hope and inspiration for the creation of a safe and attractive environment for foreign investors.<sup>50</sup> However, the Iraq–Iran war of 1980–1988 destroyed such hope.<sup>51</sup> This was followed by the first Gulf War in 1991, economic blockade, and a group of post-Kuwait-invasion external economic, political, and military pressures, triggering full destruction of the infrastructure and production lines and leading to overwhelming long-term inflation-plagued recession. This reckless policy led to dangerous setbacks, resulting in deviating from the course of economic growth and deepening

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<sup>46</sup> *ibid.*

<sup>47</sup> Sabah Al-Mukhtar, 'Iraq' (1995) 2 Y B Islamic & Middle E L 131.

<sup>48</sup> Abbas Alnasrawi, *The economy of Iraq: Oil, Wars, Destruction of Development and Prospects, 1950-2010* (Westport, Connecticut London 2010) 127.

<sup>49</sup> Anthony Arrove, 'Iraq under Siege: The Deadly Impact of Sanctions and War' (2001-2002) 25 Suffolk Transnat'l L Rev 275.

<sup>50</sup> Abbas Alnasrawi, *The economy of Iraq: Oil, Wars, Destruction of Development and Prospects, 1950-2010* (Westport, Connecticut London 2010) 139,140.

<sup>51</sup> Anne-Marie Johnson, 'Financial and Economic Consequences of the Gulf War: Iraqi Responses' (1987) 11 Fletcher F Wld Aff 51; Richard Morgan Wilbur, 'The Iran-Iraq War: An Analysis of the Cease-Fire' (1990) 14 Fletcher F World Aff 111.

structural imbalances.<sup>52</sup> In light of this fact, one can understand the past situation in Iraq, that is: Firstly, a prevailing public sector that overwhelmed the economy as well as all other activities, low-quality production, a paralysed market economy, and a marginalised private sector.<sup>53</sup> Secondly, full dependence on the oil sector, being the only source of finance and accounting for 93% of the public budget, with most sources realised by Iraq over the last decades reserved for security and military expenditures.<sup>54</sup> Thirdly, increasing levels of unemployment (up to 50%) and pervasive poverty (35%) with incomes lower than USD 1 a day and 5% thereof living in abject poverty.<sup>55</sup> Fourthly, isolationist policy that led to aging institutions and administrative system, declining knowledge and technologies, and the use of obsolete production patterns.<sup>56</sup> Then, pervasive administrative and financial corruption in higher classes especially in the state-run institutions, and lack of transparency and accountability in disposing of state sources.<sup>57</sup> Next, considerable external debt.<sup>58</sup> Lastly, biased services among parts of Iraq and social segments thereof in favour of the loyal former regime categories.<sup>59</sup>

This general trend reduced the amount of support provided to human development, particularly the health and education sectors, a fact leading to graver risks and challenges faced by human development in Iraq coupled with pervasive poverty, inequality, other indications of social and cultural backwardness, and declining production.<sup>60</sup> Out of such a grim picture emerged the structural imbalances to the investment environment, which continued to decline.<sup>61</sup>

Iraqi economic environment painted its profiles during that period of full economic dependence on oil revenues, that is, expansive investment policies are adopted at times of

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<sup>52</sup> Roger Normand, 'Sanctions against Iraq: Is It Genocide' (2001) 58 *Guild Prac* 27.

<sup>53</sup> Abdul-Hussein Tariq, *Economic Development and Workforce Planning in Iraq* (2nd edn, Dar Al Adalah 2013) 65. (Translated from Arabic Language by Author)

<sup>54</sup> *ibid*

<sup>55</sup> Anthony Arno, 'Iraq under Siege: The Deadly Impact of Sanctions and War' (2001-2002) 25 *Suffolk Transnat'l L Rev* 275; Abbas Alnasrawi, *The economy of Iraq: Oil, Wars, Destruction of Development and Prospects, 1950-2010* (Westport, Connecticut London 2010) 147.

<sup>56</sup> S I Keethaponcalan, 'Economic Sanctions: The American Policy toward Iraq' (1999) 11 *Sri Lanka J Int'l L* 149.

<sup>57</sup> Charles Tiefer, 'The Iraq Debacle: The Rise and fall of Procurement-Aided Unilateralism as A Paradigm of Foreign War' (2008) 29 *U Pa J Int'l L* 1.

<sup>58</sup> David D Caron, 'The Reconstruction of Iraq: Dealing With Debt' (2005) 11 *U C Davis J Int'l L & Pol'y* 123.

<sup>59</sup> M Cherif Bassiouni, 'Postconflict Justice in Iraq' (2006) 33 *Hum Rts* 15.

<sup>60</sup> Antonio F Perez, 'Legal Frameworks for Economic Transition in Iraq-Occupation under the Law of War vs Global Governance under the Law of Peace' (2004-2005) 18 *Transnat'l Law* 53.

<sup>61</sup> *ibid*.

higher oil revenues; otherwise, deflationary policies are adopted.<sup>62</sup> Continuing non-productive economic policies that resulted in declining contributions by commodity sectors, especially the agricultural and manufacturing sectors, will lead to lower per-capita income but higher income discrepancies.<sup>63</sup> Continuing public (particularly military and security) and private expenditure and increasing luxurious lifestyles across state departments have paved the way for pervasive administrative and financial corruption across state economic, security, and administrative activities, all combined with an inflexible production structure, thus leading to higher importation rates.<sup>64</sup> The long-standing contradiction between necessary action for higher investment rates in productive fields and consumptive trends of economic policy makers is a fact that tips the scale in favour of consumptive activities, particularly defence and security activities. Such trends led to ever-increasing military expenditure at the expense of productive and human development fields.<sup>65</sup> The lack of a competitive production- and quality-driven economic environment between the public and private sectors led to a private sector incapable of fully contributing to development.<sup>66</sup> However, the government should attend to basic requirements for such development, including the provision of infrastructure such as services, ports, and roads, as well as water and electricity grids. The legal framework is not encouraging towards an open economy.<sup>67</sup> The legal environment does not support the policy of openness to foreign investment.<sup>68</sup> Therefore, it is normal that Iraqi laws are lacking in incentives and guarantees for investors.

### **3.3 Deterioration of Financial Markets: An Economic Analysis**

Financial markets across various countries are the cornerstones of national economies due to their role in providing monies, ranging from financial surplus units to deficits, with a view to meeting the countries' financial needs to fulfil their various missions and aims.<sup>69</sup>

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<sup>62</sup> Ryan Frei, 'Extracting Oil from Turmoil: The Iraqi Oil Industry and Its Role as a Promising Future Player in the Global Energy Market' (2004) 4 Rich J Global L & Bus 147.

<sup>63</sup> Richard Garfield, 'Health and Well-Being in Iraq: Sanctions and the Impact of the Oil-for-Food Program' (2001) 11 Transnat'l L & Contemp Probs 277.

<sup>64</sup> Christina C Benson, 'Jus Post Bellum in Iraq: The Development of Emerging Norms for Economic Reform in Post Conflict Countries' (2011-2012) 11 Rich J Global L & Bus 315.

<sup>65</sup> Abbas Alnasrawi, *The economy of Iraq: Oil, Wars, Destruction of Development and Prospects, 1950-2010* (Westport, Connecticut London 2010) 153,160.

<sup>66</sup> *ibid* 160.

<sup>67</sup> *ibid* 167.

<sup>68</sup> Essam Al Tamimi and Adil Sinjakli, 'Legal Aspects of Setting up Business in Iraq and Iraqi Company Regulations' (1999) 14 Arab L Q 320.

<sup>69</sup> Gokhan Capglu, 'The Internationalization of Financial Markets and Competitiveness in the World Economy' (1990) 24 J World Trade 111.

Historically speaking, the Iraqi financial market is one of the oldest Arab markets despite the fact that is relatively nascent compared to international financial markets.<sup>70</sup> There are many other companies operating in the Iraqi financial sector, such as exchange companies that started in 1980 and that are supervised by the Central Bank of Iraq, with their activities restricted to trading foreign currencies in Iraq against a minimum capital of USD 150. They numbered 488 companies.<sup>71</sup> Also, there are money transfer companies—non-banking financial institutions formed as per Directive No 93 of 2008 as issued by the Central Bank of Iraq. They conduct money transfers and deliveries inside and outside Iraq via the opening of bank accounts in Iraqi banks.<sup>72</sup> There are now 37 companies in total. The financial investment companies are regulated by the Financial Investment Company Regulation No 5 of 1998, and are allowed to conduct all investment activities such as selling and purchasing securities and bonds, establishing joint stock companies, and investing their monies in banks.<sup>73</sup> Also small and medium loan companies are one of the most recent operating establishments in Iraq.<sup>74</sup> A minimum capital of 1 billion Iraqi Dinars and 2 billion Iraqi Dinars for limited liability and joint stock companies, respectively, are required for such companies to operate under Directive No 3 of 2010 of the Central Bank of Iraq.<sup>75</sup> Other smaller-scale establishments exist, including the Zakat Fund and the Minors' Care Fund.<sup>76</sup>

One question that needs to be asked, however, is what made the financial markets in Iraq weak and backward. There are several reasons behind this fact—mainly the recent creation of joint stock companies, weak pre-oil Iraqi financial capabilities, and pervasive social poverty, as will be discussed in the following sections.<sup>77</sup>

<sup>70</sup> Abdul-Hussein Tariq, *Economic Development and Workforce Planning in Iraq* (2nd edn, Dar Al Adalah 2013) 14. (Translated from Arabic Language by Author).

<sup>71</sup> Central Bank of Iraq, *Iraq's Financial Market: the Reality and Future Developments* (Ministry of Finance CBI/F218A, 2012) 21-23.

<sup>72</sup> *ibid* 24.

<sup>73</sup> *ibid*.

<sup>74</sup> Abdul-Hussein Tariq, *Economic Development and Workforce Planning in Iraq* (2nd edn, Dar Al Adalah 2013) 17.

<sup>75</sup> Small and Medium Enterprises Policy Funds Financing System No 3 of 2010 published in the Official Gazette, issue 4164 of 20/09/2010. { تعليمات تنظيم عمل شركات تمويل المشاريع الصغيرة والمتوسطة رقم 3 لعام 2010 }

<sup>76</sup> Abdul-Hussein Tariq, *Economic Development and Workforce Planning in Iraq* (2nd edn, Dar Al Adalah 2013) 18.

<sup>77</sup> Sahar Nasr, Republic of Iraq: Financial Sector Review (The World Bank, 2012)x (key findings of the world bank report are as follows: '(i) Iraq's financial sector is dominated by the banking system, with most assets held by state-owned banks; (ii) many private banks are in the process of developing modern banking practices, but still need further strengthening and consolidation; (ii) other financial markets are concentrated at the Iraqi Stock Exchange but capitalization is low, and few instruments are traded; (iii) the insurance sector is small, dominated by state-owned enterprises, and is not supervised; (iv) weak financial infrastructure is a clear impediment to access to finance; and (v) SME and microfinance is not well developed') *ibid*, x.

### 3.3.1 The Banking Sector

#### 3.3.1.1 Outline

The Iraqi banking sector was initiated in the nineteenth century as a private sector with a number of Iraqi banks and branches for Arab and foreign banks, amounting to 17 branches in total.<sup>78</sup> Later, governmental banks were created including Industrial and Agricultural Bank in 1935, Al-Rafedayn Bank in 1941, Central Bank of Iraq in 1947, and Al-Aqari Bank in 1948, all of which marked the beginning of governmental and private banking on a competitive basis to provide better services for the public.<sup>79</sup> Such private creations were targeted by nationalisation measures in 1964, giving rise to four banking groups that were attached to Iraqi Commercial Bank, which, in turn, was merged with Al-Rafedayn Bank in 1974. Al-Rashid Bank was created in 1988 to release Al-Rafedayn Bank from the latter's external indebtedness and insolvency.<sup>80</sup>

Due to the economic siege and the government's desire to encourage internal savings, Law No 12 of 1991<sup>81</sup> was enacted to amend the Central Bank of Iraq's Law No 64 of 1976<sup>82</sup> to allow the private sector, once again, to create private banks.<sup>83</sup> This amendment resulted initially in two private banks in 1992 and ended up with 46 private banks with 913 branches guaranteed by 10 foreign bank branches up to 2011, in addition to 7 governmental commercial and specialised banks guaranteed by the Iraqi Commercial Bank.<sup>84</sup>

#### 3.3.1.2 The Diagnosis of Problems in the Banking Sector

When it comes to assessing the banking sector performance, problems suffered by that sector must be duly considered. Banking density<sup>85</sup> in Iraq has been one bank to every 46,632 people up to 2003 versus an international density criterion of one bank to every 10,000 people. This

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<sup>78</sup> Walid Abdel-Nabi, *Iraqi Banks: The Beginning, Evolution and Future Prospects* (Central Bank of Iraq CBI/BR 35, 2012) 12. (Translated from Arabic Language by Author).

<sup>79</sup> *ibid.*

<sup>80</sup> Kamal Al-Basri and Mudar Sbahi, *Public Sector Banking: Reality and the Policy of Reform* (Iraqi Institute for Economic Reform 12A, 2012) 7. (Translated from Arabic Language by Author).

<sup>81</sup> Law amending the Iraqi Central Bank Law No. 64 of 1976 published in the Official Gazette, issue 3356 of 03/06/1991. {قانون تعديل قانون البنك المركزي العراقي رقم 64 سنة 1976}

<sup>82</sup> Repealed this law, by the Iraqi Central Bank Law No. 56 of 2004.

<sup>83</sup> Walid Abdel-Nabi, *Iraqi Banks: The Beginning, Evolution and Future Prospects* (Central Bank of Iraq CBI/B35R, 2012) 18. (Translated from Arabic Language by Author).

<sup>84</sup> Edwin Black, *Banking on Baghdad: Inside Iraq's 7,000-Year History of War, Profit, and Conflict* (John Wiley & Sons, Inc 2004) 169.

<sup>85</sup> Banking density means the ratio of banks to population.

proves to what extent this sector in Iraq lags behind the international standards, as well as how incapable banks are of providing and promoting their services. The banking culture of some large capitalists is weak, leaving banks caught between the wishes of capital holders and appropriate banking rules.<sup>86</sup> Further, quality control, in terms of adherence to laws and regulations governing the banking sector, lacks necessary transparency.<sup>87</sup> In addition, the Iraqi banking sector suffers from the lack of effective banking strategies, annual ad-hoc plans, and emergency plans despite the relevant provisions of the Banking Law No. 94 of 2004.<sup>88</sup> Further, state-of-the-art technologies and fast means of communication do not exist.<sup>89</sup> As regards the banking environment, it lacks any supporting institutions—including deposit insurers, loan insurers, banking risk analysts, and think-tanks.<sup>90</sup>

Further to the above, there are government bank-related problems, mainly overemployment at the administrative level.<sup>91</sup> Governmental bank decisions are often political rather than economic due to the banking board formation mechanism which requires a chairperson and four employees chosen by the Minister of Finance in addition to four other elected members. This ensures majority on the side of appointed members when it comes to voting.<sup>92</sup> Further, capital base weakness is ascribed to the distribution of dividends of the government-run banks, with distributable profits accounting only for 30% of the commercial activity costs, and the remaining percentage going to the Ministry of Finance, of which only 12% is added to the capital base, something that prevented a number of government-run banks from reaching the minimum capital ratio.<sup>93</sup>

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<sup>86</sup> Sahar Nasr, *Republic of Iraq: Financial Sector Review* (The World Bank, 2012) 30; See also Michael F Silva and Sophia R Vicksman, 'A Central Banker in Iraq' (2004) 3 J Int'l Bus & L 7.

<sup>87</sup> Kamal Al-Basri and Mudar Sbahi, *Public Sector Banking: Reality and the Policy of Reform* (Iraqi Institute for Economic Reform 12A, 2012) 9. (Translated from Arabic Language by Author).

<sup>88</sup> *ibid.*

<sup>89</sup> *ibid.* 10. See also Timothy B Mills, 'Reconstructing Iraq: An Analysis of, and Proposed Solutions to, the Financing Challenges Facing Iraqi Small and Mid-Size Businesses' (2004) 32 Ga J Int'l & Comp L 125.

<sup>90</sup> Sahar Nasr, *Republic of Iraq: Financial Sector Review* (The World Bank, 2012) 31.

<sup>91</sup> Timothy B Mills, 'Reconstructing Iraq: An Analysis of, and Proposed Solutions to, the Financing Challenges Facing Iraqi Small and Mid-Size Businesses' (2004) 32 Ga J Int'l & Comp L 125.

<sup>92</sup> Kamal Al-Basri and Mudar Sbahi, *Public Sector Banking: Reality and the Policy of Reform* (Iraqi Institute for Economic Reform 12A, 2012) 9.

<sup>93</sup> Timothy B Mills, 'Reconstructing Iraq: An Analysis of, and Proposed Solutions to, the Financing Challenges Facing Iraqi Small and Mid-Size Businesses' (2004) 32 Ga J Int'l & Comp L 125 (Concluding that the government bank dividend distribution mechanism does not consider the real development needs of the governmental banking sector against Iraqi economic needs) *ibid.*



### 3.3.2 Insurance Sector: Review and Assessment

The existence of insurance companies in Iraq dates back to 1920 with 15 foreign and nine national insurers, of which two were state-owned.<sup>94</sup> In 1936, the first Iraqi national law<sup>95</sup> on supervising insurers was enacted only to be followed by Nationalisation Law No 99 of 1964<sup>96</sup> to wipe out the emerging capitalist base.<sup>97</sup> Nationalisation served no economic necessity, but it was all about the political climate in Iraq which, like other third-world countries, was nationalisation-friendly and considered nationalisation a form of socialism materialisation. In fact, nationalisation was a hurried and careless decision serving no purpose but bringing about socialism in Iraq. It has even been enforced as a taken-for-granted valid procedure. Moreover, no feasibility study has ever been conducted on nationalisation; not even a field industry survey was conducted.<sup>98</sup> Industries so nationalised were selected out of the Iraq Industry Guide, something that embarrassed the then Iraqi government considering the handicrafts covered by nationalisation decisions.<sup>99</sup> Even when it came to the legal drafting of the law, it was no better.<sup>100</sup> The tendency to politicise the administration was a negative nationalisation outcome. This came to light and grew stronger during Saddam's era (1979–2003) when security considerations and allegiance to the incumbent power were the overwhelming criteria for employment and promotion.<sup>101</sup> Of course, being a member of the ruling Ba'athist Party was a key consideration for recruitment and competition across state-run entities.<sup>102</sup> Nationalisation of insurance companies led to negative impacts on the insurance market structure and subsequent development. Following the above-mentioned era, the insurance market became restricted to three state-owned specialised companies,<sup>103</sup> and remained so until Companies Law

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<sup>94</sup> Abbas Alnasrawi, *The economy of Iraq: Oil, Wars, Destruction of Development and Prospects, 1950-2010* (Westport, Connecticut London 2010) 24.

<sup>95</sup> The Insurance Companies Law No. 74 of 1936 published in the Official Gazette, issue 1519 of 11/06/1936. { قانون شركات التأمين رقم (74) لسنة 1936 }

<sup>96</sup> Law nationalized some companies and establishments No. (99) of 1964 published in the Official Gazette, issue 975 of 14/07/1965. { قانون تأمين بعض الشركات والمنشآت رقم (99) لسنة 1964 }

<sup>97</sup> Musbah Kamal, 'The Nationalization of the Insurance Sector in Iraq' (2011) 12 Insurance Journal 45. (Translated from Arabic Language by Author).

<sup>98</sup> *ibid.*

<sup>99</sup> For example, the Inventory Committee of the nationalized companies and labs paid a visit to a soap production unit covered by nationalisation orders only to be astonished by the fact that the unit operates almost fully by hand and utilizes no equipment. By virtue of a subsequent order, the said unit has been spared the enforcement of the nationalisation order; *ibid.*

<sup>100</sup> Fouad Aziz, 'Insurance Reality in Iraq' (2012) 14 Insurance Journal 5. (Translated from Arabic Language by Author).

<sup>101</sup> Musbah Kamal, 'The Nationalization of the Insurance Sector in Iraq' (2011) 12 Insurance Journal 45.

<sup>102</sup> Fouad Aziz, 'Insurance Reality in Iraq' (2012) 14 Insurance Journal 5.

<sup>103</sup> National Insurance Company, the Iraqi Insurance Company and the Iraqi Re-insurance Company. See Sahar Nasr, *Republic of Iraq: Financial Sector Review* (The World Bank, 2012) 59.

No 21 of 1997<sup>104</sup> was enacted to allow the creation of private insurance companies. The number of private insurance companies increased to reach 29 companies as at April 2012.<sup>105</sup>

These companies characterised weak financial capabilities and limited insurance services. They were supervised by the Ministry of Finance and audited by the Central Bank in terms of loans offered and the investment portfolios owned thereby.<sup>106</sup> Studying the legacy of Iraq-based insurance companies helps understand the impact the political regime had on the economy and investment system, as well as the resulting negative impacts on the foreign investment environment.

### 3.3.3 The Status of the Iraqi Stock Exchange (ISX)

The Iraq Stock Exchange (ISX) dates back to 1932, the same year that marked the first legislation.<sup>107</sup> Trading was restricted to the industrial sector through the Industrial Bank that managed supply and demand. Kept that way up until the creation of the Baghdad Financial Market (BFM) in 1992, the ISX expanded thereafter to list four more sectors: industrial, service, agricultural, and financial.<sup>108</sup> Up to 2003, the ISX was an official market run and controlled by the state and connected to the Ministry of Finance in terms of all of its details. The post-Kuwait invasion (1991) economic sanctions contributed largely to keeping the ISX away from technological developments worldwide and hence the poorness, weakness, small-size, and limited variety of ISX investments.<sup>109</sup>

### 3.4 Status of Intellectual Property Rights: A Legal Analysis

All types of intellectual property rights were protected by laws enacted in Iraq relatively long ago. This even preceded the advent of the WTO and the TRIPS Agreement ('TRIPS').<sup>110</sup> It is noted also that there are several intellectual property right laws in Iraq, mainly the Copyright

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<sup>104</sup> The Companies Law No 21 of 1997 published in the Official Gazette, issue 3689 of 29/09/1997.

{قانون الشركات رقم (21) لسنة 1997}

<sup>105</sup> Fouad Aziz, 'Insurance Reality in Iraq' (2012) 14 Insurance Journal 5. (Translated from Arabic Language by Author).

<sup>106</sup> Sahar Nasr, *Republic of Iraq: Financial Sector Review* (The World Bank, 2012) 60, 61.

<sup>107</sup> Mustafa Jaffar, 'The Impact of the New Investment Law on the Iraqi Stock Exchange' (2011) 6 Accounting and Financial Studies Journal 84. (Translated from Arabic Language by Author).

<sup>108</sup> *ibid.*

<sup>109</sup> Sahar Nasr, *Republic of Iraq: Financial Sector Review* (The World Bank, 2012) 45-46. (Stating that the ISX established by virtue of the Law No. 74 of 2004 for purposes of regulating securities trading, the ISE has witnessed material developments at the lever of e-trading and same day issuance of certificates through depositing offices and relevant transfers).

<sup>110</sup> Bashar H Malkawi, 'Iraqi Patent Law: in Search of Compliance with TRIPS' (2007) 38 Int'l Rev Intell Prop & Competition L 591.

Law, the Trademark Law, the Patent Law and the Civil Law that regulates contractual provisions and regulated works (contractual responsibility and tortious liability) as well as the Penal Code.<sup>111</sup>

### **3.4.1 Patent, Industrial Design, Undisclosed Information, Integrated Circuits and Plant Variety Law of 2004**

Regulated under the Patent and Industrial Design Law No 65 of 1970, this Law has been amended to be titled Patent, Industrial Design, Undisclosed Information, Integrated Circuits and Plant Variety Law No 81 of 2004.<sup>112</sup> These kinds are described as follows:

1. Patents: The Planning and Developmental Cooperation is a department with the Ministry of Planning that is responsible for registration of patents. Article 5 of the aforesaid Law sets out the cases where patents are conferred: 'Patents shall be conferred based on the provisions hereof for each and every novel, innovatory and industrially applicable invention for a new industrial product, method or application for existing known industrial methods'.<sup>113</sup> Novelty is a requirement for Iraqi legislators to grant a patent.<sup>114</sup> Accordingly, an invention shall not be deemed novel if the same has already been used in the public domain inside or outside Iraq, or if the design/prototype thereof has been made public via periodic newsletters inside or outside Iraq so clearly that specialists have come to use it.<sup>115</sup> A patent may not be deemed novel if already conferred for the invention in question or any part thereof for a person other than the inventor, patent rights holder or any third party who has already applied for such patent or any part thereof.<sup>116</sup> The state shall record the patent in the name of the patentee in the Patent Register<sup>117</sup> unless the novelty in question is proven to be registered outside Iraq earlier whereupon it may be recorded in the owner's name.<sup>118</sup> Ownership of a patent shall be for the real patentee. If the novelty in question is the culmination of joint efforts by several persons, they shall jointly have claim thereto. Should several persons reach such novelty individually,

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<sup>111</sup> *ibid.*

<sup>112</sup> Patent, Industrial Design, Undisclosed Information, Integrated Circuits and Plant Variety Law No. 81 of 2004 published in the Official Gazette, issue 3983 of 01/06/2004.

{ قانون براءات الاختراع والنماذج الصناعية والمعلومات غير المفصح عنها والدوائر المتكاملة والاصناف النباتية }

<sup>113</sup> *ibid* Article 5.

<sup>114</sup> *ibid* Article 7.

<sup>115</sup> Bashar Hikmet Malkawi, 'Iraq's Accession to the WTO: Commitments and Implications' (2007) 6(2) JITLP 14.

<sup>116</sup> *ibid.*

<sup>117</sup> See Article 6 of the Patent and Industrial Designs Laws and Regulations No. 65 of 1970.

<sup>118</sup> Bashar H Malkawi, 'Iraqi Patent Law: in Search of Compliance with TRIPS' (2007) 38 Int'l Rev Intell Prop & Competition L 591.

the patent shall be conferred upon the first applicant.<sup>119</sup> As regards an invention under an employment contract between the innovator and the employer, the innovator may demand the employer to pay fair compensation (unless such employment contract provides for a certain amount for such innovation) and to place the innovator's name under the employer's in the patent.<sup>120</sup> A patent term shall expire only after 20 years from registration under the aforesaid Law.<sup>121</sup> As for the patentee's rights, they shall not be infringed or violated if such patent is used for the purposes of land, maritime, and/or aerial transportation by member states to the Paris Convention for the Protection of Industrial Property or WTO (or such members giving equal treatment rights to Iraq) during temporary or makeshift presence in Iraq.<sup>122</sup>

2. Industrial Designs: Prototype or industrial design registration application may be approved if the same meets the novelty requirement.<sup>123</sup> A design or an industrial design may not be novel if it has been displayed or publically described for use prior to completing a registration application or if it features key differences from a design or an industrial design.<sup>124</sup> The protection term for an industrial design is ten years from the date of issue of the certificate.<sup>125</sup>

3. Protection for Undisclosed Information: Pursuant to article 30 of the Patent Law under the Patent, Industrial Design, Undisclosed Information, Integrated Circuits and Plant Variety Law No 81 of 2004, individuals and companies shall have the power to legally withhold information within their disclosure, obtainment, use, or control against third parties without prior consent in a manner that does not violate established commercial traditions.<sup>126</sup>

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<sup>119</sup> Article 8 of the Patent, Industrial Design, Undisclosed Information, Integrated Circuits and Plant Variety Law No. 81 of 2004.

<sup>120</sup> Article 9 of the Patent, Industrial Design, Undisclosed Information, Integrated Circuits and Plant Variety Law No. 81 of 2004.

<sup>121</sup> Article 12 of the Patent, Industrial Design, Undisclosed Information, Integrated Circuits and Plant Variety Law No. 81 of 2004.

<sup>122</sup> Article 34 of the Patent, Industrial Design, Undisclosed Information, Integrated Circuits and Plant Variety Law No. 81 of 2004.

<sup>123</sup> Article 36, Paragraph A of the Patent, Industrial Design, Undisclosed Information, Integrated Circuits and Plant Variety Law No. 81 of 2004.

<sup>124</sup> Article 36, Paragraph B of the Patent, Industrial Design, Undisclosed Information, Integrated Circuits and Plant Variety Law No. 81 of 2004.

<sup>125</sup> Article 41 of the Patent, Industrial Design, Undisclosed Information, Integrated Circuits and Plant Variety Law No. 81 of 2004.

<sup>126</sup> Reporting that Article 30 of Patent, Industrial Design, Undisclosed Information, Integrated Circuits and Plant Variety Law No. 81 of 2004, stipulates that 'A- Is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question; B- Has commercial value because it is secret; and C- Has been subject to reasonable steps under the circumstances by the person lawfully in control of the information to keep it secret'.

4. Integrated Circuit Designs: An integrated circuit means a final or semi-final product consisting of a number of interconnected components at least one of which is inactive so that all such components are brought together in a given material object for the purposes of fulfilling an e-functionality.<sup>127</sup> Such designs are registered in a special 'Integrated Circuit Designs' record supervised by the registrar at the Ministry of Industry and Metals. Such registration requires the provision of information on design, owners' name(s) and addresses, and certificates issued thereto.<sup>128</sup>

5. New Plant Varieties: The Ministry of Agriculture regulates such kinds of rights, and hence maintains a register called the 'New Plant Varieties Register' in which information on new plant varieties is recorded.<sup>129</sup> The protection term extends an indefinite period from the date of registration.<sup>130</sup>

### 3.4.2 Trademarks

The Distinctive Marks Law No 39 of 1931<sup>131</sup> was the first legislation to regulate trademarks in Iraq. Later, this Law was replaced with Trademarks Law No 21 of 1957,<sup>132</sup> which is still in force.<sup>133</sup> It is noteworthy to mention that several amendments have been introduced to this Law, the most recent of which has been by virtue of Law No 9 of 2010,<sup>134</sup> which changed the title from 'The Trademarks and Trade Names Law' to 'The Trademarks and Geographical Indicators Law'.<sup>135</sup> The said amendment kept the Ministry of Industry and Metals in charge of trademark regulation.<sup>136</sup> Registration of a trademark has several phases starting with verification of the trademark to be registered against types and materials set forth in the registration application, announcement of feedback/notes in the verification report, and

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<sup>127</sup> Article 33 of Patent, Industrial Design, Undisclosed Information, Integrated Circuits and Plant Variety Law No. 81 of 2004; See also Razak Hamad, *Protection of property rights in Iraq* (2nd edn, Baghdad Press 2012) 128. (Translated from Arabic Language by Author).

<sup>128</sup> Elizabeth Mirza Al-Dajani, 'Post Saddam Restructuring of Intellectual Property Rights in Iraq Through a Case Study of Current Intellectual Property Practices in Lebanon, Egypt, and Jordan' (2006) 6 J Marshall Rev Intell Prop L i.

<sup>129</sup> Razak Hamad, *Protection of property rights in Iraq* (2nd edn, Baghdad Press 2012) 132.

<sup>130</sup> *ibid.*

<sup>131</sup> The Distinctive Marks Law No 39 of 1931 published in the Official Gazette, issue 969 of 16/04/1931.

{ قانون العلامة الفارقة رقم 39 لسنة 1931 }

<sup>132</sup> The Trademarks Law No 21 of 1957 published in the Official Gazette, issue 4003 of 16/06/1957.

{ قانون العلامات والبيانات التجارية رقم (21) لسنة 1957 }

<sup>133</sup> Razak Hamad, *Protection of property rights in Iraq* (2nd edn, Baghdad Press 2012) 132.

<sup>134</sup> Law No. 9 of 2010 amending Law No. 21 of 1957 on Trademarks and Trade Names published in the Official Gazette, issue 4144 of 15/02/2010. { تعديل قانون العلامات التجارية والأسماء التجارية رقم 21 لسنة 1957 }

<sup>135</sup> Elizabeth Mirza Al-Dajani, 'Post Saddam Restructuring of Intellectual Property Rights in Iraq Through a Case Study of Current Intellectual Property Practices in Lebanon, Egypt, and Jordan' (2006) 6 J Marshall Rev Intell Prop L i.

<sup>136</sup> *ibid.*

promulgation to ensure non-similarity of such trademark in anticipation of issuing the registration certificate.<sup>137</sup> Iraqi laws protect internationally recognised trademarks even if not registered in Iraq.<sup>138</sup> The aforesaid Law empowers investors to change ownership or to be given licences to use the registered trademark. The protection term lasts for 10 years for registered trademarks and can be extended for a further term if so desired by the owner. Registered trademarks in Iraq numbered 55,905 as at the end of 2010.<sup>139</sup>

### 3.4.3 Copyright

Copyright is regulated by the Copyright Law No 3 of 1971,<sup>140</sup> which had comprehensive provisions at that time but has grown outdated today considering the material importance of such rights. Therefore, the Law has been amended several times to ensure compatibility with currently applicable international criteria and adoption of WTO relevant criteria.<sup>141</sup> The Ministry of Culture assumes the responsibility of registering copyright with the Intellectual Property Rights Authority, a department within the said Ministry.<sup>142</sup> As regards the scope of protection, it covers authors of innovations in science, arts, and literature including translation works. This scope of protection has been extended to cover artistic performers and the exclusive right to broadcasts, public transmissions and innovative methods of communication. The protection term for the financial rights of an author extends for such author's lifetime and 50 years from the date of death.<sup>143</sup>

### 3.4.4 Iraq's Membership of International Agreements on Intellectual Property Rights

Iraq is party to a number of international agreements on intellectual property rights.<sup>144</sup> By virtue of Law No 212 of 1975,<sup>145</sup> Iraq joined the Paris Convention for the Protection of Industrial

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<sup>137</sup> Razak Hamad, *Protection of property rights in Iraq* (2nd edn, Baghdad Press 2012) 86.

<sup>138</sup> Article 4, Paragraph 2 of the Trademarks Law No. 21 of 1957. { قانون العلامات والبيانات التجارية }

<sup>139</sup> Razak Hamad, *Protection of property rights in Iraq* (2nd edn, Baghdad Press 2012) 90.

<sup>140</sup> The Copyright Law No 3 of 1971 published in the Official Gazette, issue 957 of 21/01/1971. { قانون حق المؤلف }

<sup>141</sup> Elizabeth Mirza Al-Dajani, 'Post Saddam Restructuring of Intellectual Property Rights in Iraq Through a Case Study of Current Intellectual Property Practices in Lebanon, Egypt, and Jordan' (2006) 6 J Marshall Rev Intell Prop L i.

<sup>142</sup> *ibid.*

<sup>143</sup> This right was granted by Article 2 of the Law No. 83 of 2004 amending Law No. 3 of 1971 on Copyright published in the Official Gazette, issue 3984 of 01/06/2004.

<sup>144</sup> Elizabeth Mirza Al-Dajani, 'Post Saddam Restructuring of Intellectual Property Rights in Iraq Through a Case Study of Current Intellectual Property Practices in Lebanon, Egypt, and Jordan' (2006) 6 J Marshall Rev Intell Prop L i.

<sup>145</sup> Law No 212 of 1975 on the ratification of the WIPO published in the Official Gazette, issue 2508 of 12/01/1976.

{ قانون رقم 212 في 1975 بشأن تصديق انضمام العراق الى اتفاقية باريس لحماية الملكية الصناعية وتعديلاتها و اتفاقية المنظمة العالمية للملكية الفكرية }

Property and the World Intellectual Property Organization (WIPO) Agreement. Further, Iraq became a member of WIPO in January 1976.<sup>146</sup> By virtue of Law No 41 of 1985,<sup>147</sup> Iraq became a member of the Arab Convention for the Protection of the Copyright. Later, Iraq joined the Arab Convention for the Protection of the Intellectual Property Rights by virtue of Law No 41 of 1985.<sup>148</sup>

### 3.4.5 Protection of Intellectual Property Rights

There are multiple laws regulating the protection of intellectual property rights in Iraq. Yet, existing conditions in Iraq indicate non-abidance by intellectual property right protection criteria recognised by international conventions. This still poses a source of threat for foreign investors.<sup>149</sup> However, intellectual property right laws in Iraq are outdated despite intermittent amendments and changes introduced thereto by Iraqi governments, and are yet to catch up with TRIPS requirements.<sup>150</sup> The existing procedures all relate to the right to file a case with a competent court in Iraq pursuant to the protection provisions of Code of Civil Procedure No 83 of 1969 ('CCP').<sup>151</sup> However, the Iraqi government plans to enact a new law regulating and protecting intellectual property rights, while entering into relevant agreements to regulate such rights.<sup>152</sup>

## 3.5 Settlement Operation of Investment Disputes: Litigation Assessments

An Investment Dispute Settlement Mechanism differs according to the dispute type and the parties thereto. Moreover, principally speaking, the Iraqi law is the enforceable law in this

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<sup>146</sup> US Department of State. '2013 Investment Climate Statement–Iraq' (February 2013) <<http://www.state.gov/e/eb/rls/othr/ics/2013/204661.htm>> accessed 12 Jan 2014.

<sup>147</sup> Law No. 41 of 1985 on the ratification of the Arab Convention for Copyright published in the Official Gazette, issue 3050 of 17/06/1985. {قانون تصديق الاتفاقية العربية لحقوق المؤلف رقم (41) لسنة 1985}

<sup>148</sup> US Department of State. '2013 Investment Climate Statement–Iraq' (February 2013) <<http://www.state.gov/e/eb/rls/othr/ics/2013/204661.htm>> accessed 12 Jan 2014.

<sup>149</sup> Bashar H Malkawi, 'Iraqi Patent Law: in Search of Compliance with TRIPS' (2007) 38 Int'l Rev Intell Prop & Competition L 591.

<sup>150</sup> US Department of State. '2013 Investment Climate Statement–Iraq' (February 2013) <<http://www.state.gov/e/eb/rls/othr/ics/2013/204661.htm>> accessed 12 Jan 2014. (Concluding that 'Iraq currently does not have adequate statutory protection for intellectual property rights (IPR). The GOI is in the process of developing a new IPR law to comply with the WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS)').

<sup>151</sup> The Code of Civil Procedure No 83 of 1969 published in the Official Gazette, issue 1766 of 10/11/1969.

{قانون المرافعات المدنية رقم 83 لسنة 1969}

<sup>152</sup> Bashar Hikmet Malkawi, 'Iraq's Accession to the WTO: Commitments and Implications' (2007) 6(2) JITLP 14.

respect.<sup>153</sup> Iraqi courts have jurisdiction over such disputes.<sup>154</sup> Yet, the Law of Investment in Iraq allows litigating parties to agree on another law for the purposes of settlement, and to opt for arbitration as a means of settlement of potential disputes since the national law and Iraqi courts are key players in investment dispute settlement.<sup>155</sup> Accordingly, it is imperative to expound on key features of the Iraqi judiciary in order to shed light on available capabilities intended to achieve settlement of foreign investment-related disputes, and to assess the ability of the local laws and courts to cope up with foreign investment contracts.

### 3.5.1 Distinctive Features of the Iraqi Judiciary

The first Iraqi law regulating the judiciary was No 31 of 1929,<sup>156</sup> and it created the Judges' Affairs Committee,<sup>157</sup> which served as the caretaker of judges and court structures.<sup>158</sup> The Judicial Council enjoyed administrative and financial independence to a large extent in that period. However, when Ministry of Justice Law No 101 was enacted in 1977,<sup>159</sup> and with the creation of the Justice Council,<sup>160</sup> such independence started to diminish.<sup>161</sup> By virtue of the aforesaid Law, the judiciary became part of the Ministry of Justice for all purposes, that is, in terms of the courts' administrative and financial affairs. In this respect, Justice Medhat Al-Mahmoud<sup>162</sup> said:

The dissolution of the Judicial Council and assigning the Justice Council the affairs of judges and prosecution general members have served as a dangerous recantation in the history of the Iraqi Judiciary and from the independent judiciary principle. A council presided over by the Minister of Justice! A minister, not matter how much independent, is still a part of the executive power, enforcing its policies and caring for its interests, even if such interests are in conflict with individual rights.<sup>163</sup>

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<sup>153</sup> Sami Shubber, *The Law of Investment in Iraq* (New York, Brill 2009) 129.

<sup>154</sup> *ibid.*

<sup>155</sup> *ibid.*

<sup>156</sup> The Law of Judges and Governors No. 31 of 1929 published in the Official Gazette, issue 79 of 05/09/1929.

{قانون الحكام والقضاة رقم 31 لسنة 1929 الملغى}

<sup>157</sup> This Committee's work is similar to that of the present Supreme Judicial Council (SJC). *See* Article 3 of the Law of Judges and Governors No. 31 of 1929.

<sup>158</sup> The name and provisions of this Committee have been changed several times in 1945, 1956 and 1963. Medhat Al-Mahmoud, *The Judiciary in Iraq* (3rd edn, Judicial Institute 2011) 22. (Translated from Arabic Language by Author).

<sup>159</sup> The Law of the Ministry of Justice No. 101 of 1977 published in the Official Gazette, issue 2602 of 01 August 1977. {قانون وزارة العدل رقم 101 لسنة 1977}

<sup>160</sup> An authority assuming the functions of the Judicial Council. Medhat Al-Mahmoud, *The Judiciary in Iraq* (3rd edn, Judicial Institute 2011) 42.

<sup>161</sup> *ibid.*

<sup>162</sup> Medhat Al-Mahmoud is the SJC Chairperson for the period 2005 to date.

<sup>163</sup> Medhat Al-Mahmoud, *The Judiciary in Iraq* (3rd edn, Judicial Institute 2011) 43.



According to above, judges suffered heavily in fulfilling their mission, with unjustified punishments against judges, such as arbitrary secondment/relocation, reduction to a civil position, discharge, and even imprisonment in cases of standing up to governmental wishes or personal interests of highly placed individuals of the Ba'ath Party.<sup>164</sup> Independent, honest, and non-Ba'athist judges and prosecutors general were denied senior judicial positions. In turn, the door to such senior positions was left wide open for unqualified Ba'athist persons who had their way cleared into the judiciary and senior positions.

Moreover, there were several weaknesses in the judiciary such as the lack of accountability and transparency.<sup>165</sup> Undoubtedly, accountability and access to information on court activities were restricted to litigation only.<sup>166</sup> No further legal education was in place for judges, leaving judges incapable of keeping up with legal developments. Further, education was a particularly unattainable luxury for newly placed judges who lacked easy access to court orders handed down elsewhere in Iraq.<sup>167</sup> In a blatant violation of gender equality rules, women were denied access to judicial positions from 1984 to 2003.<sup>168</sup> Equally disgraceful has been the unrealised equal representation of all ethnic and religious sects in the judiciary—a problem due in reality to the overwhelming Ba'athist control over the power to appoint judges, thus favouring a certain sect at the expense of the others.<sup>169</sup>

### 3.5.2 Structure of the National Courts

There have been a number of laws regulating court structure, the most important of which have been the Constitution, the CCP, and Judicial Regulation Law No 160 of 1979.<sup>170</sup> The court structure comprises civil and criminal courts. Civil courts have two litigation degrees, courts of first instance and courts of appeal, while criminal courts branch out into criminal courts with

<sup>164</sup> American Bar Association, 'Judicial Reform Index for Iraq' (July 2006) <<https://apps.americanbar.org/rol/publications/jri-iraq-2006.pdf>> accessed 12 Mar 2014.

<sup>165</sup> Adnan Almrjani, *Impact of the Judiciary Independence* (Najaf, Al Nibras 2008) 168. (Translated from Arabic Language by Author).

<sup>166</sup> American Bar Association, 'Judicial Reform Index for Iraq' (July 2006) <<https://apps.americanbar.org/rol/publications/jri-iraq-2006.pdf>> accessed 12 Mar 2014.

<sup>167</sup> Adnan Almrjani, *Impact of the Judiciary Independence* (Najaf, Al Nibras 2008) 172.

<sup>168</sup> American Bar Association, 'Judicial Reform Index for Iraq' (July 2006) <<https://apps.americanbar.org/rol/publications/jri-iraq-2006.pdf>> accessed 12 Mar 2014 (stressing that '[d]espite some progress in achieving gender balance within Iraqi courts, women still represent less than two percent of the judiciary (13 women out of 738 sitting judges). The main reason for this disparity is the legacy of the Baath regime, when women were banned from the bench for nearly 20 years during 1984-2003').

<sup>169</sup> *ibid* (describing that '... it appears that full representation for all ethnic and religious groups in the judiciary has not yet been attained, due mainly to decades of Baath domination of the courts, which favoured Sunni Arabs over other minorities').

<sup>170</sup> The Judicial Regulation Law No 160 of 1979 published in the Official Gazette, issue 2746 of 17/12/1979. {قانون التنظيم القضائي رقم (160) لسنة 1979}

jurisdiction over serious crimes and misdemeanour courts with jurisdiction over less serious crimes and juvenile delinquencies.<sup>171</sup> The court structure also includes the Court of Cassation, which is defined in the judiciary Regulation Law No 160 of 1979 as the supreme judiciary body that conducts supervisory activities over all courts, with sole jurisdiction to hear cassation appeals submitted against judgments and orders handed down by the courts of appeal.<sup>172</sup> The Court of Cassation shall not constitute a litigation degree, but rather a ‘reviewing’ and ‘supervisory’ court, that is, it shall not have the jurisdiction to hear any pleading in the course of any case. However, it shall be entitled to hand down a judgment should it find any such pleading valid for abrogation of a previous judgment and/or order.<sup>173</sup> The Court of Cassation works independently from the Supreme Judicial Council (SJC); the former is not attached to the SJC, and has an independent budget.<sup>174</sup>

As for the appeal courts, Iraq is divided into 14 appeal jurisdictions.<sup>175</sup> A court of appeal is the supreme judicial body in the jurisdiction thereof, with other courts in the same jurisdiction attached thereto.<sup>176</sup> A court of appeal plays a key role in distributing judicial work to judges in such courts, while providing them with all their needs in coordination with the SJC.<sup>177</sup> As for competence, the CCP assigns to a court of appeal the duty of looking into appeals filed against any court of first instance judgments of more than 1,000 Iraqi Dinars as well as against bankruptcy and liquidation court orders. In short, a court of appeal is a second-degree court.<sup>178</sup> With regard to the courts of first instance, the CCP provides: ‘One or more courts of appeal shall be formed in the provincial capital of each and every governorate’. Such courts may also be formed in the outskirts.<sup>179</sup> A court of first instance shall consist of one judge and shall operate in accordance with competences set forth in the CCP. Such courts shall look into

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<sup>171</sup> Essam Al Tamimi and Adil Sinjakli, 'Legal Aspects of Setting up Business in Iraq and Iraqi Company Regulations' (1999) 14 Arab L Q 320.

<sup>172</sup> See Article 12 of the Judicial Regulation Law No 160 of 1979 published in the Official Gazette, issue 2746 of 17/12/1979.

<sup>173</sup> See Article 13 of the Judicial Regulation Law No 160 of 1979 published in the Official Gazette, issue 2746 of 17/12/1979.

<sup>174</sup> Adam Wahib Al-naddawy, *Civil Procedure* (Baghdad University, College of Law 1988) 70. (Translated from Arabic Language by Author).

<sup>175</sup> *ibid.*

<sup>176</sup> Medhat Al-Mahmoud, *The Judiciary in Iraq* (3rd edn, Judicial Institute 2011) 63. (Translated from Arabic Language by Author).

<sup>177</sup> Adnan Almrjani, *Impact of the Judiciary Independence* (Najaf, Al Nibras 2008) 57. (Translated from Arabic Language by Author).

<sup>178</sup> Adam Wahib Al-naddawy, *Civil Procedure* (Baghdad University, College of Law 1988) 94.

<sup>179</sup> Article 21 of the Judicial Regulation Law No. 160 of 1979 published in the Official Gazette, issue 2746 of 17/12/1979.

civil cases set forth in the aforesaid law.<sup>180</sup> Their judgments shall be appealable before the court of appeal within the geographical jurisdiction.<sup>181</sup>

In addition, the Labour Law provides for the creation of one or more labour courts in each governorate and they shall convene by one judge.<sup>182</sup> In the event of non-creation, the jurisdiction thereof shall be vested in the relevant court(s) of first instance. As for their decisions, they are final but appealable before the Court of Cassation. Labour Courts have jurisdiction over labour law-related cases and issues, retirement law, and social security for workers. In total, there are 14 labour courts across Iraq.<sup>183</sup> Likewise, Customs Courts have jurisdiction over customs cases. They must have one chief judge and another member judge, in addition to an advocate officer nominated by the Minister of Finance. Judgments handed down by such court are final but appealable before the Court of Cassation by virtue of the Customs Law. In total, there are three customs courts in Iraq.<sup>184</sup> In contrast, the Administrative Courts is not part of the SJC, as the relevant law provides for the creation of such court based on the Law of the Administrative Law Court No.106 of 1989<sup>185</sup> considering the connection between the Administrative Court and the State Shura Council (SSC).<sup>186</sup> Competencies of the Administrative Court include looking into the validity of administrative orders and decisions taken by employees and authorities of the state. Judgments handed down by the Administrative Court shall be appealable before the General Authority of the SSC. Creation of this court has been limited to the capital, Baghdad.<sup>187</sup> In addition to all of the aforesaid courts, there are other types of specialised courts (other than civil and commercial courts)—courts of civil material, courts of personal status, criminal courts, misdemeanour courts, juvenile courts, investigation courts, and the Supreme Iraqi Criminal Court.<sup>188</sup>

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<sup>180</sup> Adam Wahib Al-naddawy, *Civil Procedure* (Baghdad University, College of Law 1988) 62.

<sup>181</sup> *ibid.*

<sup>182</sup> Article 137 of the Labour Law No. 17 of 1987 published in the Official Gazette, issue 3163 of 17/08/1987.

<sup>183</sup> Medhat Al-Mahmoud, *The Judiciary in Iraq* (3rd edn, Judicial Institute 2011) 63. (Translated from Arabic Language by Author).

<sup>184</sup> Adam Wahib Al-naddawy, *Civil Procedure* (Baghdad University, College of Law 1988) 64. (Translated from Arabic Language by Author).

<sup>185</sup> Law No. 106, Second Amendment to the State Shura Law No. 65 of 1979 published in the Official Gazette, issue 3285 of 11/12/1989. {قانون التعديل الثاني لقانون مجلس شورى الدولة رقم (65) لسنة 1979}

<sup>186</sup> Essam Al Tamimi and Adil Sinjakli, 'Legal Aspects of Setting up Business in Iraq and Iraqi Company Regulations' (1999) 14 Arab L Q 320.

<sup>187</sup> Adnan Almrjani, *Impact of the Judiciary Independence* (Najaf, Al Nibras 2008) 207. (Translated from Arabic Language by Author).

<sup>188</sup> Adam Wahib Al-naddawy, *Civil Procedure* (Baghdad University, College of Law 1988) 66.

### 3.5.3 International Arbitration as an Option for Investment Dispute Settlement

#### 3.5.3.1 Rules of Arbitration

Even though Iraq has its own unique set of arbitration laws,<sup>189</sup> it is important to note that any arbitration proceedings taking place in the country are normally considered a domestic issue (even though they may involve a foreign party) in accordance with articles 251-276 of the CCP, but with the recent changes in legislation, foreign nationals or parties can decide to choose foreign arbitration if they so wish.<sup>190</sup> However, under Iraqi arbitration law, arbitration can be applied in almost all future and existing arbitration cases but provisions to arbitrate are normally included as a separate clause in most investment contracts. This means that the additional arbitration clause is often optional.<sup>191</sup> However, in insurance cases, the insurance clause is often mandatory. The arbitration clause is normally included like any other contractual clause, and therefore any dispute arising from the contract is arbitral.<sup>192</sup> Notwithstanding this, only disputes that appear to have the potential for compromise/ settlement between the parties shall be subject to arbitration, but those which do not satisfy such test are often solved using other mechanisms.<sup>193</sup>

Matters deemed capable of being compromised/settled under Iraqi arbitration laws are, however, well defined in article 704/2 of Iraqi Civil Law No 40 of 1951,<sup>194</sup> Saleh notes:

Matters which are capable of being compromised are those which are capable of being disposed of for valuable consideration, and they must be defined or known. Matters related to public policy or criminal acts may not be subject to arbitration in case of a dispute. But, financial consequences or damages arising from criminal acts or from personal matters may be subject to arbitration.<sup>195</sup>

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<sup>189</sup> Sophie Lafont, 'L'arbitrage en Mésopotamie' (2000) 2000 *Revue de l'Arbitrage* 557.

<sup>190</sup> Sami Shubber, *The Law of Investment in Iraq* (New York, Brill 2009) 129.

<sup>191</sup> Akram Yamulki, 'National Report for Iraq' in *Yearbook Commercial Arbitration* (Kluwer Law International 1979) 105.

<sup>192</sup> Mahir Jalili, 'International Arbitration in Iraq' (1987) 4 *J Int'l Arb* 109.

<sup>193</sup> Akram Yamulki, 'National Report for Iraq' in *Yearbook Commercial Arbitration* (Kluwer Law International 1979) 105.

<sup>194</sup> Article 704/2 of the Iraqi Civil Code No. 40 of 1951 stipulates that 'No composition may be concluded in respect of matters related to the public order or morality; but composition is allowable in respect of financial interests which result from the personal status or which arise from the composition of an offence.' The Iraqi Civil Code No. 40 of 1951 published in the Official Gazette, issue 3015 of 08/09/1951.

{المادة 2/704 من القانون المدني العراقي تنص على: ولا يجوز الصلح في المسائل المتعلقة بالنظام العام أو الآداب، ولكن يجوز الصلح على المصالح المالية التي تترتب على الحالة الشخصية أو التي تنشأ عن ارتكاب احدي الجرائم}

<sup>195</sup> Saleh Majid, 'Arbitration in Iraq' (2004) 19 *Arab L Q* 267-268.

At times, many cases arise where a contractual agreement is deemed null and void and an arbitrary clause is still in effect, leading to a conflict of interpretation on whether arbitration still stands valid or is invalid like the contractual agreement.<sup>196</sup> The Iraqi civil law No. 40 of 1951 is, however, short of providing a clear framework for analysing such a dispute because makes no provision for such conflicts.<sup>197</sup> However, Saleh notes that it is often assumed by many parties that the arbitration clause is independent from the contractual agreement and therefore it is not valid if the contract is rendered invalid.<sup>198</sup> Saleh bases his argument upon article 139 of the Iraqi civil code<sup>199</sup> which stipulates that ‘Where a part of the contract is void that part only will be void and the remaining part of the contract will remain valid and considered as an independent (separate) contact unless it is revealed that the contract would not have been the intention to execute.’<sup>200</sup>

With regard to the appointment of arbitrators, there is no clearly defined framework through which arbitration judges are appointed, but certain universal benchmarks are applied.<sup>201</sup> As a recent development in Iraqi law, the country does not forbid the inclusion of foreign arbitrators because there is no such provision in its laws.<sup>202</sup> Evidence of such was noted from a case between an already dissolved reconstruction council of Iraq and an Iraqi construction company where the two parties referred their arbitration case to a foreign party. The decision arrived at was respected by one of the parties and compliant by the law (it was, however, appealed by the other party but ultimately approved by the Court of Cassation).<sup>203</sup> The number of arbitrators appointed to hear a specific arbitration case is usually determined by the parties, and often the total number will be an even number to represent equal interests of both parties.<sup>204</sup> Article 256 of the CCP stipulates that if one of the parties fails to appoint an arbitrator, such matters may be referred to the Iraqi court, which will ultimately carry out the

<sup>196</sup> *ibid.*

<sup>197</sup> Akram Yamulki, 'National Report for Iraq' in *Yearbook Commercial Arbitration* (Kluwer Law International 1979) 106.

<sup>198</sup> Saleh Majid, 'Arbitration in Iraq' (2004) 19 Arab L Q 267.

<sup>199</sup> *ibid.*

<sup>200</sup> See Article 139 of the Iraqi Civil Code No. 40 of 1951 published in the Official Gazette, issue 3015 of 08/09/1951.

{المادة 139 من القانون المدني العراقي تنص: اذا كان العقد في شق منه باطلا فهذا الشق وحده هو الذي يبطل، اما الباقي من العقد فيظل صحيحا باعباره عقدا مستقلا الا اذا تبين ان العقد ما كان ليتم بغير الشق الذي وقع باطلا}

<sup>201</sup> Akram Yamulki, 'National Report for Iraq' in *Yearbook Commercial Arbitration* (Kluwer Law International 1979) 107.

<sup>202</sup> Abdul Hamid El Ahdab & Jalal El Ahdab, *Arbitration with the Arab Countries* (Kluwer Law International 2011) 231.

<sup>203</sup> Saleh Majid, 'Arbitration in Iraq' (2004) 19 Arab L Q 267.

<sup>204</sup> Abdul Hamid El Ahdab & Jalal El Ahdab, *Arbitration with the Arab Countries* (Kluwer Law International 2011) 242.

function instead. When the court makes such a decision on behalf of the party, none of the parties has the right to challenge the court's decision; mostly because they had an opportunity to choose the correct candidate but failed to do so.<sup>205</sup> However, in cases where a party feels that the other has appointed a wrong arbitrator (probably on the basis of the same grounds they would use in challenging the appointment of a judge), the party may request the court to revoke such appointment.<sup>206</sup> Such grounds for disqualification are summarised by Saleh who refers to:

Article 93 of the CCP which provides that an arbitrator can be disqualified by the court for reasons such as existence of an employment relationship, or if there is a friendship or enmity between the arbitrator/judge and the party concerned, or if the arbitrator/judge has already rendered an opinion on the case, or has accepted presents or payment.<sup>207</sup>

However, an arbitrator's appointment can still be revoked under article 91 of the CCP, which provides that in the event that one of the parties has a blood or marriage relationship with the arbitrator, the arbitrator's appointment may be revoked.<sup>208</sup> In the event of other bases of impartiality (such as an arbitrator should have no interest whatsoever in the case or he/she should not be an agent of any of the parties) may apply, and therefore all parties are bound by such stipulations.<sup>209</sup> However, where a party feels wronged by a court's decision to disqualify an arbitrator, the party may still appeal such a decision (in accordance with article 261 of the CCP).<sup>210</sup> In cases where an award is already stipulated or a decision is arrived at, and the basis of the arbitrator is later found to be wrong, the award or decision can be revoked on the same grounds. Article 260 of the CCP defines the dismissal or resignation of arbitrators by stipulating that an arbitrator cannot resign unless sufficient and valid reasons are provided and cannot be dismissed by a single party.<sup>211</sup>

Under Iraqi arbitration laws, the procedural law is used as one of the applicable laws in arbitration. In accordance with article 265 of the CCP, all arbitration proceedings should be undertaken in accordance with the procedural laws set out in the CCP, unless the parties decide otherwise (meaning that the parties are at liberty to choose other procedural rules, such as the

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<sup>205</sup> Mahir Jalili, 'International Arbitration in Iraq' (1987) 4 J Int'l Arb 109.

<sup>206</sup> Article 261/1 of Code of Civil Procedure No. 83 of 1969 published in the Official Gazette, issue 1766 of 10/11/1969.

<sup>207</sup> Saleh Majid, 'Arbitration in Iraq' (2004) 19 Arab L Q 267, 269.

<sup>208</sup> Akram Yamulki, 'National Report for Iraq' in *Yearbook Commercial Arbitration* (Kluwer Law International 1979) 108.

<sup>209</sup> *ibid.*

<sup>210</sup> Saleh Majid, 'Arbitration in Iraq' (2004) 19 Arab L Q 267.

<sup>211</sup> Abdul Hamid El Ahdab & Jalal El Ahdab, *Arbitration with the Arab Countries* (Kluwer Law International 2011) 230.

UNCITRAL arbitration rules).<sup>212</sup> Other procedural regulations defined in the CCP, but which are of an optional nature, may also be avoided by the parties, so long as they do not contravene the moral philosophy of the country.<sup>213</sup> The substantive law is also another applicable law under Iraqi arbitration proceedings and mostly defines the applicable law to be used in any given arbitration dispute.<sup>214</sup> Disputes between two Iraqi parties are usually resolved under Iraqi law, but the major issue of contention arises when arbitrating foreign disputes in Iraq.<sup>215</sup> Article 25/1 of the Iraqi Civil Law provides the answer to this question:

The contractual obligations shall be governed by the law of the state wherein lies the domicile of the contracting parties if they have a common domicile; where they have different domiciles the law of the state within which the contract was concluded will be applied unless the contracting parties have agreed otherwise or where it would be revealed from the circumstances that another law was intended to be applied.<sup>216</sup>

From the above analysis, we see that Iraqi arbitration law allows for the use of foreign laws when one of the parties is out of the country. However, the application of such a law is subject to the moral philosophies of the country, in that it should not go against moral considerations. This means that foreign laws are applicable in arbitration cases if they are not contrary to public order and Iraqi social morals. Mostly, these morals and public order considerations are defined by the Islamic and Sharia laws.<sup>217</sup>

In the declaration of awards, the Iraqi arbitration court often stipulates that the arbitrators give an award in due time, as stipulated by both parties and current arbitration laws.<sup>218</sup> When parties fail to provide the arbitrators with a specific time period to issue the award, the arbitrators are usually bound by law to give an award within six months of the commencement of the case.<sup>219</sup> The arbitrators are, however, limited to offering interim remedies during the course of arbitration (especially regarding cases concerning forgery and

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<sup>212</sup> Akram Yamulki, 'National Report for Iraq' in *Yearbook Commercial Arbitration* (Kluwer Law International 1979) 109.

<sup>213</sup> Mahir Jalili, 'International Arbitration in Iraq' (1987) 4 J Int'l Arb 109.

<sup>214</sup> Akram Yamulki, 'National Report for Iraq' in *Yearbook Commercial Arbitration* (Kluwer Law International 1979) 109.

<sup>215</sup> *ibid.*

<sup>216</sup> Article 25/1 of Iraqi Civil law No. 40 of 1951 published in the Official Gazette, issue 3015 of 08/09/1951. {المادة 25/1 : يسري على الالتزامات التعاقدية قانون الدولة التي يوجد فيها المواطن المشترك للمتعاقدين اذا اتحدا موطناً، فإذا اختلفا يسري قانون الدولة التي تم فيها العقد، هذا ما لم يتفق المتعاقدان او يتبين من الظروف ان قانوناً آخر يراد تطبيقه}

<sup>217</sup> Abdul Hamid El Ahdab & Jalal El Ahdab, *Arbitration with the Arab Countries* (Kluwer Law International 2011) 230.

<sup>218</sup> Article 263 of Iraqi Civil Procedure Law No. 83 of 1969 published in the Official Gazette, issue 1766 of 10/11/1969.

<sup>219</sup> Saleh Majid, 'Arbitration in Iraq' (2004) 19 Arab L Q 267.

other criminal cases). Their powers are also limited in that they cannot give any specific punishment to any of the parties who fail to show up for the proceedings.<sup>220</sup> However, in such situations, the arbitrators have the option of suspending the proceedings and recommending that the parties seek legal redress to any outstanding issues (outside their mandate).<sup>221</sup> When giving an award, the arbitrators must usually come to a unanimous decision, but in instances where the number of arbitrators is uneven, the majority decision will prevail.<sup>222</sup> Such awards should be written and referenced almost like a court ruling because, like arbitration awards in other countries, the Iraqi arbitration law recognises awards in the same way as it does conventional judicial rulings.<sup>223</sup> In most cases, after an award is given, the parties are at liberty to enforce it, although in other cases (especially if one of the parties is dissatisfied), this may fail to put an end to conflict. If this fails to happen, the court usually takes the mandate of thoroughly examining the arbitral award, to determine the form and laws applied in arriving at the award.<sup>224</sup> Most of the time, this situation arises when one of the parties is attempting to buy time so as not to enforce the award.<sup>225</sup> Article 274 of the CCP gives the court the power to accept the arbitration award or reject it in whole or in part, based on the evaluation of the form and nature of laws applied. Where the court rejects the award (either in whole or in part), the court usually recommends that the arbitrators rectify the rejected parts or issue a new ruling instead.<sup>226</sup> In rare cases, the court may also decide to adjudicate the case, but any decision it makes (either to accept or reject the award) is usually subject to appeal, according to the stipulations of the CCP.<sup>227</sup> This is one avenue through which the arbitration process is frustrated in Iraq because the enforcement of the award is usually extensively delayed. This defeats the primary purpose of arbitration.<sup>228</sup>

From this analysis, it can be seen that Iraqi arbitration awards are unique in the sense that they must be first confirmed by the court before any enforcement is done. In fact, Saleh affirms that for the purposes of award enforcement, one of the parties must apply to the court

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<sup>220</sup> Abdul Hamid El Ahdab & Jalal El Ahdab, *Arbitration with the Arab Countries* (Kluwer Law International 2011) 232.

<sup>221</sup> Article 269 of Iraqi Civil Procedure Law No. 83 of 1969 published in the Official Gazette, issue 1766 of 10/11/1969.

<sup>222</sup> Article 270, Paragraph 1 of Iraqi Civil Procedure Law No. 83 of 1969 published in the Official Gazette, issue 1766 of 10/11/1969.

<sup>223</sup> Article 270, Paragraph 2 of Iraqi Civil Procedure Law No. 83 of 1969 published in the Official Gazette, issue 1766 of 10/11/1969.

<sup>224</sup> Saleh Majid, 'Arbitration in Iraq' (2004) 19 Arab L Q 267.

<sup>225</sup> *ibid.*

<sup>226</sup> Mahir Jalili, 'International Arbitration in Iraq' (1987) 4 J Int'l Arb 109.

<sup>227</sup> *ibid.*

<sup>228</sup> Saleh Majid, 'Arbitration in Iraq' (2004) 19 Arab L Q 267.



for confirmation.<sup>229</sup> Upon confirmation by the court, the award is usually subject to enforcement and it becomes final and binding upon all the parties so long as none of them appeals.<sup>230</sup> In enforcing the arbitration award, there is usually no time stipulation for the parties to seek approval or rejection of the award by the court.<sup>231</sup> The CCP, however, contains its own stipulations regarding the grounds upon which the court may annul an award.<sup>232</sup> Some of the reasons for annulment stipulated under article 273 are the invalidity of the arbitration agreement, arbitrators acting beyond their scope or jurisdiction, lack of authentic documentary evidence, and a contravention of the public order of morality.<sup>233</sup> Moral philosophy and public order are sometimes vague in definition, but the law attempts to explain them through examples.<sup>234</sup> These examples are set out in article 130.2 of the CCP. However, other grounds upon which the court may annul awards are the detection of an error in deciding the award (because it will affect the validity of the award); if the arbitrations fail to observe specific rules outlined in the CCP procedures; if there is enough reason (such as the falsification of evidence) to justify the re-hearing of the case; or if there is reason enough to challenge the competence of the arbitrators (as stipulated in the above paragraphs).<sup>235</sup>

With regard to international arbitration in Iraq, any arbitration process which takes place in Iraq is normally considered a domestic dispute, as stipulated by the CCP.<sup>236</sup> However, there are no existent laws in the country concerning international arbitration, and this implies that there are no laws barring foreign arbitration either. However, in previous years (during the 1970s and 1980s) there was a general attitude among Iraqis and the government to resist any attempts to include clauses for foreign arbitration in government contracts because it was perceived retrogressive to the country's quest to uphold sovereignty.<sup>237</sup> At the same time, such a move was perceived to undermine the local courts. Nonetheless, during this time, Iraq experienced tremendous economic growth brought about by the increase in global oil prices

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<sup>229</sup> *ibid.*

<sup>230</sup> Article 272, Paragraph 1 of Iraqi Civil Procedure Law No. 83 of 1969 published in the Official Gazette, issue 1766 of 10/11/1969.

<sup>231</sup> Hamzeh Haddad, 'Enforcement of Foreign Judgments and Award in Jordan and Iraq' (1989) 2013 <<http://www.aiadr.com/aiadr%20re/2.pdf>> accessed 5 Feb 2014.

<sup>232</sup> Saleh Majid, 'Arbitration in Iraq' (2004) 19 Arab L Q 267.

<sup>233</sup> Abdul Hamid El Ahdab & Jalal El Ahdab, *Arbitration with the Arab Countries* (Kluwer Law International 2011) 322.

<sup>234</sup> Mahir Jalili, 'International Arbitration in Iraq' (1987) 4 J Int'l Arb 109.

<sup>235</sup> Hamzeh Haddad, 'Enforcement of Foreign Judgments and Award in Jordan and Iraq' (1989) 2013 <<http://www.aiadr.com/aiadr%20re/2.pdf>> accessed 5 Feb 2014.

<sup>236</sup> Mahir Jalili, 'International Arbitration in Iraq' (1987) 4 J Int'l Arb 109.

<sup>237</sup> *ibid.*

and which forced the government to slowly accept clauses of international arbitration in its contracts.<sup>238</sup>

### ***3.5.3.2 Assessment of the Rules of Arbitration Law***

In evaluating the entire Iraqi arbitration process, it is observed that the court has extensive power in the entire arbitration process. This is the reason why the arbitration process is not considered conclusive until approved by the court.<sup>239</sup> However, Saleh notes that there are sufficient reasons why the court is prominent throughout the entire arbitration process (because of the shortcomings which may arise in deciding the award as noted above).<sup>240</sup> Nonetheless, the decision of the court to accept or annul an award is subject to appeal, but this process has been faulted by many researchers as frustrating the arbitration process, and therefore its main aim of solving disputes in an efficient and precise manner is compromised.<sup>241</sup> This may ultimately cause a sabotage of the entire arbitration process. Iraq's international arbitration process is especially wanting, and the enforcement of foreign awards is equally poor.<sup>242</sup> However, it is a positive move that foreign arbitration is allowed in the country and that foreign nationals have been allowed either to choose foreign arbitration or local arbitration laws.<sup>243</sup>

Iraq has in the past had a history of resistance to any foreign influence upon its laws.<sup>244</sup> This is probably the reason why it remains hesitant in signing the New York Convention. Most of the country's laws are still retrogressive and not in conformance to the flexibility needed in 21st-century implementation of laws. For instance, even though the laws of the country allow for foreign legislation, they still give the local courts the final powers of implementing the awards. These facts are likely to discourage foreign investments because the dynamism of Iraq's arbitration laws is more attractive in theory than in practice.<sup>245</sup>

Perhaps perfected by Saddam's regime, the country is still slow to adopt international arbitration procedures that are both fair to all and non-bureaucratic.<sup>246</sup> As noted in above

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<sup>238</sup> Saleh Majid, 'Arbitration in Iraq' (2004) 19 Arab L Q 267.

<sup>239</sup> *ibid.*

<sup>240</sup> *ibid.*

<sup>241</sup> Akram Yamulki, 'National Report for Iraq' in *Yearbook Commercial Arbitration* (Kluwer Law International 1979) 112.

<sup>242</sup> *ibid.* 113.

<sup>243</sup> Sami Shubber, *The Law of Investment in Iraq* (New York, Brill 2009).

<sup>244</sup> Mahir Jalili, 'International Arbitration in Iraq' (1987) 4 J Int'l Arb 109.

<sup>245</sup> Hamzeh Haddad, 'Enforcement of Foreign Judgments and Award in Jordan and Iraq' (1989) 2013 <<http://www.aiadr.com/aiadr%20re/2.pdf>> accessed 5 Feb 2014.

<sup>246</sup> Mahir Jalili, 'International Arbitration in Iraq' (1987) 4 J Int'l Arb 109.

articles, the biggest problem in the implementation of arbitration awards is the excessive power given to courts to approve arbitration procedures.<sup>247</sup> This is especially risky and also slow for most investors because, conventionally, court proceedings are extremely bureaucratic and frustrating. This means that the arbitration process equally gains the same attributes.<sup>248</sup> There is therefore a strong need to give arbitration its own independence (from the judiciary) to make the system fast, efficient, and reliable.

Another major problem observed with the Iraqi arbitration process is its subjection of arbitration awards to the moral philosophies of the land. This means that arbitration awards can be considered null and void if they contravene moral considerations.<sup>249</sup> Even though this process presents an obstacle to making the arbitration process smooth and unbiased, the biggest problem lies in the fact that the moral philosophies of the land are not clearly defined. This means that awards are usually subjected to a variable system of determining moral justice. Another major fault noted with Iraq's definition of moral philosophy and public order is its lack of differentiation between international and national public order.<sup>250</sup> From the above analysis, it can be seen that the CCP's procedures and laws define such moral philosophies by example and not by text.<sup>251</sup> This creates a large number of 'grey areas' in the application of law, and it may equally prove problematic to the overall implementation of awards. In some cases, such loopholes may be used by unscrupulous people if they want to interpret the law in their own favour. The situation may be further aggravated when one of the parties is a foreign company (or individually) because they may not be familiar with such moral philosophies (especially if the law fails to define them sufficiently clearly).

Even though Iraq does not recognise the New York Convention in the ratification of arbitration awards, it still takes part in the judicial ratification of awards of member states participating in the Arab League Convention on Judicial Cooperation, in which it is required to enforce awards issued among member states.<sup>252</sup>

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<sup>247</sup> Hamzeh Haddad, 'Enforcement of Foreign Judgments and Award in Jordan and Iraq' (1989) 2013 <<http://www.aiadr.com/aiadr%20re/2.pdf>> accessed 5 Feb 2014.

<sup>248</sup> Akram Yamulki, 'National Report for Iraq' in *Yearbook Commercial Arbitration* (Kluwer Law International 1979) 113.

<sup>249</sup> Saleh Majid, 'Arbitration in Iraq' (2004) 19 Arab L Q 267.

<sup>250</sup> *ibid.*

<sup>251</sup> Mahir Jalili, 'International Arbitration in Iraq' (1987) 4 J Int'l Arb 109.

<sup>252</sup> Hamzeh Haddad, 'Enforcement of Foreign Judgments and Award in Jordan and Iraq' (1989) 2013 <<http://www.aiadr.com/aiadr%20re/2.pdf>> accessed 5 Feb 2014.

### 3.6 Conclusion

This chapter proves how detrimental political instability is to the investment environment. Returning to the hypothesis/question posed at the beginning of this study, it is now possible to state that an investment environment cannot attract foreign investors amidst long political episodes of coups, genocides, wars, economic sanctions, and total lack of democratic and legal institutions. This chapter has found that generally over the pre-democratic Iraq, that is, up to 2003, the strategy adopted by the then political regime has had its negative impact on foreign investment, resulting in a non-friendly foreign investment environment. One of the more significant findings to emerge from this chapter is that this fact opens up discussions and suggests that the Iraqi government must avoid any practices that may be reminiscent of anti-foreign investment ones.

The most obvious finding to emerge from this study is that former government investment-reforming policies, generally speaking, were not cautious and very responsive to political provocation—a recipe entirely incompatible with developmental reform. Lack of flexibility added to the hard-line investor treatment mechanisms. Further harm was done by the inward-looking policy caused by deliberate dictatorial policies of keeping a poor population under the fist of a strong government.

In general, therefore, it seems that panic emanating from political change and loss of power overwhelmed the attitudes of former governments, thus leading them to grave and irrevocable mistakes. Any desire expressed by such governments for foreign investor attraction was, in fact, only a response to provisional economic conditions. A clear example is the 1990s when Iraq was suffering under the blockade and the resulting trend towards legal reforms. Yet, the then government failed to attract any foreign investment or encourage the private sector to assume an effective role. Looming war was more realistic to foreign investors than such reforms. Therefore, the then government fled to the religious tourism development and promotion, thus opening the doors to Iranian and GCC-sourced tourism after two fierce wars. This led to significantly positive results, with a number of Iraqi cities receiving hotel timeshare-based investments.<sup>253</sup>

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<sup>253</sup> US Legal. 'Time Share Law & Legal Definition' (2014) <<http://definitions.uslegal.com/t/time-share/>> accessed 3 March 2014 (describing the "[t]ime share is a type of property right under which the purchaser of a time share has access to the 'share' they own in a property for a specific 'time'. Time-shares have been sold for cruises, recreational vehicles, campgrounds, and many other types of properties, but their most popular use is for shares in condominiums at timeshare resorts").

The results in this chapter have shown the negative effects of conflicts, wars, and political and economic disarray on the foreign investment climate in Iraq. The next chapter will move on to discuss a reasonable approach to tackle this issue, which could be that an investment environment reform is achievable where a real desire and appropriate planning exist to seize available opportunities.

# Chapter IV: Iraq's Response to the Massive Programme of Reforms

## 4.1 Introduction

In order to reform its investment environment Iraq needs to be open to new remedies. Damages should be determined and appropriate plans should be made to transform a war-torn country into an attractive and safe environment for foreign investors.<sup>1</sup> Therefore, attracting foreign investors into Iraqi markets is a vital part of the reform process taking place in the post-conflict environment.<sup>2</sup>

The background to this environment is a destroyed infrastructure, weakness of public institutions and the rule of law, and deep political, economic, legal and social problems.<sup>3</sup> Moreover the structure of the Iraqi investment environment had been destroyed long before, through nationalisation, wars and economic sanctions. In order to protect the domestic economy, there had been a strict prohibition of foreign ownership of Iraq's companies, heavy tariffs and the imposition of penalties on foreign goods.<sup>4</sup>

Reform efforts in Iraq therefore aim to strengthen the legal framework of investment and to augment investment by means of the appropriate international instruments. One of the positive factors in the Iraq environment is the various investment opportunities, such as the re-

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<sup>1</sup> Judith Richards Hope & Edward N Griffin, 'The New Iraq: Revising Iraq's Commercial Law Is a Necessity for Foreign Direct Investment and the Reconstruction of Iraq's Decimated Economy' (2004) 11 *Cardozo J Int'l & Comp L* 875 (After the fall of Saddam Hussein's regime and the occupancy of American and British forces in Iraq, there has been a continuous change in Iraqi investment laws. This means that many old laws have been replaced by new ones. Some laws were first amended by the United States Civil Administration which oversees the operations of American and British operations in Iraq, while others were amended by the Iraqi government). Jordan E Toone, 'Foreign Direct Investment in Post-War Iraq: An Investor's Introductory Guide to the Legal Framework' (2013) 9 *BYU Int'l L & Mgmt R* 141. (The new legislations, both issued by the US Civil Administration Authority and those enacted by the Iraqi government, have brought liberalisation of commercial rules, foreign investments, incentives and guarantees of investors and the entire business environment. The new changes to the laws are significant to the way attract investors are carried to the inside country; in addition to improving the economic development of the country "through investment capital that will come into the country as well as foreign experience; both of which will ultimately lead to the growth of the country's infrastructure and economy." This new legislation will also help meet the needs of the country, which include investment capital to be used for reconstruction and development) *ibid*.

<sup>2</sup> Rahim Mooloo and Alex Khachaturian, 'Foreign Investment in a Post-Conflict Environment' (2009) 10 *J World Investment & Trade* 341.

<sup>3</sup> Bart S Fisher, 'Investing in Iraq: Legal and Political Aspects' (2004-2005) 18 *Transnat'l Law* 71.

<sup>4</sup> Essam Al Tamimi and Adil Sinjakli, 'Legal Aspects of Setting up Business in Iraq and Iraqi Company Regulations' (1999) 14 *Arab L Q* 320.

building required after the destruction caused by armed conflict and the demand for commodities and services which had been missing during the conflict.<sup>5</sup> The destroyed infrastructure and neglected natural resources may serve as the most important and attractive investment opportunities.<sup>6</sup> A key driver for foreign investors to enter high-risk environments is the high revenues expected from natural resources, and investment in exploration industries for resources such as oil, natural gas and other minerals, account for the greater part of the FDI inflow to Iraq. These investment contracts contribute to the creation of strong attractions for investors. In addition, rising oil prices may have an especially positive impact on economic growth in Iraq, which is dependent on oil as a primary source of income.<sup>7</sup>

There has already been discussion herein of the possibility of establishing a safe and attractive investment climate and of the role of the political system in Iraq concerning the restoration of the rule of law and rehabilitation of damaged or outdated public institutions.<sup>8</sup> These issues will be examined with a more detailed analysis to draw attention to the remaining number of obstacles confronting post-conflict reform policies. The critical question is: what are the strategies of the Iraqi legislative regime for the encouragement of foreign investment?

Because investment laws act as a catalyst to economic development, this chapter will aim to explain how the laws provide a positive framework for the foreign investment environment and to survey the new investment environment following recent reforms. The ways in which new investment laws have revolutionised the investment environment will be analysed, as will the potential advantages they offer to the parties interested in doing business in Iraq. The chapter will also examine changes and amendments introduced to Iraqi laws in terms of their effectiveness in attracting new foreign investors and upgrading Iraqi investments in line with international standards.<sup>9</sup> This will be the cornerstone of the study. The chapter will assess Iraq's policies of establishing a favourable investment environment through the enactment and enforcement of liberal investment laws providing equal incentives for both national and foreign investors. In addition, it will be argued that priority should be given to the

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<sup>5</sup> Rahim Mooloo and Alex Khachaturian, 'Foreign Investment in a Post-Conflict Environment' (2009) 10 *J World Investment & Trade* 341.

<sup>6</sup> David Brent Grantham, 'Calculated Risk: The Advance of IOCs and NOCs into the Iraqi Investment Theater' (2010) 3(3) *J World Energy Law Bus* 315.

<sup>7</sup> *ibid.*

<sup>8</sup> Rahim Mooloo and Alex Khachaturian, 'Foreign Investment in a Post-Conflict Environment' (2009) 10 *J World Investment & Trade* 341.

<sup>9</sup> Judith Richards Hope & Edward N Griffin, 'The New Iraq: Revising Iraq's Commercial Law Is a Necessity for Foreign Direct Investment and the Reconstruction of Iraq's Decimated Economy' (2004) 11 *Cardozo J Int'l & Comp L* 875.

establishment of an investment authority for managing investments across the country, including aspects of planning and promotion. The authority would also provide the necessary investment licences and would follow investment projects through to their conclusion. Success in the efforts to rehabilitate the investment environment in Iraq will require an acceptable level of stability in the operation environment, along with medium to long-term predictability in the basic market conditions, availability of investment opportunities, transparency and sufficient guarantees under enforceable laws.

## 4.2 Promoting Foreign Investment: Justification and Expected Results

Low economic growth rates have persisted in Iraq, due to wrong economic policies during the 1980s and 1990s, followed by the US invasion in 2003 and the failures of post-occupation security, and addressing such problems needs large investments to revive the components of growth.<sup>10</sup> The desired reforms will be attainable through a large amount of capital and potential, the very components lacked by Iraq at the moment.<sup>11</sup> The oil sector, the only source of state revenues, needs reconstruction, reform and new investment to provide the appropriate revenues that can be channelled into further oil field investments.<sup>12</sup> In the current situation the sector cannot provide such revenues, given the current production rates and the fluctuation of international oil prices.<sup>13</sup> Accordingly, foreign investment is the handiest tool to provide the revenues necessary to build the Iraqi economy and to import state-of-the-art technologies.<sup>14</sup> Although there are legitimate concerns and fears, the enforcement of legislation governing foreign investment can be used to minimise the risks and disadvantages.<sup>15</sup>

It is believed by some that local capital is capable of assuming this investment task,<sup>16</sup> but such a belief may be unfounded, since incomes in Iraq are low and consequently local savings are insufficient.<sup>17</sup> Further, the Iraqi private sector is not qualified to execute large-scale

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<sup>10</sup> David D Caron, 'The Reconstruction of Iraq: Dealing With Debt' (2005) 11 U C Davis J Int'l L & Pol'y 123.

<sup>11</sup> Dobbins James, *Occupying Iraq: a history of the Coalition Provisional Authority*. (New York, Rand Corporation, 2009) 213.

<sup>12</sup> Ryan Frei, 'Extracting Oil from Turmoil: The Iraqi Oil Industry and Its Role as a Promising Future Player in the Global Energy Market' (2004) 4 Rich J Global L & Bus 147.

<sup>13</sup> Rex J Zedalis, *The Legal Dimensions of Oil and Gas in Iraq: Current Reality and Future Prospects* (Cambridge University Press 2009) xviii.

<sup>14</sup> US Department of State. '2013 Investment Climate Statement–Iraq' (February 2013) <<http://www.state.gov/e/eb/rls/othr/ics/2013/204661.htm>> accessed 12 Jan 2014.

<sup>15</sup> David Brent Grantham, 'Calculated Risk: The Advance of IOCs and NOCs into the Iraqi Investment Theater' (2010) 3(3) J World Energy Law Bus 315.

<sup>16</sup> Abdul Malik Mahmud, 'Investment in Iraq, Reality or Illusion?' (2012) 83 Alra'ud magazine 8. (Translated from Arabic Language by Author).

<sup>17</sup> David D Caron, 'The Reconstruction of Iraq: Dealing With Debt' (2005) 11 U C Davis J Int'l L & Pol'y 123.



infrastructure projects and rehabilitate projects and factories, due to the diminished condition of expertise, technology and capital.<sup>18</sup> One of the problems facing the country is that a large amount of capital is smuggled into neighbouring countries for political and security reasons. There is an inherent mistrust on the part of Iraqi investors due to former policies of expropriation of the wealth of merchants and industrialists. The expropriations, such as nationalisation in 1964s<sup>19</sup> and the measures taken in 1995 and 1996, were carried out under various pretexts, such as boosting the exchange rate of the Iraqi dinar,<sup>20</sup> but were in reality nothing less than theft of private property. Another current problematic factor is the constant menace of rising prices, and hence the Iraqi investor's mistrust and lack of entrepreneurial spirit.<sup>21</sup> Therefore, Iraqi investors are waiting for the results of the foreign investments to prove successful before taking investment action.<sup>22</sup> Further problems stem from the lack of expertise the adverse attitude to reasonable risk on the part of the Iraqi banks, and also Iraqi investors' lack of confidence in the banks, which confront them with complicated financial and investment procedures. The banks in turn prefer to conduct traditional business yielding swift risk-free profits,<sup>23</sup> such as loans to government employees offering sufficient guarantees of repayment, or loans in return for encumbered property and excessive guarantees for such loans, with high rates of interest that frighten investors away.<sup>24</sup>

Should Iraq procure the money needed for construction and boosting growth rates by means of grants, and aid or loans and financial facilities? This is an option that has proved unsuccessful in several developing countries that sought to make up saving shortages in order to finance development schemes.<sup>25</sup> Growing external debts and debt service led to a shortfall in the desired outcomes. In the case of Iraq, the country is already encumbered with debts much in excess of its GDP.<sup>26</sup> The question therefore is how the country may move away from the indebtedness that is causing so much suffering.

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<sup>18</sup> Bart S Fisher, 'Investing in Iraq: Legal and Political Aspects' (2004-2005) 18 *Transnat'l Law* 71.

<sup>19</sup> Ralph B Lake; David R Reitsema, 'The Iraqi Nationalization of the Iraq Petroleum Company: Implications for the International Law of Expropriation' (1972) 2 *Denv J Int'l L & Pol'y* 217.

<sup>20</sup> Abdul Malik Mahmud, 'Investment in Iraq, Reality or Illusion?' (2012) 83 *Alrraúd magazine* 8. (Translated from Arabic Language by Author).

<sup>21</sup> *ibid.*

<sup>22</sup> Kamal Basari, *Current Economic Challenges and Future Policies for Iraq: 2010-2014* (Iraqi economists Association 1278, 2010) 18. (Translated from Arabic Language by Author).

<sup>23</sup> Abdul Malik Mahmud, 'Investment in Iraq, Reality or Illusion?' (2012) 83 *Alrraúd magazine* 8.

<sup>24</sup> Kamal Basari, *Current Economic Challenges and Future Policies for Iraq: 2010-2014* (Iraqi economists Association 1278, 2010) 18.

<sup>25</sup> A O Adede, 'Loan Agreements between Developing Countries and Foreign Commercial Banks-Reflections on Some Legal and Economic Issues' (1977-1978) 5 *Syracuse J Int'l L & Com* 235.

<sup>26</sup> David D Caron, 'The Reconstruction of Iraq: Dealing With Debt' (2005) 11 *U C Davis J Int'l L & Pol'y* 123.

In view of the facts stated above, the best solution would be foreign investment in conjunction with an extremely accurate and objective financial policy for economic development.<sup>27</sup> This study argues that foreign investments can be effective in the following ways: first of all, foreign companies help train local personnel who work for them, and trained employees will transfer their acquired skills to local companies.<sup>28</sup> Secondly, foreign investments help to develop scientific cooperation between foreign affiliates and the research & development (R&D) centres in hosting countries, with such centres being in a position to acquire technologies and research methodologies.<sup>29</sup> Thirdly, foreign companies contribute to the provision of the needs of local companies in terms of machinery, equipment and technical aid, thus allowing the latter to produce commodities of international standards and to reach out for overseas markets.<sup>30</sup> Fourthly, competition between foreign affiliates and local companies may lead the latter to seek state-of-the-art technical and administrative systems, and to harness and develop them. Local companies would gain increasing powers to acquire modern systems along with technical, technological and human development.<sup>31</sup> Fifthly, foreign investment helps to compensate for shortages of local savings, and furthermore has the potential to develop infrastructure projects and to address structural deficiencies in the industrial sector.<sup>32</sup> Sixthly,

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<sup>27</sup> Judith Richards Hope & Edward N Griffin, 'The New Iraq: Revising Iraq's Commercial Law Is a Necessity for Foreign Direct Investment and the Reconstruction of Iraq's Decimated Economy ' (2004) 11 *Cardozo J Int'l & Comp L* 875.

<sup>28</sup> Attention should be given to the view that such advantages are limited, as these companies in most cases bring their foreign employees with them, along with their investments. Liesbeth Colen, Miet Maertens and Jo Swinnen, 'Foreign Direct Investment as an Engine for Economic Growth and Human Development: A Review of the Arguments and Empirical Evidence' (2009) 3 *Hum Rts & Int'l Legal Discourse* 177.

<sup>29</sup> Arguing that the disadvantage of this idea is that international companies are known for their lack of interest in providing support for research and development activities in hosting countries. They tend to restrict their research activities to key centres in developed countries, under the pretext of difficulties in co-ordinating research and development activities, centres and affiliates. They also argue that developing countries are characterised by high costs and a shortage of research labs and specialist skills. S Linn Williams, 'Transfer of Technology to Developing Countries' (1983) 30 *Fed B News & J* 263.

<sup>30</sup> Stating the argument that capital-intensive machinery and equipment do not accord with the conditions in most developing countries that are distinguished by relatively extensive non-skilled labour, and are also known for their lack of a capacity to harness such technologies to fit in with their respective social and economic conditions. *ibid.*

<sup>31</sup> Liesbeth Colen, Miet Maertens and Jo Swinnen, 'Foreign Direct Investment as an Engine for Economic Growth and Human Development: A Review of the Arguments and Empirical Evidence' (2009) 3 *Hum Rts & Int'l Legal Discourse* 177; *See also* Abdul-Hussein Tariq, *Economic Development and Workforce Planning in Iraq* (2nd edn, Dar Al Adalah 2013) 13 (Some Iraqi economists believe this idea has the disadvantage that foreign companies often work in such conditions to acquire competing local companies with a view to greater monopolistic control) *ibid.*

<sup>32</sup> Liesbeth Colen, Miet Maertens and Jo Swinnen, 'Foreign Direct Investment as an Engine for Economic Growth and Human Development: A Review of the Arguments and Empirical Evidence' (2009) 3 *Hum Rts & Int'l Legal Discourse* 177 (Emphasising that, foreign companies should pour their investments into commodity and other vital sectors to address structural deficiencies, rather than deepening such structural deficiencies and creating a double track economy, with a relatively advanced sector (in terms of technology and production) represented by foreign companies and the other relatively backward, in terms of technology and production,

foreign investment helps to boost the balance of payments of the hosting country through increasing foreign cash inflow and relevant capitalisation. Another contributing factor is the potential provided by companies to obtain a foothold in export markets. Foreign investment also contributes to reducing the occurrence of financial crises and debt defaults.<sup>33</sup>

### 4.3 Enact Liberal Laws

Until recently, applicable laws did not allow foreign investors to operate in Iraq. This prohibition was expressed by Article 2, Paragraph 3 of the Arab Investment Law No 46 of 1988.<sup>34</sup> However, in the post-Saddam era (ie, under the US civil administration authority) there have been continuous changes, particularly in Iraqi investment laws. It should be noted that such legal reforms have great importance in terms of attracting foreign investment.<sup>35</sup> Some observers say that such amendments are justified, since former laws were unjust and prevented foreigners (except for Arabs)<sup>36</sup> from investing in Iraq, whether directly, through bonds and securities, or indirectly, through full or partial ownership of local companies.<sup>37</sup> The new laws, despite controversies over their legitimacy, since they were not enacted by a freely and democratically elected government, have raised Iraqi investment laws up to international standards.<sup>38</sup>

#### 4.3.1 Coalition Provisional Authority (CPA) and Reform Laws Programme

Since the change of government after the fall of Saddam Hussein, Iraqi laws have been continuously changing. During the temporary administration of the US Civil Administrator, Paul Bremer, new legislation was introduced and old laws were repealed.<sup>39</sup> Paul Bremer's

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represented by national affiliates. Moreover, foreign investors often prefer to work in the extraction sector and refrain from contributing to the manufacturing sector).

<sup>33</sup> Vinod Rege, 'Economies in Transitions and Developing Countries-Prospects for Greater Co-operation in Trade and Economic Fields' (1993) 27 J World Trade 83.

<sup>34</sup> See Article 2, paragraph 3 of the Arab Investment Law No 46 of 1988.

{ لا يجوز تأسيس المشاريع او المساهمة فيها من بل شركات يساهم فيها راس مال اجنبي مهما كانت نسبة مساهمته }

<sup>35</sup> Bart S Fisher, 'Investing in Iraq: Legal and Political Aspects' (2004-2005) 18 Transnat'l Law 71.

<sup>36</sup> Alan K Audi, 'Iraq's New Investment Laws and the Standard of Civilization: A Case Study on the Limits of International Law' (2004-2005) 93 Geo L J 335 (claiming that '[t]he new laws did away with all restrictions on foreign ownership of Iraqi industry...') ibid, 335.

<sup>37</sup> Bart S Fisher, 'Investing in Iraq: Legal and Political Aspects' (2004-2005) 18 Transnat'l Law 71.

<sup>38</sup> Robert D. Tadlock, 'Occupation Law and Foreign Investment in Iraq: How an Outdated Doctrine Has Become an Obstacle to Occupied Populations' (2004) 39 U S F L Rev 227. (arguing that '[i]nternational law obliges occupying powers to respect laws already in force in a country 'unless absolutely prevented' from doing so') ibid, 227. Thomas Catán, 'Iraq Business Deals May Be Invalid, Law Experts Warn' Financial Times/UK (30 October 2003) 77.

<sup>39</sup> Nicole Marie Crum, 'Liberalization or Economic Colonization: The Legality of the Coalition Provisional Authority's Structural Investment Law Reforms in Post-Conflict Iraq' (2005-2006) 2 S C J Int'l L & Bus 49.

administration introduced more than a hundred orders and regulations; one of the remarkable changes was brought about by a decree named Civil Administration Authority No. 17,<sup>40</sup> which exempted foreign personnel from Iraqi civil and penal laws. Covered in the exemption were civil and military personnel, as well as non-Iraqi workers, such as contractors and sub-contractors involved in the reconstruction of Iraq.<sup>41</sup> Foreign Investment Order No. 39 of 2003 was intended to be the cornerstone of a new free market economy for Iraq, but it excluded natural resources, banking and insurance.<sup>42</sup> Decree No. 39 of 2003<sup>43</sup> served to encourage foreign investments by providing protection for foreign investors' rights and properties, and granting them treatment equal to that of their Iraqi counterparts. Furthermore, a foreign investor, by virtue of the same Decree may, at will and without delay, transfer money and rights out of the country.<sup>44</sup> Decree No. 39 also regulated other key aspects, including insurance, investment dispute settlement, and intellectual property rights.<sup>45</sup> Other CPA orders regulating the economic framework of Iraq include Order No. 40 of 2003, which contained new provisions aimed at renovating the banking and financial sector; Order 54 of 2004, which provided for liberation of trade (and was amended later by Order No. 70); Order No. 56 of 2004, which regulated the operation of the Central Bank; Order No. 74 of 2004, which included provisions concerning the Iraqi stock exchange; Order No. 95 of 2004, which regulated aspects of the financial administration and the public debt; and Order No. 36, which set forth provisions for oil distribution. More laws were amended by virtue of other CPA orders, including: the Iraqi Companies Law No. 21 of 1997, which was amended by means of Order No, 64; Order No. 80, which amended the Trademark Law No. 21 of 1957; and Order No. 81, which amended laws related to intellectual property rights on patents, industrial design, information confidentiality, integrated circuits and the agro-species law.<sup>46</sup>

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<sup>40</sup> Coalition Provisional Authority Order Number 17 (Revised) of 2004, Status of the Coalition Provisional Authority, MNF-Iraq, Certain Missions and Personnel in Iraq published in the Official Gazette, issue 3985 of 01/07/2004. {وضع سلطة الائتلاف المؤقتة والقوات المتعددة الجنسيات في العراق والملاك والبعثات المعينة في العراق}

<sup>41</sup> James Dobbins, Seth G Jones, Benjamin Runkle, Siddharth Mohandas, *Occupying Iraq: a History of the Coalition Provisional Authority* (New York, Rand Corporation 2009) 213.

<sup>42</sup> Alan K Audi, 'Iraq's New Investment Laws and the Standard of Civilization: A Case Study on the Limits of International Law' (2004-2005) 93 Geo L J 335.

<sup>43</sup> Order No. 10 of 2003 predated this Order, but no material difference exist between them save for the Arabic drafting thereof, which has come to be more clear and accurate. Order No. 39 has been amended later on by virtue of Order No. 46 of 2003, giving the Minister of Trade the power to issue company establishing certificates.

<sup>44</sup> Nicole Marie Crum, 'Liberalization or Economic Colonization: The Legality of the Coalition Provisional Authority's Structural Investment Law Reforms in Post-Conflict Iraq' (2005-2006) 2 S C J Int'l L & Bus 49.

<sup>45</sup> Coalition Provisional Authority Order Number 39 of 2003 on Foreign Investment published in the Official Gazette, issue 3980 of 01/03/2003. {امر سلطة الائتلاف رقم ٣٩ للاستثمار الأجنبي الملغى}

<sup>46</sup> The details of provisions which were inserted in CPA's Orders, published in the CPA Official Documents. The original text is in the English language, and the official translation in Arabic is available in the Official

The justifications for the Orders included the facilitation of foreign investment, development of the infrastructure, the enhancement of commercial activities, the provision of new employment opportunities, the attraction of capital and new technology and the transference of knowledge and skills to Iraqis.<sup>47</sup> The new legislation introduced by Bremer included the amendment of Iraqi Company Law No. 21 of 1997 so as to grant foreign companies and nationals the right to establish business organisations and hold shares in Iraq.<sup>48</sup> Banking and insurance laws were also amended to allow foreign investors to participate in banking and insurance business in the country.<sup>49</sup>

An open-door policy was adopted, and there was an abundance of investment opportunities in Iraq created by the start of reconstruction, but foreign investment nonetheless faltered. The reasons for this included foreign investors' concerns about security, the political situation of an occupied country and a lack of transparency in the institutions responsible for the management of reconstruction.<sup>50</sup> Moreover, the legislative changes and amendments have been deemed illegal by some observers for having been made by an occupying power, as part of a Western conspiracy to seize the oil-rich Iraqi economy. For instance, Saleh notes that: 'Under international law, the provisions of the related Geneva Conventions of 1929, 1949, and 1985, such as Articles 64, 65, and 67 of the fourth Geneva Convention of 1949, the occupying Authority has no legal power to change or issue new laws, except for the purpose of maintaining orderly government and safeguarding public order in the occupied country'.<sup>51</sup> Opponents of the investment laws claim that legislative changes promoted by the Iraqi Government lack legal validity, since the incumbent government is not democratically elected and subject to the Western influence, and so not entitled to make material legislative changes.<sup>52</sup>

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Gazette and at the CPA Official Documents on <<http://govinfo.library.unt.edu/cpa-iraq/regulations/#Orders>> accessed 12 Jan 2014.

<sup>47</sup> Bart S Fisher, 'Investing in Iraq: Legal and Political Aspects' (2004-2005) 18 *Transnat'l Law* 71.

<sup>48</sup> Alan K Audi, 'Iraq's New Investment Laws and the Standard of Civilization: A Case Study on the Limits of International Law' (2004-2005) 93 *Geo L J* 335.

<sup>49</sup> *ibid.*

<sup>50</sup> Rahim Moloo and Alex Khachaturian, 'Foreign Investment in a Post-Conflict Environment' (2009) 10 *J World Investment & Trade* 341.

<sup>51</sup> Saleh Majid, 'Arbitration in Iraq' (2004) 19 *Arab L Q* 267.

<sup>52</sup> Nicole Marie Crum, 'Liberalization or Economic Colonization: The Legality of the Coalition Provisional Authority's Structural Investment Law Reforms in Post-Conflict Iraq' (2005-2006) 2 *S C J Int'l L & Bus* 49. (House of Lords-UK Parliament describing that "[w]hile it is true that the Iraqi Governing Council and its ministers have been recognized by the United Nations Security Council as the 'principal bodies of the Iraqi interim administration which, without prejudice to its further evolution, embodies the sovereignty of the State of Iraq during the transitional period', thus making them the internationally recognised representatives of the Iraqi people, that alone is insufficient to confer legitimacy on the new investment laws". Alan K Audi, 'Iraq's New Investment Laws and the Standard of Civilization: A Case Study on the Limits of International Law' (2004-2005) 93 *Geo L J* 335.

Other observers, however, have countered such arguments by asserting that the legislative environment imposed by Saddam's regime was no less illegal, since Saddam was not democratically elected to power.<sup>53</sup> Further, many experts have been of the opinion that the investment laws of Iraq need to be re-legislated for the economic benefit of the Iraqi people after long years of economic and administrative mismanagement which characterised the Iraqi state for decades.<sup>54</sup> There is also the view that constant changes in investment legislations are forward steps which will make Iraq the hub of foreign investment in the Middle East.<sup>55</sup> Furthermore, this thesis argues that these changes are necessary in order to raise Iraq's foreign investment laws to the standard of international investment laws.

#### **4.3.2 Constitutional Protection**

Constitutional protection is one of the strongest forms of protection that can be offered by a host state, since a constitution is often a reflection of the general policy of the state in political, legal, economic and social terms.<sup>56</sup> Moreover, constitutional rules, since they take precedence over all other laws, provide protection for foreign investment under the constitutional umbrella which forms the general framework that must be followed as regards all other relevant legislations.<sup>57</sup> The Iraqi 2005 Constitution<sup>58</sup> upholds the principle of foreign investment promotion and protection<sup>59</sup>: Article 26 thereof provides that 'The State shall guarantee the encouragement of investment in the various sectors, and this shall be regulated by law'.<sup>60</sup>

#### **4.3.3 Investment Law No. 13 of 2006**

This Law was enacted to encourage the Iraqi and foreign private sectors to invest in Iraq through the provision of necessary facilities for establishing investment projects.<sup>61</sup> Iraq needs

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<sup>53</sup> *ibid* (arguing that '[i]n order to justify the reforms, said it has been argued that the reforms are endorsed by the Iraqi Governing Council and thus represent the will of the Iraqi people, not their occupiers. This assertion merits scrutiny...') *ibid*, 354.

<sup>54</sup> Robert D. Tadlock, 'Occupation Law and Foreign Investment in Iraq: How an Outdated Doctrine Has Become an Obstacle to Occupied Populations' (2004) 39 U S F L Rev 227.

<sup>55</sup> *ibid*.

<sup>56</sup> Sami Shubber, *The Law of Investment in Iraq* (New York, Brill 2009) 162.

<sup>57</sup> *ibid*.

<sup>58</sup> Constitution of the Republic of Iraq of 2005 published in the Official Gazette, issue 4012 of 28/12/2005. English copy is available on <[http://www.uniraq.org/documents/iraqi\\_constitution.pdf](http://www.uniraq.org/documents/iraqi_constitution.pdf)> accessed 5 Feb 2014.

<sup>59</sup> Article 23 of the Iraqi Constitution of 2005 provides for that 'First: Private property is protected. The owner shall have the right to benefit, exploit and dispose of private property within the limits of the law. Second: Expropriation is not permissible except for the purposes of public benefit in return for just compensation, and this shall be regulated by law'.

<sup>60</sup> Article 26 of the Constitution of the Republic of Iraq of 2005.

<sup>61</sup> Necessitating Reasons of Iraq Investment Law No. 13 of 2006 published in the Official Gazette, issue 4031 of 17/01/2007.

a large amount of investment to rehabilitate the infrastructure and create developmental projects,<sup>62</sup> and consequently a full package of measures has been adopted, including the elimination of all investment license/permit restrictions, the adoption of an open-door import policy, price liberalisation and the adoption of a market economy and tax reforms, all with a view to attracting capital and facilitating the transfer of technology.<sup>63</sup>

The Federal Investment Law has several purposes that cover a number of key fields. It aims to push forward social and economic development nationwide by encouraging investments and technology transfer, and by expanding and diversifying the production and service base.<sup>64</sup> It is also intended to encourage the private sector, both Iraqi and foreign, to invest in Iraq, an objective that is attainable through the provision of necessary facilities (privileges, exemptions and guarantees) to establish investment projects and boost the competitive edge of projects governed by this law in local and foreign markets.<sup>65</sup> The law also aims at regulating the protection provided for investor's rights and property.<sup>66</sup> Other key objects include boosting exports, the balance of payments and the balance of commerce for Iraq. Priorities of the same law include, inter alia, market-oriented development of human resources and provision of job opportunities to eliminate unemployment.<sup>67</sup>

The Federal Investment Law applies to local and foreign investment relations alike, yet its regulatory provisions make distinctions.<sup>68</sup> In order to attract foreign investment, the Law gives an investor privileges, guarantees and rights equal to those of a national investor.<sup>69</sup> The question here is: what criterion is used by Iraq legislators in defining an investor nationality? An investor is either a real or a legal person, as set forth in Article 1, Paragraph I and J of Investment Law No. 13 of 2006.<sup>70</sup> The nationality of a real person is used to distinguish an

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<sup>62</sup> David D Caron, 'The Reconstruction of Iraq: Dealing With Debt' (2005) 11 U C Davis J Int'l L & Pol'y 123.

<sup>63</sup> Harith Al Dabbagh, 'Le Cadre Juridique des Investissements Étrangers en Irak' (Le rôle du droit dans le développement économique Le droit au service du développement économique France-Congrès de l'IDEFLomé 17 au 20 November 2008).

<sup>64</sup> Sami Shubber, *The Law of Investment in Iraq* (New York, Brill 2009) 9.

<sup>65</sup> Harith Al Dabbagh, 'Le Cadre Juridique des Investissements Étrangers en Irak' (Le rôle du droit dans le développement économique Le droit au service du développement économique France-Congrès de l'IDEFLomé 17 au 20 November 2008).

<sup>66</sup> US Department of State. '2013 Investment Climate Statement–Iraq' (February 2013) <<http://www.state.gov/e/eb/rls/othr/ics/2013/204661.htm>> accessed 12 Jan 2014.

<sup>67</sup> Sami Shubber, *The Law of Investment in Iraq* (New York, Brill 2009) 9.

<sup>68</sup> Harith Al Dabbagh, 'Le Cadre Juridique des Investissements Étrangers en Irak' (Le rôle du droit dans le développement économique Le droit au service du développement économique France-Congrès de l'IDEFLomé 17 au 20 November 2008).

<sup>69</sup> Jordan E Toone, 'Foreign Direct Investment in Post-War Iraq: An Investor's Introductory Guide to the Legal Framework' (2013) 9 BYU Int'l L & Mgmt R 141.

<sup>70</sup> Article 1, Paragraph I and J of the Iraqi Investment Law No.13 of 2006 provides for that 'I. The Foreign Investor: Is the investor who does not hold the Iraqi nationality in the case of a real person, and is registered

Iraqi from a foreign investor.<sup>71</sup> For a legal person, however, the place of incorporation and the main offices are the criterion used to make such a distinction.<sup>72</sup> An investor's nationality has a key role in the legal status of both real and legal persons, since it defines the legal system to which a person is subject; and this in turn determines a package of rights and commitments, some of which are determined by the investor's nationality but others by the hosting country, by virtue of the investment agreements it has signed and the relevant international laws.<sup>73</sup> The advantages of such a distinction are that some legislative rules governing privileges, guarantees or duties are attached to foreign, rather than national, investors, for example the right to be subject to foreign, rather than Iraqi, legislation and jurisdiction.<sup>74</sup>

Aspects not regulated by Investment Law No. 13 of 2006 include oil and gas exploration and investment in production, as well as investment in the banking and insurance sectors.<sup>75</sup> According to this law, regulation of investment in such sectors is the prerogative of other laws. The special nature and importance of these sectors are the reasons why they have been excluded from the provisions of the Investment Law.<sup>76</sup>

#### 4.3.4 Revision of Companies Law

The Companies Registration Directory was established by virtue of Decree No 26, dated 2 June 1919, that is, during the British Mandate.<sup>77</sup> The first purely Iraqi Companies Law was Law No 31 of 1957 which remained in force,<sup>78</sup> despite scores of amendments introduced thereto, up to the enactment of Companies Law No 36 of 1983.<sup>79</sup> By virtue of the latter, the Central Authority for Registration of Companies was created, followed by the Companies Registration Directory

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in a foreign country in the case of a juridical or legal person. J. The Iraqi Investor: Is the investor who holds Iraqi Nationality in case of a real person and is registered in Iraq in the case of a juridical or legal person?.

<sup>71</sup> *ibid.*

<sup>72</sup> *ibid.*

<sup>73</sup> M Sornarajah, *The International Law on Foreign Investment* (3rd edn, Cambridge University Press, New York 2011) 197.

<sup>74</sup> Article 27, Paragraph 2 of the Iraqi Investment Law No 13 of 2006; Surya P Subedi, *International Investment Law: Reconciling Policy and Principle* (Hart Publishing 2008) 7.

<sup>75</sup> Reporting that Article 29 of the Iraqi Investment Law No 13 of 2006 stipulates that 'All areas of investments shall be subject to the provisions of this law except: First: Investment in Oil and Gas extraction and production. Second: Investment in banks and insurance companies sectors'.

<sup>76</sup> Sami Shubber, *The Law of Investment in Iraq* (New York, Brill 2009) 22.

<sup>77</sup> Over the British Mandate period over Iraq, no Iraqi company law was legislated. Instead, the Indian Companies Law No. 7 of 1913 was enforced. Mowafaq H Raza, *Companies Law: Goals, Basics and Implications* (Baghdad, Printing Press of Justice Ministry 1985) 7.

<sup>78</sup> Commercial Companies Law No. 31 of 1957 published in the Official Gazette, issue 4035 of 09/01/1957.

{قانون الشركات التجارية رقم (31) لسنة 1957 الملغى }

<sup>79</sup> Companies Law No. 36 of 1983 published in the Official Gazette, issue 2935 of 18/04/1983.

{قانون الشركات رقم 36 لسنة 1983 الملغى }



in 1988.<sup>80</sup> Companies Law No 36 of 1983 was later rescinded by the enactment and enforcement of Companies Law No 21 of 1997.<sup>81</sup> Companies Law No 21 of 1997, as amended, regulates the legal position of companies and, as amended, sets out provisions for establishment of all types of companies: mixed or private joint-stock companies,<sup>82</sup> limited liability company (whether mixed or private),<sup>83</sup> sole owner enterprise,<sup>84</sup> joint liability company<sup>85</sup> and simple company.<sup>86</sup> However, Law No 22 of 1997 applies to state companies.<sup>87</sup>

In the post-2003 era, Law No 21 of 1997 has not been revoked, but some provisions thereof have been suspended and others amended by virtue of Coalition Authority's Decree No 64 of 2004,<sup>88</sup> by virtue of which the aforesaid Law has the following objectives: first, putting an end to the concomitance of companies' activities and development and economic plans; second, encouraging all types of investments, that is, not to be limited to national capital, as 'investment' is generally provided for and thus applies to all investment bodies; third, restricting a registrar's role to matching a company's contract and activities to the provisions of this Law; and fourth, granting the right to any person affected by the enforcement of this

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<sup>80</sup> Latif Jabr Koman, *Commercial Companies: A Study in Iraqi law* (Mustansiriya University 2008) 218. (Translated from Arabic Language by Author).

<sup>81</sup> The Companies Law No 21 of 1997 published in the Official Gazette, issue 3689 of 29/09/1997.

{قانون الشركات رقم (21) لسنة 1997}

<sup>82</sup> Reporting that Article 6/ first of Iraqi Companies Law No 21 of 1997 stipulates that 'The mixed or private joint-stock company shall be formed by not less than five persons, who will participate in it by owning shares through public subscription and will be responsible for the company's debts in so far as the nominal value of the shares to which they subscribed'.

<sup>83</sup> *ibid* art 6/second stipulates that 'The mixed or private limited liability company shall be formed by no more than 25 natural or juridical persons, who will subscribe to its shares and will be responsible for the company's debts in so far as the nominal value of the shares to which they subscribed'.

<sup>84</sup> *ibid* art 6/fourth stipulates that 'The sole owner enterprise is a company formed by one person, who owns the one quota in it and assumes personal and unlimited responsibility for all of its obligations'.

<sup>85</sup> *ibid* art 6/third stipulates that 'The joint liability company shall be formed by not less than two and not more than 25 persons, each owning a quota of its capital. They shall jointly assume personal and unlimited responsibility for all of its obligations'.

<sup>86</sup> *ibid* art 181 stipulates that 'The simple company shall consist of several partners, who are not less than two and not more than five and who have contributed shares to the capital. In such a company, one or more may contribute services, and others funds'. Latif Jabr Koman, *Commercial Companies: A Study in Iraqi law* (Mustansiriya University 2008) 130. See also Essam Al Tamimi and Adil Sinjakli, 'Legal Aspects of Setting up Business in Iraq and Iraqi Company Regulations' (1999) 14 Arab L Q 320.

<sup>87</sup> Law No. 22 of 1997 on State Companies published in the Official Gazette, issue 3685 of 01/09/1997.

{قانون الشركات العامة رقم 22 لسنة 1997}

<sup>88</sup> Coalition Provisional Authority Order Number 64 Amendment to the Company Law No. 21 of 1997 published in the Official Gazette, issue 74 of 2004. {تعديل قانون الشركات رقم 21 لعام 1997 الصادر عن سلطة الائتلاف المؤقتة}

Law, due to acts by the registrar or any other officer, to claim damages therefor.<sup>89</sup> This shall provide protection for investors.<sup>90</sup>

The reasons behind such amendments have been to introduce drastic changes to the criteria, requirements, and procedures of company establishment and related financial investment, not to mention the need to transform from a centralised system into the free market economy.<sup>91</sup> In other words, the amendments are aimed at realising economic growth through the creation of an efficient private sector and the facilitation of foreign investor monetary inflows.<sup>92</sup> Therefore, the Companies Registration Directory accepts company registration applications and allows foreign investor representation offices to operate in Iraq even in the case of 100% non-Iraqi founders.<sup>93</sup> Another positive outcome is the significant improvement in foreign company registration procedures since the Company Registrar must approve or disapprove any such application within ten days from the date of application. Applications by foreign companies are disapproved if they have violated the law and relevant guidelines.<sup>94</sup>

Notwithstanding the above, security-related risks and other limitations remain key contributors to the non-expanding number of foreign companies in Iraq.<sup>95</sup> Considering the myriad legislative changes noted above, no legal stability has materialised, and there remains the lack of a stable economic approach regarding the role of commercial companies.

The regulatory framework for joint stock companies in Iraq includes the laws and supervisory standards exercised by control and supervisory bodies.<sup>96</sup> Shareholders' rights head the list of priorities for the joint stock company regulation. Such rights are all about the right of shareholders to transfer their respective shares to other shareholders or to third parties.<sup>97</sup>

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<sup>89</sup> Judith Richards Hope & Edward N Griffin, 'The New Iraq: Revising Iraq's Commercial Law Is a Necessity for Foreign Direct Investment and the Reconstruction of Iraq's Decimated Economy ' (2004) 11 *Cardozo J Int'l & Comp L* 875.

<sup>90</sup> Alan K Audi, 'Iraq's New Investment Laws and the Standard of Civilization: A Case Study on the Limits of International Law' (2004-2005) 93 *Geo L J* 335.

<sup>91</sup> Judith Richards Hope & Edward N Griffin, 'The New Iraq: Revising Iraq's Commercial Law Is a Necessity for Foreign Direct Investment and the Reconstruction of Iraq's Decimated Economy ' (2004) 11 *Cardozo J Int'l & Comp L* 875.

<sup>92</sup> Alan K Audi, 'Iraq's New Investment Laws and the Standard of Civilization: A Case Study on the Limits of International Law' (2004-2005) 93 *Geo L J* 335.

<sup>93</sup> Latif Jabr Koman, *Commercial Companies: A Study in Iraqi law* (Mustansiriya University 2008) 220. (Translated from Arabic Language by Author).

<sup>94</sup> *ibid* 221.

<sup>95</sup> David Brent Grantham, 'Caveat Investor: Assessing the Risks and Rewards of IOCs Entry into Iraq' (2010) 3 *J World Energy Law Bus* 304.

<sup>96</sup> Invest in Iraq. 'Join Stock Company' (28 December 2012) <<http://www.invest-in-iraq.com/join-stock-company/>> accessed 17 February 2014.

<sup>97</sup> *ibid*.

However, this right is conditional. One complete year must elapse for private shareholders to be entitled to make such transfer in the following cases: if the shares in question are mortgaged, administered by a court order, encumbered for the company, and/or if the transferee is prohibited from holding such shares by virtue of an applicable law or an order made by a competent authority. In addition, shareholders may claim their respective distributable profits as well as their respective shares of assets upon liquidation.<sup>98</sup> Yet, Article 102 of the Iraqi Companies Law provide for the right of shareholder to take part in the general assembly of directors' meetings, review financial reports and the auditor's report and all other meeting agenda items including, but not limited to, appointing the auditor, setting auditor's fees, approving distributable profit percentage, and determination of compensations for board chairpersons and directors in proportion to their respective efforts for fulfilment of tasks and to profit rates.<sup>99</sup> For all of these purposes, the general assembly of directors must hold at least one annual meeting to which shareholders shall be invited by means of lawfully applicable notification methods.<sup>100</sup> General assembly meeting notifications are by way of the formal newsletter in addition to announcement in two daily newspapers and in the Iraq Stock Exchange. An invitation must include the date and place of the meeting. The period between the invitation and meeting must be at least fifteen (15) days. Fixing announcements of general assembly meetings or posting information thereof with a view to influencing the resolutions to be taken thereby is a violation punishable by law.<sup>101</sup>

General assembly meetings of joint stock companies are presided over by the board chairperson or head of the founders' committee and attended by members with a majority of shares subscribed and duly paid.<sup>102</sup> For the purposes of such meetings, a member may appoint another person, by means of a duly executed proxy, to attend, participate in and vote during general assembly meetings. Further, a member may delegate another shareholder to represent that member.<sup>103</sup> The specific meeting agenda may not be ignored, skipped or changed unless by virtue of a proposal made by holders of at least 10% of the company's share capital and the approval of the majority of vote holders represented in the meeting.<sup>104</sup>

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<sup>98</sup> Thomas Doherty, *Improving Investor Protection in Iraqi Joint Stock Companies* (USAID-TIJARA Provincial economic growth program, July 2011) 7.

<sup>99</sup> Article 102 of the Companies Law No 21 of 1997 published in the Official Gazette, issue 3689 of 29/09/1997.

<sup>100</sup> Article 86 of the Companies Law No 21 of 1997 published in the Official Gazette, issue 3689 of 29/09/1997.

<sup>101</sup> Article 88/1 of the Companies Law No 21 of 1997 published in the Official Gazette, issue 3689 of 29/09/1997.

<sup>102</sup> Article 95/1 of the Companies Law No 21 of 1997 published in the Official Gazette, issue 3689 of 29/09/1997.

<sup>103</sup> Article 91/1 of the Companies Law No 21 of 1997 published in the Official Gazette, issue 3689 of 29/09/1997.

<sup>104</sup> Article 89 of the Companies Law No 21 of 1997 published in the Official Gazette, issue 3689 of 29/09/1997.

In addition to the above, balanced treatment of all shareholders of joint stock companies achieves equality in terms of voting rights to key resolutions at general assembly meetings, and further protects them against the consequences of circulating insider information or concluding irregular transactions with parties concerned. Applicable rules allow minority shareholders to defend themselves against violation of their rights by company officers or majority shareholders.<sup>105</sup> As regards exercising voting rights by all shareholders to key general assembly resolutions, Article 97 of the Companies Law No 21 of 1997 provides that each and every shareholder shall have as many votes as the number of shares held.<sup>106</sup> The joint stock company regulatory framework in Iraq requires directors and the executive management to disclose transactions or deals concluded as part of the general assembly annual report.<sup>107</sup> This requirement serves as a protection for shareholders against conflict of interests and mismanagement. Article 134, Paragraph 1 of the Companies Law No 21 of 1997 provides for inclusion of the detailed general assembly report on the company activities, particularly the key agreements entered into by the company. Further, such report must detail all actions that realised the interests of the 10% (or more) shareholders as well as those of the directors and authorised managers, as well as the interests of their families and any bodies controlled thereby. Internationally approved accounting standards apply in Iraq.<sup>108</sup> For the purposes of disclosure of accounting and financial statement information, instructions provide for inclusion of information, in the general assembly's annual report, of interests or benefits realised by directors and executives or by their next of kin through various transactions and/or contracts, including sales, purchases, and services made to or by the company.<sup>109</sup> In addition, the names of shareholders of 5% or more of the capital must be disclosed. Another requirement is for any person or jointly acting persons to identify themselves and announce their holdings to the supervisory body of the Iraq Stock Exchange (ISX) should they hold more than 30% of a joint stock company.<sup>110</sup>

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<sup>105</sup> Thomas Doherty, *Improving Investor Protection in Iraqi Joint Stock Companies* (USAID-TIJARA Provincial economic growth program, July 2011) 9.

<sup>106</sup> See Article 97 of the Companies Law No 21 of 1997 published in the Official Gazette, issue 3689 of 29/09/1997.

<sup>107</sup> Thomas Doherty, *Improving Investor Protection in Iraqi Joint Stock Companies* (USAID-TIJARA Provincial economic growth program, July 2011) 1.

<sup>108</sup> See Article 134, paragraph 1 of the Companies Law No 21 of 1997 published in the Official Gazette, issue 3689 of 29/09/1997.

<sup>109</sup> Thomas Doherty, *Improving Investor Protection in Iraqi Joint Stock Companies* (USAID-TIJARA Provincial economic growth program, July 2011) 10.

<sup>110</sup> *ibid.*

## 4.4 Institutional Creation

The creation of investment and financial bodies sends a clear message to foreign investors that a country is open for investment, and the efficient. Performance of such bodies is vital to a government's foreign investment promotion policy. These bodies eliminate, or at least minimise, red tape, and facilitate the quality services needed to create and sustain investment. For these reasons, Iraq established a number of financial and investment authorities after 2003.<sup>111</sup>

### 4.4.1 Investment Commissions

Facilitating aspects of foreign investors' dealings with governmental bodies in the investment-hosting country is the mark of a positive attitude towards economic and commercial activity.<sup>112</sup> The Iraqi Investment Law No. 13 of 2006 provides for the establishment of investment commissions responsible for developing and planning national investment policies, facilitating the enforcement of investment law through the enactment of regulations and directives, and monitoring the execution of strategic investment projects.<sup>113</sup> The formation of investment commissions in Iraq is in keeping with the federal nature of the Iraqi Constitution, that is to say, the Investment Law provides for the establishment of federal, region and governorate investment commissions.<sup>114</sup> Accordingly, the National Investment Commission (henceforth the NIC) was created in 2007, and began operating in 2008.<sup>115</sup> Kurdistan, in turn, has established a territorial investment commission pursuant to the Investment Law of Kurdistan No (4) of 2006.<sup>116</sup> In like manner, other federal governorates have created their respective investment commissions to fulfil their needs and attend to their priorities in accordance with each individual governorate's perspective on investment challenges, opportunities and needs.<sup>117</sup> The delegation of powers to these region and governorate commissions is an aspect of a policy aimed at developing mechanisms for encouraging investment and granting investment licences

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<sup>111</sup> Christopher J Coyne, 'The Economic Reconstruction of Iraq' (2010) SSRN <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1550867](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1550867)> accessed 15 Jan 2014.

<sup>112</sup> OECD, *Supporting Investment Policy and Governance Reforms in Iraq* (OECD 2010) 14.

<sup>113</sup> Article 4 of the Iraqi Investment Law No. 13 of 2006 published in the Official Gazette, issue 4031 of 17/01/2007.

<sup>114</sup> Sami Shubber, *The Law of Investment in Iraq* (New York, Brill 2009) 48-49.

<sup>115</sup> Jordan E Toone, 'Foreign Direct Investment in Post-War Iraq: An Investor's Introductory Guide to the Legal Framework' (2013) 9 BYU Int'l L & Mgmt R 141.

<sup>116</sup> The Investment Law of Kurdistan No (4) of 2006 published in the Official Gazette, issue 62 of 27/08/2006. English copy is available on <<http://www.investpromo.gov.iq/index.php?id=92>> accessed 5 Feb 2014.

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<sup>117</sup> Article 4 of the Iraqi Investment Law No. 13 of 2006 published in the Official Gazette, issue 4031 of 17/01/2007.

while ensuring compatibility with federal investment plans, goals to be obtained through consultations with the NIC. In fact, this is a commendable approach by Iraqi legislators in terms of foreign investment promotion.<sup>118</sup>

There was, however a deficiency here, namely the non-regulation of potential conflicts between the NIC and its region or governorate counterparts.<sup>119</sup> The Iraqi legislature is to be blamed for the absence of any reference to the legal personality of the governorate investment commissions. In view of the financial dependence of these commissions, such a lack of legal personality would limit their powers regarding the issue of investment licences to investors.<sup>120</sup> To correct the aforementioned situation, the Iraqi legislators therefore referred to the establishment of a legal personality for such commissions in the First Amendment of the Iraqi Investment Law No. 2 of 2010.<sup>121</sup> Accordingly, those commissions will be able to operate as per their predefined objectives.<sup>122</sup> Further, the Court of First Instance in Najaf, looking into Case No. 1827/B4/2010, upheld the status of these commissions as legal personalities.<sup>123</sup>

In addition, the Investment Law of Iraqi Kurdistan No. 4 of 2006 provided for the establishment of a region investment authority with a legal personality, financial and administrative independence, and the powers to conduct all legal measures as necessary to put the Investment Law into force.<sup>124</sup> Besides the Investment Board of Kurdistan Region, there is another entity, the Supreme Investment Council, which is authorised by law to exercise certain powers that are almost the same as those of the Investment Authority.<sup>125</sup> The existence of several bodies for dealing with investors, whether nationals or foreigners, under the Investment Law of Kurdistan is apt to discourage investors, due to the overlapping of their powers and the ensuing administrative complexities for investors.<sup>126</sup> Consequently, the legislature in Kurdistan

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<sup>118</sup> Sami Shubber, *The Law of Investment in Iraq* (New York, Brill 2009) 51.

<sup>119</sup> Mohammed Al-Musawi, 'Weaknesses in the Performance of Investment Commissions' (2013) 18 Baghdad of Legal Science 350. (Translated from Arabic Language by Author).

<sup>120</sup> *ibid.*

<sup>121</sup> Law No. 2 of 2010 amending Law No. 13 of 2006 on Investment in the Official Gazette, issue 4143 of 08/02/2010.

<sup>122</sup> Mohammed Al-Musawi, 'Weaknesses in the Performance of Investment Commissions' (2013) 18 Baghdad of Legal Science 350. (Translated from Arabic Language by Author).

<sup>123</sup> Unpublished Judicial decision. *See* Mohammed Al-Musawi, 'Weaknesses in the Performance of Investment Commissions' (2013) 18 Baghdad of Legal Science 350.

<sup>124</sup> Article 10/1 of Kurdistan Investment Law No. 4 of 2006.

<sup>125</sup> Sami Shubber, *The Law of Investment in Iraq* (New York, Brill 2009) 57.

<sup>126</sup> Mohammed Al-Musawi, 'Weaknesses in the Performance of Investment Commissions' (2013) 18 Baghdad of Legal Science 350. (Translated from Arabic Language by Author).

had to adopt the same perspectives as Iraqi Investment Law No 13 of 2006 in providing for the establishment of one independent official body (a ‘one stop shop’) to deal with investors.

#### 4.4.2 Safe Investment Havens

Among the strategies adopted to encourage investments was the enactment of Investment Law No. 13 of 2006 which, in Article 9, Paragraph 7, provides for ‘Establishing secure and free investment areas with the agreement of the council of Ministers.’<sup>127</sup> Apparently, legislators used words such as ‘safe’ and ‘secure’ to reduce as much as possible anxieties about security, since the conditions which prevailed at the time deterred Iraqi and foreign investors from operating and investing in Iraq.<sup>128</sup>

The creation of safe investment areas is the first step in dispelling the security concerns that hinder the operation of many companies, despite their having been issued with investment permits.<sup>129</sup> Another benefit of these areas is the formation of new economic clusters with advanced infrastructure which are largely independent of the currently weakened and poor infrastructures of the cities.<sup>130</sup> Without them, new ventures would have to depend on some currently less reliable services, including electricity.<sup>131</sup> Safe investment areas are able to scale down bureaucracy and red tape, deal a blow to administrative corruption, and overcome delays, such as those caused by problems of urban planning.<sup>132</sup>

This study argues that upgrading the existing free zones in Iraq, will be more effective and feasible than establishing new safe areas. Free zones in Iraq operate under the Iraqi Free Zones Law No. 3 of 1998,<sup>133</sup> which allows an investor to exercise all industrial, commercial and service activities, with tax exemption for imported and exported goods. Capital, profits and investment-generated income are likewise exempted from all taxes and duties, unless imported into areas under customs authority jurisdiction.<sup>134</sup>

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<sup>127</sup> Article 9, Paragraph 7 of Iraqi Investment Law No. 13 of 2006 published in the Official Gazette, issue 4031 of 17/01/2007.

<sup>128</sup> OECD, *Supporting Investment Policy and Governance Reforms in Iraq* (OECD 2010) 24.

<sup>129</sup> Abdul Malik Mahmud, 'Investment in Iraq, Reality or Illusion?' (2012) 83 *Alra'ud* magazine 8. (Translated from Arabic Language by Author).

<sup>130</sup> *ibid.*

<sup>131</sup> Abdul-Hussein Tariq, *Economic Development and Workforce Planning in Iraq* (2nd edn, Dar Al Adalah 2013) 141. (Translated from Arabic Language by Author).

<sup>132</sup> *ibid.*

<sup>133</sup> Law of the General Authority for Free Zones No. 3 of 1998. { قانون الهيئة العامة للمناطق الحرة }

<sup>134</sup> Iraqi Commercial Office in Washington DC 'Free Trade Zones' (2013) <<http://www.ico-us.org/FreeTradeZones/tabid/59/language/en-US/Default.aspx>> accessed 19 Jan 2014 (The Free Zones operating in Iraq are: (1) Khur Az- Zubair Free Zone: Located to the south west of Basra, 40 km from Basra,

### 4.4.3 One-Stop Shop

The One-Stop Shop Authority (OSS) is the only entity an investor needs to visit if wishing to invest in Iraq. To ease the bureaucratic hurdles, the OSS handles investment requests through one easily-accessed station.<sup>135</sup> The currently applicable Investment Law requires investors to obtain investment permits from the National Commission for Investment and the Regions or Governorates Commissions. Investors, however may apply to the OSS for investment permits, in which case applicants would be notified of OSS's final decision within 45 days of the application date and the submission of all the required documentation.<sup>136</sup>

The OSS also provides a group of facilities, such as an information-sharing centre where investors can obtain answers to all enquiries; the provision of pre-approval support for investors, including easier approval procedures and information about local partners, markets, sectors and incentives of investment; the provision of post-permit support, including approval of applications, equipment, importation of raw material and expatriate employee care; and facilitation of the investment process through providing clarification on legislations, registration, the issue of permits, licensing and plot allocations.<sup>137</sup>

### 4.4.4 Financial Intermediaries

The Trade Bank of Iraq (TBI) was created in 2003 as a financial tool to support the local banking sector and to facilitate investment. The TBI aims at levelling up trade exchange and private sector financing, in addition to establishing international trade channels with Iraq.<sup>138</sup> It commenced its operations as a governmental bank with a capital of USD 100,000,000, which increased later to USD 860,000,000, with assets worth USD 17,801 billion in 2012.<sup>139</sup>

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on a total land area of 400 expandable dunams. This zone is distinguished for its strategic location overlooking the Arabian Gulf, its marketing and commercial penetration of the Iraqi and the Gulf markets, its closeness to the Khur Az-Zubair Port with its integral infrastructure, and for being within close range of locations for raw materials and manufactured goods;(2) Nineveh / Flaifel Free Zone, located to the north of Nineveh Province on the Mousel-Zahu Road, 20 km to the north of Mousel, on 160 expandable dunams. This Zone is distinguished by its geographical location, as it lies at the crossroads of roads and railways to and from Turkey, Syria and Jordan. It is also close to energy, raw material and manpower sources; (3) Qa'im Free Zone is located to the northwest of Iraq, Anbar Province, on the Iraqi Syrian borders about 400 km from Baghdad on 28 dunams) *ibid.*

<sup>135</sup> OECD, *Supporting Investment Policy and Governance Reforms in Iraq* (OECD 2010) 28.

<sup>136</sup> Jordan E Toone, 'Foreign Direct Investment in Post-War Iraq: An Investor's Introductory Guide to the Legal Framework' (2013) 9 *BYU Int'l L & Mgmt R* 141.

<sup>137</sup> OECD, *Supporting Investment Policy and Governance Reforms in Iraq* (OECD 2010) 37.

<sup>138</sup> Trade Bank of Iraq. 'About TBI: History' (2013) <<http://www.tbiraq.com/en/about/history/>> accessed 14 Mar 2014.

<sup>139</sup> *ibid.*



Moreover, the TBI has, since its inception, experienced steady increases in banking transactions, with net profits reaching USD 385,000,000 by the end of 2011.<sup>140</sup>

The TBI is clearly committed to conducting banking transactions that are compatible with international codes and traditions, as set forth by the International Chamber of Commerce (ICC), while keeping up with anti-money laundering instructions and rules.<sup>141</sup> On this basis, the TBI has been selected as the best trade bank in the Middle East, according to the London-based Trade & Forfeiting Review for 2007, 2008, 2009 and 2011.<sup>142</sup>

In Iraq's investment environment, the TBI is a leading figure in the commercial and investment financing sector. In supporting local banking sector bodies, the TBI adopted a "Business Partnership" approach as manifested by its issue of letters of guarantee to public sector entities along with private sector banks.<sup>143</sup> In this respect, the TBI has allocated part of the government-based letters of guarantee for direct issue directly to local banks which fulfil certain requirements pre-set by the TBI.<sup>144</sup> By the same token, the TBI seeks to help private banks to expand their operative networks with a view to facilitating commodity and service importation processes. The TBI also sets limitations for private banks when it comes to contractual credits.<sup>145</sup> In addition, and as part of the private sector support programme, the TBI grants its clients banking facilities to import commodities and services needed for major infrastructure projects, such as the Erbil Electricity Generation Project in Kurdistan, which is one of the most successful key projects financed by the TBI.<sup>146</sup>

In addition to the establishment of the Trade Bank, there was further reorganisation of the sector through the enactment in 2004 of Banking Law No. 94,<sup>147</sup> which created a banking

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<sup>140</sup> The Trade Bank of Iraq. 'Significant Achievements and Strategic' (2013) <<http://www.tbiraq.com/ar/news-and-achievements/achievements/>> accessed 14 Mar 2014.

<sup>141</sup> Abdul Malik Mahmud, 'Investment in Iraq, Reality or Illusion?' (2012) 83 Alrraúd magazine 8. (Translated from Arabic Language by Author).

<sup>142</sup> Trade Bank of Iraq. 'TBI History' (2013) <<http://www.tbiraq.com/en/about/history/>> accessed 14 Mar 2014 (Noting that the magazine GTR nominated TBI as the best bank for business continuity in 2010 when it managed to restore its regular operations within one working day after it suffered a terrorist attack. In August 2011, The Banker magazine placed the TBI among the 500 best Middle East banks) *ibid*.

<sup>143</sup> Documentary letters of credit issued by TBI up to 31 Dec. 2011 amounted to USD 15,559 billion, along with letters of credit of USD 3,313 billion. Abdul Malik Mahmud, 'Investment in Iraq, Reality or Illusion?' (2012) 83 Alrraúd magazine 8. (Translated from Arabic Language by Author).

<sup>144</sup> The standards established by the TBI for the issue of documentary credits are: accurate financial data, detection of bank branches, and the experience of each bank in terms of issuing documentary credits. *ibid*.

<sup>145</sup> The Trade Bank of Iraq. 'Significant Achievements and Strategic' (2013) <<http://www.tbiraq.com/ar/news-and-achievements/achievements/>> accessed 14 Mar 2014.

<sup>146</sup> Other examples of projects financed by TBI include the Karbala Cement Plant, the Bismayah Residence Compound, and tourist hotels across the country. *See* The Trade Bank of Iraq. 'Success Stories' (2013) <<http://www.tbiraq.com/en/news-and-achievements/success-stories/>> accessed 14 Mar 2014.

<sup>147</sup> The Iraqi Banking Law No. 94 of 2004 published in the Official Gazette, issue 3986 of 01/09/2004.

entity which was fully owned by foreigners but received the same treatment as Iraqi banks in terms of rights and obligations.<sup>148</sup> It was therefore able to contribute to the capital of Iraqi banks,<sup>149</sup> to open representation offices to introduce and promote the services offered by such banks, and to study the local market.<sup>150</sup> As for privately-owned banks, there are thirty six in total, seven of which are co-ventures with foreign partners, while some eight others are banks with an Islamic ethos.<sup>151</sup>

#### 4.4.5 Maintaining the Foreign Project Structure

A foreign investor, with a sincere desire for investment (including their commercial information and industry secrets) does not need to make any changes to their legal entity to be compliant with the Iraqi law. Nor do they need to change nationality or that of their corporate body to be given an investment licence in Iraq.<sup>152</sup> A licence is given to a foreign investor once the latter applies to the NIC or the local investment authority.<sup>153</sup> A foreign investor's type or nationality, as long as they are compliant with the requirements of the Investment Law No 13 of 2006, is not a source of concern. However, a foreign investor may have a partnership with a national counterpart to win some concessions approved for national investors or to eliminate concerns of project stakeholders regarding the source of capital and potential sourcing thereof from money laundering activities<sup>154</sup>. Therefore, a foreign investor would establish a national joint stock or limited liability company. Alternatively, a foreign investor may subscribe to the capital of a joint stock company, becoming one of the most important co-founders or subscribers to such national company.<sup>155</sup>

In fact, there are several ways to have a mixed foreign–national capital, mainly through: Firstly, the establishment of a trust or subscribing to the capital thereof in the case of a joint

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<sup>148</sup> Article 4, Paragraph 5 of the Iraqi Central Bank Law No.56 of 2004 published in the Official Gazette, issue 1 of 06/03/2004.

<sup>149</sup> Article 4, Paragraph 8 of the Iraqi Central Bank Law No.56 of 2004 published in the Official Gazette, issue 1 of 06/03/2004.

<sup>150</sup> Article 7, Paragraph 1 of the Iraqi Central Bank Law No.56 of 2004 published in the Official Gazette, issue 1 of 06/03/2004.

<sup>151</sup> Abdul-Hussein Tariq, *Economic Development and Workforce Planning in Iraq* (2nd edn, Dar Al Adalah 2013) 141. (Translated from Arabic Language by Author).

<sup>152</sup> Sami Shubber, *The Law of Investment in Iraq* (New York, Brill 2009) 89.

<sup>153</sup> Jordan E Toone, 'Foreign Direct Investment in Post-War Iraq: An Investor's Introductory Guide to the Legal Framework' (2013) 9 *BYU Int'l L & Mgmt R* 141.

<sup>154</sup> US Department of State. '2013 Investment Climate Statement–Iraq' (February 2013) <<http://www.state.gov/e/eb/rls/othr/ics/2013/204661.htm>> accessed 12 Jan 2014.

<sup>155</sup> UKTI, 'Doing business in Iraq' (26 Apr 2013) UK Trade & Investment <<http://www.ukti.gov.uk/export/countries/asiapacific/middleeast/iraq/doingbusiness.html>> accessed 1 March 2014.

stock company under development.<sup>156</sup> Secondly, acquisition of a national company by a foreign one.<sup>157</sup> Thirdly, introduction of investment-oriented shares in a trust. It is noteworthy that foreign investors tend to establish joint stock companies in Iraq as founders or subscribers for easy stepping in and out as well as the associated limited liability.<sup>158</sup>

Should a foreign investor wish to enter the Iraqi market, such investor may acquire a national company as there is no law preventing acquisition of a company by another. According to many legal provisions, shares may be acquired by a single person.<sup>159</sup> Yet, the lack of a special law on acquisition reveals an obstacle considering the peculiar nature of acquisition that is not covered by general rules such as the offer period, nature and organiser, the recommendation made by the General Assembly of director to shareholders on whether to accept or reject the offer, the acquisition success to failure ratio, and measures to protect rights of shareholders who refuse to sell.<sup>160</sup> However, a new securities bill is in the pipeline to regulate acquisition, particularly Article 35 thereof, with referrals made to acquisition guidelines to be enforced under the aforesaid bill upon finalisation. In addition, there is a legislative limitation set forth under Article 10/3 of the Interim Law on Securities Markets No 74 of 2004, which read:

It shall be unlawful for a Person or Affiliated Persons to acquire or seek to acquire a right to more than 30% of the shares entitled to vote of any joint stock company unless the person or persons, whether natural or legal, identify themselves and disclose their holdings to the Exchange and the Commission and comply with such rules as the Commission may prescribe with respect to such transactions and the protection of minority owners. Such reports shall be made public by the Exchange and the Commission. This provision shall apply also to persons holding such positions at the time this Law comes into effect.<sup>161</sup>

Concerning the establishment of multinational companies in Iraq, Iraqi legislators have ruled it out, generally speaking, but instead allow for the same in special cases under the National

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<sup>156</sup> Hussein Tamimi. 'Iraq Needs to Rehabilitate and Expand Infrastructure Investment through the Gate' (2013) <<http://nenosplace.forumotion.com/t973-iraq-needs-to-rehabilitate-and-expand-infrastructure-investment-through-the-gate>> accessed 22 March 2014. (Translated from Arabic Language by Author).

<sup>157</sup> Iraq Project, *Iraq Investment Climate Statement Bureau of Economic, Energy and Business Affairs* (Business Development, USA Trade, and Investments in Iraq 2011) 9.

<sup>158</sup> David Brent Grantham, 'Calculated Risk: The Advance of IOCs and NOCs into the Iraqi Investment Theater' (2010) 3(3) *J World Energy Law Bus* 315.

<sup>159</sup> See Article 49 of the Insurance Regulation Law No. 10 of 2005 published in the Official Gazette, issue 3995 of 03/03/2005, {قانون تنظيم التأمين}; Article 9 of the Law of Competition and Antitrust No. 14 of 2010 published in the Official Gazette, issue 4147 of 09/03/2010, {قانون المنافسة ومنع الاحتكار}; Article 10 of the Order No. 74 of 2004 Interim Law on Securities Markets published in the Official Gazette, issue 4147 of 09/03/2010. { القانون المؤقت لأسواق الاوراق المالية }

<sup>160</sup> David Brent Grantham, 'Calculated Risk: The Advance of IOCs and NOCs into the Iraqi Investment Theater' (2010) 3(3) *J World Energy Law Bus* 315.

<sup>161</sup> Article 10/3 of the Order No. 74 of 2004 Interim Law on Securities Markets.

Banks Law No.94 of 2004 and the Insurance Law No.10 of 2005.<sup>162</sup> These cases are restricted to oil and gas exploration and production, and investment in the banking and insurance sectors. Investment in the aforesaid fields is beyond the jurisdiction of the Investment Law No 13 of 2006.<sup>163</sup> Accordingly, exceptional rules of establishing multinational companies in Iraq may not be applied to other companies established in Iraq in any field other than the three fields specified above.<sup>164</sup> Article 56, Paragraph 4 of the Iraqi Companies Law No 21 of 1997 allows a foreign bank to partner with an Iraqi bank but with the foreign bank falling under the jurisdiction of the Iraqi Companies Law. The resulting company shall be an Iraqi, rather than a multinational, company.<sup>165</sup>

Although Article 33, Paragraphs 3 and 4 of the Iraqi Banking Law No 94 of 2004 has been more specific on allowing the establishment of a multinational banking company in Iraq, the enforcement range of such provision remains confined exclusively to the fields specified. Such exceptional provisions, though far from general, indicate a conflict between legal provisions concerned with similar regulatory effect and jurisdiction.<sup>166</sup> In practice, the provisions of the Iraqi Companies Law No 21 of 1997 prevail.<sup>167</sup> Consequently, such exceptions cannot be used as a reference or used on a larger scale in terms of interpretation.<sup>168</sup> Simply, an exception remains an exception pursuant to Article 3 of the Iraqi Civil Law No. 40 of 1951.<sup>169</sup> Anyway, such exceptions do not sufficiently cover the activities potentially chosen by a foreign investor under the Investment Law No 13 of 2006.<sup>170</sup>

Issuing investment bonds<sup>171</sup> is a way to bring about a mixture of foreign and national capitals—a case by virtue of which, if realised, the national capital can be introduced into a

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<sup>162</sup> Jordan E Toone, 'Foreign Direct Investment in Post-War Iraq: An Investor's Introductory Guide to the Legal Framework' (2013) 9 *BYU Int'l L & Mgmt R* 141.

<sup>163</sup> Judith Richards Hope & Edward N Griffin, 'The New Iraq: Revising Iraq's Commercial Law Is a Necessity for Foreign Direct Investment and the Reconstruction of Iraq's Decimated Economy ' (2004) 11 *Cardozo J Int'l & Comp L* 875.

<sup>164</sup> Iraq Project, *Iraq Investment Climate Statement Bureau of Economic, Energy and Business Affairs* (Business Development, USA Trade, and Investments in Iraq 2011) 10-12.

<sup>165</sup> Mohammed Al-Musawi, 'Weaknesses in the Performance of Investment Commissions' (2013) 18 *Baghdad of Legal Science* 350.

<sup>166</sup> See Article 33, paragraphs 3 and 4 of the Iraqi Banking Law No. 94 of 2004.

<sup>167</sup> The Iraqi law prevails in cases of conflict according Article 3, Paragraph First of the Companies Law No 21 of 1997 published in the Official Gazette, issue 3689 of 29/09/1997.

<sup>168</sup> Jordan E Toone, 'Foreign Direct Investment in Post-War Iraq: An Investor's Introductory Guide to the Legal Framework' (2013) 9 *BYU Int'l L & Mgmt R* 141.

<sup>169</sup> Article 3 of the Iraqi Civil Law No. 40 of 1951 stipulates that: 'That which has been established contrary to analogy cannot be used analogy for other matters.' { ما ثبت على خلاف القياس فغيره لا يقاس عليه }

<sup>170</sup> Iraq Project, *Iraq Investment Climate Statement Bureau of Economic, Energy and Business Affairs* (Business Development, USA Trade, and Investments in Iraq 2011).

<sup>171</sup> Judith Richards Hope & Edward N Griffin, 'The New Iraq: Revising Iraq's Commercial Law Is a Necessity for Foreign Direct Investment and the Reconstruction of Iraq's Decimated Economy ' (2004) 11 *Cardozo J*

joint stock company established or subscribed to by a foreign investor without counter-redemption therefrom.<sup>172</sup> However, the Iraqi Companies Law No 21 of 1997, as amended, has not adopted this system. It is further universally inapplicable due to the fact that the rules of the said Law are related to the general system, and therefore no agreement can be reached on adopting new regulations that are not provided for under the currently applicable Companies Law.<sup>173</sup>

## 4.5 Upgrade Polarisation Mechanisms for Foreign Investors

The effort to improve the investment environment is not restricted to addressing risks. More importantly, it involves the provision of attractive investment opportunities and reasonable incentives.<sup>174</sup> To attract large numbers of foreign investors, investment opportunities must be duly promoted, with key sought-after incentives given to investors.<sup>175</sup> This policy has grown over time to become part of any contemporary investment policy which has the purpose of attracting investors,<sup>176</sup> and Iraq, by enacting Investment Law No. 13 of 2006, has adopted this policy.

### 4.5.1 Temptations Profitability within Investment Opportunities

Considering the investment needs in Iraq, investment opportunities are myriad across sectors in the Iraqi economy. In this respect, the Iraqi Government has availed investment opportunities across such sectors including construction, industry, agriculture, tourism, housing,

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Int'l & Comp L 875. (An investment bond (*Sukuk*) is a security whereby the relation between the issuing company and the owner materialises. Accordingly, the relation rules are defined in terms of rights and duties of parties. The owner of a bond is a partner in terms of profits and losses but has no role in management. Such owner receives their share upon liquidation prior to capital shareholders). *ibid*.

<sup>172</sup> Certain countries allow for redemption of joint stock company shares upon selling. In Iraq, however, no specific provision of the Companies Law allows a company to buy its shares. However, according to general rules, there is no restriction upon a debtor buying their own debt upon which purchase the joint liability expires (Article 418-419 of Iraqi Civil law) as the company is indebted to the shareholder with the latter's capital share. Dan E Stigall, 'Iraqi Civil Law: Its Sources, Substance, and Sundering' (2006-2007) 16 J Transnat'l L & Pol'y 1.

<sup>173</sup> Latif Jabr Koman, *Commercial Companies: A Study in Iraqi law* (Mustansiriya University 2008) 18 (The Companies Law rules are part of the general law, and hence no contrary provisions may be agreed to. Art 1 of the Trade Law No. of 1984 has provisions in this respect. It is also noteworthy that the applicable Iraqi Companies Law does not allow a company to create its own articles of association, unlike the provisions of the rescinded Commercial Companies Law No 31 of 1957) *ibid*. (Translated from Arabic Language by Author).

<sup>174</sup> Virtus C Igbokwe, Nicholas Turner, Obijiofor Aginam (eds), *Foreign Direct Investment in Post-Conflict Countries: Opportunities and Challenges* (Adonis & Abbey 2010).

<sup>175</sup> Päivi Lujala, Sandra S Nichols and Carl Bruch, 'When Peacebuilding Meets the Plan: Natural Resource Governance and Post-Conflict Recovery' (2011) 12 Whitehead J Dipl& Int'l Rel 11.

<sup>176</sup> Virtus C Igbokwe, Nicholas Turner, Obijiofor Aginam (eds), *Foreign Direct Investment in Post-Conflict Countries: Opportunities and Challenges* (Adonis & Abbey 2010).

communications and health care.<sup>177</sup> After the fall of Saddam Hussein in 2003, émigré Iraqis started to flow back, providing a powerful segment of the purchasing power for goods and services.<sup>178</sup> With a domestic market consisting of a population of 30 million, Iraq provides a clear opportunity for the production and sale of goods and services to replace reliance on imports, taking into account rising income per capita, thanks to higher employment rates in the public and private sectors and salary increases offered by the Government.<sup>179</sup> All of the above factors have collectively contributed to the purchasing power of a population which was already hungry for consumer satisfactions after the three decades of economic and trade sanctions imposed on Iraq after the invasion of Kuwait.<sup>180</sup>

Furthermore, leading investment companies still have the tendency to invest in the energy sector, particularly as proven Iraqi reserves of oil stand at 115 billion barrels.<sup>181</sup> Based on these numbers, Iraq ranks 2–3 worldwide among world's countries with largest proven reserves.<sup>182</sup> There are also indications that Iraq has 45–100 billion additional barrels in its western desert that remain undiscovered.<sup>183</sup> Further, Iraq's discovered oil reserves amounts to 10 % of the world's total reserves.<sup>184</sup> Iraq has natural gas (NG) reserves as well. Available information indicates 112 trillion cubic feet NG reserves in Iraq,<sup>185</sup> thus ensuring Iraq the tenth rank worldwide in terms of largest NG reserves. Potentially additional NG reserves amount to 275–300 trillion cubic feet,<sup>186</sup> along with large amounts of other metals including phosphate, sulphur and iron.<sup>187</sup>

In addition, the Iraqi workforce is characterised by academic and technical qualifications of a high standard, and the country is also rich in certain much sought-after

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<sup>177</sup> National Investment Commission. 'Top Ten Reason to Invest in Iraq' (2014) <<http://www.investpromo.gov.iq/index.php?id=2>> accessed 5 Jan 2014.

<sup>178</sup> Abdul-Hussein Tariq, *Economic Development and Workforce Planning in Iraq* (2nd edn, Dar Al Adalah 2013) 17. (Translated from Arabic Language by Author).

<sup>179</sup> *ibid.*

<sup>180</sup> Clarence M Dass, 'Adventure Capitalizing in Baghdad: an Entrepreneurial Approach to Reconstructing Iraq' (2009-2010) 4 *Entrepreneurial Bus L J* 157.

<sup>181</sup> Abbas Alnasrawi, *The economy of Iraq: Oil, Wars, Destruction of Development and Prospects, 1950-2010* (Westport, Connecticut London 2010) 5.

<sup>182</sup> Rex J Zedalis, *The Legal Dimensions of Oil and Gas in Iraq: Current Reality and Future Prospects* (Cambridge University Press 2009) 12.

<sup>183</sup> *ibid.*

<sup>184</sup> Abbas Alnasrawi, *The economy of Iraq: Oil, Wars, Destruction of Development and Prospects, 1950-2010* (Westport, Connecticut London 2010) 5.

<sup>185</sup> Rex J Zedalis, *The Legal Dimensions of Oil and Gas in Iraq: Current Reality and Future Prospects* (Cambridge University Press 2009) 15.

<sup>186</sup> Abbas Alnasrawi, *The economy of Iraq: Oil, Wars, Destruction of Development and Prospects, 1950-2010* (Westport, Connecticut London 2010) 19.

<sup>187</sup> *ibid.*

specialisations, such as engineering and agriculture, and there many with specialist administrative and organisational skills.<sup>188</sup> Operational costs in Iraq are the lowest in the region, and even the world. For example, an Iraqi engineer's fee is 89% less than that of a counterpart in the United Arab Emirates and 92% less than a counterpart in the United Kingdom.<sup>189</sup> Its strategic location, relatively large population and competitive costs are reasons for Iraq to stand out as an exportation hub both regionally and worldwide.<sup>190</sup> The country enjoys a strategic location in the Middle East, as it forms the tip of the Arabian Gulf, which provides a shorter route between the Mediterranean Sea and the Indian Ocean. Undoubtedly, the Arabian Gulf and the Euphrates Valley serve as a key market route reaching up to ports across the Mediterranean.<sup>191</sup> Further, Iraq overlooks the shortest aerial route between Western and Southern Europe in one direction, and South East Asia and Australia in the other.<sup>192</sup> Therefore, Iraq has ports and airports that can well be used for purposes of distribution and trade at lower costs.

#### **4.5.2 Special and Differential Treatment**

In support of the Iraqi Government's efforts to create an attractive environment for foreign investors, the Investment Law has been enacted 'liberally' to provide incentives for both national and foreign investors.<sup>193</sup>

##### ***4.5.2.1 Repatriation of the Investor's Capital and Its Returns***

The Law of Investment in Iraq allows any investor to transfer abroad any capital which has been brought into Iraq for purposes of investment, including any profits lawfully generated thereby.<sup>194</sup> It is worth noting that the provisions of the Law do not provide an explicit time for

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<sup>188</sup> Abdul-Hussein Tariq, *Economic Development and Workforce Planning in Iraq* (2nd edn, Dar Al Adalah 2013) 69. (Translated from Arabic Language by Author).

<sup>189</sup> National Investment Commission. 'Top Ten Reason to Invest in Iraq' (2014) <<http://www.investpromo.gov.iq/index.php?id=2>> accessed 5 Jan 2014.

<sup>190</sup> *ibid.*

<sup>191</sup> Abdul-Hussein Tariq, *Economic Development and Workforce Planning in Iraq* (2nd edn, Dar Al Adalah 2013) 69.

<sup>192</sup> *ibid.*

<sup>193</sup> Sami Shubber, *The Law of Investment in Iraq* (New York, Brill 2009) 6.

<sup>194</sup> Mohammed Al-Musawi, 'Weaknesses in the Performance of Investment Commissions' (2013) 18 Baghdad of Legal Science 350. {محمد الموسوي، 'نقاط الضعف في اداء هيئات الاستثمار'} (Pointing out that this provision of the Law is in compliance with the Coalition Authority's Decree (2003), but is different from the Iraqi Free Zone Investment Law, the provisions of which allow foreign and non-resident Iraqi investors to transfer all their invested capitals and the proceeds thereof. However, resident Iraqi investors, whether legal or natural persons, may transfer their full investment capital abroad, but with a limit of up to 50 % of the proceeds to be given the same privilege. The remaining proceeds may be transferred internally in foreign currency. Such most-favoured treatment would be repellent to resident Iraqi investors, and could even a propel an investment drain. Further,

the transfer, as long as the capital transfer is made according to instructions provided beforehand by the Central Bank of Iraq (CBI) as well as Foreign Transfer Controls.<sup>195</sup> This incentive allows unconditional transfer of capital in terms of amount and or time; a clearly positive advantage for investors, but not equally so for the country, since transferring an investor's capital as a lump sum could wreak havoc on Iraq's balance of payments. Lower rates for foreign currencies would affect the national economy and moreover, this incentive allows an investor to make the transfer not only in Iraqi Dinars, but in any convertible currency.<sup>196</sup> However, the Iraqi Law of investment provides for full repayment by an investor of all debts due to the Iraqi Government before the transfer is allowed to take place.

This study suggests, for the avoidance of red tape, that it would have been better to have named the NIC as the entity responsible for clearing an investor's debts.

#### **4.5.2.2 Exemption from Taxation and Fees**

The Law of Investment in Iraq adopted a tax-exemption policy,<sup>197</sup> with investment projects granted a ten-year tax and fee exemption as from the start of the commercial operation. To be eligible for tax exemption, requirement, the Law requires the projects to be in developmental zones and to be licensed by the NIC.<sup>198</sup> Further, the Law allows the Ministerial Cabinet to propose new bills to extend or grant additional tax-exemptions in light of benefits generated by the investment to the country.<sup>199</sup> Also, the NIC has been vested with the power to raise the tax exemption period to fifteen (15) years, but only in cases where an Iraqi partner's share exceeds 50%.<sup>200</sup> It is worth noting that Iraqi legislators have ensured the right to tax exemption

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an Iraqi investor does not benefit from such privileges in the case of a Kurdistan-based investment, since Article 7, Paragraph 5 provides exclusively for foreign investors to be entitled to such privileges. Real connection applies to the dual nationality of Iraqis) *ibid.*

<sup>195</sup> Article 11, Paragraph 1 of the Investment Law No. 13 of 2006 published in the Official Gazette, issue 4031 of 17/01/2007.

<sup>196</sup> Abdul Malik Mahmud, 'Investment in Iraq, Reality or Illusion?' (2012) 83 *Alraüd* magazine 8. (Translated from Arabic Language by Author).

<sup>197</sup> Jordan E Toone, 'Foreign Direct Investment in Post-War Iraq: An Investor's Introductory Guide to the Legal Framework' (2013) 9 *BYU Int'l L & Mgmt R* 141 (A number of tax reforms preceded the Investment Law. They are: A 15%-25% reduction in the limited company, Joint Stock Company and foreign company tax rate in Iraq, or for those with permanent presence in Iraq by virtue of Decree No. 49 of 2004. Under Article 3, Paragraph 1, individual income tax has been cut significantly, from the former 10–40% to the current 3–15% only. Suspension of all custom tariffs imposed on Iraq-bound imports was affected by virtue of Decree No. 38 of 2003. This massive reduction follows an era of 1 – 200% custom tariffs) *ibid.*

<sup>198</sup> Article 15, paragraph 1 of the Investment Law No. 13 of 2006 published in the Official Gazette, issue 4031 of 17/01/2007.

<sup>199</sup> Sami Shubber, *The Law of Investment in Iraq* (New York, Brill 2009) 68.

<sup>200</sup> Article 15, paragraph 3 of the Investment Law No. 13 of 2006 published in the Official Gazette, issue 4031 of 17/01/2007.



for investments moving from one developmental zone to another, provided that the NIC is appropriately notified of any such move.<sup>201</sup> Moreover, the Law provides for tax exemptions for investments rather than for proprietors, that is, the tax-exemption for an investment is sustained even in the case of ownership transfer, provided that the new owner keeps the same investment and the same domain, or, if transferring to another domain, does so with the NIC's consent.<sup>202</sup>

A question arises here: what is the objective range of tax exemptions for investors? A close look at the provisions of the Law yields the fact that all investment activities are covered by such tax exemption, with the exception of the oil and gas exploration and extraction industry and investments related to banking and insurance.<sup>203</sup> Further to the above, the objective range of tax-exemptions may be extended in the interests of the wider design of an investment, provided that any such extension is made within three years of notifying the NIC of the design or development.<sup>204</sup>

It should be noted that that the tax-exemption also applies as well to any fees imposed by Iraqi laws.<sup>205</sup> In addition to the above-stated incentives, investments have been made exempt from customs tariffs by virtue of Article No.17 of the Law.<sup>206</sup> However, such exemption may be lifted and taxes may become payable in cases where assets exempted from customs tariffs are sold in violation of the Law.<sup>207</sup> This also holds true in cases where assets are used for another investment, in contravention of the relevant directives.

The Kurdistan Investment Law provides for tax, fee and custom tariff exemptions in a manner similar to the Federal Investment Law, with some minor but significant differences.<sup>208</sup> To give an example of the minor differences, according to Article 17, Paragraph 1 of the

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<sup>201</sup> Article 16 of the Investment Law No. 13 of 2006 published in the Official Gazette, issue 4031 of 17/01/2007.

<sup>202</sup> Sami Shubber, *The Law of Investment in Iraq* (New York, Brill 2009) 68.

<sup>203</sup> Abdul-Hussein Tariq, *Economic Development and Workforce Planning in Iraq* (2nd edn, Dar Al Adalah 2013) 69 (Stating that Iraqi legislators, by excluding the oil & gas exploration and extraction sectors from the privileges offered by the Law, wanted relevant investments in these key sectors to be governed by different rules from those provided for in the Law. Undoubtedly, there is a special law on refining oil; that is Law No. 64 of 2007. There is also the 2007 Oil & Gas Bill, which has a wider scope compared to Law No. 63 of 2007, which is restricted to refining oil and to no other investments in the oil and gas sectors. Investment in the banking and insurance sector is governed by special rules, as banking investment is subject to the Banking Law enacted by the Coalition Authority Decree No. 40 of 2003. Investment in insurance and re-insurance business, however, is regulated by the Insurance Law enacted by Coalition Authority Decree No. 10 of 2005) *ibid.*

<sup>204</sup> Article 17, paragraph 3 of the Investment Law No. 13 of 2006 published in the Official Gazette, issue 4031 of 17/01/2007.

<sup>205</sup> Abdul Malik Mahmud, 'Investment in Iraq, Reality or Illusion?' (2012) 83 *Alraüd* magazine 8. (Translated from Arabic Language by Author).

<sup>206</sup> Sami Shubber, *The Law of Investment in Iraq* (New York, Brill 2009) 68.

<sup>207</sup> Article 18 of the Investment Law No. 13 of 2006 published in the Official Gazette, issue 4031 of 17/01/2007.

<sup>208</sup> Sami Shubber, *The Law of Investment in Iraq* (New York, Brill 2009) 72-73.

Federal Investment Law, machinery and equipment have to be imported within three years from the date of approval of their listing by the Chairman of the NIC, instead of the two years stipulated in Article 5, Paragraph 2 of the Kurdistan Investment Law. Moreover, the percentage of exemption of spare parts is 20% according to Article 17, Paragraph 3 of the Federal Investment Law, but 15% according to Article 5, Paragraph 3 of the Kurdistan Investment Law.<sup>209</sup> In relation to the more important differences, the Kurdistan Investment Law stipulates that imported goods must cross only the borders of the Kurdistan Region in order to be eligible for tax concessions.<sup>210</sup> Sami Shubber noting that:

There is no such requirement under the Federal Investment Law. Moreover, while it is not crystal clear, it would appear from the wording of Article 5, Paragraph 2, of the Kurdistan Investment Law that, if these equipment and machinery are imported through another crossing area, the investor will have to pay double the taxes due. The linking of the application of the exemptions to the geographical area through which they pass cannot be justified by any logic.<sup>211</sup>

Article 33 of the Federal Investment Law, however, stipulates that "No text shall be valid which contradicts the provisions of this law," and thus investors are provided with a means to dispute the provisions of the Article 5, Paragraph 2, of the Kurdistan Investment Law in courts of law in cases where tax is imposed on imports from other border crossings.<sup>212</sup>

#### ***4.5.2.3 Provide Land for Investment Projects***

The Law of Investment aimed to provide investors in Iraq with administrative facilities, and particularly with the provision of investment-grade buildings and utilities, through allowing exclusive property ownership for residential purposes or through leasing the same to investors for other investment purposes.<sup>213</sup>

Iraq faces a serious housing crisis due to a host of problems, top among which are high population growth, densely-populated areas, soaring unemployment rates, low incomes, slums, and also the problem of refugees and displaced persons, which have contributed collectively to

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<sup>209</sup> *ibid.*

<sup>210</sup> Kurdistan Investment Law No. 4 of 2006 (reporting that Article 5, Paragraph 2 of the Kurdistan Investment Law stipulates that 'Equipment and machinery that are imported for the Project shall be exempt from taxes, duties and the condition to obtain an Import Licence, provided that they cross the Region's borders...').

<sup>211</sup> Sami Shubber, *The Law of Investment in Iraq* (New York, Brill 2009) 73.

<sup>212</sup> *ibid.*

<sup>213</sup> Abdul Malik Mahmud, 'Investment in Iraq, Reality or Illusion?' (2012) 83 *Alra'ud* magazine 8. (Translated from Arabic Language by Author).

the poor housing conditions and ever-increasing demand.<sup>214</sup> More than 70% of Iraqis live in urban areas, and 13% of urban homes house more than ten persons, while 37% house three or more persons in each room.<sup>215</sup> 57% of residents of urban areas live currently in slum-like conditions.<sup>216</sup> Population density is ever-increasing due to high fertility rates and the growing youth sector.<sup>217</sup> This puts demand on land and resources and a number of housing problems which will need to be resolved.

As far as the Law is concerned, it has sought to provide facilities in terms of the provision of housing-supportive units, and has given foreign investors the right to own formerly state-owned, public-private as well as private lands and real estate units, through either selling or leasing to investors.<sup>218</sup> In addition, Iraqi legislators have offered administrative facilities by requiring the relevant authorities to provide lands and buildings suitable for investment and notifying the NIC of the same, since the latter is the entity concerned with investment allocations by the consent of the Ministerial Cabinet.<sup>219</sup>

The Law of Investment in Iraq gives investors the right to lease the land necessary to set up a project and for the lifetime of that project, by virtue of a usufruct contract enduring for a period no longer than 50 years.<sup>220</sup> By the same token, the Law allows for lease contract renewals, provided that the consent of the NIC is obtained. The latter will base its decision on the nature of the project in question and how useful it is to the national economy.<sup>221</sup> The decision to exclude the sale and lease of investment-reserved properties from the provisions of the Law on Selling and Leasing State Property No. 21 of 2013<sup>222</sup> or any similar law has had a positive effect on the simplification of administrative requirements and the elimination of red tape.<sup>223</sup>

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<sup>214</sup> OECD, *Supporting Investment Policy and Governance Reforms in Iraq* (OECD 2010) 24.

<sup>215</sup> Abdul-Hussein Tariq, *Economic Development and Workforce Planning in Iraq* (2nd edn, Dar Al Adalah 2013) 215. (Translated from Arabic Language by Author).

<sup>216</sup> *ibid* 216.

<sup>217</sup> *ibid*.

<sup>218</sup> OECD, *Supporting Investment Policy and Governance Reforms in Iraq* (OECD 2010) 26.

<sup>219</sup> Mohammed Al-Musawi, 'Weaknesses in the Performance of Investment Commissions' (2013) 18 Baghdad of Legal Science 350. (Translated from Arabic Language by Author).

<sup>220</sup> Article 11, Paragraph 3, of the Iraqi Investment Law No.13 of 2006.

<sup>221</sup> Sami Shubber, *The Law of Investment in Iraq* (New York, Brill 2009) 77.

<sup>222</sup> The Law of Sale and Lease of State Properties No. 21 in 2013 published in the Official Gazette, issue 4286 19/08/2013. { قانون بيع و ايجار اموال الدول }

<sup>223</sup> Abdul Malik Mahmud, 'Investment in Iraq, Reality or Illusion?' (2012) 83 *Alra'ud* magazine 8. (Translated from Arabic Language by Author).

#### 4.5.2.4 Dealing in Shares and Bonds

This incentive allows a foreign investor to trade shares and bonds freely in the Iraqi Stock Exchange and the financial market, and to have portfolios containing such shares and bonds.<sup>224</sup> The Law has not set a percentage for foreign shares in capital, which means that foreign investors are able to purchase and sell shares of Iraqi companies unrestrictedly. The same applies to bonds and the establishment of portfolios in the country.<sup>225</sup> Consequently, the Iraqi Stock Exchange has become attractive to an increasing number of foreign investors who regard it as a promising<sup>226</sup> market, and one which is expected to be even more attractive<sup>227</sup> following the easing of regulatory rules.<sup>228</sup> The Iraqi Stock Exchange is a target for private investments apart from the oil industry, in a country where state-owned companies still control the oil industry.<sup>229</sup>

As regards the Kurdistan Investment Law, there is no such incentive. Furthermore, there is currently no Kurdistan stock market.<sup>230</sup>

#### 4.5.2.5 Project Insurance

Providing insurance for foreign investment is a legal tool for protecting this type of investment against various obstacles that may arise.<sup>231</sup> The insurance company (the insurer) is committed to compensating respective investors for losses sustained due to any insured risk.<sup>232</sup> It would not be fitting for the insurer to be a governmental body of the country which aims to attract

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<sup>224</sup> Naturally, Iraqi investors enjoy the same incentive without the need to provide for this right in the Law. OECD, *Supporting Investment Policy and Governance Reforms in Iraq* (OECD 2010) 62.

<sup>225</sup> Sami Shubber, *The Law of Investment in Iraq* (New York, Brill 2009) 76.

<sup>226</sup> Abdul Malik Mahmud, 'Investment in Iraq, Reality or Illusion?' (2012) 83 *Alrraúd* magazine 8. (Translated from Arabic Language by Author). (Describing the Iraqi Stock Exchange as still nascent compared to its regional counterparts, such as the GCC stock markets, but becoming increasing attractive with the decline in sectarian killings in 2006 – 2007 and with a high potential for rapid growth) *ibid*.

<sup>227</sup> The current capital market value is estimated at USD 4 billion. This value is doubled once the shares of mobile phone operators are listed. The three mobile phone operators in Iraq; ie, Asia Cell, an offshoot of Qtel, CORK Telecom, an offshoot of France Telecom and the Kuwaiti Agility Logistics, and Zain Iraq, an offshoot of the Zain Kuwait, are required to list their shares in the Iraqi Stock Exchange by virtue of their operation licences, which have cost USD 1.25 billion. *ibid*.

<sup>228</sup> Abdul-Hussein Tariq, *Economic Development and Workforce Planning in Iraq* (2nd edn, Dar Al Adalah 2013) 218 (Illustrating that some regulatory rules, such as banking service savings and settlement of share trades, have been enforced. Such settlements may allow non-Iraqi investors a period of up to 2 days to take payment measures following a transaction, whereas former regulations required them to pay prior to conducting a transaction) *ibid*.

<sup>229</sup> *ibid*.

<sup>230</sup> Sami Shubber, *The Law of Investment in Iraq* (New York, Brill 2009) 77.

<sup>231</sup> Jeswald W Salacuse, 'The Arab Authority for Agricultural Investment and Development: A New Model for Capital Transfer in the Middle East' (1978) 12 *J World Trade L* 56.

<sup>232</sup> James Calvin Baker, 'The New Multilateral Investment Guarantee Agency Globalizing the Investment Insurance Approach towards Development' (1988-1989) 15 *Syracuse J Int'l L & Com* 13.

investment, as in that case the foreign investor's rights would be subject to the will of the debtor, (the host country), and thus would lack much of the required protection, since the insurer and the source of risk (against which the investor is seeking protection) would be combined in one person.<sup>233</sup> Effective insurance in this respect is insurance undertaken by a neutral entity or by an international organisation with many member countries and which is trusted by investors.<sup>234</sup> For this reason capital-exporting countries have established national entities to insure their citizens' offshore investments and companies. Other international entities have been established to protect investments against international agreements between capital-exporting countries and capital-importing countries. One result of this has been different insurance provisions for foreign investments, taking into consideration the technical and legal actors involved.<sup>235</sup>

There are several risks facing investors in the Iraqi investment environment, and therefore the investment law allows for the insurance of investment projects against potential risks by any insurance company.<sup>236</sup> Furthermore, Iraq has become party to both the Arab Investment and Export Credit Guarantee Corporation (henceforth 'DHAMAN') and the Multilateral Investment Guarantee Agency (MIGA).

#### **4.5.2.5.1 Project Insurance by DHAMAN**

The DHAMAN was established on 1<sup>th</sup> of April 1974, when its Memorandum of Association (MoA) was signed by twelve countries.<sup>237</sup> All Arab shareholder countries are allowed to contribute to the capital without any discrimination between the capital-exporting and importing countries.<sup>238</sup> Regarding its legal personality, it is a joint stock company with capital-exporting and importing countries as members.<sup>239</sup> It enjoys a fully independent legal personality, with responsibilities shared equally by members and a shared contribution to the capital.<sup>240</sup> The DHAMAN aims at encouraging Arab capital transfers across member countries

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<sup>233</sup> Heinz Rindler, 'The Multilateral Investment Guarantee Agency (MIGA): Should Austria Accede' (1997) 2 *Austl Rev Int'l Eur L* 69.

<sup>234</sup> James Calvin Baker, 'The New Multilateral Investment Guarantee Agency Globalizing the Investment Insurance Approach towards Development' (1988-1989) 15 *Syracuse J Int'l L & Com* 13.

<sup>235</sup> *ibid.*

<sup>236</sup> Article 11, Paragraph 4 of the Iraqi Investment Law No. 13 of 2006 published in the Official Gazette, issue 4031 of 17/01/2007.

<sup>237</sup> Ibrahim F I Shihata, 'The Multilateral Investment Guarantee Agency' (1986) 20 *Int'l L* 485.

<sup>238</sup> Jeswald W Salacuse, 'The Arab Authority for Agricultural Investment and Development: A New Model for Capital Transfer in the Middle East' (1978) 12 *J World Trade L* 56.

<sup>239</sup> Article 3 of Convention Establishing the Arab Investment and Export Credit Guarantee Corporation of 1974.

<sup>240</sup> Ibrahim F I Shihata, 'The Multilateral Investment Guarantee Agency' (1986) 20 *Int'l L* 485.

by providing insurance services against risks that may arise in these countries.<sup>241</sup> This is achievable through provision of the appropriate compensation for losses sustained due to such risks.<sup>242</sup> The DHAMAN also conducts complementary activities including studies on investment opportunities and positions across member Arab countries.<sup>243</sup> An agreement signed with the DHAMAN requires certain terms and conditions from the investments and investors it covers.<sup>244</sup> DHAMAN agreements allow citizens of contracting country to provide insurance for various investments throughout the other contracting countries. In other words, such agreements do not require the investment project and the insurance provision to be established in the same country.<sup>245</sup> This approach is especially advantageous as it requires all countries concerned to work on avoiding the risks covered by the DHAMAN so as to scale down

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<sup>241</sup> *ibid* (describing the Memorandum of Association and all measures taken by a member country to the effect of denying an investor material rights to their investment, such as expropriation, confiscation, receivership, public interest- instigated expropriation, forced seizure and preventing a creditor from receiving and disposing of their right and deferring material repayment. Clearly, this approach features a good deal of flexibility as it covers each and every measure taken by a member country to effectively deny investors their key investment rights. This approach is worthy of support as it stretches DHAMAN-provided insurance to cover any unexpected obstacle that may happen to insured investments in the investment-importing country. This kind of flexible approach allows the DHAMAN to assume its role more effectively, thus winning more trust from contracting investors) Jeswald W Salacuse, 'The Arab Authority for Agricultural Investment and Development: A New Model for Capital Transfer in the Middle East' (1978) 12 J World Trade L 56 (Stating that the insurance agreement covers measures that may restrict investors ability to transfer their assets or revenues abroad. The insurance agreement also covers unreasonable delayed transfer approvals. In fact, the DHAMAN's guarantee extends to several forms of deficiency and so ensures large benefits to investors through insuring them against the complex administrative measures they may face. However, general lower exchange rate measures are ruled out by the MoA. This is justified by the argument that inflation and lower currency value are normal commercial risks an investor must expect). Ibrahim F I Shihata, 'The Multilateral Investment Guarantee Agency' (1986) 20 Int'l L 485 (Pointing out that losses of an investor's material assets resulting from wars and internal upheavals are covered by the insurance agreement signed with the DHAMAN. Accordingly, insurance does not cover non-material assets such as cash) *ibid*.

<sup>242</sup> Jorgen Voss, 'The Protection and Promotion of Foreign Direct Investment in Developing Countries: Interests, Interdependencies, Intricacies' (1982) 31 Int'l & Comp L Q 686.

<sup>243</sup> *ibid*.

<sup>244</sup> Ibrahim F I Shihata, 'The Multilateral Investment Guarantee Agency' (1986) 20 Int'l L 485 (Describing the commitment to good faith, whereby investment insurance agreements provide generally for investors to be obliged to notify the DHAMAN, within thirty days of it coming to their knowledge, of any circumstance that may result in legal obligations on the DHAMAN by virtue of the relevant agreement). Jorgen Voss, 'The Protection and Promotion of Foreign Direct Investment in Developing Countries: Interests, Interdependencies, Intricacies' (1982) 31 Int'l & Comp L Q 686 (Stressing that the investors shall provide the DHAMAN with all insurance-covered investment information. Further, an investor must keep, at their main place of business or anywhere else as agreed upon with the DHAMAN, any reasonable information that may be requested by DHAMAN, particularly periodic reports and records necessary for the latter to remain posted on all aspects of the relevant agreement investment. An investor must also keep accounting books and other records, with sufficient information on investments, revenues, payments and costs. Such information must be approved by a chartered accountant). Jeswald W Salacuse, 'The Arab Authority for Agricultural Investment and Development: A New Model for Capital Transfer in the Middle East' (1978) 12 J World Trade L 56 (Emphasising that the investors payment insurance premiums shall be essential for an agreement to be valid. Premium value actually aims less at covering compensation amounts paid by the DHAMAN than covering administrative expenses and building up appropriate reserves. However, premium values are risk-based) *ibid*.

<sup>245</sup> Article 15, Paragraph 2/B of Convention Establishing the DHAMAN.

potential burdens.<sup>246</sup> Any such discrimination would result in problems, particularly in the absence of an accurate criterion for defining the two kinds of countries, some countries both import and export capital, thus making a clear designation difficult.<sup>247</sup> Being a joint stock company with private capital allows the DHAMAN to conduct insurance operations in and for its own name and to honour obligations towards insured investors without the need to refer in each and every case to the shareholder countries, thus winning investors' trust.<sup>248</sup>

In order to be a party to an insurance agreement, an investor must be a national of a DHAMAN member country.<sup>249</sup> Insurance agreements distinguish between individual, corporate and other legal persons' investments: the first must be a national of a member country. The second, a legal person, must have their shares or capital shares materially held by a member country or citizens thereof, with their headquarters in a member country.<sup>250</sup> For the MoA to uphold the effective control criterion as a condition for legal persons is an approach worthy of support. This criterion is a measure of the legal person's contribution to the national economy and the degree of commitment to it.<sup>251</sup> However, having both headquarters and effective control in one country is legally unjustifiable, and could result in unacceptable legal and economic outcomes. Therefore, in 1986 the DHAMAN Board took its Decision No. 9, which provides that 'by virtue of a Board decision, a legal person may accept a party to an insurance agreement despite having its headquarters in a non-member country provided that such legal person is owned by a minimum of 50% to an entity that belongs to a member country.'<sup>252</sup>

This legal character is not free of defects, however, since it leaves the determination of each members' shares in the capital to agreement between the countries concerned, without any proportion-based relation between a member country's share and the benefits gained or the losses sustained by the country's citizens from the insurance system, or the losses in insured investments, which may result in unfair results. It is worth mentioning that the MoA, includes a minimum subscription limit of 5 % of the capital.<sup>253</sup> It provides also for a changing capital,

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<sup>246</sup> Article 2, Paragraph 1 of Convention Establishing the DHAMAN.

<sup>247</sup> *ibid.*

<sup>248</sup> Ibrahim F I Shihata, 'The Multilateral Investment Guarantee Agency' (1986) 20 Int'l L 485.

<sup>249</sup> Article 17, Paragraph 1 of Convention Establishing the DHAMAN.

<sup>250</sup> *ibid.*

<sup>251</sup> Ibrahim F I Shihata, 'The Multilateral Investment Guarantee Agency' (1986) 20 Int'l L 485.

<sup>252</sup> *ibid.*

<sup>253</sup> Article 8, Paragraph 2 of Convention Establishing the DHAMAN.

that is, capital may be increased by new members or a member's decision to raise its capital share.<sup>254</sup>

Further, such agreements insure direct and indirect investments. Investments so covered require the fulfilment of two conditions: Firstly, an investment must be new,<sup>255</sup> ie, executed after the conclusion of the insurance agreement. This condition is in practice fulfilled through the goals set by the insurance system, which is generally to attract new capital to the country.<sup>256</sup> Secondly, the investment and its insurance must be approved by the country in question in order for the insurance cover to be provided.<sup>257</sup> The author argues the second part of the requirement may constitute an obstacle to an investor in view of administrative red tape encountered in some Arab countries.

#### **4.5.2.5.2 Project Insurance by MIGA**

The MIGA was established by virtue of an international agreement developed by the World Bank for purposes of development and construction, and has been in force since 1988.<sup>258</sup> This international body enjoys an independent legal personality<sup>259</sup> and aims generally at encouraging production capital and technology inflows to developing countries, pursuant to the needs and objectives of such countries and based on fairly established and stable standards for dealing with foreign investments.<sup>260</sup> In this respect, the MIGA assumes insurance and re-insurance roles for investment projects operating between one member country and another.<sup>261</sup> The MIGA also conducts research and promotes investment opportunity information in developing countries, with a view to encouraging foreign investments therein.<sup>262</sup> Membership of the MIGA is allowed to all World Bank member states.<sup>263</sup>

Regarding the scope of insurance, the MIGA covers the following risks:<sup>264</sup> expropriation, deficient liquid transfers, social instability, agreement violation, and other

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<sup>254</sup> Article 8, Paragraph 1 of Convention Establishing the DHAMAN.

<sup>255</sup> Article 15, Paragraph 5 of Convention Establishing the DHAMAN.

<sup>256</sup> Ibrahim F I Shihata, 'The Multilateral Investment Guarantee Agency' (1986) 20 Int'l L 485.

<sup>257</sup> The Convention Establishing the Arab Investment And Export Credit Guarantee Corporation of 1974 (reporting that Article 15, Paragraph 7 stipulates that '[t]he conclusion of insurance contracts shall be subject to the insured's obtaining the prior approval of the competent official authority in the host country for the making of the investment and for its insurance by the Corporation against the risks to be covered').

<sup>258</sup> Karl William Viehe, 'The Multilateral Investment Guarantee Agency' (1987) 6 Int'l Fin L Rev 37.

<sup>259</sup> Article 1, Paragraph A of the Convention Establishing the MIGA.

<sup>260</sup> Article 2 of the Convention Establishing the MIGA.

<sup>261</sup> Article 2, Paragraph A of the Convention Establishing the MIGA.

<sup>262</sup> Article 1, Paragraph B of the Convention Establishing the MIGA.

<sup>263</sup> Article 4, Paragraph A of the Convention Establishing the MIGA.

<sup>264</sup> Article 11 of the Convention Establishing the MIGA.



risks.<sup>265</sup> The MIGA MoA requires that certain terms must be met by insurable investments and insurable investors. For example, direct and indirect investments are insured provided that they are new investments, ie, they have commencement dates after the MIGA's registration of the relevant insurance requests.<sup>266</sup> This does not, however, prevent provision of coverage to investments aimed at developing an existing investment. Nor does it prevent provision of coverage to the re-investment of revenues realised by existing investments, if such revenues can be transferred abroad. In other cases, guarantees are restricted to investments contributing to the economic and social development of the investment-attracting country.<sup>267</sup> Other requirements include compliance with the applicable laws and regulations of the country and its developmental objectives.<sup>268</sup> This requirement exemplifies the MIGA's role in encouraging foreign investments with a view to boosting developing economies.

The MIGA MoA does not include detailed provisions of the rights and obligations of contracting parties. It rather provides for determination of the terms and conditions of a guarantee agreement, pursuant to the rules and instructions issued by the MIGA Board.<sup>269</sup> Generally, investors' commitments to payment of premiums are set forth in agreements.<sup>270</sup> These agreements, however, do not include provisions for setting the method of premium evaluation, but rather provide for the MIGA's setting of periodic premiums related to each and every risk type.<sup>271</sup> The crucial factor for investors is the right to compensation for losses sustained due to the realisation of the risk covered by the relevant agreement.<sup>272</sup> A key feature of such compensation is that it is partial, ie, it does not cover all losses sustained by an

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<sup>265</sup> Heinz Rindler, 'The Multilateral Investment Guarantee Agency (MIGA): Should Austria Accede' (1997) 2 *Austl Rev Int'l Eur L* 69 (the MIGA covers a new obstacle not dealt with by DHAMAN: violation or prejudice on a national level directed towards investors' contractual obligations. Investors receive compensation for this kind of violation in three cases: (1) If it proves to be impossible to go to a court or arbitration panel to settle the claim filed thereby on contract termination or violation; (2) If the MIGA does not settle the claim within a reasonable period; (3) If a MIGA-issued decision proves to be unenforceable) Karl William Viehe, 'The Multilateral Investment Guarantee Agency' (1987) 6 *Int'l Fin L Rev* 37 (Noting that the MIGA Memorandum of Association allows the cover of any other non-commercial risks following a joint request by the investor and the host country and agreement by the MIGA Board's special majority. This provision allows flexibility to the MIGA in covering future risks that may hinder foreign capital flows. However, the MoA rules out lowered national exchange rates and inflation as beyond its scope. These are unjustifiable exclusions as they result from unstable economic conditions that require insurance for investors) *ibid*.

<sup>266</sup> Jurgen Voss, 'The Multilateral Investment Guarantee Agency: Status, Mandate, Concept, Features, Implications' (1987) 5 *J World Trade L* 21.

<sup>267</sup> *ibid*.

<sup>268</sup> Karl William Viehe, 'The Multilateral Investment Guarantee Agency' (1987) 6 *Int'l Fin L Rev* 37.

<sup>269</sup> Jurgen Voss, 'The Multilateral Investment Guarantee Agency: Status, Mandate, Concept, Features, Implications' (1987) 5 *J World Trade L* 21.

<sup>270</sup> Heinz Rindler, 'The Multilateral Investment Guarantee Agency (MIGA): Should Austria Accede' (1997) 2 *Austl Rev Int'l Eur L Law* 69.

<sup>271</sup> *ibid*.

<sup>272</sup> Ibrahim F I Shihata, 'The Multilateral Investment Guarantee Agency' (1986) 20 *Int'l L* 485.

investor.<sup>273</sup> Further, the MIGA's provision of, or agreement to, compensation for an investor entitles the MIGA to replace such an investor in all of the guaranteed investment-related rights in relation to the investment receiving country or any other debtor.<sup>274</sup>

Iraq met the MIGA's accession requirements on 8<sup>th</sup> of October 2008, and became MIGA member No. 173.<sup>275</sup> Currently, the MIGA accepts insurance requests from qualified investors in Iraq, not to mention providing insurance cover for Iraqi investors in developing countries, as required by its Agreement.<sup>276</sup> It carefully assesses risk-coverage requirements for any member state. As for Iraq, however, the uncertain investment environment has resulted in denial of insurance cover requests for some projects.<sup>277</sup> However, the MIGA stresses that every investment will be carefully examined, and it may also help to explore other ways outside the MIGA programme to simplify sound investment processes for Iraq.<sup>278</sup>

#### 4.5.2.5.3 Evaluation of Insurance System

The foreign investment insurance system under the international guarantee agency has several advantages for foreign investors, capital importing countries and capital exporting countries. Although many capital exporting countries have national insurance systems for their offshore investments, there is a question of how feasible it is to establish an international investment insurance body for such countries when they have national systems assuming the same role. In fact, an international guarantee body ensures advantages to such countries and, to this end, scales down the political impact of the investment guarantee process assumed by the international agency.<sup>279</sup> In practice, the developing capital-attracting countries are hesitant with regard to the acceptance of an investment insurance system assumed by a national body of the capital exporting country.<sup>280</sup> Others refuse to conclude mutual agreements with capital

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<sup>273</sup> Karl William Viehe, 'The Multilateral Investment Guarantee Agency' (1987) 6 Int'l Fin L Rev 37.

<sup>274</sup> Article 18 of the Convention Establishing the MIGA.

<sup>275</sup> The Multilateral Investment Guarantee Agency. 'Iraq Membership in MIGA' (2013) <<http://www.miga.org/news/index.cfm?aid=2093>> accessed 29 Jan 2014 (MIGA, in supporting Iraq, quoted the World Bank strategy on Iraq which calls for a private sector-led large-scale development and growth. The said support indicates MIGA's commitment to fragile and war-torn states) *ibid*.

<sup>276</sup> On 8<sup>th</sup> Oct 2010, the MIGA announced the first contract on Iraq-based investment securitization with a Baghdad-based plant specializing in materials used for drink bottles. The Multilateral Investment Guarantee Agency. 'World Bank's MIGA Open for Business in Iraq, Insures First Investment' (2013) <<http://www.miga.org/news/index.cfm?aid=2788>> accessed 5 Feb 2014.

<sup>277</sup> The Multilateral Investment Guarantee Agency. 'World Bank Group Delegation Considers Iraq's Investment Potential' (2013) <<http://www.miga.org/news/index.cfm?aid=2276>> accessed 5 Feb 2014.

<sup>278</sup> *ibid*.

<sup>279</sup> Jurgen Voss, 'The Multilateral Investment Guarantee Agency: Status, Mandate, Concept, Features, Implications' (1987) 5 J World Trade L 21.

<sup>280</sup> Klaus Peter Berger, 'The New Multilateral Investment Guarantee Agency Globalizing the Investment Insurance Approach towards Development' (1988-1989) 15 Syracuse J Int'l L & Com 13.

exporting countries regarding the enforcement of the national investment insurance system<sup>281</sup> on the grounds that there would be a restriction of national sovereignty in dealing with incoming investments.<sup>282</sup> The MIGA has as members many investment exporting and importing countries under one governing agreement that is binding on all members.<sup>283</sup> It therefore operates under a unified legal system for all investors and countries where investments are established, unlike many national investment insurance tools that have to enter individually into mutual agreements with capital investment attracting countries, which inevitably results in various legal provisions according to the conditions of every country.<sup>284</sup> Furthermore, the MIGA distributes risks among the member states and this contributes to the provision of the MIGA's administrative expenses and provides financial facilities for capital exporting countries, unlike the situation in which such countries assume risks and expenses as a single national body. In addition, the MIGA can re-insure investments covered by national guarantees; thus it reduces the insurance burdens to capital exporting countries.<sup>285</sup> Further, the investment insurance system, when assumed by international bodies, realises great benefits for some capital exporting countries, since they cannot enforce a national insurance system for their offshore investments due to restriction of the latter to a few number of countries or to the lack of a diversified industrial sector, in which case risks are difficult to break down according to investment type and investment country.<sup>286</sup> Similarly, a regional international agency so created would contribute to easier surplus capital transfers for the purposes of investment in other countries, instead of transfers to external markets.<sup>287</sup>

Moreover, an international insurance agency enables a capital-attracting country to select useful foreign investments. This is generally realised by the international body agreeing to insure such investments, as such an agreement is a prerequisite if the international body is

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<sup>281</sup> Heinz Rindler, 'The Multilateral Investment Guarantee Agency (MIGA): Should Austria Accede' (1997) 2 *Austl Rev Int'l Eur L* 69; Yushu Feng, 'China and the Multilateral Investment Guarantee Agency' (1994-1999) 8 *China L Rep* 135; Khrushchev Ekwueme, 'A Nigerian Perspective on a Forward-Looking Multilateral Agreement on Investment' (2006) 7 *J World Investment & Trade* 165.

<sup>282</sup> Klaus Peter Berger, 'The New Multilateral Investment Guarantee Agency Globalizing the Investment Insurance Approach towards Development' (1988-1989) 15 *Syracuse J Int'l L & Com* 13.

<sup>283</sup> Jurgen Voss, 'The Multilateral Investment Guarantee Agency: Status, Mandate, Concept, Features, Implications' (1987) 5 *J World Trade L* 21.

<sup>284</sup> Heinz Rindler, 'The Multilateral Investment Guarantee Agency (MIGA): Should Austria Accede' (1997) 2 *Austl Rev Int'l Eur L* 69.

<sup>285</sup> Jurgen Voss, 'The Multilateral Investment Guarantee Agency: Status, Mandate, Concept, Features, Implications' (1987) 5 *J World Trade L* 21.

<sup>286</sup> Jan Wouters; Philip De Man; Leen Chanet, 'The Long and Winding Road of International Investment Agreements: Toward a Coherent Framework for Reconciling the Interests of Developed and Developing Countries' (2009) 3 *Hum Rts & Int'l Legal Discourse* 263.

<sup>287</sup> Klaus Peter Berger, 'The New Multilateral Investment Guarantee Agency Globalizing the Investment Insurance Approach towards Development' (1988-1989) 15 *Syracuse J Int'l L & Com* 13.

to assume the insurer's role.<sup>288</sup> Furthermore, when an investor's country does not have a national investment insurance agency, the relevant international agency will be the only option for offshore investment insurance, and in any case, investors will generally prefer to have their investments insured by an international agency, even if their country has its own national investment insurance system.<sup>289</sup> Such preference is based on several reasons, most importantly: Firstly, lower insurance premiums, due to many countries sharing the loss burden between them. Secondly, uniform insurance terms concerning various foreign investments, resulting in equal treatment of investments. Then, provision of guarantees for joint international projects that do not enjoy a given nationality. Finally, the role an international insurance body is able to assume regarding enforcement of uniform legal rules to deal with foreign investments.<sup>290</sup>

#### **4.5.2.6 Bank Accounts**

It is necessary to put the investment project into full operation in order to enable the investor to buy and import tools, machines and equipment, and to bring the project to its desired conclusion. The provisions of the Law therefore allow an investor to open a national currency bank account inside or outside Iraq, provided that the relevant project is NIC-licensed.<sup>291</sup> Giving such incentive to investors is a key factor, in view of the facilities it offers for meeting financial investment requirements. In other words, it is an investment-attracting factor.<sup>292</sup> Shubber described that 'This freedom, it is submitted, is very important for facilitating the investor's import and export operations in Iraq. This way the investor does not feel restricted to use a particular bank or currency, and thus would feel encouraged to invest in Iraq'.<sup>293</sup>

However, in cases where an investor wishes to open an account in Iraq, Iraqi legislators ought to have restricted dealings to banks registered with the CBI, since the latter's controls that allow it a deep insight with regard to a bank's ability to meet the financial requirements of a given project.<sup>294</sup>

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<sup>288</sup> *ibid.*

<sup>289</sup> Ibrahim F I Shihata, 'The Multilateral Investment Guarantee Agency' (1986) 20 Int'l L 485; Karl William Viehe, 'The Multilateral Investment Guarantee Agency' (1987) 6 Int'l Fin L Rev 37.

<sup>290</sup> Ibrahim F I Shihata, 'The Multilateral Investment Guarantee Agency' (1986) 20 Int'l L 485.

<sup>291</sup> Article 11, Paragraph 5 of the Iraqi Investment Law No. 13 of 2006 published in the Official Gazette, issue 4031 of 17/01/2007.

<sup>292</sup> Sami Shubber, *The Law of Investment in Iraq* (New York, Brill 2009) 80.

<sup>293</sup> *ibid.*

<sup>294</sup> Abdul Malik Mahmud, 'Investment in Iraq, Reality or Illusion?' (2012) 83 Alra'ud magazine 8. (Translated from Arabic Language by Author).

## **4.6 Upgrade Guarantees and Protection to Investors**

Iraqi legislators aim to encourage and promote investments, to enable the necessary hi-tech transfers to be made, to expand and diversify its productive and service bases, and to protect the rights and property of investors, and the Investment Law provides legal guarantees intended to imbue foreign investors with trust regarding the destiny of their Iraq-bound investments and to safeguard investments against any arbitrary measures.<sup>295</sup>

### **4.6.1 Employment of Non-Iraqi Personnel**

If an investment requires high labour skills that are not to be found among the Iraqi workforce, Iraqi law allows for the employment of foreign labour under the controls set out in the NIC.<sup>296</sup> Article 12, Paragraph 1, stipulates that 'Priority in recruitment and employment shall be given to Iraqi workers. The right to employ and use non-Iraqi workers in case it is not possible to employ an Iraqi with the required qualifications and capable of performing the same task in accordance with guidelines issued by the Commission.'<sup>297</sup> Shubber comments that '[t]hese conditions appear to be cumulative, therefore, if one of them is missing, the investor will not be able to employ non-Iraqi personnel'.

It can be said that the legislators have adopted a reasonable attitude in this respect, as such foreign recruitment would benefit the country in terms of the development of human resources and the provision of job opportunities for Iraqis, while serving investors with a world-wide selection of skilled labour.<sup>298</sup> It is worth noting that the Kurdistan Investment Law provides a similar guarantee, though providing explicitly for prioritising local labour.<sup>299</sup>

### **4.6.2 The Right of Entry, Residence and Exit**

The provisions of the Law ensure foreign investors and their non-Iraqi employees the right to stay, and to enter into and depart from Iraq easily at any time. Article 12, Paragraph 2, of the Iraqi Investment Law stipulates that 'Granting the foreign investor and non-Iraqis working in the investment projects the right of residency in Iraq and facilitating his/her entry and exit to

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<sup>295</sup> OECD, *Supporting Investment Policy and Governance Reforms in Iraq* (OECD 2010) 24.

<sup>296</sup> Sami Shubber, *The Law of Investment in Iraq* (New York, Brill 2009) 85.

<sup>297</sup> Article 12, Paragraph 1 of the Iraqi Investment Law No. 13 of 2006 published in the Official Gazette, issue 4031 of 17/01/2007.

<sup>298</sup> Sami Shubber, *The Law of Investment in Iraq* (New York, Brill 2009) 85.

<sup>299</sup> Reporting that Article 7, Paragraph 2 of the Kurdistan Investment Law No. 4 of 2006, stipulates that 'An Investor may employ local and foreign staff needed for the Project, with the priority given to recruiting local manpower in accordance with the laws and regulations applicable in the Region'.

and from Iraq.<sup>300</sup> The right of entry, residence and exit aims at facilitating the foreign investor's movement into and out of Iraq.<sup>301</sup> This guarantee, set forth in the Federal Investment Law, is a key measure for both foreign investors and their employees, as this movement must not be restricted by any measures which may become an investment liability, particularly when creating start-ups.<sup>302</sup> The Kurdistan Investment Law lacks any similar provision, and therefore the provisions of the Federal Investment Law pertain.<sup>303</sup>

#### **4.6.3 Guarantee against Expropriation and Nationalisation**

Private ownership is enshrined under the governing laws of Iraq, with the Constitution of Iraq providing for necessary protection. According to Article 23 of the Iraqi Constitution 'First: private property is protected. The owner shall have the right to benefit, exploit and dispose of private property within the limits of the law. Second: expropriation is not permissible except for the purposes of public benefit in return for just compensation, and this shall be regulated by law.'<sup>304</sup> Expropriation for the purposes of public benefit in Iraq is regulated under Acquisition Law No. 12 of 1981.<sup>305</sup> Consensual expropriation is achieved through negotiations between the expropriating authority and the proprietor in accordance with the powers granted under Article 4 of the aforesaid acquisition law.<sup>306</sup> According to Article 6, Paragraph 1, of the Acquisition Law, an expropriation decision shall be binding to both parties should the proprietor approve the same in writing, or 10 days after notifying such proprietor of the same without objection before the assessment authority.<sup>307</sup> If the holder or the property owner objects to the valuation's decision within the said period, the expropriation shall be terminated.<sup>308</sup> The expropriating authority shall deposit the value of the property and register the same in the name

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<sup>300</sup> Article 12, Paragraph 2 of the Iraqi Investment Law No. 13 of 2006 published in the Official Gazette, issue 4031 of 17/01/2007.

<sup>301</sup> Harith Al Dabbagh, 'Le Cadre Juridique des Investissements Étrangers en Irak' (Le rôle du droit dans le développement économique Le droit au service du développement économique France-Congrès de l'IDEFLomé 17 au 20 November 2008).

<sup>302</sup> *ibid.*

<sup>303</sup> Sami Shubber, *The Law of Investment in Iraq* (New York, Brill 2009) 89.

<sup>304</sup> Constitution of the Republic of Iraq of 2005.

<sup>305</sup> The Acquisition Law No. 12 of 1981 published in the Official Gazette, issue 2817 of 16/02/1981.

<sup>306</sup> Reporting that Article 4 of Acquisition Law No. 12 of 1981, stipulates that 'Directorates and social sectors which have the right to possess property can agree with the property owner or the land owner to possess the property by agreement either in kind or in cash depending on the price estimated by the commission established according to this law. If the property is a public property, all partners shall approve this'.

<sup>307</sup> Article 6, Paragraph 1 of the Acquisition Law No. 12 of 1981 published in the Official Gazette, issue 2817 of 16/02/1981.

<sup>308</sup> Article 6, Paragraph 2 of the Acquisition Law No. 12 of 1981 published in the Official Gazette, issue 2817 of 16/02/1981.

of the beneficiary in the Real Estate Register within 60 days from the assessor's decision.<sup>309</sup> If the expropriating authority fails to finalise such deposit, the proprietor may withdraw the said agreement, pursuant to Article 8 of the same law.<sup>310</sup>

Should consensual expropriation prove unattainable, the Acquisition Law allows state departments to request the expropriation of the property in question, either wholly or partially, to see the intended project through.<sup>311</sup> Judicial expropriation, instigated by an application by the expropriating authority before the competent court within the jurisdiction of which the property is located, shall be detailing all property-related matters along with reasons behind the proposed expropriation.<sup>312</sup> However, the court shall verify the legal requirements of such applications within 10 days.<sup>313</sup> According to the Acquisition Law, settlement of expropriation claims belongs to summary justice. A court's decision for or against expropriation is appealable within 15 days of it being delivered.<sup>314</sup>

As regards the Investment Law, it is noted that Iraqi legislators have adopted a reassuring stance towards investors by providing for an absolute expropriation ban with regard to all projects covered by the law without specifying the type of project or how important it might be.<sup>315</sup> The reason for this stance is the legislators' desire to provide an airtight guarantee for all investments and to attract many investment projects as possible to Iraq.<sup>316</sup> This protection extends to all investors, irrespective of their nationality. There is a single exception to this protection, and that is the juridical acquisition for the purposes of public benefit in return for a fair compensation, in accordance with Article 23, Paragraph 2 of the Iraqi Constitution and Article 9 of the Acquisition Law.<sup>317</sup> The Investment Law is one of the most important guarantees assuring investors that their investments will be safe from potential political risks.

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<sup>309</sup> Article 7, Paragraph 1 of the Acquisition Law No. 12 of 1981 published in the Official Gazette, issue 2817 of 16/02/1981.

<sup>310</sup> Article 8 of the Acquisition Law No. 12 of 1981 published in the Official Gazette, issue 2817 of 16/02/1981.

<sup>311</sup> Reporting that Article 9 of Acquisition Law No. 12 of 1981, stipulates that 'In order to implement their projects and achieve their goals, government departments and social sector which have the right to legally possess a property can request to possess any property, part of it, or its relevant original property rights, according to the rules of this law'.

<sup>312</sup> Article 10 of Acquisition Law No. 12 of 1981 published in the Official Gazette, issue 2817 of 16/02/1981.

<sup>313</sup> Article 11, Paragraph 1 of Acquisition Law No. 12 of 1981 published in the Official Gazette, issue 2817 of 16/02/1981.

<sup>314</sup> Article 61 of Acquisition Law No. 12 of 1981 published in the Official Gazette, issue 2817 of 16/02/1981.

<sup>315</sup> Iraqi Investment Law No. 13 of 2006 (reporting that Article 12, Paragraph 3 stipulates that 'Non-seizure or nationalization of the investment project covered by the provisions of this law in whole or in part, except for projects on which a final judicial judgment was issued'). Noteworthy, the Kurdistan Investment Law does not provide for expropriation of investment projects. Instead, provisions of the Federal Investment Law apply.

<sup>316</sup> OECD, *Supporting Investment Policy and Governance Reforms in Iraq* (OECD 2010) 68.

<sup>317</sup> Article 23, Paragraph 2 of the Constitution of the Republic of Iraq of 2005; Article 9 of the acquisition law No. 12 of 1981 published in the Official Gazette, issue 2817 of 16/02/1981.

However, Shubber's argument overlooks the depth of Article 12, Paragraph 3 of the Iraqi Investment Law, that:

...does not use the usual terminology in some legislation with respect to nationalisation, namely "except for the public good and by virtue of a law, 'or' on grounds or reasons of public utility, security, or the national interests". The absence of such wording could be interpreted to the effect that the Iraqi government has waived its right under international law to nationalise foreign investment, therefore, there is no need to refer to the notions of public utility or national interests, as justifications for such a measure. It could also be possible to argue that perhaps the drafters of the Federal Investment Law, not being international lawyers, might not have been aware of the existence of the right to nationalize foreign investment under international law. However, the first interpretation is to be preferred, because it is in line with the objectives of the Federal Investment Law.<sup>318</sup>

Some writers maintain that foreign investments in Iraq could end up being nationalised despite the explicit provisions of the Investment Law.<sup>319</sup> It is argued, first of all, that the Constitution allows expropriation for purposes of public interest in return for fair compensation;<sup>320</sup> and secondly, that International Law allows sovereign states to expropriate or nationalise foreign investments on their lands unless that it has undertaken not to do so by signing an international treaty.<sup>321</sup> However, expropriation of foreign investments in that case would be a violation of the principle of good faith, being a unilateral action with legal consequences which undermines foreign investors' rights and violates the country's previous undertakings in dealing with such investors.<sup>322</sup> In reality it is unlikely that Iraq will embark on the expropriation or nationalisation of any investment as it realises that any such action would deliver a mortal blow to all attempts to rehabilitate the investment environment.

#### **4.6.4 Repatriation of Salaries and Benefits by Non-Iraqi Personnel**

The provisions of the Law allow the non-Iraqi technical and administrative employees of an investment project to transfer their salaries and remuneration abroad, but only after settling

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<sup>318</sup> Sami Shubber, *The Law of Investment in Iraq* (New York, Brill 2009) 91-92.

<sup>319</sup> Abdul Malik Mahmud, 'Investment in Iraq, Reality or Illusion?' (2012) 83 *Alra'ud* magazine 8; Mohammed Al-Musawi, 'Weaknesses in the Performance of Investment Commissions' (2013) 18 *Baghdad of Legal Science* 350. (Translated from Arabic Language by Author).

<sup>320</sup> Article 23, Paragraph 2, of the Constitution of the Republic of Iraq of 2005, which provides 'Expropriation is not permissible except for the purposes of public benefit in return for just compensation, and this shall be regulated by law'.

<sup>321</sup> M Sornarajah, *The International Law on Foreign Investment* (3rd edn, Cambridge University Press, New York 2011) 36.

<sup>322</sup> Sami Shubber, *The Law of Investment in Iraq* (New York, Brill 2009) 91.



their obligations and debts to the Iraqi Government and all other relevant entities.<sup>323</sup> In fact, this provision lacks a necessary precision: first, its guarantee applies only to non-Iraqi technical and administrative employees and does not apply to local or other specialised employees;<sup>324</sup> second, it provides for full payment of obligations by transfer to the Iraqi Government and/or third parties, but without specifying the body that is to be entrusted with issuing a no-objection certificate for the purpose of transfers, although, strictly speaking, this power should have been vested with the NIC; and third, no limit has been set on transferable salaries, although such a limit would be act as a security, and the Law should have provided for a small percentage of salaries to be retained in anticipation of potential obligations on investors in the future. Also, the Law lacks any provisions for imposing taxes on foreign employees working for investment projects.<sup>325</sup>

#### **4.6.5 Equal Treatment with Iraqi Investors**

According to Article 10, Paragraph 4 of the investment law of Iraq, 'The Iraqi or foreign investor enjoys the same privileges, facilities, and guarantees, and submits to the obligations stated in this law'. The Law requires the Government to provide foreign investors with no less favoured treatment than Iraqi investors.<sup>326</sup> This non-discriminatory treatment conforms to the minimum standards for the treatment of foreigners under International Law.<sup>327</sup> Further, this provision is in line with the rules of international law prohibiting discrimination against foreign investors in terms of expropriation and/or nationalisation.<sup>328</sup> In an investment environment which foreign investors may feel to be uncongenial, equal treatment is a key factor in increasing the attractiveness of Iraq. It should be mentioned that the above provision is general in nature, ie, it does not require a specific timing of a contract term, and may well include foreign investors even at the negotiation stage. Nor has the provision set limits on the forms of

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<sup>323</sup> Article 12, Paragraph 4 of the Iraqi Investment Law No. 13 of 2006 published in the Official Gazette, issue 4031 of 17/01/2007.

<sup>324</sup> Sami Shubber, *The Law of Investment in Iraq* (New York, Brill 2009) 97 (mentioning that '...it might be argued in mitigation that the intention might have been to encourage the investors to use local labourers, and other categories of employees not covered by the provision, on his investment projects. In this case, there is no need to repatriate salaries and benefits'). The Kurdistan Investment Law is fairer in this respect. Article 7, Paragraph 4 of the Kurdistan Investment Law No. 4 of 2006 applies to all employees without discrimination.

<sup>325</sup> *ibid* 97.

<sup>326</sup> Harith Al Dabbagh, 'Le Cadre Juridique des Investissements Étrangers en Irak' (Le rôle du droit dans le développement économique Le droit au service du développement économique France-Congrès de l'IDEFLomé 17 au 20 November 2008).

<sup>327</sup> OECD, *Supporting Investment Policy and Governance Reforms in Iraq* (OECD 2010) 69.

<sup>328</sup> M Sornarajah, *The International Law on Foreign Investment* (3rd edn, Cambridge University Press, New York 2011) 71.

incentive, for equality includes present and future incentives granted to Iraqi investors by virtue of the Law.<sup>329</sup>

#### 4.6.6 Confidentiality of Information

The investment law of Iraq is devoid of any provision on privacy of investment-related technical and economic data and information. The Kurdistan Investment Law, however, allows an investor the right to privacy, even with regard to incriminating disclosures punishable under the Penal Code.<sup>330</sup> Shubber's argument is that the lack of a non-disclosure provision does not jeopardise the investors' intellectual property rights, as they are protected by virtue of Article 2, Paragraph 4 of the Iraqi Investment Law No. 13 of 2006, which states, 'This law aims at the following: Fourth: To protect the rights and properties of investors'.<sup>331</sup>

#### 4.6.7 Sale and/or Re-Export of Machinery and Equipment

The Law allows investors to dispose of their investments to other persons. This is a key guarantee for investors, as they may face urgent situations requiring speedy disposal.<sup>332</sup> The Law provides for a new investor to succeed the former one in terms of legal rights and obligations. However, the Law displays a kind of ambiguity in two respects: Firstly, there is no reference to the way such contractual rights and obligations will be dealt with by virtue of the investment contract concluded with the Government or its representatives. Secondly, the legislation allows disposal of an investment within the tax-exemption period but does not regulate the disposal after that period.<sup>333</sup> The above provisions apply to the total disposal of an investment project. In the case of a partial disposal, that is, disposal restricted to machinery or equipment, the Law allows the investor to sell, assign or re-export such machinery, equipment, etc. The same provision provides for continuity of the tax-exemption period in the case of an

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<sup>329</sup> Sami Shubber, *The Law of Investment in Iraq* (New York, Brill 2009) 99-100.

<sup>330</sup> *ibid* 100-101.

<sup>331</sup> *ibid*.

<sup>332</sup> Article 24 of the Iraqi Investment Law No. 13 of 2006 published in the Official Gazette, issue 4031 of 17/01/2007.

<sup>333</sup> Article 142, Paragraph 2 of the Iraqi Civil Code No. 40 of 1951 stipulates that 'Where the contract has created obligations and rights in rem related to a thing which thereafter was transferred to a singular successor such obligations and rights will be transferred to this successor at the same time as that of transference of the thing where said obligations and rights are of the prerequisites thereof and the singular successor was aware of the same at the time when the thing passed to him').

{ إذا انشأ العقد التزامات وحقوقاً شخصية تتصل بشيء انتقل بعد ذلك الى خلف خاص، فإن هذه الالتزامات والحقوق تنتقل الى هذا الخلف في الوقت الذي ينتقل فيه الشيء إذا كانت من مستلزماته وكان الخلف الخاص يعلم بها وقت انتقال الشيء اليه }

Iraq-based disposal. In case of a beneficiary not covered by the Law, financial dues must be paid and the NIC must be notified.<sup>334</sup>

## 4.7 Efforts to Join WTO

### 4.7.1 Membership Requirements

Iraq aspired to join the WTO after becoming an observer in 2004.<sup>335</sup> Joining the WTO is very complicated, due to the ramifications of the Membership Agreement.<sup>336</sup> It involves a host of procedures related to creating appropriate conditions for the investment environment, the rationalisation of governmental subsidies, in addition to a package of legal, tax and charging reforms.<sup>337</sup> For Iraq to qualify for WTO membership, the Government must fulfil certain procedures to develop its customs protection policies, that is, it must remove all restrictions imposed on imports, and set customs tariffs instead. This is a matter that requires a comprehensive review of Iraqi customs law, especially Customs Law No. 23 of 1984, as well as laws on technical issues, including technical specifications for imported commodities and those for public, botanical and animal health in compatibility with Section 20 of the General Agreement on Tariffs and Trade Agreement (GATT),<sup>338</sup> which allows countries to adopt appropriate measures to protect public health, provided that such measures are not clandestine.<sup>339</sup> Export subsidies must be removed and there must be efforts to enforce an appropriate agricultural policy, one that addresses first of all subsidy-related issues and also allows agricultural imports into local markets, while considering the issue of duplicate customs tariffs.<sup>340</sup> Other requirements include liberalisation of the services sector to open it up to the outer world, since the WTO insists on enforcement of the 'Non-discrimination Principle' in that sector. As regards intellectual property rights, Iraq has to enact and enforce a number of laws

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<sup>334</sup> Abdul Malik Mahmud, 'Investment in Iraq, Reality or Illusion?' (2012) 83 *Alra'ud* magazine 8. (Translated from Arabic Language by Author).

<sup>335</sup> US Department of State. '2013 Investment Climate Statement–Iraq' (February 2013) <<http://www.state.gov/e/eb/rls/othr/ics/2013/204661.htm>> accessed 12 Jan 2014.

<sup>336</sup> Ali Ibn Abi Talib Elgindi and Peter Lunenborg, 'The WTO Accession Process and Non-Economic Considerations' (2012) 7 *Global Trade & Cust J* 461.

<sup>337</sup> Bashar Hikmet Malkawi, 'Iraq's Accession to the WTO: Commitments and Implications' (2007) 6(2) *JITLP* 14.

<sup>338</sup> GATT is a multilateral agreement regulating international trade, reduction in tariffs, elimination of preferences and trade barriers on a reciprocal and mutually advantageous basis, according GATT text 1947. *See* General Agreement on Tariffs and Trade Geneva, 30 October 1947, Treaty Series 55, 814.

<sup>339</sup> OECD, *Supporting Investment Policy and Governance Reforms in Iraq* (OECD 2010) 59.

<sup>340</sup> Bashar Hikmet Malkawi, 'Iraq's Accession to the WTO: Commitments and Implications' (2007) 6(2) *JITLP* 14.

that are compatible with the minimum requirements of intellectual property rights in accordance with the Uruguay WTO Agreement.<sup>341</sup> The Membership Agreement requires development of the Preventive and Anti-Dumping Actions Bill. Moreover, Iraq must commit to comprehensive reformative economic policies to enable the Iraqi economy to allow free capital movements and foreign investments, and so on.<sup>342</sup>

#### 4.7.2 Anti/Pro WTO Membership Stances

Some authors argue against accession to the WTO; others, including the Iraqi Government, argue its advantages.<sup>343</sup> The anti-membership stance is based on the view that in the foreseeable future such membership will not bring much benefit to Iraq;<sup>344</sup> first of all, because Iraq has only one export-oriented commodity, that is, oil, and although oil comes within the technical framework of the WTO, it does not face any obstacles in entering the markets of WTO member countries.<sup>345</sup> Secondly, although WTO laws are concerned with trade and do not necessitate adoption of market-oriented institutions and policies, political pressures and threats of deceleration of membership procedures may force countries seeking membership to open up to markets and introduce institutional changes that exceed market-based requirements.<sup>346</sup> Thirdly, opening Iraqi markets to external competition would result in pressures on the already uncompetitive Iraqi industries and, to a lesser extent on the services sectors. Such pressures may even take such endangered sectors out of the market equation.<sup>347</sup> Fourthly, social policies adopted by developing countries such as Iraq, including subsidies, subsidised essential items and energy, would be under pressure from the WTO. The poorer sectors of the population, would then face a worsening of adverse political and economic conditions already of long standing.<sup>348</sup>

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<sup>341</sup> OECD, *Supporting Investment Policy and Governance Reforms in Iraq* (OECD 2010) 59-60.

<sup>342</sup> Bashar Hikmet Malkawi, 'Iraq's Accession to the WTO: Commitments and Implications' (2007) 6(2) JITLP 14.

<sup>343</sup> Mohammed Abdul, 'Where an Interest in Iraq's Accession to the WTO' (2011) 4 Journal of legislation and judiciary 28; Abdul-Hussein Tariq, *Economic Development and Workforce Planning in Iraq* (2nd edn, Dar Al Adalah 2013) 200. (Translated from Arabic Language by Author).

<sup>344</sup> Medhat al-Quraishi, 'Effects of Iraq's Accession to the World Trade Organization on the Iraqi Industry and the National Economy' (2013) 2 Journal of Commerce Ministry 53. (Translated from Arabic Language by Author).

<sup>345</sup> Abdul-Hussein Tariq, *Economic Development and Workforce Planning in Iraq* (2nd edn, Dar Al Adalah 2013) 174.

<sup>346</sup> *ibid.*

<sup>347</sup> Medhat al-Quraishi, 'Effects of Iraq's Accession to the World Trade Organization on the Iraqi Industry and the National Economy' (2013) 2 Journal of Commerce Ministry 53.

<sup>348</sup> Abdul-Hussein Tariq, *Economic Development and Workforce Planning in Iraq* (2nd edn, Dar Al Adalah 2013) 174.

Opponents of this stance argue that Iraq needs to catch up with the rest of the world in terms of politics, national institutions and economic performance. Further, they argue that membership would make the following positive contributions:<sup>349</sup> firstly, the Iraqi economy is a revenue-based economy, and the development of any alternatives would involve reliance on the state, and therefore there would be reliance on the state regarding development of alternatives.<sup>350</sup> Iraq would not be able to realise necessary political and institutional changes free of pressure.<sup>351</sup> Secondly, if Iraq remains a non-WTO member, it will not be able to achieve sustainable development and diversification by adopting import replacement and protectionism. In other words, export-oriented products need open markets, and Iraq cannot find enough non-WTO markets for such a purpose.<sup>352</sup> Thirdly, social aid in the form of cash transfers are allowed under WTO laws. Rationing of commodity aid will remain in force until improved economic and social conditions allow room for appropriate alternatives. Lastly, the status of 'developing country' can be used to win exemptions and postpone enforcement of procedures for some members.<sup>353</sup>

#### 4.7.3 Evaluation of Stances

This thesis argues that joining the WTO is a foregone conclusion in view of the contents and implications of the Iraqi Constitution and the supporting legislation favouring a market economy.<sup>354</sup> These confirm a market-oriented stance and argue for WTO membership. For Iraq, membership would create the financial conditions necessary for development, but it does not ensure the sought-after benefits,<sup>355</sup> because the acquisition of these benefits depends on the extent to which a country, in terms of its governmental and civil institutions, is capable of creating a climate where technical capabilities and the necessary infrastructure exist under the rule of law.<sup>356</sup> Membership negotiations should be accompanied by relevant scientific studies

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<sup>349</sup> Medhat al-Quraishi, 'Effects of Iraq's Accession to the World Trade Organization on the Iraqi Industry and the National Economy' (2013) 2 *Journal of Commerce Ministry* 53.

<sup>350</sup> Aysar Yassin, *The Importance of Iraq's Accession to the World Trade Organization* (NIC, 2009) 13. {أيسرياسين، أهمية انضمام العراق الى منظمة التجارة العالمية}; Bashar Hikmet Malkawi, 'Iraq's Accession to the WTO: Commitments and Implications' (2007) 6 (2) *JITLP* 14.

<sup>351</sup> Aysar Yassin, *The Importance of Iraq's Accession to the World Trade Organization* (NIC, 2009) 15.

<sup>352</sup> *ibid.*

<sup>353</sup> Bashar Hikmet Malkawi, 'Iraq's Accession to the WTO: Commitments and Implications' (2007) 6(2) *JITLP* 14.

<sup>354</sup> Christina C. Benson, 'Jus Post Bellum in Iraq: The Development of Emerging Norms for Economic Reform in Post Conflict Countries' (2011-2012) 11 *Rich J Global L & Bus* 315.

<sup>355</sup> Bashar Hikmet Malkawi, 'Iraq's Accession to the WTO: Commitments and Implications' (2007) 6(2) *JITLP* 14.

<sup>356</sup> Mohammed Abdul, 'Where an Interest in Iraq's Accession to the WTO' (2011) 4 *Journal of legislation and judiciary* 28.

and technical consultation. Considering the fact that opportunities for membership grow more complicated and difficult as time passes, it can confidently be said that the price of membership is lower than the cost of keeping Iraq out of the WTO.<sup>357</sup> For Iraq, joining the WTO would mean that the extremely weak Iraqi economy would be subject to reforms necessitating strict and straightforward decision-making, even if the results entail short-term sacrifices.<sup>358</sup> The WTO environment does not provide a safe climate for an economy bulging at the seams, but rather provides a general framework for competitive commercial exchange in which capability and efficiency will have the upper hand.<sup>359</sup> Nevertheless, WTO directives are flexible enough to take account of special conditions of each country (and some exemptions and exceptions would apply).<sup>360</sup> To summarise, it can be said that joining the WTO is a difficult task, yet is an inevitable prospect for developing countries.<sup>361</sup>

#### **4.8 The Development of Judicial System and Dispute Settlement Mechanisms**

A foreign investor would go to the national judiciary of the investment-hosting country for various reasons. He may seek each and every means of legal redress offered by the host country prior to opting for international arbitration.<sup>362</sup> In other cases, investment disputes between an investment-hosting country and foreign investors are governed by the national judiciary, either on the grounds that the latter has jurisdiction over disputes of various types based on the national sovereignty of the country concerned. In cases of non-agreement over an investment contract, there may be a resort to an international mechanism for dispute settlement.<sup>363</sup>

The Iraq judicial system must be examined in terms of its capacity to settle foreign investment disputes and create an effective, sufficient and integral means of guarantee for foreign investors.

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<sup>357</sup> Aysar Yassin, *The Importance of Iraq's Accession to the World Trade Organization* (NIC, 2009) 21. (Translated from Arabic Language by Author).

<sup>358</sup> Bashar Hikmet Malkawi, 'Iraq's Accession to the WTO: Commitments and Implications' (2007) 6(2) JITLP 14.

<sup>359</sup> OECD, *Supporting Investment Policy and Governance Reforms in Iraq* (OECD 2010) 60.

<sup>360</sup> Christina C. Benson, 'Jus Post Bellum in Iraq: The Development of Emerging Norms for Economic Reform in Post Conflict Countries' (2011-2012) 11 Rich J Global L & Bus 315.

<sup>361</sup> Bashar Hikmet Malkawi, 'Iraq's Accession to the WTO: Commitments and Implications' (2007) 6(2) JITLP 14.

<sup>362</sup> UNCTAD, *Investor-State Disputes Arising from Investment Treaties: A Review* (United Nations 2005) 32.

<sup>363</sup> M Sornarajah, *The International Law on Foreign Investment* (3rd edn, Cambridge University Press, New York 2011) 202.

#### 4.8.1 The Development of Judicial System

In the aftermath of 2003, a new position was introduced in the Iraqi judiciary. This stage requires judicial reforms at a level corresponding to the new democratic Iraq.<sup>364</sup> Additionally, some key reforms were introduced in the Iraqi judicial system; eg, the Supreme Judicial Council (SJC) was restructured by Order No. 35 of the CPA, whereby the SJC was assigned supervision of the Iraqi judicial system independently from the Ministry of Justice.<sup>365</sup> The said order was followed by the CPA-enacted Law No. 12 on May 8, 2004, which was designed to boost an independent judiciary by providing for administrative and financial independence of the SJC from the Ministry of Justice.<sup>366</sup> An independent judiciary is enshrined and well-established in the Iraqi Constitution under Article 47, which provides for establishing three federal powers in the State of Iraq, the independence of which shall established by the Constitution: legislative, executive, and judicial powers. Each of these powers shall conduct its works under the ‘separation of powers’ principle.<sup>367</sup> Furthermore, the judicial power shall be independent, with duties and functions conducted by courts of various degrees and types.<sup>368</sup>

Courts shall hand down their judgments pursuant to the applicable laws. In addition to this point, judges shall be independent and not subject by any power except that of the law in the course of conducting their duties. No power may interfere with judicial affairs or administration of justice.<sup>369</sup>

##### 4.8.1.1 The Role of National Judiciary

The Iraqi Investment Law provides for a role for the national judiciary in settling investment disputes. It is the body assigned to do so by virtue of Article 27 of the Investment Law No. 13 of 2006, which reads ‘Disputes arising between the parties governed by this Law shall be governed by the Iraqi Law unless such parties agree otherwise in cases not governed solely by the Iraqi Law’.<sup>370</sup> There may be a resort to the judiciary of the investment-hosting country

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<sup>364</sup> American Bar Association, ‘Judicial Reform Index for Iraq’ (July 2006) <<https://apps.americanbar.org/rol/publications/jri-iraq-2006.pdf>> accessed 12 Mar 2014.

<sup>365</sup> Medhat Al-Mahmoud, *The Judiciary in Iraq* (3rd edn, Judicial Institute 2011) 42. (Translated from Arabic Language by Author).

<sup>366</sup> Administration of Independent Judiciary Mem No.12 of 2004, CPA Official Documents <<http://govinfo.library.unt.edu/cpa-iraq/regulations/>> accessed 12 Mar 2014.

<sup>367</sup> Article 47 of the Constitution of the Republic of Iraq of 2005.

<sup>368</sup> Medhat Al-Mahmoud, *The Judiciary in Iraq* (3rd edn, Judicial Institute 2011) 73.

<sup>369</sup> Adnan Almrjani, *Impact of the Judiciary Independence* (Najaf, Al Nibras 2008) 69. (Translated from Arabic Language by Author).

<sup>370</sup> Sami Shubber, *The Law of Investment in Iraq* (New York, Brill 2009) 129.

pursuant to bilateral agreements.<sup>371</sup> For example, the Iraqi–Sudanese Agreement of 1999 on the Protection and Encouragement of Bilateral Investments provides that ‘[a]n investor may go to the national judiciary in the investment-hosting country in any of the following cases:

1. Non-agreement by parties to reconciliation;
2. Inability by the mediator to develop their report timely;
3. Non-agreement by parties to accept solutions suggested in the mediator’s report;
4. Non-agreement by parties to going to arbitration; and
5. Non-timely decision by the arbitration body for no acceptable reason’.<sup>372</sup>

The Iraqi–Yugoslav 2000 Agreement on Protection and Encouragement of Bilateral Investments reads that ‘Should a dispute remain six months without an amicable settlement, any party thereto may refer the same to competent courts of the contracting party.’<sup>373</sup> This agreement assigns the national judiciary of the investment-hosting country a key role in settling disputes, while allowing for other means of dispute settlement, including mediation, negotiations and arbitration.<sup>374</sup>

The ruling of the national judiciary was sought in the case of the investment contract between the General Company for Ports in Iraq (a publicly owned company) and Malaysian Petromin International (a privately owned company) on 11 Aug 1999, within the framework of the Memorandum of Understanding reached by Iraq and the United Nations on 20 May 1996, Article 21, which provides that ‘the Contract shall be enforced and interpreted pursuant to the laws of the Republic of Iraq. Any disputes arising out of the same shall be settled by normal Iraqi courts.’<sup>375</sup> Further, a contract was signed on 16 April 2009 by the State Real Estate Department in Najaf and Medihold, pursuant to the investment license given to the

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<sup>371</sup> As regards bilateral investment agreements, Iraq is a signatory to 35 investment treaties, the overall framework of which relates to mechanisms adopted to regulate, protect, and promote investments in addition to provisions on regulating interests, arbitration, dispute settlement, expropriation, and compensation for losses. In addition, Iraq has 11 bilateral free-trade agreements. Concerning multilateral investment agreements, Iraq has become party to 9 agreements under the umbrella of the Arab League Convention on Judicial Cooperation, all of which are concerned with protecting and promoting investment projects. In addition, Iraq became a member of the Multi Investment Guarantee Agreement in 2008, and was granted observer status in the WTO. It is noteworthy that in December 2012, Iraq ratified a bilateral investment agreement with the United States of America (USA) to boost in-bound investments and free trade between both countries via the creation of an investment and trade framework. See US Department of State. ‘2013 Investment Climate Statement–Iraq’ (February 2013) <<http://www.state.gov/e/eb/rls/othr/ics/2013/204661.htm>> accessed 12 Jan 2014.

<sup>372</sup> Iraqi Foreign Ministry. ‘Documents Department and Treaties’ (2013) <<http://www.mofa.gov.iq/en/ForeignPolicy/default.aspx?sm=hLkb6T4awQw=>> accessed 19 Mar 2014.

<sup>373</sup> *ibid.*

<sup>374</sup> Abdul Malik Mahmud, ‘Investment in Iraq, Reality or Illusion?’ (2012) 83 *Alrraúd* magazine 8. (Translated from Arabic Language by Author).

<sup>375</sup> Adnan Almrjani, *Impact of the Judiciary Independence* (Najaf, Al Nibras 2008) 118. (Translated from Arabic Language by Author).



Company for the purpose of constructing a medical facility. It was agreed that ‘The Iraqi Courts of Al-Najaf shall have jurisdiction over any dispute arising out of enforcement hereof’.<sup>376</sup>

A major problem when the parties resort to the national judiciary is the different cultural and legal backgrounds of those involved. These difficulties stem from the way contracts are interpreted, when subjective concepts and attitudes are brought to the dispute.

#### ***4.8.1.2 Establishment of the Commercial Court***

The Commercial Court has been created recently by virtue of the SJC Statement No. 136, issued on November 2010, which is the first specialist court in Iraq to be assigned cases in which a party is a non-Iraqi.<sup>377</sup> This Court was created due to the surge in commercial activities in Iraq on both the international and national levels. Investment Law No. 13 was enacted in 2006, and was followed by the Law of Private Investment in Crude Oil Refining No. 64 of 2007. Investment plays a major role worldwide, and efforts were made to execute developmental programmes as quickly as possible to achieve balanced economic development and growth and to integrate the country into the international economic system.<sup>378</sup> Iraq must pay attention to investor-attracting factors<sup>379</sup> and ensure a better environment for working capital through the enactment of specific laws to protect and promote investment. Such factors include ensuring access to arbitration, the creation of specialised commercial courts that win foreign companies’ trust in the possibility of seeking legal redress in their disputes on the basis of Article 22 of Judicial Regulation Law No. 160 of 1979<sup>380</sup> and Section 7 of Order No. 12 of 2004.<sup>381</sup>

After the establishment of the economic open-door policy in Iraq, it has become inevitable to create commercial courts to assure investors of the presence of an impartial specialist court that allows for summary settlement of disputes.<sup>382</sup> Furthermore, a foreign investor may not only plead before such a court in the course of legal proceedings marking

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<sup>376</sup> Abdul Malik Mahmud, 'Investment in Iraq, Reality or Illusion?' (2012) 83 Alrraud magazine 8.

<sup>377</sup> US Department of State. '2013 Investment Climate Statement–Iraq' (February 2013) <<http://www.state.gov/e/eb/rls/othr/ics/2013/204661.htm>> accessed 12 Jan 2014.

<sup>378</sup> *ibid.*

<sup>379</sup> Abdul Malik Mahmud, 'Investment in Iraq, Reality or Illusion?' (2012) 83 Alrraud magazine 8. (Translated from Arabic Language by Author).

<sup>380</sup> The Judicial Regulation Law No 160 of 1979 published in the Official Gazette, issue 2746 of 17/12/1979.

<sup>381</sup> Order No. 12 of 2004 on Judiciary Independence published in the Official Gazette, issue 3985 of 08/05/2004.

<sup>382</sup> Iraq's Dinar. 'Commercial Court experience successfully give reassurance to foreign investors' (2013) <<http://www.oneiraqidinar.com/commercial-court-experience-successfully-give-reassurance-to-foreign-investors/>> accessed 8 Jan 2014.

disputes with private sector entities but also with entities from the Iraqi Government. The only difference between a commercial court and a court of first instance lies in the involvement of non-Iraqi litigants. However, in a commercial case with Iraqi litigants, a court of first instance shall be the competent court.<sup>383</sup>

The Court's jurisdiction includes all businesses covered by Article 5 of the Trade Law No.30 of 1984. It also deals with industrial projects concerning investment and commerce, including the extraction of raw materials.<sup>384</sup> It has jurisdiction over commercial and commission agencies, transportation, brokerage, moveable property purchase and lease cases related to construction, building, equity, bonds, shipping and passenger travelling, loading and offloading, touristic services, hotels, publication and advertising, as well as other matters provided for under Article 6 of the Trade Law No.30 of 1984, such as the creation of commercial securities and related transactions, as these constitute commercial acts, regardless of the capacity and intention of the case initiator.<sup>385</sup>

The first judgment of the Commercial Court revoked the decision of the Ministry of Industry and Minerals (MoIM), which was the defendant (the trademark registering party) on the French Veolia Environment and condemned the defendant for registering a trademark in the plaintiff's name pursuant to the legally applicable ways. Veolia Environment, the plaintiff, filed an application with the relevant department of the defendant to register its trademark, Veolia Environment, in several types of commodities and goods following the defendant's refusal to register the same on no legal grounds because the trademark was a two-word phrase, while the other trademark was a one-word phrase in upper case letters and placed inside a square frame. The trademark to which the subject matter of the case is related is not framed and is written in lower case letters. Therefore, no similarity exists between both trademarks, and thus, the case was dismissible. Moreover, the court reviewed the original copy of the trademark layout and decided to appoint three judicial experts to look into the matter. They confirmed non-similarity between both trademarks and the subsequent cheating and deceiving of the public into buying trademarked commodities bearing misleading trademarks that are not identical. There is a clear verbal difference in the pronunciations of the trademarks, and hence,

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<sup>383</sup> US Department of State. '2013 Investment Climate Statement–Iraq' (February 2013) <<http://www.state.gov/e/eb/rls/othr/ics/2013/204661.htm>> accessed 12 Jan 2014.

<sup>384</sup> Medhat Al-Mahmoud, *The Judiciary in Iraq* (3rd edn, Judicial Institute 2011) 64.

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<sup>385</sup> Article 6 of the Trade Law No.30 of 1984 published in the Official Gazette, issue 2987 of 02/04/1984.

the experts grounded the report, which is valid for a judgment pursuant to Article 140 (1) of Evidence Law.<sup>386</sup>

The Court handed down its judgment based on Articles 5 and 10 of the Trademark No. 21 of 1957.<sup>387</sup>

#### **4.8.2 New Means of Investment Disputes Settlement**

Article 27 of the Investment Law provides that disputes arising between parties covered by the provisions of the Law will be referred to the relevant Iraqi laws if the parties agree to do so.<sup>388</sup> This provision does not cover only cases that are subject to Iraqi law or over which Iraqi courts have jurisdiction.<sup>389</sup> Accordingly, the general principle provides for the application of Iraqi Law to all investment-related disputes covered by the Investment Law, unless the parties to the dispute agree to another enforceable law.<sup>390</sup> This provision enshrines the freedom of the parties to a dispute to select the enforceable law for the settlement of the dispute. There are, nevertheless, disputes that are regulated exclusively by Iraqi Law, or where the jurisdiction is vested in Iraqi courts; ie, the parties related to any dispute may not select any other law.<sup>391</sup>

##### ***4.8.2.1 Disputed Regulated Exclusively by Iraqi Law***

The Investment Law provides for the sole jurisdiction of Iraqi Law over disputes arising out of employment contracts and crime-related disputes.<sup>392</sup>

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<sup>386</sup> Evidence Law No. 107 of 1979 published in the Official Gazette, issue 2728 of 03/09/1979.

<sup>387</sup> *French Veolia Environment v Iraqi MoIM* 2011 Judicial Bulletin 11 Nov 2010 (Amir Al Shammari) (The trademark registering party).

<sup>388</sup> Article 27 of the Investment Law is in line with Article 25 of the Iraqi Civil Law No.40 of 1951, which provides '(1) The contractual obligations shall be governed by the law of the state wherein lies the domicile of the contracting parties if they have a common domicile; where they have different domiciles the law of the state within which the contract was concluded will be applied unless the contracting parties have agreed (otherwise) or where it would be revealed from the circumstances that another law was intended to be applied. (2) The law of the site of the immovable shall be applied in respect of contracts which have been concluded in respect thereof.' Dan E Stigall, 'Iraqi Civil Law: Its Sources, Substance, and Sundering' (2006-2007) 16 J Transnat'l L & Pol'y 1.

<sup>389</sup> OECD, *Supporting Investment Policy and Governance Reforms in Iraq* (OECD 2010) 69.

<sup>390</sup> Sami Shubber, *The Law of Investment in Iraq* (New York, Brill 2009) 130.

<sup>391</sup> Harith Al Dabbagh, 'Le Cadre Juridique des Investissements Étrangers en Irak' (Le rôle du droit dans le développement économique Le droit au service du développement économique France-Congrès de l'IDEFLomé 17 au 20 November 2008).

<sup>392</sup> Article 27 of the Iraqi Investment Law No. 13 of 2005 published in the Official Gazette, issue 4031 of 17/01/2007.

#### 4.8.2.1.1 Disputes Arising of Employment Contracts

Article 27, Paragraph 1 of the Investment Law stipulates that Iraqi Law and Iraqi courts are to have exclusive jurisdiction over any disputes arising from an employment contract between an investor (whether Iraqi or non-Iraqi) and employees thereof, regardless of their nationalities.<sup>393</sup> A non-Iraqi employee, however, may rule out Iraqi Law, should the employment contract so provide. Therefore, personal disputes between an employee and an investor are not regulated by the aforementioned Article.<sup>394</sup> Employment contracts, as well as disputes arising from them, are regulated by the Iraqi Labour Law No. 39 of 1987.<sup>395</sup>

When labour differences grow into disputes, the employer and the trade unions concerned must move immediately to notify both the Minister of Labour and the Chief of the Trade Union Association, giving an account of the reasons for the dispute and details of its progress, and of the measures taken for addressing and settling the same.<sup>396</sup> Following a meeting between the Minister of Labour and Social Affairs and the presiding officer of the Confederation of Trade Unions, each of them shall work at first individually and then together, on reconciliatory efforts to settle the dispute.<sup>397</sup> Thus, the applicable laws assign the reconciliation process to the Minister of Labour and the Chief of the Trade Union Association.<sup>398</sup> When the reconciliatory efforts result in a settlement, that settlement will be binding and immediately enforceable.<sup>399</sup> In cases of failure, the dispute is referred to the Minister of Justice, who orders the Labour Dispute Circuit of the Court of Cassation to convene and look into the dispute.<sup>400</sup> The Labour Disputes panel of the Court of Cassation must hand down its judgment within fifteen days of the case being referred to it.<sup>401</sup> Any judgment this

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<sup>393</sup> Article 27, Paragraph 1 of the Iraqi Investment Law No. 13 of 2006 published in the Official Gazette, issue 4031 of 17/01/2007.

<sup>394</sup> Sami Shubber, *The Law of Investment in Iraq* (New York, Brill 2009) 131.

<sup>395</sup> The Labour Law No. 17 of 1987 published in the Official Gazette, issue 3163 of 17/08/1987. English Copy is available at <<http://www.investpromo.gov.iq/index.php?id=99>> accessed 25 Feb 2014. It is worth mentioning that there is a new Labour Bill now in passage through the Iraqi Parliament. It seeks to provide social guarantees and to enact a new employer-employee law that relies on fair economic bases. According to this proposed law, the state ensures the right to create trade and professional unions, since Iraq has signed many international and Arab labour conventions.

<sup>396</sup> Article 131 of Iraqi Labour Law No. 71 of 1987 published in the Official Gazette, issue 3163 of 17/08/1987.

<sup>397</sup> Article 132, Paragraph 1 and 2 of Iraqi Labour Law No. 71 of 1987 published in the Official Gazette, issue 3163 of 17/08/1987.

<sup>398</sup> Article 132, Paragraph 3 of Iraqi Labour Law No. 71 of 1987 published in the Official Gazette, issue 3163 of 17/08/1987.

<sup>399</sup> Article 132, Paragraph 4 of Iraqi Labour Law No. 71 of 1987. The labour bill adds up arbitration as a means of labour dispute settlement under Articles 195 and 162.

<sup>400</sup> Article 132, Paragraph 5 of Iraqi Labour Law No. 71 of 1987 published in the Official Gazette, issue 3163 of 17/08/1987.

<sup>401</sup> Article 133 of Iraqi Labour Law No. 71 of 1987 published in the Official Gazette, issue 3163 of 17/08/1987.

court delivers will be at a public hearing, binding on the parties concerned and enforceable within three days of delivery.<sup>402</sup> If the employer has not complied with the judgment within three days of being notified of it, the employees concerned may cease to work, with all their due rights preserved throughout the period of stoppage. Also, the employer may be punished for non-compliance.<sup>403</sup>

In assessing this mechanism, one must say that it does not offer sufficient guarantees for workers. Nor is it any longer in line with developments in the newly formed legal system. Legislators therefore have been right to allow foreign workers to agree to rule out this mechanism for the purposes of dispute settlement. What is needed is a law that accords with international agreements and introduces new provisions and principles drawn from international law.

#### **4.8.2.1.2 Disputes Relating to Crimes**

The provisions of Iraqi Penal Law No. 111 of 1969<sup>404</sup> applies to crime-related disputes between non-Iraqis.<sup>405</sup> The principle of the territoriality of criminal law provides for the applicability of the national penal code to all crimes committed in Iraq,<sup>406</sup> and the penal law addresses all cases involving a criminal act, an act with criminal consequences result or an act so intended.<sup>407</sup> In all cases, the Penal Code No. 111 of 1969 applies to each and every person involved in a crime committed, whether wholly or partially, in Iraq, even if such involvement is extraterritorial, and whether such a person is the sole or a complicit perpetrator, provided that no applicable treaty or agreement provides otherwise. Therefore, the said principle aims at applying the Penal Code to all and any crime committed territorially, whether or not the perpetrator is an Iraqi national, and whether or not the victim is an Iraqi national.<sup>408</sup>

Enforcement of the principle of territoriality of criminal law is a consequence of to the special nature of the Penal Code, which is a manifestation of the country's sovereignty. In other words, a Penal Code is different from other laws, such as the Civil Law and the Personal Status

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<sup>402</sup> Article 135 of Iraqi Labour Law No. 71 of 1987 published in the Official Gazette, issue 3163 of 17/08/1987.

<sup>403</sup> Article 136, Paragraph 1 of Iraqi Labour Law No. 71 of 1987 published in the Official Gazette, issue 3163 of 17/08/1987.

<sup>404</sup> The Penal Code No. 111 of 1969 published in the Official Gazette, issue 1778 of 15/12/1969.

<sup>405</sup> Crimes, according to the applicable Iraqi Penal Code, in terms of severity are divided into three types: Felonies, misdemeanours and crimes. The established separation standard between them is the legally established punishments thereof pursuant to Article 23 of Iraqi Penal Code No. 111 of 1969.

<sup>406</sup> Article 27, Paragraph 2 of the Iraqi Investment Law No. 13 of 2006 published in the Official Gazette, issue 4031 of 17/01/2007.

<sup>407</sup> Sami Shubber, *The Law of Investment in Iraq* (New York, Brill 2009) 132-133.

<sup>408</sup> Article 6 of Iraqi Penal Code No. 111 of 1969 published in the Official Gazette, issue 1778 of 15/12/1969.

Law, in that the latter allows national judges to enforce foreign laws.<sup>409</sup> A territory of a country means each and every land wherein such country exercises its sovereignty and jurisdiction, including the land, marine and air spaces, as well as airliners and vessels.<sup>410</sup> Accordingly, any agreement by and between parties to enforce any foreign law to settle any dispute between them as arising out of a crime shall be null and void, since such agreement shall be under the sole jurisdiction of the Iraqi law and courts.<sup>411</sup> This provision is certainly in line with the principle of territoriality of criminal law regarding criminal cases, as established by the international law.<sup>412</sup>

#### 4.8.2.1.3 Disputes between National Authorities & Investors

Iraqi law alone applies to civil disputes<sup>413</sup> between an investor and the Investment Authority or any other governmental party on matters not related to violation of provisions established by the investment.<sup>414</sup> Iraqi courts have jurisdiction over persons and legal persons (whether governmental or private) in the settlement of a dispute.<sup>415</sup> In commercial disputes, the Investment Law allows contracting parties to agree to arbitration. However, the investment laws in question must provide clearly for the option of arbitration,<sup>416</sup> otherwise Iraqi law applies. Likewise, where Iraqi courts have jurisdiction over disputes, Iraqi law shall apply at the federal level, and similarly with the court's jurisdiction.<sup>417</sup> Regarding the application of Iraqi law at the federal level and the jurisdiction of Iraqi courts, Shubber says:

It should be pointed out that the choice of Iraqi law, and the jurisdiction of Iraqi courts, applies at the federal, as well as the regional level. For the federal Civil Code and the federal Law of Civil Procedure apply to the whole of Iraq. Consequently, disputes of the nature described in the provision, occurring in the

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<sup>409</sup> Medhat Al-Mahmoud, *The Judiciary in Iraq* (3rd edn, Judicial Institute 2011) 129. (Translated from Arabic Language by Author).

<sup>410</sup> *ibid.*

<sup>411</sup> Sami Shubber, *The Law of Investment in Iraq* (New York, Brill 2009) 132.

<sup>412</sup> Rollin M Perkins, 'The Territorial Principle in Criminal Law' (1970-1971) 22 *Hastings L J* 1155.

<sup>413</sup> The Iraqi Civil Law No. 40 of 1951 sets forth civil matters that apply to all cases covered thereby, either explicitly or implicitly. As regards commercial matters, they are listed under Article 5 of the Trade Law No. 30 of 1984. Dan E Stigall, 'Iraqi Civil Law: Its Sources, Substance, and Sundering' (2006-2007) 16 *J Transnat'l L & Pol'y* 1.

<sup>414</sup> Article 27, Paragraph 5 of the Iraqi Investment Law No. 13 of 2006 published in the Official Gazette, issue 4031 of 17/01/2007.

<sup>415</sup> Article 29 of the Iraqi Law of Civil Procedure, No. 83 of 1969 published in the Official Gazette, issue 1766 of 10/11/1969.

<sup>416</sup> Sami Shubber, *The Law of Investment in Iraq* (New York, Brill 2009) 133.

<sup>417</sup> Harith Al Dabbagh, 'Le Cadre Juridique des Investissements Étrangers en Irak' (Le rôle du droit dans le développement économique Le droit au service du développement économique France - Congrès de l'IDEFLomé 17 au 20 November 2008).

Iraqi Kurdistan Region, for example, are governed by Iraqi law and are subject to the jurisdiction of the courts in the Kurdistan Region.<sup>418</sup>

#### **4.8.2.2 Disputes Governed by Foreign Law**

The Iraqi Investment Law features great flexibility for contracting parties regarding the avoidance of Iraqi law for purposes of settling disputes arising out of an investment contract.<sup>419</sup> This approach aims at allowing for enforcement of familiar and equitable laws for foreigners who find stronger guarantees of enforcement in them, and allows them not to have to deal with unfamiliar national laws.<sup>420</sup>

##### **4.8.2.2.1 Foreign Labour Contracts**

Should Iraq-based foreign employees wish to avoid Iraqi law and Iraqi court jurisdiction regarding their employment-contract disputes, the applicable law to which they desire to be subject must be agreed upon and provided for clearly in their contracts.<sup>421</sup>

Article 27, Paragraph 1 of the Investment Law of 2006 sets forth an absolute provision that relates to the non-regulatory part of employment contracts, ie, the part dealing with payment time, the amount and place of payment and the specification of work hours and the place of work.<sup>422</sup> Yet, this part does not include the regulatory areas that require jurisdiction to be vested solely in the applicable Iraqi law; ie, areas requiring unavoidable conformity to minimum wages requirements, insurance coverage for work-related injuries and regulation of working hours. As these areas are subject to commanding rules.<sup>423</sup>

A group of Iraqi jurists are of the opinion that employment contracts are subject to commanding rules prevailing at the jurisdiction where such contracts are to be put into force.

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<sup>418</sup> Sami Shubber, *The Law of Investment in Iraq* (New York, Brill 2009) 133.

<sup>419</sup> Jordan E Toone, 'Foreign Direct Investment in Post-War Iraq: An Investor's Introductory Guide to the Legal Framework' (2013) 9 *BYU Int'l L & Mgmt R* 141.

<sup>420</sup> Abdul Malik Mahmud, 'Investment in Iraq, Reality or Illusion?' (2012) 83 *Alra'ud magazine* 8. (Translated from Arabic Language by Author).

<sup>421</sup> Article 27, Paragraph 1 of the Iraqi Investment Law No. 13 of 2006. It should be mentioned that the Kurdistan Investment Law has not touched upon this subject in such detail. Yet, the general rule, pursuant to Article 17 of the said law, is to allow the parties concerned to opt for the applicable law. Otherwise, the Iraqi Law shall apply. To some extent this provision falls foul of Article 14, Paragraph 6 of the Investment Law No. 13 of 2006, as the latter does not allow parties concerned to move jurisdiction for a foreign law on the ground that the applicable Iraqi law predominates. This conclusion is supported by Article 14, Paragraph 6 which provides for adherence: 'to the valid Iraqi laws regarding salaries, vacations, work hours and conditions and others as a minimum'-an indication that such obligations are public order-related, and hence cannot be the subject of a violation of an agreement.

<sup>422</sup> Sami Shubber, *The Law of Investment in Iraq* (New York, Brill 2009) 136.

<sup>423</sup> Jordan E. Toone, 'Foreign Direct Investment in Post-War Iraq: An Investor's Introductory Guide to the Legal Framework' (2013) 9 *BYU Int'l L & Mgmt R* 141.

It is argued that such contracts represent the legal and economic medium for work relations and their ‘gravity centre,’ which is the place of enforcement. Thus it is difficult to separate the contract from its enforcement while proposing unity of the contract and its enforcement on the one hand and that of the applicable law on the other.<sup>424</sup> Enforcement and the jurisdiction thereof are the distinctive features of an employment contract.<sup>425</sup> Further, the governing law in the jurisdiction of enforcement is the one that is acceptable to the contracting parties. In addition, that jurisdiction constitutes the centre of gravity centre for the interests and concerns of all parties, thus rendering the contract in question more connected to the country of enforcement for the purposes and considerations clarified above.<sup>426</sup>

Despite the fact that the above interpretation is generally acceptable, it runs counter to the aim of the Investment Law, which is to attract foreign investors. A very important aspect of this endeavour is that the parties should be able to choose the law which will apply to their disputes, and to avoid unfamiliar new rules, under which violations are more likely.<sup>427</sup> As Shubber observes, ‘This is an important principle, according to which the parties are free to choose the applicable law to govern their contractual relations.’<sup>428</sup>

#### **4.8.2.2.2 Non-Iraqi Parties to Disputes**

Iraqi legislation allows foreigners who are parties to investment projects in Iraq the freedom to opt for a legislative and judicial system other than that of Iraq, and also to choose an alternative mechanism for the settlement of civil disputes.<sup>429</sup> However, the choice must be by virtue of an explicit agreement by the parties as provided for under Article 27, Paragraph 2.<sup>430</sup> This provision, nonetheless, is subject to Article 15 of the Civil Law, which regulates foreigners’ litigation before Iraqi courts in the following cases:

- a- when he is in Iraq;
  - b- where the litigation is in respect of concerning a real estate existing in Iraq or a movable which existed in Iraq at the time of commencement of the proceeding;
- and

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<sup>424</sup> Medhat Al-Mahmoud, *The Judiciary in Iraq* (3rd edn, Judicial Institute 2011) 118; Adam Wahib Al-naddawy, *Civil Procedure* (Baghdad University, College of Law 1988) 273.

<sup>425</sup> *ibid.*

<sup>426</sup> *ibid.*

<sup>427</sup> Sami Shubber, *The Law of Investment in Iraq* (New York, Brill 2009) 136.

<sup>428</sup> *ibid.*

<sup>429</sup> Sami Shubber, *The Law of Investment in Iraq* (New York, Brill 2009) 137.

<sup>430</sup> Article 27, Paragraph 2 of the Iraqi Investment Law No. 13 of 2006 published in the Official Gazette, issue 4031 of 17/01/2007.



- c- when the subject matter of adjudication is a contract which has been executed in or must be executed in Iraq or where the litigation concerns an event which took place in Iraq.

Notably, the aforesaid Article 15 applies in cases of constant disagreement by parties to the choice of a non-Iraqi legislative and judicial jurisdiction.<sup>431</sup> The issue here is the selection of the applicable law and the competent court in cases where there is a foreign first party and an Iraqi second party to a contract. Pursuant to Article 27, Paragraph 2, there can be no agreement to exclude Iraqi law.<sup>432</sup> And yet this provision is legally valid, since having a foreign party to a contract means that the contract includes a foreign component, and is thus subject to the provisions of international law, the principles of which allow room for an agreement to choose the applicable enforceable law and the competent court.<sup>433</sup> In other words, the national laws of the country of the contracting parties shall apply to the contracting obligations in cases where there is a single domicile.<sup>434</sup> Otherwise, the applicable laws of the country of contracting shall apply, unless the contracting parties agree to, or the situation allows, another governing law. The property location is determinant factor, and Iraqi Civil Law provides for choice of the applicable law in contracts with foreign components.<sup>435</sup>

The Iraqi Court of Cassation ruled for SAS Scandinavia Airlines Middle East in a judgment that read: ‘whereas the contracting parties have agreed, pursuant to the freight policy terms and conditions, to enforce the Norwegian law or the Swedish law, the Court of First Instance of Basra should have enforced either of said laws considering the carrier’s nationality as per Article 25 of the Civil Law.’<sup>436</sup>

Iraqi legislation, in accordance with the above Article, has depended on the investor's nationality, rather than the national origin of the capital, to decide on the status of a contracting party.<sup>437</sup> Accordingly, the Iraqi Investment Law does not treat foreign capital owned by an Iraqi as foreign investment and therefore it is still subject to the restrictions of the national laws

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<sup>431</sup> Medhat Al-Mahmoud, *The Judiciary in Iraq* (3rd edn, Judicial Institute 2011) 119. (Translated from Arabic Language by Author).

<sup>432</sup> Sami Shubber, *The Law of Investment in Iraq* (New York, Brill 2009) 137.

<sup>433</sup> *ibid.*

<sup>434</sup> Dan E Stigall, 'Iraqi Civil Law: Its Sources, Substance, and Sundering' (2006-2007) 16 *J Transnat'l L & Pol'y* 1.

<sup>435</sup> Article 25, Paragraph 1 and 2 of the Iraqi Civil Law No. 40 of 1951 published in the Official Gazette, issue 3015 of 08/09/1951.

<sup>436</sup> Adam Wahib Al-naddawy, *Civil Procedure* (Baghdad University, College of Law 1988) 198. (Translated from Arabic Language by Author).

<sup>437</sup> Medhat Al-Mahmoud, *The Judiciary in Iraq* (3rd edn, Judicial Institute 2011) 121. (Translated from Arabic Language by Author).

regulating investment.<sup>438</sup> An Iraqi national transferring foreign capital into Iraq is treated in the same way as someone investing capital which is already in Iraq, and thus the inflow of capital is weakened and made less flexible.<sup>439</sup> This leads to an injustice, since Iraqi investors with foreign investment capital are not distinguished from Iraqi investors with national capital; an approach which discourages investment in Iraq, and gives an advantageous position to a foreign investor with national capital compared to an Iraqi investor with foreign capital.<sup>440</sup> Another question to arise in this context concerns the designation of investments made with a combination of foreign and national capitals: would the investment be regarded as national or as foreign? The answer is uncertain, as the legislation considers the investor's nationality, rather than the source of capital, for the purpose of designating an investment as national or foreign.<sup>441</sup> It would seem that the best solution here would be for the legislators to focus on the nature and designation of the investment and to decide whether an investment is national or foreign on the basis of which of the two constitutes the greater share of the capital.

#### **4.8.3 Availability International Arbitration**

New investment rules governing the arbitration in the country have changed the appointment of arbitrators by making the process more acceptable in international circles.<sup>442</sup> According to Article 27 of the Iraqi investment law, disputes between persons are subject to Iraqi laws and jurisdiction.<sup>443</sup> However, according to the Article 27, Paragraph 4 of investment law, foreign parties have the liberty to choose international arbitration laws to govern their contracts.<sup>444</sup> One of the advantages of the arbitration process is that it ensures arbitrators have specialised competence, which ultimately leads to improvement in the quality of arbitral awards.<sup>445</sup> This is in contrast to judicial procedures where the judges may not have specialised training and knowledge about the issue in dispute. The new arbitration rules ensure that experienced professionals, who have previously presided over arbitration procedures, are chosen as

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<sup>438</sup> *ibid.*

<sup>439</sup> Abdul Malik Mahmud, 'Investment in Iraq, Reality or Illusion?' (2012) 83 *Alra'ud* magazine 8. (Translated from Arabic Language by Author).

<sup>440</sup> *ibid.*

<sup>441</sup> *ibid.*

<sup>442</sup> Jordan E Toone, 'Foreign Direct Investment in Post-War Iraq: An Investor's Introductory Guide to the Legal Framework' (2013) 9 *BYU Int'l L & Mgmt R* 141.

<sup>443</sup> OECD, *Supporting Investment Policy and Governance Reforms in Iraq* (OECD 2010) 69.

<sup>444</sup> Article 27 of the Iraqi investment law No. 13 of 2006, and also section 251 of the Code of Civil Procedures, stipulate that an arbitral agreement can be made in relation to an existing dispute, or in relation to future disagreements that may arise from an investment contract. Sami Shubber, *The Law of Investment in Iraq* (New York, Brill 2009) 141.

<sup>445</sup> Article 261 of the Iraqi Law of Civil Procedure, No. 83, 1969 published in the Official Gazette, issue 1766 of 10/11/1969.

arbitrators. In addition, the parties are at liberty to verify the expertise of the arbitrator at the start of the case.<sup>446</sup>

Consequently, the investment law No. 13 of 2006 gives validity to international arbitration, and the enforcement of arbitral awards is now a requirement in Iraqi law for the regulation of the arbitration process.<sup>447</sup> This means, foreign investors now have the liberty to choose international arbitration in other foreign jurisdictions to settle their disputes.<sup>448</sup> This development was applied in a previous dispute, arising from a contract between an Iraqi construction company and the now dissolved Reconstruction Council of Iraq. The case was referred to a foreign arbitrator who was chosen by both parties. The arbitrator's decision was approved by the Court of Cassation as binding on both parties.<sup>449</sup>

## 4.9 Conclusion

This chapter has described the reform strategy that was instigated in order to introduce drastic changes to the foreign investment environment in Iraq. The direct purpose was to rehabilitate this environment following a long period of war and conflict.<sup>450</sup> Iraq has made significant progress in the reconstruction of its economy, and investors have shown considerable interest in the country, as evidenced by the influx of Chinese investors in the past few years.<sup>451</sup> In fact, recent statistics show that the number of foreign investments doubled post-2009, as investors swarmed into the Middle Eastern country to cash in on investment opportunities arising from the relative political stability and security of parliamentary elections and the formation of the partnership between the conflicting parties. The main goal of the current chapter was to examine and analyse the reform strategy adopted by the legislators and the government of Iraq. It also attempted to assess the future prospects of the reform policy and to track various new developments made to the legal and regulatory framework of the foreign investment environment. The results have shown that despite the extensiveness of the reforms, their success has been doubtful, especially when the inflow of foreign capital to Iraq is used as an

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<sup>446</sup> Akram Yamulki, 'National Report for Iraq' in *Yearbook Commercial Arbitration* (Kluwer Law International 1979) 112.

<sup>447</sup> Article 27, Paragraph 5 of the Iraqi Investment Law No (13) of 2006 published in the Official Gazette, issue 4031 of 17/01/2007.

<sup>448</sup> David Brent Grantham, 'Calculated Risk: The Advance of IOCs and NOCs into the Iraqi Investment Theater' (2010) 3(3) *J World Energy Law Bus* 315.

<sup>449</sup> Saleh Majid, 'Arbitration in Iraq' (2004) 19 *Arab L Q* 267.

<sup>450</sup> Rahim Moloo and Alex Khachaturian, 'Foreign Investment in a Post-Conflict Environment' (2009) 10 *J World Investment & Trade* 341.

<sup>451</sup> Chris Zambelis, 'China's Iraq Oil Strategy Comes Into Sharper Focus' (2013) 13 *China Brief* 10.

indicator. This inflow has certainly not been commensurate with the ambitious aims of the Reform Plan initiated in 2003.

‘Iraq will serve as an example for the Middle East,’ was an American catch-phrase heard after the invasion of Iraq,<sup>452</sup> and it suggested the possibility of a comprehensive political, legal, economic and social reform. In measuring the success of the reform plans, it is not enough to compare the present with the past and to claim that there has been an improvement. Iraq has the potential to become not merely less bad, but positively good. Undoubtedly, the reforms are a long-term endeavour, and although there are currently few positive indications, it is also true that fruition does not take place overnight.

The fact remains that, in 2014, reform targets are still far from being realised, more than a decade after the plans were initiated by Paul Bremer, the Civil Administrator of Iraq, and then adopted by the Iraqi Government. Further work needs to be done to find the real causes for foreign investors’ reluctance to venture into Iraq, and the following chapters will be concerned with this issue.

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<sup>452</sup> Larry Diamond, 'Transition to Democracy in Iraq?' (2004-2005) 11 *Brown J World Aff* 45.

# Chapter V: The Perplexity in Reform Programme: Observations and Reflections<sup>1</sup>

## 5.1 Introduction

In Iraq, in the post-2003 democratic transition, the reforms adopted were considered sufficient to attract foreign investment.<sup>2</sup> The objective of this chapter is to analyse why more than ten years of Iraqi and international efforts to encourage foreign investment have failed, and why foreign investment in Iraq remains limited, with USD 2.852 billion of foreign investment flows of 2013.<sup>3</sup>

This chapter proves that the reforms were not sufficient to reform the investment environment in Iraq.<sup>4</sup> However, the study has consistently shown that some laws do not meet the minimum international standards but yet are still in force.<sup>5</sup> Highlighting a controversy in the emerging challenges post-2003<sup>6</sup> as evidenced by this chapter analysis of the elements of the Iraqi investment environment that have been far from addressed.<sup>7</sup> Moreover, national infrastructure does not meet acceptable standards, and there is inherent administrative red tape with which foreign investors have to comply.<sup>8</sup>

This chapter will argue that the investment path to Iraq is still full of obstacles because reforms have been far from addressed. Furthermore, the Iraqi investment environment, in turn,

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<sup>1</sup> This Chapter is an expanded and revised version of the Author article's, Nidham G Al Abasey, 'Cakes without Sugar: Reasons behind Foreign Investor Reluctance to Enter Mesopotamia' (2013) 41 Syracuse J Int'l L & Com 145.

<sup>2</sup> OECD, *Supporting Investment Policy and Governance Reforms in Iraq* (OECD 2010) 7 (claiming that '[h]owever, Iraq has witnessed positive changes in recent years, and a number of developments afford a more optimistic outlook'). *ibid.*

<sup>3</sup> See UNCTAD, *World Investment Report 2014* (United Nations 2014) 207.

<sup>4</sup> Rahim Moloo and Alex Khachaturian, 'Foreign Investment in a Post-Conflict Environment' (2009) 10 J World Investment & Trade 341. (pointing out that '... investors must carefully examine all possible threats to their investment and, with tips from this article in mind, think about how best to maneuver around those threats while retaining a profitable investment') *ibid.*, 358.

<sup>5</sup> Stating that the laws on intellectual property rights in Iraq do not comply in several respects with the provisions of the TRIPS Agreement. Bashar Hikmet Malkawi, 'Iraq's Accession to the WTO: Commitments and Implications' (2007) 6(2) JITLP 14.

<sup>6</sup> Samer Shehata, 'Losing Hearts and Minds Understanding America's Failure in Iraq' (2005) 6 Geo J Int'l Aff 71.

<sup>7</sup> Rahim Moloo and Alex Khachaturian, 'Foreign Investment in a Post-Conflict Environment' (2009) 10 J World Investment & Trade 341. (pointing out that '[p]erhaps the greatest obstacle to Iraq's economic development and openness to foreign investment has been the collapse of the state's institutional capacity') *ibid.*, 352.

<sup>8</sup> Clarence M Dass, 'Adventure Capitalizing in Baghdad: an Entrepreneurial Approach to Reconstructing Iraq' (2009-2010) 4 Entrepreneurial Bus L J 157.

has been shaken to the roots by political rifts at the borders of which the volcano of terrorism has erupted. The consequential corruption has taken its toll. Further, the weak investment-related legal system is ascribed to the lack of effective protection for intellectual property rights, the indefinite role of national investment authorities and, most dangerously, the extreme ineffectiveness (even the lack) of an independent and efficient judiciary.<sup>9</sup> This chapter will first provide a brief overview of Iraq's ranking in international indices in the investment climate and will argue that reform strategies have failed in terms of addressing obstacles to foreign investment in Iraq. The chapter will analyse the reasons behind the lack of improvement in the Iraq investment environment by examining the obstacles. This account seeks to explore the current effects and future risks, set out the obstacles that are a subject of reform, but which have not been successful, and those obstacles that are still far from being addressed, and will evaluate the policy of reform as a whole.

## **5.2 Provide Evidence: Iraq Ranking In International Indicators of the Investment Climate**

Many international bodies and organisations provide investors and decision makers with digital information that helps them make investment decisions. This help takes the form of a number of indices that clarifies the efficiency of an investment environment.<sup>10</sup> Statistical studies have proven that there is a close relationship between a country's rank on such indices and how much investment it attracts.<sup>11</sup> To boost the stance of this study and show how faulty governmental reforms have proven to be obstacles to foreign investment in Iraq, the following points examine Iraq's performance in the investment climate on the basis of international indices.

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<sup>9</sup> Jordan E Toone, 'Foreign Direct Investment in Post-War Iraq: An Investor's Introductory Guide to the Legal Framework' (2013) 9 *BYU Int'l L & Mgmt R* 141. (concluding that '[a]mong the more important of these implications is the fact that despite the ongoing security concerns facing foreign investors, Iraq is 'open for business.' Whether or not Iraq is opening up to foreign investment too quickly will depend on several factors, including the development of the Iraqi Judiciary and the Iraqi security forces'). US Department of State. '2013 Investment Climate Statement-Iraq' (February 2013) <<http://www.state.gov/e/eb/rls/othr/ics/2013/204661.htm>> accessed 12 Jan 2014.

<sup>10</sup> Kaufmann D and Kraay A, 'Governance Indicators: Where Are We, Where Should We Be Going?' (Spring 2008) 23 *The World Bank Research Observer* <<http://siteresources.worldbank.org/INTWBIGOVANTCOR/Resources/KKGovernanceIndicatorsSurveyWBROSpring2008.pdf>> accessed 18 Feb 2014.

<sup>11</sup> UNCTAD, *World Investment Report 2013*(United Nation, 2013) 215.

### 5.2.1 Index of Economic Freedom

Economic freedom is one of the most important investment-attracting factors because it constitutes the best means for reaching an advanced level of growth and economic welfare. Economic freedom is measured using a number of variables that seek to figure out how open an economy is and how much the state interferes with its economy.<sup>12</sup>

Iraq has continued to miss a position on the 2013 index because of a lack of reliable data on economic liberalism within the country. Iraq has been categorised among the countries with zero economic liberalism, and a 4.9-point classification on the index during 1997–2001. In 2002, this classification went up to 5, which is the highest ceiling for a total lack of economic liberalism, thus marking an unmistakable situation of zero economic liberalism, a tighter grip on economic activities, and expansion of state or government control.<sup>13</sup>

To have the pre-2003 Iraq so classified among states with zero economic liberalism is a result that sounds pretty logical because of the economic policies and measures adopted by the country's pre-2003 governments. This period was an era of heavy state interference with its economy. However, in post-2003 Iraq, there has been an economic reformist approach with a view to larger economic liberalism. However, the steps adopted by Iraq have never been sufficiently convincing to merit any enhancement considered in its classification.

### 5.2.2 Ease of Doing Business Index

The Ease of Doing Business Index, created and updated annually by the World Bank Group (WBG) and International Finance Corporation (IFC), is a compound index consisting of ten sub-components that make up the base for a business-doing environment. This index measures how a country's laws and governmental procedures affect its economic situation while focusing on the small- and medium-scale enterprise sector with a view toward developing benchmarks for measuring and comparing business environment conditions in developed and developing countries.<sup>14</sup>

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<sup>12</sup> The Heritage Foundation introduced this index in 1995 in conjunction with the Wall Street Journal. Other bodies concerned with measuring economic freedom include the Fraser Institute of Canada and the Dubai International Financial Center (DIFC). See The Heritage Foundation and the Wall Street Journal. 'Index of Economic Freedom' (2013) <<http://www.heritage.org/index>> accessed 18 Jan 2014.

<sup>13</sup> The Heritage Foundation and the Wall Street Journal. 'Index of Economic Freedom' (2013) <<http://www.heritage.org/index>> accessed 18 Jan 2014.

<sup>14</sup> World Bank Group (WBG) and the International Finance Corporation (IFC). 'Doing Business Index 2013' (2013) <[http://www.trade.gov/iraq/build/groups/public/@tg\\_iqtf/documents/webcontent/tg\\_iqtf\\_003994.pdf](http://www.trade.gov/iraq/build/groups/public/@tg_iqtf/documents/webcontent/tg_iqtf_003994.pdf)> accessed 18 Feb 2014.

In 2014, Iraq ranked 151 out of 189 countries on the Ease of Doing Business Index,<sup>15</sup> pushing it four ranks behind its placement in 2013.<sup>16</sup> Iraq debuted on this Index in 2005, when it ranked 114 out of 155 countries, before moving behind to 145 out of 175 in 2006 and 146 in 2007 and 2008, with a persistent backward trend to 152 in 2009 and 166 in 2010, 2011 and 163 in 2012. These classifications explain the difficulties encountered by the Iraqi investment, which is additional proof of the futility of the post-2003 reforms.<sup>17</sup>

### **5.2.3 Country Risk Rating**

The country-based risk assessment indices include a number of indications for investment-hosting countries that affect the flow-in of foreign investments. These include political, economic, and financial risks. Iraq has always been ranked low on all these indices, which is further proof of the obstacles to investing in Iraq. The unanimous categorisation of Iraq by all these indices indicates the height of the risks facing investments in Iraq. Country-based risk assessment indices are issued by several specialist bodies, and the following are some of them:

#### ***5.2.3.1 International Country Risk Guide***

The International Country Risk Guide (ICRG) is a monthly guide first issued in 1980 of Political Risk Services Group (PRS) that measures investment-related risks.<sup>18</sup> This guide covers 140 countries, including Iraq, which remained among the high-risk countries until 2013. From 2004 to 2007, Iraq was among the very high-risk countries but moved forward to the moderate risk category in 2008, only to move back to the high-risk category from 2009 to 2013.<sup>19</sup>

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<sup>15</sup> Mohammed Al-Musawi, 'Weaknesses in the Performance of Investment Commissions' (2013) 18 Baghdad of Legal Science 350. (The NIC argued that the World Bank Report very low rating of Iraqi, in terms of investment operations, is somehow exaggerated. Further, the limitations set forth by the said Report, according to NIC, are red-tape related even if relevant to Iraq. However, much effort is underway to overcome such obstacles. Sami Al Araj, head of NIC, said that 'Administrative red-tape in Iraq still serves as a liability to issuing investment licenses. Therefore, the World Bank used the resulting delays for its low rating of Iraq. Despite the very low rating, Iraq is still the highest in terms of investment opportunities across the region').  
ibid.

<sup>16</sup> World Bank Group (WBG) and the International Finance Corporation (IFC). 'Ease of Doing Business in Iraq' (2014) <<http://www.doingbusiness.org/rankings>> accessed 14 July 2014.

<sup>17</sup> ibid.

<sup>18</sup> The PRS Group. 'Political Risk Rating (ICRG)' (2013) <<http://www.prsgroup.com/Default.aspx>> accessed 14 Jan 2014.

<sup>19</sup> The PRS Group. 'Political Risk Rating (ICRG): Iraq' (2013) <<https://epub.prsgroup.com/index.php/products/icrg>> accessed 14 Jan 2014.



### **5.2.3.2 Euromoney Country Risk**

This index is semi-annually issued by the magazine Euromoney to measure a country's ability to meet its foreign obligations, such as debt service, paying for imports when due, and freedom to transfer investment returns and capital. This index has nine sub-indices with various weights. The greater the percentage of an index, the lower the risk that a country would not meet its obligations.<sup>20</sup>

In total, 185 countries are covered by this index. According to the 2013 results, Iraq belongs to the high-risk category of states. In 2004–2012, Iraq has been swinging between the very high-risk to high-risk categories.<sup>21</sup>

### **5.2.3.3 Institutional Investor Index**

The Investment Corporation index has been issued semi-annually since 1998 and covers 173 countries.<sup>22</sup> Iraq was categorised among the high-risk countries during 2010–2013. From 2004 to 2009, Iraq was a very high-risk country, except for 2008 when it was a high-risk country.<sup>23</sup>

### **5.2.3.4 Dun & Bradstreet Index**

This index measures country specific international commercial exchange-related risks, paying attention to assessing country specific risks that are not related to a country's ability to meet the obligations of not only debt repayment, investment capital and returns, and payment for imports to exporters, but also missed exportation and investment opportunities. The index in question depends on four categories of variables that cover political risks, macro-economic risks, external, and commercial risks.<sup>24</sup> Covering 132 countries, the index has classified Iraq among the highest risk group from 2004 to 2013.<sup>25</sup>

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<sup>20</sup> Euromoney Country Risk. 'World risk average' (2013) <<http://www.euromoneycountryrisk.com/>> accessed 5 Jan 2014.

<sup>21</sup> Euromoney Country Risk. 'Iraq risk average' (2013) <<http://www.euromoneycountryrisk.com/Wiki/Iraq>> accessed 12 Feb 2014.

<sup>22</sup> Institutional investor. 'Global Rankings' (2013) <<http://www.institutionalinvestor.com/Research/3633/Global-Rankings.html>> accessed 14 Jan 2014.

<sup>23</sup> *ibid.*

<sup>24</sup> Dun & Bradstreet index. 'Country Risk Subscriber Zones' (2013) <<http://www.dnbcountryrisk.com/?page=ctryrisk1>> accessed 13 Jan 2014.

<sup>25</sup> Dun & Bradstreet. 'Country Risk: Iraq' (2013) <[https://www.dbai.dnb.com/int/en/dbai\\_frame.html](https://www.dbai.dnb.com/int/en/dbai_frame.html)> accessed 11 Jan 2014.

### 5.2.3.5 Coface Index

This index measures the risks related to a country's failure to repay its debts and highlights how corporate financial obligations are affected by the performance of the local economy, local political conditions, and economic relations with the outer world. Countries are classified into two key groups: (1) Investment Class Countries A, which branches out into four classes (A1–A4) and (2) Speculation Class Countries (B, C, and D). According to this 164-state index, Iraq belongs to Group 2, with a low class of D, ie, Iraq is categorised as a high-risk country.<sup>26</sup> Two of the negative results that emerges from a Coface index of 2014 are "Ethnic and religious rivalries complicating the establishment of the rule of law and fuelling the risk of civil war; Insecurity and institutional weaknesses delaying reconstruction and investment".<sup>27</sup>

### 5.2.4 Transparency Index

The Transparency Index was started in 1993 by Transparency International, which defines "corruption" as "abuse of public office for private gain." This index measures the transparency level by determining corruption levels among public servants and politicians.<sup>28</sup> Iraq was introduced to TI's reports in 2003. Iraq ranked 113 internationally and 16 in the Arab world, with a 2.2-point<sup>29</sup> index, dropping down to 2.1 in 2004 to rank 129 internationally and 17 in the Arab world. In 2005, the index went up to 2.2 for Iraq to rank 137 internationally and 17 in the Arab world. Iraq dropped in 2006 and 2007 to international ranks of 160 and 178, respectively, and 17 and 16, respectively, in the Arab world, with a 1.9 point index in 2006 and 1.4 in 2007. In 2008,<sup>30</sup> the status of Iraq worsened to hit 1.3, ranking 178, but ranking went

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<sup>26</sup> Coface. 'What we do' (2013) <[http://www.coface.com/CofacePortal/COM\\_en\\_EN/pages/home/wwd](http://www.coface.com/CofacePortal/COM_en_EN/pages/home/wwd)> accessed 16 Mar 2014.

<sup>27</sup> Coface. 'Major macroeconomic indicators: Iraq' (2012) <[http://www.coface.com/CofacePortal/COM\\_en\\_EN/pages/home/risks\\_home/country\\_risks/country\\_file/Iraq?extraUid=572145](http://www.coface.com/CofacePortal/COM_en_EN/pages/home/risks_home/country_risks/country_file/Iraq?extraUid=572145)> accessed 15 Feb 2014.

<sup>28</sup> Transparency International. 'Who We Are: Our history, 1993 in the Beginning' (2014) <<http://www.transparency.org/whoweare/history>> accessed 15 Feb 2014.

<sup>29</sup> Transparency International. 'Evaluations' (2013) <<http://www.transparency.org/whoweare/accountability/evaluations>> accessed 14 Jan 2014.

<sup>30</sup> Transparency International. 'Corruption Perceptions Index 2008: Results' (2008) <[http://www.transparency.org/research/cpi/cpi\\_2008](http://www.transparency.org/research/cpi/cpi_2008)> accessed 18 February 2014.

back up as 176,<sup>31</sup> 175,<sup>32</sup> 175,<sup>33</sup> 169<sup>34</sup> and 171 respectively with 1.5, 1.5, 1.8, 18 and 16 points from 2009 to 2013.<sup>35</sup>

The quoted indices simply add to a distrustful investment environment and the growing reluctance of investors to investing in Iraq owing to lack of transparent transactions.

### **5.2.5 Governance Indicator**

Governance Indices are issued by the World Bank Group following the collection of respective elements from various sources. These indices monitor governance and institutions entrusted with power in a given country. Such monitoring includes the mechanisms of electing, supervising, and replacing a country's government, a government's ability to develop and enforce sound and efficient policies, and respect from citizens and the state for institutions that govern a country's economic and social relations.<sup>36</sup> The Percentile Index is adopted here to figure out where Iraq stands among the rest of the world.

#### **5.2.5.1 Regulatory Quality Index**

This index develops perceptions of a government's ability to develop and enforce sound policies and regulations that help encourage private sector growth.<sup>37</sup> Iraq's ranks on this index have been 7.4/2003, 3.4/2004, 5.4/2005, 6.9/2006, 7.3/2007, 13.1/2008, 16.7/2009, 15.8/2010, and 12.8/2011. This is but an indication of the deteriorating and inefficient regulatory frameworks to bring investments into Iraq.<sup>38</sup>

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<sup>31</sup> Transparency International. 'Corruption Perceptions Index 2009: Results' (2009) <[http://www.transparency.org/research/cpi/cpi\\_2009](http://www.transparency.org/research/cpi/cpi_2009)> accessed 18 February 2014.

<sup>32</sup> Transparency International. 'Corruption Perceptions Index 2010: Full Table and Rankings' (2010) <<http://www.transparency.org/cpi2010/results>> accessed 18 February 2014.

<sup>33</sup> Transparency International. 'Corruption Perceptions Index 2011: Full Table and Rankings' (2011) <<http://www.transparency.org/cpi2011/results>> accessed 18 February 2014.

<sup>34</sup> Transparency International. 'Corruption Perceptions Index 2012: Full Table and Rankings' (2012) <<http://www.transparency.org/cpi2012/results>> accessed 18 February 2014.

<sup>35</sup> Transparency International. 'Corruption Perceptions Index 2013: Full Table and Rankings' (2013) <<http://cpi.transparency.org/cpi2013/results/>> accessed 25 Feb 2014.

<sup>36</sup> World Bank Group. 'The Worldwide Governance Indicators (WGI)' (2013) <<http://info.worldbank.org/governance/wgi/index.asp>> accessed 18 Feb 2014.

<sup>37</sup> The Worldwide Governance Indicators. 'Regulatory Quality' (2013) <<http://info.worldbank.org/governance/wgi/pdf/rq.pdf>> accessed 9 Feb 2014.

<sup>38</sup> The Worldwide Governance Indicators. 'Iraq Index' (2013) <[http://info.worldbank.org/governance/wgi/sc\\_chart.asp](http://info.worldbank.org/governance/wgi/sc_chart.asp)> accessed 9 Feb 2014.

### **5.2.5.2 Government Effectiveness Index**

This index develops perceptions on the efficiency of public services and civil service and the degree of independence of the latter from political pressures. It also analyses the sound mechanisms used for government policy development and enforcement, as well as the credibility of the government in terms of realising these policies.<sup>39</sup> Iraq has secured low ratings in this respect: 1.5/2003, 2.0/2004, 1.0/2005, 0.5/2006, 2.9/2007, 8.7/2008, 9.1/2009 & 2010, 10.4/2011.<sup>40</sup>

These ratings indicate the inefficiency of the Iraqi Government's administrative performance. This is no surprise considering the conditions of the Baath Government till its toppling by the Coalition Forces in 2003. Despite the little improvements made since 2007, the ratings remain below the investors' expectations.

### **5.2.5.3 Index of Political Stability and Absence of Violence**

This index measures the perceptions of potential instability, such as potential government instability or toppling by unconstitutional means, and violent cases with political and terroristic motives.<sup>41</sup>

Iraq had very low ratings from 2003 to 2011: 0.5/2003, 0.0/2004, 0.5/2005, 0.0/2006, 0.5/2007, 1.4/2008, 2.4/2009, 1.9/2010, 3.8/2011.<sup>42</sup> These ratings reveal the country's unstable political situation and higher waves of violence and terrorism. Therefore, efforts must be exerted to alleviate political rifts and enshrine national interests for a better political reality, which is currently experiencing noticeable deterioration.

### **5.2.5.4 Rule of Law Index**

This index evaluates the confidence of the parties working with the state in terms of the latter's commitment to sound legal practices as per the rule of law principle, especially as it relates to contract enforcement, property rights, police, and courts, while ensuring such parties have

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<sup>39</sup> The Worldwide Governance Indicators. 'Government effectiveness' (2013) <<http://info.worldbank.org/governance/wgi/pdf/ge.pdf>> accessed 9 Feb 2014.

<sup>40</sup> The Worldwide Governance Indicators. 'Iraq Index' (2013) <[http://info.worldbank.org/governance/wgi/sc\\_chart.asp](http://info.worldbank.org/governance/wgi/sc_chart.asp)> accessed 9 Feb 2014.

<sup>41</sup> The Worldwide Governance Indicators. 'Political Stability and Absence of Violence' (2013) <<http://info.worldbank.org/governance/wgi/pdf/pv.pdf>> accessed 9 Feb 2014.

<sup>42</sup> The Worldwide Governance Indicators. 'Iraq Index' (2013) <[http://info.worldbank.org/governance/wgi/sc\\_chart.asp](http://info.worldbank.org/governance/wgi/sc_chart.asp)> accessed 9 Feb 2014.

necessary protection against arbitrary orders or decisions in individual cases.<sup>43</sup> Iraq ranked low on this index between 2003 to 2011: 2.9/2003, 0.5/2004 & 2005, 1.0/2006 to 2008, 1.4/2009, 1.9/2010, and 2.3/2011.<sup>44</sup> These figures prove the lack of state prestige and omission on the part of public authorities to enforce applicable laws with equality and observation of realities in Iraq. Therefore, foreign investors may be dubious about the efficiency and enforceability of legal rules and regulations in the countries they intend to invest.

### **5.2.6 Indicators Analysis**

In a nutshell, and as suggested by these indices, the investment environment in Iraq has consistently secured low rating despite moderate improvement in some of these rankings during different periods. However, improvements have not been made to the extent that enables the recovery of Iraqi investment environment. In contrast, Iraq still lacks a sound, healthy, and competitive environment, which would attract foreign investors.<sup>45</sup> Therefore, a clear investment promotion strategy coupled with boosting the recent approaches adopted over the years that have shown the best index ratings for Iraq must be adopted.<sup>46</sup>

## **5.3 Analyse the Reasons: The Determinants Untreated in Iraq's Investment Environment**

### **5.3.1 Analysis of Inherent Limitations**

Even though Iraq is a country rich in investment opportunities, investors have expressed concerns over the feasibility of investing money in Iraq and obtaining negative returns. The causes of investors' fears include political conflicts, insecurity, corruption, and poor infrastructure.

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<sup>43</sup> The Worldwide Governance Indicators. 'Rule of Law' (2013) <<http://info.worldbank.org/governance/wgi/pdf/rl.pdf>> accessed 11 Feb 2014.

<sup>44</sup> The Worldwide Governance Indicators. 'Iraq Index' (2013) <[http://info.worldbank.org/governance/wgi/sc\\_chart.asp](http://info.worldbank.org/governance/wgi/sc_chart.asp)> accessed 9 Feb 2014.

<sup>45</sup> Jorgen Voss, 'The Protection and Promotion of Foreign Direct Investment in Developing Countries: Interests, Interdependencies, Intricacies' (1982) 31 Int'l & Comp L Q 686.

<sup>46</sup> Kojo Yelapaala, 'Rethinking the Foreign Direct Investment Process and Incentives in Post-Conflict Transition Countries' (2010) 30 Nw J Int'l L & Bus 23.

### ***5.3.1.1 The Continuation of the Political Conflicts and Security Collapse***

An unstable political atmosphere would discourage foreign investors from going to countries with relevant risks. Undoubtedly, both local and international situations do affect an investment-hosting country's political stability.<sup>47</sup> Political risks may take the form of wars, ethnic armed conflicts, and terrorist activities, all of which threaten human and non-human capital. Reforming the political and security system, with a view to creating a stable environment, is a long-term effort considering these types of risks.<sup>48</sup> Political risks, which take the shape of nationalisations or confiscation of foreign properties and the like, may be addressed by means of legislation and conclusion of investment agreements. This is a short-term effort, with relevant risks limited to physical, rather than human, capital.<sup>49</sup>

Iraq is rich in limitless natural resources, lucrative investment opportunities, strategic geographic location, and a civilization-rich history. However, all such advantages have not bestowed a competitive edge on Iraq concerning attraction of foreign investors. Decades of war as well as political and security instability are key reasons behind discouraging foreign investors from Iraq.<sup>50</sup>

Major political climate characteristics of Iraq have materialised from the 1950s amidst internal political disputes, wars and economic sanctions and then the US-led invasion in 2003 and terrorism. All these factors have led to deeply rooted problems that have harmed every walk of life, including skilled labour immigration,<sup>51</sup> and have marginalised Iraq from the outer world in terms of foreign trade and investment. The decaying and red-tape-infested administrative system, financial corruption, and the underdeveloped infrastructure have taken their toll.<sup>52</sup>

The post-2003 political conflicts in Iraq resulted in a fragile security environment; however, such fragility has existed in Iraq over the last four decades owing to wars fought by

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<sup>47</sup> Bart S Fisher, 'Investing in Iraq: Legal and Political Aspects' (2004-2005) 18 *Transnat'l Law* 71.

<sup>48</sup> Jordan E Toone, 'Foreign Direct Investment in Post-War Iraq: An Investor's Introductory Guide to the Legal Framework' (2013) 9 *BYU Int'l L & Mgmt R* 141.

<sup>49</sup> US Department of State. '2013 Investment Climate Statement–Iraq' (February 2013) <<http://www.state.gov/e/eb/rls/othr/ics/2013/204661.htm>> accessed 12 Jan 2014.

<sup>50</sup> David Brent Grantham, 'Calculated Risk: The Advance of IOCs and NOCs into the Iraqi Investment Theater' (2010) 3(3) *J World Energy Law Bus* 315.

<sup>51</sup> Abbas Alnasrawi, *The economy of Iraq: Oil, Wars, Destruction of Development and Prospects, 1950-2010* (Westport, Connecticut London 2010) 181.

<sup>52</sup> Rex J Zedalis, 'Iraqi Oil and Revenues from Its Sale: A Review of How Existing Security Council Resolutions Affected the Past and May Shape the Future' (2007) 18(3) *Eur J Int'l L* 499.

Iraq and its consequent political seclusion, as manifested by the investor repellent siege.<sup>53</sup> The dissolution of the Iraqi army and security departments by the former Civil Administrator of Iraq, Paul Bremer, and his substitution with militias of the ruling parties contributed to the insecurity. This led to large-scale corruption in granting military positions to persons who lacked basic police or military training. The political rampage has been further compounded by sacking thousands of civil servants who once were members of the banned Baath Party. For the same political reasons (ie, membership of the Baath Party), some opponents were banned from having a say in the political process.<sup>54</sup> However, the governments in existence during those times endeavoured to enact pro-investment laws to attract investors into Iraq. This effort failed because of the then unstable political and security situations, and the presence of a pessimistic outlook.<sup>55</sup> This led to the failure of attracting in-bound investments and out-bound departure of local capital.<sup>56</sup> By 2005, the political situation improved following the adoption of the new constitution and the completion of the first free elections, thus marking a better political situation and a future democratic outlook. Another positive point was the significantly improving security situation.<sup>57</sup>

Contrary to expectations, the political and security situation in Iraq only worsened, with serious setbacks taking place to initiate an unending series of daily terrorist acts since mid-2006. As for investors, deliberate assassinations, kidnappings, bombings, and threats against individuals and corporations alike have created an enormous obstacle to in-bound investments. Political instability and insecurity are the main reasons behind foreign companies and local capital leaving Iraq.<sup>58</sup>

In 2009, under a political truce, the number of terrorist attacks reduced owing to hunting down of armed militias under the “law enforcement” operation. Following the formation of the national partnership government, which involved parties from across the Iraqi political spectrum, the investment environment improved slightly, with numerous Turkish, Chinese, and

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<sup>53</sup> US Department of State. '2013 Investment Climate Statement–Iraq' (February 2013) <<http://www.state.gov/e/eb/rls/othr/ics/2013/204661.htm>> accessed 12 Jan 2014.

<sup>54</sup> James P Pfiffner, 'US Blunders in Iraq: De-Baathification and Disbanding the Army' (2010) 25 *Intelligence and National Security* <<http://ssrn.com/abstract=1548083>> accessed 18 Mar 2014.

<sup>55</sup> Clarence M Dass, 'Adventure Capitalizing in Baghdad: an Entrepreneurial Approach to Reconstructing Iraq' (2009-2010) 4 *Entrepreneurial Bus L J* 157.

<sup>56</sup> Stephen Biddle, Michael E O'Hanlon, and Kenneth M Pollack, 'How to Leave a Stable Iraq: Building on Progress' (2008) 87 *Foreign Aff* 40.

<sup>57</sup> OECD, *Supporting Investment Policy and Governance Reforms in Iraq* (OECD 2010) 14.

<sup>58</sup> Clarence M Dass, 'Adventure Capitalizing in Baghdad: an Entrepreneurial Approach to Reconstructing Iraq' (2009-2010) 4 *Entrepreneurial Bus L J* 157.

Iranian companies engaging in business activities of various natures, particularly in the housing industry.<sup>59</sup>

On December 19, 2011, Iraqis woke to receive the news that Vice President, Tariq al-Hashimi, had been arrested on charges of running a terrorist group.<sup>60</sup> This story caused further damage to the deteriorating political, legal, and security situation in the country, sending a bleak message to potential investors.<sup>61</sup> Upon analysis, it was determined that the worst part of the situation was that it reflected a negative political environment. If the charges against the Iraqi Vice-President, who was accused of harbouring terrorists, were proven in the absence of any fierce political competition, this would be a clear indication that terrorists held a strong foothold in the Iraqi Government. However, if the charges were proven false, the case would reflect the exclusion mechanism adopted by politicians on one hand, and the lack of independence of investigative authorities and the judiciary represented by the court that sentenced Al-Hashemi to death on the other.<sup>62</sup> This led to massive political and legal issues. The asylum sought by Al-Hashemi in Kurdistan and his stay therein under the protection of the Kurdistan forces despite the arrest warrant against him was followed by the reluctance of the Kurdistan Police to enforce the Baghdad court arrest orders; the role of the Kurdistan Police in denying the Federal Police admittance into Iraqi Kurdistan to enforce the arrest warrant is also significant.<sup>63</sup> Such developments resulted in a big question over the administrative and legal powers of the Kurdistan region, leaving the Iraqi Constitution in a dilemma regarding the regulation and administrative organisation of the state.<sup>64</sup> Most of the political and administrative problems are due to the failing constitution in terms of the sought-after crystal clear administrative federal or decentralised organisation. The ambiguous constitutional provisions regarding the regulation of powers between the central and province governments on one hand, and the overlap of powers on the other, contributed to creating one of the most

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<sup>59</sup> David Brent Grantham, 'Calculated Risk: The Advance of IOCs and NOCs into the Iraqi Investment Theater' (2010) 3(3) J World Energy Law Bus 315.

<sup>60</sup> Ned Parker, 'Iraq We Left Behind: Welcome to the World's Next Failed State' (2012) 91(2) Foreign Aff 94

<sup>61</sup> Antony Blinken, 'Is Iraq on Track: Democracy and Disorder in Baghdad-Morning in Mesopotamia' (2012) 91(4) Foreign Aff 152.

<sup>62</sup> On 9<sup>th</sup> Sept 2012, the Iraqi Central Criminal Court sentenced Vice President Tariq al-Hashimi to death after he was convicted on charges of managing terrorist death squads. *See* The Judicial Authority. 'Judgment to Death Supreme Judicial Council ' (2012) <<http://www.iraqja.iq/view.1677/>> accessed 23 Mar 2014; Michael A Newton, 'The Death Penalty and the Iraqi Transition: Observations on a Lost Opportunity' (18 December , 2012) 12-45 Vanderbilt Public Law Research <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2191144](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2191144)> accessed 21 Mar 2014.

<sup>63</sup> BBC News Middle East, 9 September, 2012, 22:04 GMT, available at <<http://www.bbc.co.uk/news/world-middle-east-19537301>> accessed 23 Mar 2014.

<sup>64</sup> Haider Ala Hamoudi, 'Notes in Defense of the Iraq Constitution ' (2012) 33(5) U Pa J Int'l L 1117.



complex problems that resulted in the conflict between the Central Government, Kurdistan Region and the Region-free Governorates.<sup>65</sup> This scene is but a reflection of a failed state, where the absence of law and infesting corruption and brutality are the rule. Some political leaders use militias or terrorist groups to suppress adversaries and intimidate the public with an inclination to settle scores with opponents by means of timed bombs and silencer guns on streets.<sup>66</sup> There are large-scale accusations against ruling parties and some senior officials in the government of protecting and harbouring criminals and corrupt individuals on one hand and liquidating supervisory and judicial bodies that hinder illegal activities on the other.<sup>67</sup> Clearly, the Iraqi Government has proven itself unable to provide basic services such as electricity, clean water, and appropriate healthcare to the public. Unemployment among youths amounts to 30%; thus, they are easy prey for terrorist groups.<sup>68</sup> Consequently, Iraq does not exhibit the stability sought by foreign companies which has a negative impact on its efforts to attract investors.<sup>69</sup>

Despite the aforementioned reforms,<sup>70</sup> the Iraqi investment environment remained incapable of attracting and retaining major foreign companies. At the time, foreign investors were uncertain about the long term stability of Iraq's investment climate.<sup>71</sup> Fleeing from investments in Iraq is justifiable; the political congestion between Baghdad and Irbil has generated problems that have reflected on the operations of oil companies.<sup>72</sup> Relations between investment-hosting and parent states have gained importance in Iraq's case, as the strained Baghdad–Ankara political relations have had a toll on Turkish companies' Iraq-based operations.<sup>73</sup> The security of Turkish investors is related to Iraq's inter-country political disputes. Baghdad–Ankara relations are experiencing tension because of a number of differences; recently, Turkey refused to extradite the fugitive Iraqi Vice-President Al-Hashemi

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<sup>65</sup> *ibid.*

<sup>66</sup> Ned Parker, 'Iraq We Left Behind: Welcome to the World's Next Failed State' (2012) 91(2) *Foreign Aff* 94

<sup>67</sup> Antony Blinken, 'Is Iraq on Track: Democracy and Disorder in Baghdad-Morning in Mesopotamia' (2012) 91(4) *Foreign Aff* 152.

<sup>68</sup> Ned Parker, 'Iraq We Left Behind: Welcome to the World's Next Failed State' (2012) 91(2) *Foreign Aff* 94

<sup>69</sup> Clarence M Dass, 'Adventure Capitalizing in Baghdad: an Entrepreneurial Approach to Reconstructing Iraq' (2009-2010) 4 *Entrepreneurial Bus L J* 157.

<sup>70</sup> *See* Chapter IV of the thesis.

<sup>71</sup> David Brent Grantham, 'Calculated Risk: The Advance of IOCs and NOCs into the Iraqi Investment Theater' (2010) 3(3) *J World Energy Law Bus* 315.

<sup>72</sup> Rex J Zedalis, *The Legal Dimensions of Oil and Gas in Iraq: Current Reality and Future Prospects* (Cambridge University Press 2009) 317-319.

<sup>73</sup> SUNDAY'S ZAMAN, Sunda, 20 May, 2012, 13:34 GMT available at <<http://www.todayszaman.com/news-280891-turkey-iraq-condemn-shameful-behavior-against-flag-in-basra-protest.html>> accessed 23 Mar 2014 (Hundreds of Iraqi demonstrators burnt the Turkish flag and threatened Turkish interests in Iraq on the backdrop of Turkey's interference with Iraqi affairs and violation of Iraqi sovereignty).

in addition to accusations brought by Al-Maliki's government against Erdogan of dealing with Kurdistan as an independent state in August 2003, following the Turkish Foreign Minister Ahmet Davutoglu's visit to Kirkuk without notifying the Federal Government, which irked the latter. Earlier, Erdogan accused his Iraqi counterpart of power monopoly. In response, al-Maliki accused Turkey of causing chaos in the region by meddling in the internal affairs of neighbouring countries, including Iraq and Syria.<sup>74</sup>

Broadly speaking, the partial stability of given areas in an investment region does not lead to astonishing results. Although the southern and northern parts of Iraq enjoy reasonable security, the creation of a healthy and attractive environment requires more stability across Iraq.<sup>75</sup> Foreign direct investments are long-term by nature, and hence, investors are interested in the political and security situation across the whole of a country, rather than just parts of it.<sup>76</sup> Therefore, insecurity is a hindrance to foreign private investment as it results in higher security and protection costs for investments, and transport. A number of opinions stress that such investment companies sometimes use security or military companies to overcome the insecurity dilemma.<sup>77</sup> Moreover, some sectors such as the oil sector will be a target for foreign companies for two reasons: (1) the global strategic importance of this sector, which promotes the protection of such companies, and (2) the high returns that motivate a high-risk approach.<sup>78</sup>

Iraq is going through difficult times, mainly because of sectarian and racial divisions that have never been as deeply felt or expressed as they are now.<sup>79</sup> One of the reasons behind sectarian volatilisation has been the Iraq-based US Forces; the Sunnis, Shiites, and Kurds deal

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<sup>74</sup> BBC News Middle East, 22 May, 2012, 16:54 GMT, available at <<http://www.bbc.co.uk/news/world-middle-east-18163248>> accessed 23 Mar 2014.

<sup>75</sup> Clarence M Dass, 'Adventure Capitalizing in Baghdad: an Entrepreneurial Approach to Reconstructing Iraq' (2009-2010) 4 *Entrepreneurial Bus L J* 157.

<sup>76</sup> Surya P Subedi, *International Investment Law: Reconciling Policy and Principle* (Hart Publishing 2008) 16.

<sup>77</sup> Alberto Abadie and Javier Gardeazabal, 'Terrorism and the world economy' (2008) 52(1) *EUR ECON REV* 1.

<sup>78</sup> Wayne Madsen, 'Afghanistan, the Taliban and the Bush Oil Team' (23 January 2002) CRG <<http://globalresearch.ca/articles/MAD201A.html>> accessed 15 Mar 2014 (This can be seen in Colombia, where foreign companies were reluctant to enter the Colombian market. Opposition groups used to blow up the pipelines of foreign oil companies, but the latter managed to wipe out such opposition groups by offering huge financial support to the Colombian Government with a view to securing their interests. The same holds true for the companies that operated in Afghanistan before toppling, as they concluded many agreements with the Government since 1996. These foreign companies offered large amounts to the Taliban Government. When Unocal was told that Taliban is a regressive terrorist movement, UNOCAL spokesman Mike Thatcher said, "We're an oil and gas company. We go where the oil and gas is." This makes sense because large companies use specialist security companies for protection). This applies to the Iraqi economy, where oil resources are outside city boundaries, thus making protection and capital retention easy. *ibid.*

<sup>79</sup> Johnny West, *Iraq's Last Window: Diffusing the Risks of a Petro-State* (Center for Global Development 1800 Massachusetts Ave, NW Washington Working Paper 266, September 2011) 17.

with the US forces differently.<sup>80</sup> The country's foreseeable future holds no indication of the settlement of rampant disputes that have taken place between warring parties since the March 2010 parliamentary elections.<sup>81</sup> All political efforts did not lead to any solution; the appointment of the two ministers of defence and interior is far from settled,<sup>82</sup> the council of strategic policies has never come to light, and the dispute between Baghdad and Irbil about Kirkuk and other disputed regions remains intact.<sup>83</sup> Moreover, acting on the Oil and Gas Law is still of no interest to politicians. Meanwhile, the Federal Government and Government of Kurdistan are still at war regarding the endorsement of oil agreements with several oil companies created without the federal government's review or consent. The Constitution<sup>84</sup> remains as it is despite its ambiguities. No census has been executed. There are a large number of political blocs, especially those represented in the House of Representatives, on top of conflicts that affected the overall situation of the State.<sup>85</sup>

At a serious evolution of political and security events, armed insurrection in Iraqi cities, particularly Ramadi and Salahuddin, started with a wave of raids and arrests were arrested on terrorism charges against the bodyguards of the Minister of Finance, Rafe' Al-Eissawy; an Iraqi List member and an iconic figure of Sunni.<sup>86</sup> However, the uprising gave way to unlimited demands, most importantly the angry demand for the freedom of female defendants in Iraqi prisons. Protestors accuse security forces of arresting women to force their wanted husbands and sons to turn themselves in,<sup>87</sup> and call for releasing those detainees already proven innocent by court orders, but never set free as well as others who were arrested upon informant reports while being denied the right to legal investigation.<sup>88</sup> It is important to mention that, as the protesters claim, the way the state is addressing the dilemma of terrorism is clearly politicised

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<sup>80</sup> McCarthy C, 'The Paradox of the International Law of Military Occupation: Sovereignty and the Reformation of Iraq' (2005) 10 J Conflict & Sec L 43.

<sup>81</sup> Strong suspicions exist between political blocs which stubbornly fight and exchange accusations of power monopolies or attempted dictatorships. Hussain Intiaz, *Afghanistan, Iraq and Post-Conflict Governance: Damoclean Democracy?* (BRILL, New York edn, New York BRILL 2010) 5.

<sup>82</sup> Crisis Group Middle East Report. 'Déjà Vu All Over Again: Iraq's Escalating Political Crisis' (30 Jul 2012) <<http://www.crisisgroup.org/en/regions/middle-east-north-africa/iraq-iran-gulf/iraq/126-deja-vu-all-over-again-iraqs-escalating-political-crisis.aspx>> accessed 6 Feb 2014; Ned Parker, 'Iraq We Left Behind: Welcome to the World's Next Failed State' (2012) 91(2) Foreign Aff 94.

<sup>83</sup> Soner Cagaptay, *The Future of the Iraqi Kurds* (Washington Institute for Near East Policy 85, July 2008) 12.

<sup>84</sup> An undertaking given to the Sunni movements in return for their political involvement. Ned Parker, 'Iraq We Left Behind: Welcome to the World's Next Failed State' (2012) 91(2) Foreign Aff 94.

<sup>85</sup> *ibid* (Political blocs seem to be keener on keeping limited wins than offering exchanged concessions to ensure political and security stability in the future). *ibid*.

<sup>86</sup> Duraid Adnan, 'Arrest of a Sunni Minister's Bodyguards Prompts Protests in Iraq' *The New York Times* (2012) A9.

<sup>87</sup> *ibid*.

<sup>88</sup> Duraid Adnan, 'Sunni Lawmaker in Iraq Is Killed in a Suicide Bombing' *The New York Times* (2013) A7.

and sectarian. This has caused protesters to call for abolishment of the Anti-Terrorism Law owing to the notion that it is designed to target Sunni Arabs. Moreover, protesters call for the Accountability and Justice Law, which has replaced the De-Baathification Law, to be rescinded and for a newly enacted amnesty law for all detainees to be put into force.<sup>89</sup>

Prime Minister Nouri al-Maliki's response to protesters has consisted of a mixture of warnings and approbation. He has expressed his willingness to set up a fact-finding committee to investigate the cases of detainees and penitentiaries while accusing some demonstrators of making up a sectarian crisis and being involved in a clamour that will end with a partitioned Iraq.<sup>90</sup> In a serious setback about 500 inmates have escaped from Iraqi prisons.<sup>91</sup> The inmates include a big number of convicted thought to be members of al-Qaeda. Due to such dramatic effects and during the second week of June of 2014, Islamic State of Iraq and the Levant (ISIS)-led forces took control of a Mosul, Salaheddin and areas of Kirkuk city.<sup>92</sup> Considering the latest developments in Iraq, the door is wide open for partitioning, with the ill omens of civil war looming ahead.

### ***5.3.1.2 Spread of Corruption***

Globally, the previously quoted indices indicate that corruption has reached serious proportions and threatens the development and investment programmes just as it distorts the economic decision-making process and drains the economy.<sup>93</sup> This reduces the quality and volume of foreign and local investments.<sup>94</sup>

Despite the fact that most countries in the world have a certain degree of corruption, such corruption has never prevented foreign investors from going to these countries. However, the case is different with the 171<sup>th</sup> country out of 175 listed and scored 16 points by the Transparency International (TI) in 2013.<sup>95</sup> The reasons behind the recent corruption infestation are ascribed partially to the Ba'ath Party period (1968–2003), as the whole country was nothing more than the private property of highly placed Ba'athists. This situation worsened when

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<sup>89</sup> Rami Ruhayem, 'Protests engulf west Iraq as Anbar rises against Maliki' *BBC News* (2013) <<http://www.bbc.co.uk/news/world-middle-east-20887739>> accessed 15 Mar 2014.

<sup>90</sup> *ibid.*

<sup>91</sup> BBC News Middle East, 22 July, 2013, 18:54 GMT, available at <<http://www.bbc.co.uk/news/world-middle-east-23403564>> accessed 19 Mar 2014.

<sup>92</sup> Fazel Hawramy, 'Isis militants seize central Iraqi city of Tikrit' *The Guardian* (11 June 2014 2014).

<sup>93</sup> David Ng, 'The impact of corruption on financial markets' (2006) 32 *MANAGE FINANC* 10.

<sup>94</sup> Brian J Hurn, 'Ethics in International Business' (2008) 40 *Industrial and Commercial Training* 347.

<sup>95</sup> Transparency International. 'Corruption Perceptions Index 2013: Full Table and Rankings' (2013) <<http://cpi.transparency.org/cpi2013/results/>> accessed 25 Feb 2014.

Saddam Hussein assumed power in 1979, as his way of ruling Iraq led to the establishment of a ruling and resource-controlling family. Unfortunately, Iraq has been reduced to a booty that is allocated in accordance with proximity to and allegiance to the ruling family and to the Ba'ath Party, respectively. In turn, the largest segment of society is below the poverty line and denied the simplest human needs such as food, health care, appropriate accommodation and education. This decade-long policy led to the destruction of the values and ethical structure of society. While Saddam Hussein's aggressive dictatorship minimised corruption rates, particularly at the financial and administrative levels among low-profile employees and servants, corruption remained a dormant virus borne by large social segments which, upon the fall of the dictatorship, found an appropriate opportunity to become fully active. Corruption has turned into an epidemic with boundless octopus arms that reach out beyond control.<sup>96</sup>

In the post-2003 era, due to the failure of most state institutions and the fragility of the few remaining ones, corruption has met an even more thriving environment, thus hovering around new political leaders and reviving the political corrupt practices of power control and misuse of powers. Allocation of positions along sectarian lines and the conflict of interests between ministries have also contributed to the widening corrupt circles.<sup>97</sup> One of the most detestable results of corruption is the fact that corruption has become an established behavioural practice to meet various needs. This turns corruption practices from immoral acts into normal acts that form a part of the traditional social system. They then become valued and finally become legitimised. Moreover corruption has become a tool to boost the mainstays of the ruling political parties, especially in light of the lack of legislation regulating the creation, financing and control of political parties.<sup>98</sup>

The worst part about this is the suspicions regarding the reconstruction efforts undertaken after 2003 among supporters and donors.<sup>99</sup> Corruption is a serious problem, especially in Iraq; Iraq is a country rich in natural resources where the rule of law has been weakened by consecutive wars and dictatorships. Therefore, Iraq is the victim of instability and punitive supervisory procedures. Furthermore, since the discovery of oil to the present date, Iraq has lost opportunities of economic recovery derived from large oil revenues. Corruption,

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<sup>96</sup> Robert E Looney, 'Reconstruction and Peacebuilding under Extreme Adversity: The Problem of Pervasive Corruption in Iraq' (2008) 15 *Int'l Peacekeeping* 424.

<sup>97</sup> *ibid.*

<sup>98</sup> Charles Tiefer, 'The Iraq Debacle: The Rise and fall of Procurement-Aided Unilateralism as A Paradigm of Foreign War' (2008) 29 *U Pa J Int'l L* 1.

<sup>99</sup> M Cherif Bassiouni, 'Post conflict Justice in Iraq' (2006) 33 *Hum Rts* 15.

as witnessed currently, is starting to nurture terrorism and deepen sectarian divisions. The failure of rehabilitating state institutions hinders the development of investment and business environments.<sup>100</sup>

Since 2004, there has been a constant series of corruption charges within the UN Oil-for-Food Programme. The Oil-for-Food Programme was designed in 1996 at a cost of USD 60 billion to enable Iraq to buy food, medicine, and other necessary supplies using oil revenues. Back then, oil volumes had an impenetrable ceiling against the UN-imposed blockade on Iraq after its invasion of Kuwait in 1990. The programme came to an end because of the invasion of Iraq in 2003 and the toppling of Saddam Hussein.<sup>101</sup> The scandal emerged after an Iraqi newspaper published a list of 270 persons that included UN officials, politicians, and company owners who made use of illegal oil transactions as part of the programme.<sup>102</sup> Thereafter, the US Congress discovered that Saddam Hussein had accumulated a staggering amount of USD 17.3 billion from such transactions, of which USD 13.6 billion were with neighbouring countries.<sup>103</sup>

The UN received backlash for being the entity responsible for the programme.<sup>104</sup> This led the UN to set up a three-member independent committee, presided over by Folker, for investigating the charges. The investigations resulted in corruption charges against officials, companies,<sup>105</sup> and organisations.<sup>106</sup> The programme damaged the reputation and credibility of the UN, and was described as the largest financial scandal in history. The wider scale of this scandal was all about the future of the UN, with the so-called Neo-conservatives in the United States adding fuel to the fire as an indication of the UN's incompetence. Senator Norm Coleman, head of the Congressional Investigation Committee, called for Annan's

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<sup>100</sup> Charles Tiefer, 'The Iraq Debacle: The Rise and Fall of Procurement-Aided Unilateralism as A Paradigm of Foreign War' (2008) 29 U Pa J Int'l L 1; Ryan J Liebl, 'Rule of Law in Postwar Iraq: From Saddam Hussein to the American Soldiers Involved in the Abu Ghraib Prison Scandal, What Law Governs Whose Actions?' (2005) 28 Hamline L Rev 91.

<sup>101</sup> Joy Gordon, 'When Unilateralism Is Invisible: A Different Perspective on the Oil-for-Food Scandal' (2007) 13 Global Governance 59.

<sup>102</sup> BBC News Channel, Wednesday, 7 September, 2005, 20:49 GMT, available at <[http://news.bbc.co.uk/1/hi/world/middle\\_east/4232629.stm](http://news.bbc.co.uk/1/hi/world/middle_east/4232629.stm)> accessed 15 Mar 2014.

<sup>103</sup> Paul A. Volcker, *Independent Inquiry Committee into the United Nations Oil-for-Food Programme* (27 October 2005, New York 10022, 2005) 18.

<sup>104</sup> *ibid*

<sup>105</sup> *ibid* (A key figure of the scandal was Benon Sevan, the former director of the program, who pleaded not guilty to all bribery or complicity charges leveled against him. Kojo, the son of UN Secretary General Kofi Annan, has been proven to have received payments from Cotecna, another suspicious person) *ibid*, 18-20.

<sup>106</sup> Investigations included French company Total, as well as international companies from the Middle East and Russia, in addition to security companies. *ibid*.

resignation.<sup>107</sup> Astonishingly, Iraqi brokers accused of suspicious dealings have emerged once again to contribute to the reconstruction stage in Iraq.<sup>108</sup>

With the arrival of US Forces in Iraq, reconstruction finances started to flow into the war-torn country.<sup>109</sup> What happened to such finances? Washington provided a total of USD 60 billion to reconstruction efforts and USD 146 billion in the Iraqi currency.<sup>110</sup> However, Iraqi citizens have not benefited considerably from these funds. How then was the money spent? Recently, the Iraqi Ministry of Electricity failed to satisfying the needs of the electricity despite "the true price of Iraq's power crisis is not just the USD 40bn it costs the Iraqi economy annually, but also the growing frustration of the Iraqi populace that suffers with only four-five hours of electricity each day."<sup>111</sup> Portable water supplies are cut off every other day. Conditions in the country are as poor as those in the "pre-Saddam" era and are worsening because of the terrorist attacks, which have claimed the lives of tens of thousands since 2003.<sup>112</sup>

Considering this situation, TI warned that reconstruction efforts may well turn into the largest corruption scandal in history<sup>113</sup> and stated that management of oil revenues must be more transparent and accountable<sup>114</sup> and a weak government, black market, and legacy of dictatorship form a dangerous corruption-breeding combination.<sup>115</sup> TI recommended key steps

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<sup>107</sup> Nile Gardiner, *The White House Should Call on Kofi Annan To Resign* (December 15, 2004, Web Memo #623, 2004) 43.

<sup>108</sup> Examining by Joy Gordon, 'When Unilateralism Is Invisible: A Different Perspective on the Oil-for-Food Scandal' (2007) 13 *Global Governance* 59 (The provisional Iraqi Government conducted routine investigations in 2005 but never came up with a decision).

<sup>109</sup> David D Caron, 'The Reconstruction of Iraq: Dealing With Debt' (2005) 11 *U C Davis J Int'l L & Pol'y* 123.

<sup>110</sup> Stuart W Bowen, A Final Report from the Special Inspector General for Iraq Reconstruction (SIGIR July 13, 2012, 12-017).

<sup>111</sup> John Sachs, Shamshek Asad and Hussain Qaragholi, 'Iraq's Power Crisis and the Need to Re-Engage the Private Sector – Smartly' *The Middle East Economic Survey (MEES)* (2012) <<http://www.mees.com/en/articles/3923-iraq-s-power-crisis-and-the-ned-to-re-engage-the-private-sector-smartly>> accessed 15 Mar 2014.

<sup>112</sup> Anthony H Cordesman, 'Economic Challenges in Post-Conflict Iraq' (2010) Center for Strategic & International Studies 2012 <[http://csis.org/files/publication/100317\\_IraqEconomicFactors.pdf](http://csis.org/files/publication/100317_IraqEconomicFactors.pdf)> accessed 25 Jan 2014.

<sup>113</sup> Jeffrey Coonjohn, 'Corruption in Post-Conflict Environments an Iraqi Case Study' (2012) <<http://www.kcdme.com/Corruption%20in%20Post-Conflict%20Environments%2002.02.2012.pdf>> accessed 14 Feb 2014.

<sup>114</sup> *ibid.*

<sup>115</sup> Jane Corbin, 'BBC uncovers lost Iraq billions' *BBC News* (10 June 2008) <[http://news.bbc.co.uk/1/hi/world/middle\\_east/7444083.stm](http://news.bbc.co.uk/1/hi/world/middle_east/7444083.stm)> accessed 19 Mar 2014 (Bribery has been rampant since the toppling of Saddam Hussein. Some contractors and government officials have conceded that corruption widely exists. The report lashed out at the US policy of awarding investment contracts in Iraq, depicting the same as secretive and favouring certain large companies. TI agrees with some UN bodies, such as the UN global consultative body which reported that the US awarded an oil investment contract to the Texas-based Halliburton run by Dick Cheney until Cheney was elected Vice President of the US last December. A BBC team tracked down the missing billions in a house inhabited by Hazem Sha'alan, who was appointed minister of defence in the 2004 Iraqi Government in Acton, West London. Sha'alan and accomplices drained about USD 1.2 billion from the ministry by purchasing old military equipment from Poland while

to be adopted urgently before a “plague of corruption” amounts to inevitability and irreparability. International contractors operating in Iraq, according to the TI, must abide by the Anti-Corruption Law. Donors and allied forces are encouraged to adopt a stricter approach in dealing with the phenomena. TI indicated a highly corrupt post-war Iraq.<sup>116</sup>

George W. Bush faced strong pressure from opponents to unveil profiteering war-related activities in Iraq.<sup>117</sup> Henry Waxman, who presides over the Congressional Committee on Integrity and Government Reform, said, ‘[t]he money squandered or gulped by corruption as part of these contracts are infuriating and astonishing. We may discover that it has been the widest profiteering process in history’.<sup>118</sup>

The Office of the Special Inspector General for Iraq Reconstruction (SIGIR) identified two reasons for the lack of tangible results from the reconstruction efforts in Iraq: Firstly, rampant corruption.<sup>119</sup> Secondly, economic mismanagement. However, the 2008 federal report revealed that the reconstruction policies adopted by Washington for Iraq failed owing to bureaucratic division inside the Pentagon and a lack of familiarity with the Iraqi society.<sup>120</sup>

Today, corruption is present in the Iraqi Government at all levels. Some ministries are obviously controlled by militias or organised crime bosses.<sup>121</sup> The Iraqi Government is incapable of enforcing the bare minimum of anti-corruption laws.<sup>122</sup> Furthermore, key Government officials boldly refuse to engage in or initiate any corruption case investigations. Consequently, the Commission of Integrity is not empowered to be a true investigative

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claiming it to be state-of-the-art and subsequently transferring the difference in money to personal accounts. Radi Ar-Radi, the judge who presided over the Public Commission on Integrity, said, ‘They failed to rebuild the ministry of defence, and hence the continuing violence and blood baths. Iraqis and foreigners are still slaughtered, and those corrupt officials are to be blamed for that. They are criminals’. Sha’alan was sentenced to death, but fled the country to avoid this sentence) *ibid.*

<sup>116</sup> *ibid.*

<sup>117</sup> Nicola Bullard, 'Silent War: The US' Economic and Ideological Occupation of Iraq' (2005) Chulalongkorn University Social Research Institute (CUSRI) Wisit Prachuabmoh Bldg January 2005 <[http://focusweb.org/pdf/Iraq\\_Dossier.pdf](http://focusweb.org/pdf/Iraq_Dossier.pdf)> accessed 15 Jan. 2014.

<sup>118</sup> Jane Corbin, 'BBC uncovers lost Iraq billions' *BBC News* (10 June 2008) <[http://news.bbc.co.uk/1/hi/world/middle\\_east/7444083.stm](http://news.bbc.co.uk/1/hi/world/middle_east/7444083.stm)> accessed 19 Mar 2014.

<sup>119</sup> Judith Richards Hope & Edward N Griffin, 'The New Iraq: Revising Iraq's Commercial Law Is a Necessity for Foreign Direct Investment and the Reconstruction of Iraq's Decimated Economy' (2004) 11 *Cardozo J Int'l & Comp L* 875. An example cited by the report is USD 36 billion deal for military equipment, weapons, and communication gear for the Iraqi forces, but no one knows about the fate of this expenditure. The report also mentions that a US company, DynCorp International, submitted USD 18 million in invoices for unjustifiable costs. Furthermore, large amounts have been mismanaged or squandered (eg, a police training camp with a USD 43.8 million swimming pool which was never used) *ibid.*

<sup>120</sup> Paul Richter, 'Missing Iraq money may have been stolen, auditors say' *Los Angeles Times* (13 June 2011) <<http://articles.latimes.com/2011/jun/13/world/la-fg-missing-billions-20110613>> accessed 19 Mar 2014.

<sup>121</sup> Ned Parker, 'Iraq We Left Behind: Welcome to the World's Next Failed State' (2012) 91(2) *Foreign Aff* 94

<sup>122</sup> *ibid.*



authority.<sup>123</sup> Despite the powers of the commission associated with investigating corruption cases, it cannot fulfil its role because of fragile security and violent criminals who are controlling various ministries. It is impossible to investigate corruption cases without support from the police and government. However, in Iraq, such support does not currently exist.<sup>124</sup> Accordingly, the commission investigators cannot be relied upon to detect criminal activities of persons protected by the influential, even to the extent that they cannot be protected in the course of any such investigation.

As regards the federal budget, which is the financial scheme of the government, it clarifies the estimations of state revenues and expenditures in the form of itemised monetary units. This statement is approved by the legislative body of the state. Therefore, it is necessary for the budget to be clear and transparent so the general public can view the financial resources management mechanism and become familiarised with the economic and social attitudes of the government.<sup>125</sup> In Iraq, however, the lack of transparency has contributed to a corresponding failure in public finance use, and hence the widening gap between citizens and the political elite. Conversely, although the public budget is an issue of public policy concern, it should not be a key part of the increasing political conflicts in Iraq.<sup>126</sup> Considering these conditions, the World Budget Transparency has issued its evaluation report on budgets of all world countries out of which Iraq ranked very low among other countries in 2012.<sup>127</sup> This very low ranking does not fit in with Iraq as a democracy. Consequently, the general public must be made aware of the government policy concerning public finding.<sup>128</sup> The proposed and the sanctioned budgets are not announced despite the fact that the Financial Administration Law provides for familiarising the general public with such information via the website of the Ministry of Finance.<sup>129</sup> Moreover, lack of transparency in developing and executing the public budget does

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<sup>123</sup> Stuart W Bowen, *A Final Report from the Special Inspector General for Iraq Reconstruction* (SIGIR July 13, 2012, 12-017) 5.

<sup>124</sup> Crisis Group Middle East Report, *Failing Oversight: Iraq's Unchecked Government: Executive Summary and Recommendations* (113, 26 September 2011) 8.

<sup>125</sup> Karla W Simon, 'Budget Process and the Tax Law' (1987-1989) 17 Cap U L Rev 455.

<sup>126</sup> Iraqi Institute for Economic Reform. 'Consequences of Non-Transparency of Federal Budget and Lack of Economic Legislation' (2013) <[http://www.iier.org/i/uploadedfiles/publication/real/1365814502\\_100410BudgetTransparencyDr.KamalBasri4A.pdf](http://www.iier.org/i/uploadedfiles/publication/real/1365814502_100410BudgetTransparencyDr.KamalBasri4A.pdf)> accessed 14 January 2014.

<sup>127</sup> International Budget Partnership. 'The Open Budget Index' (2012) <<http://internationalbudget.org/wp-content/uploads/OBI2012-IraqCS-English.pdf>> accessed 12 February 2014 (concluding that 'Iraq's OBI 2012 score is 4 out of 100, which is well below the average score of 43 for all the 100 countries surveyed. It is also below the score of many other countries in the region, including its neighbours Algeria, Egypt, Jordan, Lebanon, Morocco, Tunisia, and Yemen') *ibid*.

<sup>128</sup> Iraqi Institute for Economic Reform. 'Consequences of Non-Transparency of Federal Budget and Lack of Economic Legislation' (2013) <[http://www.iier.org/i/uploadedfiles/publication/real/1365814502\\_100410BudgetTransparencyDr.KamalBasri4A.pdf](http://www.iier.org/i/uploadedfiles/publication/real/1365814502_100410BudgetTransparencyDr.KamalBasri4A.pdf)> accessed 14 January 2014.

<sup>129</sup> *ibid*.

not accord with the 2005 Constitution of Iraq which provides that public money is public property.<sup>130</sup> Further, the Ministry of Finance does not publish budget strategy documents which review governmental economic and taxation policy goals the medium-to-long terms, or to revenue, expenditure, deficit, and surplus or debt expectations.<sup>131</sup> Another unpublished report is the monthly report on the budget performance progress.<sup>132</sup> Such monthly reports must feature a statistical comparison between revenues and monthly expenditures as well as information on government potential activity.<sup>133</sup> Budget transparency lacks the year-end report, which is the main document for holding government accountable and which must be audited by the most supreme auditing body.<sup>134</sup> The year-end report is the means by which the government is proven to have been committed, or not, to the revenue and expenditure levels approved by the Parliament upon sanctioning the budget.<sup>135</sup> Despite the 2012 Report of the World Budget Transparency detecting Iraqi public budget defects, the 2013 Iraqi budget has been developed along the same defective lines—it does not feature any strategic plan for economic development, but rather is fully dependent on oil revenues, with soaring inflation rates in operational expenses.<sup>136</sup>

Any comment about the ability of Iraqi institutions established to combat corruption to enforce anti-corruption laws is pointless.<sup>137</sup> Another acknowledgment to be made here is that anti-corruption and law enforcement efforts have not been well planned in the consideration of rampant corruption, which has come to take various forms and become a means of profitable trade through which security and military positions are acquired in exchange for money.<sup>138</sup> Many officials receive bribes for these purposes. Corruption has become a human disaster,

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<sup>130</sup> Article 27 of the Constitution of the Republic of Iraq of 2005.

<sup>131</sup> Ahmed Al Huseiny. 'Financial Crisis and the fluctuations of the global crude oil prices and their impacts on the Iraqi Public Budget' (2013) <[http://www.iier.org/i/publication\\_detail.php?publication\\_id=3](http://www.iier.org/i/publication_detail.php?publication_id=3)> accessed 17 March 2014.

<sup>132</sup> *ibid.*

<sup>133</sup> *ibid.*

<sup>134</sup> Iraqi Institute for Economic Reform. 'Consequences of Non-Transparency of Federal Budget and Lack of Economic Legislation' (2013) <[http://www.iier.org/i/uploadedfiles/publication/real/1365814502\\_100410\\_BudgetTransparencyDr.KamalBasri4A.pdf](http://www.iier.org/i/uploadedfiles/publication/real/1365814502_100410_BudgetTransparencyDr.KamalBasri4A.pdf)> accessed 14 January 2014.

<sup>135</sup> *ibid.*

<sup>136</sup> Ahmed Al Huseiny. 'Financial Crisis and the fluctuations of the global crude oil prices and their impacts on the Iraqi Public Budget' (2013) <[http://www.iier.org/i/publication\\_detail.php?publication\\_id=3](http://www.iier.org/i/publication_detail.php?publication_id=3)> accessed 17 March 2014.

<sup>137</sup> Jeffrey Coonjohn, 'Corruption in Post-Conflict Environments an Iraqi Case Study' (2012) <<http://www.kcdme.com/Corruption%20in%20Post-Conflict%20Environments%2002.02.2012.pdf>> accessed 14 Feb 2014.

<sup>138</sup> Solomon Moore, 'Secret Iraqi Deal Shows Problems in Arms Orders' *The New York Times* (April 13, 2008) <<http://www.nytimes.com/2008/04/13/world/middleeast/13arms.html?pagewanted=all>> accessed 19 Mar 2014 (Arming contracts and all security-related activities are corrupting-breeding arenas owing to the inability of the independent supervisory bodies to audit them under the pretext of national security).

even a matter of life or death in Iraq, and has found its way into child vaccines, portable water, and admittance of fatal radioactive goods and foods into Iraq.<sup>139</sup> The pressing question here is: where do huge amounts of corruption-generated money go? And what reasons are behind the increasing rates of corruption?

Most of such corruption-generated money is used to finance and strengthen the ruling parties to ensure their survival and purchase secret accounts outside Iraqi borders. The rest of this money is used to finance and nurture terrorism. Increasing corruption rates are due to illegal uses of oil revenues, which have been on the rise because of increasing oil prices.<sup>140</sup>

### ***5.3.1.3 Diminished Infrastructure Capacity***

In today's world, infrastructure receives outstanding importance, as it is the cornerstone of economic and social development. On one hand, infrastructure assumes the role of being the link between economic resources of a given country and production structures therein; on the other hand, it links production locations and markets, thus boosting economic activities and their horizons and variety in addition to improving commercial activities and promoting easier establishment of service and production ventures.<sup>141</sup> As far as investment is concerned, in developing an efficient infrastructure, there is an urgent and inevitable need for attracting direct foreign investments (DFIs) while enhancing the competitive edge of the country concerned. Accordingly, the deteriorated infrastructure in Iraq sends a negative message to foreign investors, thus limiting investor-flowing opportunities. This is the impact of the abovementioned situation on economic growth and development.<sup>142</sup>

Undoubtedly, the Iraqi economy suffers from the out-of-date infrastructure which is largely accountable for by the wars in which Iraq has been involved.<sup>143</sup> The Iraq–Iran war wreaked havoc in terms of infrastructure, followed by the First and Second Gulf Wars, which wiped it out.<sup>144</sup> Acts of rampage, destruction, and looting also contributed to the current

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<sup>139</sup> Al-Yasiri A, 'Corruption in the Form of Bureaucracy: The Investment Projects as a Case Study' (2013) 79 *Journal of the Kufa University* 352. (Translated from Arabic Language by Author).

<sup>140</sup> Patrick Cockburn, 'Iraq 10 years on: How Baghdad Became a City of Corruption' *The Independent* (04 March 2013) <<http://www.independent.co.uk/news/world/middle-east/iraq-10-years-on-how-baghdad-became-a-city-of-corruption-8520038.html>> accessed 12 Mar 2014.

<sup>141</sup> Erik R Wright, 'Infrastructure Analysis: A Corps Staff Officer's Perspective' (2011) 5 *Homeland Security Rev* 225.

<sup>142</sup> Clarence M Dass, 'Adventure Capitalizing in Baghdad: an Entrepreneurial Approach to Reconstructing Iraq' (2009-2010) 4 *Entrepreneurial Bus L J* 157.

<sup>143</sup> D Nordhaus, *The Economic Consequences of a War with Iraq* (9361, 2002) 22.

<sup>144</sup> *ibid.*

situation.<sup>145</sup> Similarly, the electricity dilemma in Iraq started with a lack of basic materials and spare parts necessary for maintenance. Technical support for a grid station was also lacking due to the economic blockade imposed after the 1991 Iraqi invasion of Kuwait.<sup>146</sup> The dilemma persisted up to 2003, after which Iraq only encountered slow-motion schemes in the form of specific investment targets for the electricity sector. Poor planning and rampant administrative corruption across the departments in the Ministry of Electricity account for this persistent predicament.<sup>147</sup> Iraqi infrastructure has experienced little improvement after 2003, including building roads and introduction to airports. However, the infrastructure (eg transportation and electricity utilities) are still affected by being outdated and by governmental negligence.<sup>148</sup> It is noteworthy that the low<sup>149</sup> electricity production rate has affected the performances of other sectors, particularly the industrial sector. The low-capacity infrastructure in Iraq, especially in terms of electricity production, will impact all other sectors, particularly the industrial sector, given the urgent and inevitable need for projects to create electrically powered units. Given the abysmal distribution capacity of this sector and the resulting longer blackout periods, individuals and institutions, especially those in the private sector, have sought to come up with alternatives from private generators to make up for the power shortage. Such generators are fuel powered. This leads to increasing electricity costs and consequently higher direct costs in the form of higher production costs for production projects. Therefore, one may say that less efficient infrastructure is a major hindrance to investment.<sup>150</sup>

Terrorist attacks pose a key danger to the shyly growing infrastructure, especially when it comes to electricity transmission towers and railways.<sup>151</sup> In fact, the lack of strategic thinking and appropriate execution of reformative schemes for institutions concerned with provision of the services needed for infrastructure rehabilitation and development has resulted in a

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<sup>145</sup> *ibid.*

<sup>146</sup> Ned Parker, 'Iraq We Left Behind: Welcome to the World's Next Failed State' (2012) 91(2) *Foreign Aff* 94.

<sup>147</sup> John Sachs, Shamshek Asad and Hussain Qaragholi, 'Iraq's Power Crisis and the Need to Re-Engage the Private Sector—Smartly' *The Middle East Economic Survey (MEES)* (2012) <<http://www.mees.com/en/articles/3923-iraq-s-power-crisis-and-the-ned-to-re-engage-the-private-sector-smartly>> accessed 15 Mar 2014.

<sup>148</sup> Dahr Jamail, 'Iraq: A Country in Shambles' *Al Jazeera* (09 Jan 2012) <<http://www.aljazeera.com/indepth/features/2012/01/20121411519385348.html>> accessed 19 Mar 2014.

<sup>149</sup> The Iraqi Ministry of Electricity, *Statistics Production Analysis of Electric Power in Iraq, Supervisory Analysis 2014* (12/14, Feb. 2014) 5-9.

<sup>150</sup> Abdul-Hussein Tariq, *Economic Development and Workforce Planning in Iraq* (2nd edn, Dar Al Adalah 2013) 58. (Translated from Arabic Language by Author).

<sup>151</sup> Dahr Jamail, 'Iraq: A Country in Shambles' *Al Jazeera* (09 Jan 2012) <<http://www.aljazeera.com/indepth/features/2012/01/20121411519385348.html>> accessed 19 Mar 2014.

ramshackle and deteriorated the national infrastructure.<sup>152</sup> Unfortunately, the excessively weak infrastructure has contributed to foreign investors' reluctance to invest in Iraq, as such infrastructure would increase operational and reach-out costs for local and international markets alike. Eventually, this situation discourages foreign investment in Iraq.

### **5.3.2 Pillars of the Investment Environment Suffer Substantial Cracks**

Although Iraq has taken significant steps to create an attractive and competitive investment environment together with the enactment of Investment Law No. 13 of 2006 and establishment of the National Investment Commission, which has given way to rising hopes of strong Iraq-bound foreign investment flows, the following limitations account partly for foreign investors' reluctance to flow into Iraq:

#### **5.3.2.1 The Imbalance Investment Commissions**

The facilitating procedures of foreign investors' dealings with government commissions in the investment hosting country would normally mark a positive economic and commercial activity encouraging attitude.<sup>153</sup> Therefore, the Iraqi Investment Law No. 13 of 2006 provides for establishing investment commissions<sup>154</sup> that shall be responsible for developing and planning national investment policies, facilitating investment law enforcement by enacting regulations and directives, and monitoring the execution of strategic investment projects.<sup>155</sup>

However, the Iraqi NIC was born politically dependent. Political rifts and corruption cast shadows largely on the commission performance of the local NIC.<sup>156</sup> Political quotas played a key role in choosing NIC officers and employees, thus leading to incompetent individuals being entrusted with the responsibility of management of investment commissions.<sup>157</sup> Furthermore, the private sector, represented by high-profile businessmen or

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<sup>152</sup> Ch Abdul Rehman, Muhammad Ilyas, Hassan Mobeen Alam (and others), 'The Impact of Infrastructure on Foreign Direct Investment: The Case of Pakistan' (2011) 6 IJBM 268.

<sup>153</sup> Sami Shubber, *The Law of Investment in Iraq* (New York, Brill 2009) 48.

<sup>154</sup> Article 4 of the Iraqi Investment Law No 13 of 2006 published in the Official Gazette, issue 4031 of 17/01/2007.

<sup>155</sup> Sami Shubber, *The Law of Investment in Iraq* (New York, Brill 2009) 49.

<sup>156</sup> Hussein Tamimi. 'Iraq Needs to Rehabilitate and Expand Infrastructure Investment through the Gate' (2013) <<http://nenospace.forumotion.com/t973-iraq-needs-to-rehabilitate-and-expand-infrastructure-investment-through-the-gate>> accessed 22 March 2014 (Consequences of political rifts in the Iraqi Government include lack of coordination concerning obtainment of approvals for key projects that end up rejected owing to the non-obtainment of necessary approvals because of political rifts in decision-making circles). *ibid*.

<sup>157</sup> See Iraq Project, *Iraq Investment Climate Statement Bureau of Economic, Energy and Business Affairs* (Business Development, USA Trade, and Investments in Iraq, 2011) 7,16 (In general, NIC employees show

key investors, is not represented in the NIC board.<sup>158</sup> Much to Iraq's detriment, the non-professional administration of some investment commissions has led to politically-motivated decisions granting or denying investment licenses;<sup>159</sup> investment commissions have not been far from the government bodies causing corruption, of which the Commission of Integrity (CoI) has detected several cases of blackmailing foreign investors into bribing employees for completing or approving investments and disburse payments.

The NIC has not fulfilled its role, nor has it worked smoothly, as it failed to reconstruct a foreign investment friendly environment. Moreover, the NIC never had an investment advancement plan and even lacked a comprehensive vision to plan for foreign investment attraction. The NIC does not have a clear-cut integrated plan for current or future investment opportunities. Qusay al-Abadi, a member of the Parliamentary Economy and Investment Committee, called to cancel the national investment for failing to ensure the success of the investment process in the country.<sup>160</sup> All of this led to incorrect investment choices in terms of serving Iraqi development priorities.<sup>161</sup> In addition, the NIC could have played a greater role in supporting Iraqi legislators and the government via identification of key obstacles to foreign investment inflow, with a view to adopting appropriate solutions considering direct contact of the NIC with investors, which enables the NIC to spot obstacles to smooth inflows of foreign investments into Iraq.<sup>162</sup>

Iraq's foreign investment promotion policy has never been commensurate with the country's investment needs. Shortcomings in terms of promotion have been a key characteristic of the NIC; the NIC has never established a promotion unit through which it may raise awareness of the parties concerned through media campaigns, conferences, or websites, thus

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a very modest level of expertise and competence, especially in terms of mastering foreign languages, administrative systems, and e-control).

<sup>158</sup> See article 4 of the Investment Law No 13 of 2006 published in the Official Gazette, issue 4031 of 17/01/2007.

<sup>159</sup> The most critical point here is that investment commissions have lost their institutional professionalism regarding the vision behind establishment and performance. They are the victims of political pressures that have affected their performance. For such reasons, investment commissions have lost their credibility and necessary political support to interact effectively with investors and national institutions (as put forward by the Council of Representatives). Rahim Al-Uqailee, 'Corruption in Iraq hampered investment' (2012) 117 the judiciary 12. (Translated from Arabic Language by Author).

<sup>160</sup> Qusay Al-Abadi. 'Call to cancel the investment commissions' (2012) <[http://www.alliraqnews.com/index.php?option=com\\_content&view=article&id=54651:2012-10-11-16-37-41&catid=41:2011-04-08-17-27-21&Itemid=86](http://www.alliraqnews.com/index.php?option=com_content&view=article&id=54651:2012-10-11-16-37-41&catid=41:2011-04-08-17-27-21&Itemid=86)> accessed 11 Mar 2014. (Translated from Arabic Language by Author).

<sup>161</sup> NIC suggestions, proposed by local investment commissions, should be studied, prioritised, and then listed as part of the wider national investment plan. OECD, *Supporting Investment Policy and Governance Reforms in Iraq* (OECD 2010) 16-18.

<sup>162</sup> *ibid.*

creating a “foggy” perspective in the already investor-reluctant investment environment.<sup>163</sup> The NIC lacks sufficient and accurate information about the investment environment in Iraq, particularly about the legal framework to establish investments, seize available investment opportunities, and provide statistics and studies.<sup>164</sup> However, the NIC argues that it has never been enabled to serve as an independent, empowered member to adopt an investment attraction and sustainment strategy, but suffers from governmental and political pressures. Furthermore, despite the participation of the NIC in international and national affairs, the organisation needs more effective and active participation to attract individuals and corporations to Iraq by displaying available investment opportunities, distributing promotional booklets and holding direct meetings with key investors or companies to provide first-hand knowledge of investment projects in the country.<sup>165</sup> In addition, the NIC Marketing Department lacks strategic means for targeting and building relationships with clients. Most NIC employees do not master communication and foreign-language skills. The mechanisms adopted to follow planning and project-licensing processes such as design, purchase, production, distribution, marketing, post-transaction services, search, and development are still paper-based.<sup>166</sup> Furthermore, the NIC Department of Statistics has only limited and far from accurate statistics, which lack any classification or analyses. This leads to difficult investment decision-making in the light of uncertainties owing to a lack of a reliable database.<sup>167</sup>

The performance of the NIC has always been distorted by conflicts and interference with ministries. Despite entrusting the NIC with the responsibility of planning and executing investment projects, the investment and development departments in other government bodies that are entrusted with establishing ministry specific investments are still in charge of such planning and execution. This led to a lack of a comprehensive investment vision.<sup>168</sup> Therefore, the long-awaited objective of reconstructing the national economy has never materialised. This was further worsened by the presence of weak political will in standardising the existing

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<sup>163</sup> *ibid.*

<sup>164</sup> Qusay Al-Abadi, 'Call to cancel the investment commissions' (2012) <[http://www.alliraqnews.com/index.php?option=com\\_content&view=article&id=54651:2012-10-11-16-37-41&catid=41:2011-04-08-17-27-21&Itemid=86](http://www.alliraqnews.com/index.php?option=com_content&view=article&id=54651:2012-10-11-16-37-41&catid=41:2011-04-08-17-27-21&Itemid=86)> accessed 11 Mar 2014. (Translated from Arabic Language by Author).

<sup>165</sup> Mohammed Al-Musawi, 'Weaknesses in the Performance of Investment Commissions' (2013) 18 Baghdad of Legal Science 350. (Translated from Arabic Language by Author).

<sup>166</sup> Abdul Malik Mahmud, 'Investment in Iraq, Reality or Illusion?' (2012) 83 *Alrraüd* magazine 8. (Translated from Arabic Language by Author).

<sup>167</sup> Mohammed Al-Musawi, 'Weaknesses in the Performance of Investment Commissions' (2013) 18 Baghdad of Legal Science 350.

<sup>168</sup> USAID, *Assessment of Current and Anticipated Economic Priorities in Iraq Report for Prime Minister's Advisory Commission* (The Louis Berger Group 2012) 7.

institutional framework of action, the controversial applicable laws, which are too ambiguous to settle such duplication of roles.<sup>169</sup>

The NIC–region or governorate investment commission relationship is all about interference in terms of power and capacities despite the supervisory powers given to the NIC and the requirements that such provincial bodies act in line with the National Investment Plan.<sup>170</sup> However, there is an objection to the non-regulation of potential conflicts between the NIC and region or governorate counterparts. A clear manifestation of this conflict materialised in cooperation cessation and contract termination threats delivered by the Iraqi Government to Shell and Exxon Mobil, should the latter sign contracts with the Government of Iraqi Kurdistan.<sup>171</sup> As explained by the Central Government, the reason behind such disputes is that the Kurdistan Board of Investment is not authorised to issue oil exploration licenses.<sup>172</sup> The Iraqi Government declared the illegality of production-sharing agreements between foreign companies and the Kurdistan Regional Government. For instance, Hussain al-Shahristani, Deputy Prime Minister of Energy Affairs, said, “Iraq was ‘weighing measures’ that it may take against Exxon after the company signed what the central government considers to be illegal contracts with the Kurds.”<sup>173</sup> The Iraqi Ministry of Oil continually requests that Kurdistan notify the ministry of all oil agreements signed by the latter with international companies.<sup>174</sup> In turn, the Ministry of Natural Wealth and Resources in Kurdistan argues that the Iraqi Constitution gives Iraqi provinces the right to enter into contracts with oil companies.<sup>175</sup> It appears that such disputes will persist because of the lack of legislation for regulating Iraqi oil wealth.<sup>176</sup> Iraqi Oil Minister Mr. Ghadban stated, ‘I am not optimistic that the energy law will be adopted in the coming months, and I would be happy if it is adopted by the end of the year.’

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<sup>169</sup> *ibid* 38,47.

<sup>170</sup> Mohammed Al-Musawi, 'Weaknesses in the Performance of Investment Commissions' (2013) 18 *Baghdad of Legal Science* 350.

<sup>171</sup> The Exxon Mobil-Kurd oil deal spat spotlights Iraq’s juggling act between politics and investments. See Alice Fordham & Dan Morse, 'Exxon Mobil dispute deepens Arab-Kurd split in Iraq' *The Washington post* (5 April 2012) <[http://www.washingtonpost.com/world/middle\\_east/exxon-mobil-dispute-deepens-arab-kurd-split-in-iraq/2012/04/05/gIQAAbg2txS\\_story.html](http://www.washingtonpost.com/world/middle_east/exxon-mobil-dispute-deepens-arab-kurd-split-in-iraq/2012/04/05/gIQAAbg2txS_story.html)> accessed 8 Jan 2014.

<sup>172</sup> Zedalis RJ, *The Legal Dimensions of Oil and Gas in Iraq: Current Reality and Future Prospects* (Cambridge University Press 2009) 29.

<sup>173</sup> *ibid*.

<sup>174</sup> Nidham G Al Abasey, 'Cakes without Sugar: Reasons behind Foreign Investor Reluctance to Enter Mesopotamia' (2013) 41 *Syracuse J Int'l L & Com* 145.

<sup>175</sup> Iraq Directory. 'Exxon Mobil-Kurd oil deal spat spotlights Iraq’s juggling act between politics and investment' (12/28/2011) <<http://www.iraqdirectory.com/DisplayNews.aspx?id=17846>> accessed 14 Mar 2014.

<sup>176</sup> Kadhim Ajrash & Nayla Razzouk. 'Iraq’s Oil Law May Be Pushed Till End of 2012, Ghadban Says' (2012) <<http://www.bloomberg.com/news/2012-02-02/iraq-s-energy-law-may-be-delayed-for-rest-of-year-ghadban-says.html>> accessed 10 Mar 2014.



He also stated that, '[t]he more the law is delayed, the more we will have problems such as the one with Exxon Mobil.'<sup>177</sup>

For these reasons, some Iraqi writers and officials have called for a "Supreme Investment Council" along the lines of the Supreme Energy Council, which was formed in neighbouring Arab countries. This council is supposed to consist of the NIC, Ministry of Finance, Ministry of Planning, and representatives from departments of investment in other ministries and bodies under the management of the Ministerial Cabinet.<sup>178</sup> The objective of setting up the Supreme Investment Council is to settle existing disputes between the NIC and ministries and standardise investment plans and efforts.<sup>179</sup> This can be realised by setting up the proposed Supreme Investment Council, which will have the upper hand in decisions taken by ministries and the NIC, thus leading to the commitment of conflicting parties to the enforcement of the same. Considering its high-level political management, the Supreme Investment Council may well overcome the obstacle of political rifts. However, this study argues against the establishment of the Supreme Investment Council, thus adding another obstacle to the already obstacle-ridden institutional framework. The viability of a national investment commission under the role assigned to the Supreme Investment Council is questionable. If the solution is to introduce an administrative council, reform should be introduced a fortiori to the NIC. Accordingly, the key critique thrown at the suggestion lies in the violation of principles on which Investment Law No. 13 of 2006 is based.

### ***5.3.2.2 Bureaucracy in the Land Allocation of Investment Projects***

In the pre-1991 war era, Iraq had an outstanding position in the Middle East thanks to its distinguishable abilities in public sector management, which used to have a segment of well-trained and highly qualified civil servants.<sup>180</sup> While good institutional capabilities still exist across several fields, the long years of war and international isolation resulted in the following issues: Firstly, diminished investments in key domains of public sector management which diminished the administrative capabilities of civil service. Secondly, very large numbers of public sector employees stemming from a lack of job opportunities elsewhere (the Iraqi

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<sup>177</sup> *ibid.*

<sup>178</sup> Qusay Al-Abadi. 'Call to cancel the investment commissions' (2012) <[http://www.alliraqnews.com/index.php?option=com\\_content&view=article&id=54651:2012-10-11-16-37-41&catid=41:2011-04-08-17-27-21&Itemid=86](http://www.alliraqnews.com/index.php?option=com_content&view=article&id=54651:2012-10-11-16-37-41&catid=41:2011-04-08-17-27-21&Itemid=86)> accessed 11 Mar 2014. (Translated from Arabic Language by Author).

<sup>179</sup> *ibid.*

<sup>180</sup> Hussein Aldory, *The Development of Public Administration in Iraq* (Mustansiriyah University 1993) 5. (Translated from Arabic Language by Author).

Government has become one of the largest pools of employees worldwide). Then, limited e-governance and automation. Next, lower credit standards, higher corruption rates, and a weaker public sector. Lastly, inefficient economic governance in general.<sup>181</sup> All these factors combine to yield a weaker and less efficient government, particularly when it comes to the ability to provide key services and assume responsibility for organisational responsibilities.<sup>182</sup>

The main shortcoming to be spotted here is the strictly central administration that rules by unquestionable orders and the accompanying red tape that takes the form of a series of orders and bodes.<sup>183</sup> This type of administration has fallen afoul of requirements for investments because the latter requires simple, out-of-the-box, and swift mechanisms to come to fruition.<sup>184</sup> Along with the complicated political transition, the administration related challenges prevented the enforcement of necessary structural changes to re-engineer the government and its mechanisms. Red tape, lack of administrative efficiency, and blackmailing investors are key obstacles to investments, as seen by Sami Al Araji, head of the NIC.<sup>185</sup>

The OSS Authority is the only entity an investor would visit if willing to be in Iraq. The OSS facilitates the investment process by equipping investors with the investment permit without interference by the bureaucratic red tape.<sup>186</sup> However, the OSS policy has not eliminated the red tape; even by bringing investment and land allocation licensing processes to a more complicated level there is still the requirement to obtain approvals from a large number

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<sup>181</sup> USAID, *IRAQ Institutional Capacity Building Assessment* (2, 2010) 52.

<sup>182</sup> Abbas Alnasrawi, *The economy of Iraq: Oil, Wars, Destruction of Development and Prospects, 1950-2010* (Westport, Connecticut London 2010) 168-169; OECD, *Supporting Investment Policy and Governance Reforms in Iraq* (OECD 2010) 102.

<sup>183</sup> Haider Kadhim, *Administrative Collapse in Iraq: Causes and solutions* (Basra University 2012) 184. (Translated from Arabic Language by Author).

<sup>184</sup> Hassan Juma, 'Federalism and Centralism: Conflict Management in Iraq' (2011) 16 *Administrative and economic sciences* 401. (Translated from Arabic Language by Author).

<sup>185</sup> Abdul Malik Mahmud, 'Investment in Iraq, Reality or Illusion?' (2012) 83 *Alra'ud magazine* 8. (Translated from Arabic Language by Author). (Abdullah Al-Isma'ili, head of Development Affairs at the Omani Gulf Energy Company, argued that the investment process has several obstacles and red-tape to the extent of scaling down ambitions of foreign investors, particularly in terms of obtaining licenses to investments and importing materials to be used for such investments); See also Mohammed Al-Musawi, 'Weaknesses in the Performance of Investment Commissions' (2013) 18 *Baghdad of Legal Science* 350. (In addition, Taymour Al-Byali, the representative of a US construction company, argued that the current situation in Iraq requires many measures, most of which are complicated). Abdul Malik Mahmud, 'Investment in Iraq, Reality or Illusion?' (2012) 83 *Alra'ud magazine* 8. (Further, the Vice-President of the Parliamentary Committee on Provinces, Mansour At- Tamimi, told Free Iraq Radio that the investment problem in Iraq is very complex due to the myriad obstacles, highlighting that the way investors are dealt with is too bad to keep them in Iraq. Accordingly, the investment environment has become repellent rather than attractive. At-Tamimi also revealed that the one-stop-shop has failed in terms of investment facilitation. As for selling or leasing lands for purposes of investment, it is very complicated because of the red-tape and the conflict between investment authorities on one hand and the institutional owners of such lands) *ibid*.

<sup>186</sup> James A Baker & Lee H Hamilton, *The Iraq Study Group Report* (Iraq Study Group Support, 2006).

of ministries and bodies.<sup>187</sup> For example, considering Iraq's position as the world's second largest country with oil reserves, the exploration operations for which are still underway, approval must be obtained from the Ministry of Oil to establish an investment on a given part of land. Difficulties can be easily imagined if the reply obtained from the Ministry of Oil is 'oil or other sources of energy soil tests are not finalised'.<sup>188</sup> The NIC is also required to obtain approvals from the Ministry of Water Resources,<sup>189</sup> Ministry of Electricity,<sup>190</sup> Ministry of Defence, Ministry of Interior,<sup>191</sup> Ministry of Finance,<sup>192</sup> Ministry of Construction and Housing,<sup>193</sup> Ministry of Environment, Ministry of Tourism and Antiquities,<sup>194</sup> and Customs and Free Zones Authority before any investment license can be issued. Considering the inherent red tape and delays, obtaining approvals from the aforementioned departments inevitably leads to significantly delayed efforts by the NIC, especially because of the political disputes between the NIC and the political "references" of such ministries and bodies.

### ***5.3.2.3 Financial Markets are Still Lagging***

Any outdated legislation that regulates companies operating in the Iraqi financial market must be amended to catch up with the new Iraqi economic trend toward a market economy and to keep up with the legislation regulating international financial markets.<sup>195</sup> A lack of legal

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<sup>187</sup> USAID, *IRAQ Institutional Capacity Building Assessment* (2, 2010) 27.

<sup>188</sup> Abbas Al-Yasiri, 'Corruption in the Form of Bureaucracy: The Investment Projects as a Case Study' (2013) 79 *Journal of the Kufa University* 352. (Translated from Arabic Language by Author).

<sup>189</sup> Iraq is an agricultural country wherein the rivers Euphrates and Tigris flow in addition to many creeks and water bodies that irrigate vast agro lands. Therefore, the NIC must obtain the approval of the Ministry of Water Resources and the Ministry of Agriculture to ensure that there is no conflict between an investment and public or private rights on the site proposed for such investment. *ibid.*

<sup>190</sup> Iraq has an electricity grid that encompasses almost every part of the country. Considering the severe power shortage, the Government has prioritised projects of the Ministry of Electricity. For its part, the NIC is committed to non-conflict with grid lines or the projects of the Ministry of Electricity. Abdul Malik Mahmud, 'Investment in Iraq, Reality or Illusion?' (2012) 83 *Alra'ud magazine* 8. (Translated from Arabic Language by Author).

<sup>191</sup> Since 2003, Iraq has faced a wave of terrorism and instability causing change in heavy security forces across Iraqi cities. Therefore, it is the NIC's duty to avoid issuing an investment license unless approvals of security institutions are obtained first. Mohammed Al-Musawi, 'Weaknesses in the Performance of Investment Commissions' (2013) 18 *Baghdad of Legal Science* 350. (Translated from Arabic Language by Author).

<sup>192</sup> The Ministry of Finance is the body entrusted with allocating government-owned lands. Therefore, it is the holder of the power to allot a piece of land to NIC. *ibid.*

<sup>193</sup> The Ministry of Housing exerts enormous efforts to build housing communities in a large number of governorates and on vast sites under a long-term plan to build five million housing units. *ibid.*

<sup>194</sup> Iraq has been home to the civilizations of Babylon, Assyria, Sumer, and Akkad in addition to the Islamic civilization. Mahmoud, *supra* note 147. Because of this, monuments are almost ubiquitous, and excavation efforts for artifacts of these prior civilizations are underway in many sites. This has caused the NIC's commitment to not introducing investment projects that may be harmful to archeological sites. Abdul Malik Mahmud, 'Investment in Iraq, Reality or Illusion?' (2012) 83 *Alra'ud magazine*. (Translated from Arabic Language by Author).

<sup>195</sup> Abdul-Hussein Tariq, *Economic Development and Workforce Planning in Iraq* (2nd edn, Dar Al Adalah 2013) 192. (Translated from Arabic Language by Author).

protection takes away the confidence of Iraqi and foreign investors and capital owners and holds them back from operating effectively in such a market. Furthermore, this market suffers from weak monitoring tools and measures, which secures minimum disclosure and transparency for those concerned—a fact that has given rise to companies operating in the Iraqi market with limited finances, with the exception of banks that are required by the Central Bank to hold a minimum capital of 250 billion Iraqi Dinars, compared to 15 billion Iraqi Dinars for money transfer companies, 150 million Iraqi Dinars for exchange companies, 1–2 billion Iraqi Dinars for small-and medium-sized loan companies, and 150 million Iraqi Dinars for financial investment companies.<sup>196</sup> In addition, some companies have weak or limited databases, much to the detriment of investors in terms of taking safe and quick consultative decisions.<sup>197</sup> Other weaknesses include lack of flexibility in the prevailing interest rate structure, especially with banks and insurance companies that offer mid-and long-term loans for real estate purposes.<sup>198</sup>

### **5.3.3 Determinants of the Legal Framework**

This section highlights the nature of legal limitations that have relatively precluded foreign investment flows and distorted the investment environment. It further analyses existing legal limitations, which can be classified into three levels:

#### ***5.3.3.1 Inadequate Protection and Enforcement of Intellectual Property Rights***

Laws regarding intellectual property rights in Iraq do not comply with the provisions of the Agreement on TRIPS in several respects. Copyright Law No. 3 of 1971 is not completely harmonious in its use of terms such as “author” and “original author” or in its references to the rights included in a copyright and for holders of such rights.<sup>199</sup> For example, the protection range set forth in the Copyright Law is narrow and only provides for consolidated data without any reference to other articles,<sup>200</sup> while TRIPS provide for readable, selection-based, or content-order-based works.<sup>201</sup> Similarly, Malkawi noted that Copyright Law No. 3 of 1971

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<sup>196</sup> Daveed Gartenstein-Ross and Joshua D Goodman, 'The Global Economic Crisis & Iraq's Future' (Summer 2009) III (2) in *Focus Quarterly* <<http://www.jewishpolicycenter.org/966/global-economic-crisis-iraq-future>> accessed 3 Feb 2014.

<sup>197</sup> Abdul-Hussein Tariq, *Economic Development and Workforce Planning in Iraq* (2nd edn, Dar Al Adalah 2013) 192. (Translated from Arabic Language by Author).

<sup>198</sup> *ibid.*

<sup>199</sup> Bashar H Malkawi, 'Iraqi Patent Law: in Search of Compliance with TRIPS' (2007) 38 *Int'l Rev Intell Prop & Competition L* 591.

<sup>200</sup> Article 2, Paragraph 13 of Iraqi Copyright Law No.3 of 1971 published in the Official Gazette, issue 957 of 21/01/1971.

<sup>201</sup> Article 10, Paragraph 2 of TRIPs Agreement.

does not address whether the exclusive right to adapt a work includes the right to make a cinematographic adaptation of the work.<sup>202</sup> Further, the protection term under the aforesaid Iraqi Copyright Law lags well behind TRIPS,<sup>203</sup> with the law providing for the first public issue as the commencement date for protection.<sup>204</sup>

The Trademark Law No.21 of 1957<sup>205</sup> violates the provisions of TRIPS in that it allows for the filing of appeals and application of decisions of the trademark registrar before the Minister of Industry and Minerals.<sup>206</sup> However, TRIPS provides for litigation before independent administrative and/or judicial entities.<sup>207</sup> Moreover, despite the introduction of amendments to the Iraqi Trademark Law, it still lacks in the use of state-of-the-art technology in filing trademark registration applications, mainly because red tape procedures are time-and money-consuming as well as less effective.<sup>208</sup>

Regarding patents, pursuant to TRIPS, a patent must be a novel innovation and applicable industry-wide. However, compared to Article 27 of TRIPS, Iraqi Patent Law No. 65 of 1970 does not explicitly set forth patent-awarding requirements. Therefore, Iraqi legislators have made up for this shortcoming through Article 2 of the Patent Law, which was produced to fulfil the aforementioned requirements.<sup>209</sup> In certain parts, Iraqi Patent Law goes further than TRIPS in that it includes even biological patents for development of methods of diagnosis and treatment, surgeries, and protection of flora and fauna. Accordingly, Article 3 of the Patent law should be amended to accommodate exclusions provided for under Article 27 of TRIPS.<sup>210</sup> The provisions of the law regarding “fair compensation” are ambiguous; an innovator may claim fair compensation from the relevant employer in return for such an innovation as long as the same is covered by the employment contract period, unless such a contract provides for a specific compensation for an innovation. This provision may well leave the door wide open for

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<sup>202</sup> Bashar Hikmet Malkawi, 'Iraq's Accession to the WTO: Commitments and Implications' (2007) 6(2) JITLP 14.

<sup>203</sup> Articles 20, Paragraph 4 and 6 of TRIPs Agreement.

<sup>204</sup> *ibid.* At Article 12 '[S]uch a term shall be no less than 50 years from the end of the calendar year of authorized publication, or, failing such authorized publication within 50 years from the making of the work, 50 years from the end of the calendar year of making'.

<sup>205</sup> Bashar Hikmet Malkawi, 'Iraq's Accession to the WTO: Commitments and Implications' (2007) 6(2) JITLP 14 (It is worth mentioning that compatibility exists between the Iraqi Law and TRIPs in terms of the visual sensitivity requirement for trademarks). *ibid.*

<sup>206</sup> *See* Article 24, Paragraph 3 of Iraqi Trademark Law No.21 of 1957.

<sup>207</sup> Bashar Hikmet Malkawi, 'Iraq's Accession to the WTO: Commitments and Implications' (2007) 6(2) JITLP 14.

<sup>208</sup> *ibid.*

<sup>209</sup> *ibid.*

<sup>210</sup> *ibid.*

several predictions on accepting compensation, setting a fair compensation mechanism in accordance with the significance and importance of the innovation in question, and the entity associated with setting the compensation value.<sup>211</sup> Once again, the Patent Law fails to refer disputes to judicial entities. Article 33 of the Patent law allows for appealing a registrar's decision to void a patent before the competent minister, while TRIPS provides for judicial referral to settle such disputes.<sup>212</sup> The protection period for an industrial prototype is Seven years as per the Iraqi Patent Law, but Ten years as per TRIPS, in yet another violation of TRIPS.<sup>213</sup>

Furthermore, the Iraqi Government's ability to enforce protection of intellectual property rights and enforcement of relevant laws is extremely weak. In addition, Iraqi laws on intellectual property rights lack procedural measures for border-based customs management when it comes to purchasing illegal copies of commodities and shipping them across borders amounting to violations of property rights.<sup>214</sup> Moreover, such laws are not enforced in the first place. For example, it is possible to find forger copies in public stores. The Iraqi laws on intellectual property rights do not authorise competent authorities to self-act for confiscating materials that are proven to be violating property rights. Furthermore, registry organisations in ministries and government bodies concerned with the protection of intellectual property rights are still using primitive tools that do not meet international standards. Finally, the Iraqi laws on intellectual property rights are dispersed under several laws managed by several bodies. Hence, there is an urgent need to consolidate all intellectual property rights under one easily referred to law.<sup>215</sup>

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<sup>211</sup> Elizabeth Mirza Al-Dajani, 'Post Saddam Restructuring of Intellectual Property Rights in Iraq Through a Case Study of Current Intellectual Property Practices in Lebanon, Egypt, and Jordan' (2006) 6 J Marshall Rev Intell Prop L i (It is hoped that the new intellectual property bill will comply with Articles 51–60 of TRIPS regarding the competent court judgment requirement to finalise customs clearance procedures of commodities suspected to be violating intellectual property rights. For this purpose, a national committee has been established by the Council of Ministers of relevant Iraqi ministries, syndicates, trade bodies, and the private sector to draft a new intellectual property rights bill covering all related intellectual property rights). *ibid.*

<sup>212</sup> See Article 32 of TRIPs Agreement.

<sup>213</sup> Bashar Hikmet Malkawi, 'Iraq's Accession to the WTO: Commitments and Implications' (2007) 6(2) JITLP 14.

<sup>214</sup> Razak Hamad, *Protection of property rights in Iraq* (2nd edn, Baghdad Press 2012) 217.

<sup>215</sup> Bashar Hikmet Malkawi, 'Iraq's Accession to the WTO: Commitments and Implications' (2007) 6(2) JITLP 14; Elizabeth Mirza Al-Dajani, 'Post Saddam Restructuring of Intellectual Property Rights in Iraq Through a Case Study of Current Intellectual Property Practices in Lebanon, Egypt, and Jordan' (2006) 6 J Marshall Rev Intell Prop L i.

### 5.3.3.2 *Blurry Iraqi Laws for Ratification of International Arbitration Awards*

Iraq is an active member of the Arab League of Nations, and in this respect,<sup>216</sup> the country is often governed by stipulations from the 1985 Riyadh Convention,<sup>217</sup> which provides a common framework through which member states enforce laws (including arbitration laws).<sup>218</sup>

According to Articles 251–276 of the country’s civil laws, any arbitration proceedings taking place in the country are normally considered to be a domestic issue (even though it may involve a foreign party).<sup>219</sup> However, with recent changes in legislation, foreign nationals or parties can decide to choose foreign arbitration.<sup>220</sup>

Most states across the globe are common signatories to the New York Convention on the Recognition and Enforcement of Arbitrary Awards, but Iraq failed to be a signatory to the agreement and is therefore excluded from the convention.<sup>221</sup>

Requirements for the recognition and enforcement of foreign arbitration decisions in Iraq are unclear because the Law on Enforcement of Foreign Judgments in Iraq (No. 30 of 1928)<sup>222</sup> and the CCP (No. 83 of 1969) do not regulate such decisions. Accordingly, foreign arbitration decisions may not be enforceable in Iraq, since this principle cannot be deduced

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<sup>216</sup> According to Article 3 of Iraq’s 2005 Constitution, 'Iraq is a country of multiple nationalities, religions, and sects. It is a founding and active member in the Arab League and is committed to its charter, and it is part of the Islamic world.' See article 3, of the Constitution of the Republic of Iraq of 2005, available at <<http://www.wipo.int/wipolex/en/details.jsp?id=10027>> accessed 15 Mar 2014.

<sup>217</sup> The Riyadh Arab Agreement for Judicial Cooperation was signed on 6th Jun. 1983 in “Riyadh,” by all the Council of Arab Ministers of Justice except Egypt and Islamic Republic of Comoros. Riyadh Arab Agreement for Judicial Cooperation 6 April 1983, available at <<http://www.unhcr.org/refworld/docid/3ae6b38d8.html>> accessed 19 Mar 2014.

<sup>218</sup> *ibid.* At Article 37. ‘Without prejudice to the provisions of Articles 28 and 30 of this Agreement, adjudications of arbitrators shall be recognized and executed by any contracting party in the manner stipulated in this part subject to the legal norms of the requested party, and the competent judicial authority of the requested party may neither discuss the subject of such arbitration nor refuse to execute the judgment, except in the following cases: (a) If the law of the requested party does not permit the settlement of the subject of the dispute by arbitration, (b) If the adjudication of the arbitrators is made in execution of a condition or arbitration contract that is void or has not become final, (c) If the arbitrators are non-competent under the contract or condition of arbitration or under the law on the basis of which the adjudication was made.’

<sup>219</sup> Saleh Majid, 'Arbitration in Iraq' (2004) 19 Arab L Q 267.

<sup>220</sup> Gaultier BRAND-GAZEAU. 'Le cadre juridique des affaires en Irak.' (Juin 2010) <<http://www.dissertationsgratuites.com/dissertations/Le-Cadre-Juridique-Des-Affaires-En/64659.html>> accessed 22 Mar 2014.

<sup>221</sup> Abdel Sattar al-Beriqdar, spokesman for Iraq’s High Judicial Council, told RFE that Iraq is keen to join the 1958 New York Convention on the Recognition and Enforcement of Arbitrary Awards. Radio Free Europe, 'Iraq Drafting International Arbitration Law' (2011). Despite the fact that Iraqi officials have indicated that they are going to sign the New York convention treaty, their failure to do so means that if a foreign national or company is to obtain an arbitration award against an Iraqi company (or individual), it will have to enforce the same through the courts. Jan Paulsson and Nigel Rawding and Lucy Reed, *The fresh fields guide to arbitration clauses in international contracts* (3 ede, London, Kluwer Law International 2011) 18.

<sup>222</sup> The Law on Enforcement of Foreign Judgments in Iraq No. 30 of 1928 published in the Official Gazette, issue 61 of 26/06/1928.

from the provisions neglecting the same. Furthermore, Law No. 30 of 1928 has provided explicitly for the scope of enforcement in that it requires a decision or judgment to be handed down by a court formed outside Iraq for it to be enforceable in Iraq.<sup>223</sup>

Iraqi commentators adopt two opinions regarding this negative attitude: the first allows for enforcement, while the second denies such enforcement. Advocates of the first opinion say that foreign arbitration judgments can be enforced in Iraq despite the lack of a legal provision to this end. The argument behind this is that the Arbitration Section of Iraqi Civil Procedure Law No. 83 of 1969 does not specify judgments within the scope thereof.<sup>224</sup> Therefore, such scope cannot be restricted without an explicit legal provision. Accordingly, it covers national and foreign arbitration judgments, ie, an absolute provision remains so unless restricted by another. According to this opinion, irrespective of whether foreign arbitration judgments are covered by international conventions for enforcement of foreign arbitrator's judgments,<sup>225</sup> they shall be enforced. Moreover, acceptance of such enforcement in the country where any judgment so handed down is to be enforced has become a private law principle that is common across the world. Hence, such enforcement is acceptable in Iraq as per Article 30 of the applicable Iraqi Civil Law which provides: 'Any matter not covered by the previous Articles regarding conflict of laws shall be governed by the most common private international law principles.'

The second opinion, however, rejects the above argument as advocates of the same are, and rightly so, for non-acceptance of foreign arbitration judgments in Iraq unless the same are regulated by international bilateral or multilateral agreements providing for enforcement of arbitrators' judgments in the contracting country if Iraq is party thereto.<sup>226</sup> In addition, enforcement of foreign arbitration judgments is one of the most common principles of the private international law worldwide, and hence, the potential enforcement thereof in Iraq pursuant to Article 30 of the Iraqi Civil Law No. 40 of 1951 may not be accepted in this respect because the aforesaid Article is restricted to a subject of the private international law or conflict of laws. It reads as follows: 'Any matter not covered by the previous Articles regarding conflict of laws shall be governed by the most common private international law principles'.<sup>227</sup>

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<sup>223</sup> Hamzeh Haddad, 'Enforcement of Foreign Judgments and Award in Jordan and Iraq' (1989) 2013 <<http://www.aiadr.com/aiadr%20re/2.pdf>> accessed 5 Feb 2014.

<sup>224</sup> *ibid.*

<sup>225</sup> Saleh Majid, 'Arbitration in Iraq' (2004) 19 Arab L Q 267.

<sup>226</sup> Abdul Hamid El Ahdab & Jalal El Ahdab, *Arbitration with the Arab Countries* (Kluwer Law International 2011) 230.

<sup>227</sup> Saleh Majid, 'Arbitration in Iraq' (2004) 19 Arab L Q 267.



Considering the fact that enforcement of foreign arbitration judgments is not a case of conflict of laws, the said Article is not applicable thereto.<sup>228</sup> Therefore, foreign arbitrator judgments including those handed down to settle foreign investment contracts are not applicable in Iraq unless provided for by international agreements.

In any event, for the purposes of enforcement of arbitration decisions by the concerned executive authorities, the approval of such a decision by the competent court after payment of fees pursuant to Article 272 (F/1) of Iraqi Civil Procedure Law No. 83 of 1969 is a requirement of the Iraqi laws. The purpose of this procedure is to monitor the arbitrators' work through approval or revocation judgments handed down by the competent court on the ground that arbitrators are different from judges in terms of legal experience. Another reason is to ensure that the arbitrators' decisions are not illegal in either subject or form.<sup>229</sup>

#### ***5.3.3.3 Weakness Regulatory Framework for Joint Stock Companies***

Despite the fact that the Article 88/1 of the Iraqi Companies Law provide shareholders with financial reports as well as the reports developed by the management and the auditor in due course prior to holding the general assembly meeting (fifteen days) so they can review and develop their questions to the board chairperson and the auditor on controversial issues,<sup>230</sup> in reality practice indicates that the majority of shareholders receive such reports during the general assembly meeting.<sup>231</sup> This means that there is a lack of appropriate opportunity given to shareholders for informed participation when discussing and agreeing/not agreeing to resolutions.<sup>232</sup> The reason behind this (form the author's point of view ) is the lack of desire on the part of companies to send these reports in a timely manner, relying on both the lack of awareness of shareholders in this respect and avoiding causing trouble with shareholders upon approving company policies.<sup>233</sup>

Although the earlier-explained<sup>234</sup> regulatory framework is a sound one, this study highlights a legislative shortcoming in the Companies Law No 21 of 1997 as the joint stock

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<sup>228</sup> Abdul Hamid El Ahdab& Jalal El Ahdab, *Arbitration with the Arab Countries* (Kluwer Law International 2011) 230.

<sup>229</sup> Hamzeh Haddad, 'Enforcement of Foreign Judgments and Award in Jordan and Iraq' (1989) 2013 <<http://www.aiadr.com/aiadr%20re/2.pdf>> accessed 5 Feb 2014.

<sup>230</sup> See Paragraph 4.3.4 of the thesis.

<sup>231</sup> *ibid.*

<sup>232</sup> Invest in Iraq. 'Join Stock Company' (28 December 2012) <<http://www.invest-in-iraq.com/join-stock-company/>> accessed 17 February 2014.

<sup>233</sup> *ibid.*

<sup>234</sup> See Paragraph 4.3.4 of the thesis.

company ISX-listing rules do not provide for any procedures to disclose information and insider information of companies.<sup>235</sup> Another shortcoming is the lack of mechanisms to be used by minority shareholders to address violations of their rights. Accordingly, and considering the above analysis, no indicators of fair and just treatment for minority shareholders exist.<sup>236</sup> Moreover, the legal and supervisory framework in Iraq does not consider the rights of other company stakeholders or the extent to which they are allowed to hold shares or be given a certain amount of profit.<sup>237</sup> Equally unfair is the lack of provision on such holders' right to review key actions taken by a company or participate in its management. Article 4/2 of the Companies Law No 21 of 1997, as amended, provides for limited protection of the rights of company creditors, and prevents any voting or any other form of power exercising that may jeopardise creditors' rights.<sup>238</sup> Further, Accounting Rule No 6, Disclosure of Financial Statement and Accounting Policies,<sup>239</sup> provides for disclosure in the general assembly's annual report of the effects of a company's activities on society and the national economy, and how contributory they have been to providing and enhancing the work environment. Environmental procedures and actions taken by the company are also meant to be disclosed. However, such provisions are insufficient to ensure full and effective protection for other joint stock company stakeholders in Iraq.<sup>240</sup>

In terms of disclosures, the legal and supervisory framework in Iraq regulates a part of the key requirements for disclosure and transparency that must be adhered to by joint stock companies as provided for under the Companies Accounting Regulation No 1 of 1985.<sup>241</sup> These instructions require joint stock companies to develop analytical reports annexable to the key financial reports, and to announce the annual management report including the complementary information to such financial reports (eg a brief on the company and the key objectives thereof as well as the nature of activities conducted thereby over the year in question) while

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<sup>235</sup> Invest in Iraq. 'Join Stock Company' (28 December 2012) <<http://www.invest-in-iraq.com/join-stock-company/>> accessed 17 February 2014.

<sup>236</sup> Thomas Doherty, *Improving Investor Protection in Iraqi Joint Stock Companies* (USAID-TIJARA Provincial economic growth program, July 2011) 6-7.

<sup>237</sup> *ibid.*

<sup>238</sup> Article 4, Paragraph 2 of the Companies Law No 21 of 1997 published in the Official Gazette, issue 3689 of 29/09/1997.

<sup>239</sup> The Law of the Council of accounting standards and regulatory No. 1 of 1995 published in the Official Gazette, issue 3578 of 28/08/1995. {ديوان الرقابة المالية (قانون مجلس المعايير المحاسبية والرقابية)}

<sup>240</sup> Invest in Iraq. 'Join Stock Company' (28 December 2012) <<http://www.invest-in-iraq.com/join-stock-company/>> accessed 17 February 2014.

<sup>241</sup> Latif Jabr Koman, *Commercial Companies: A Study in Iraqi law* (Mustansiriya University 2008) 160. (Translated from Arabic Language by Author).

highlighting any interests of chairpersons, directors, and/or executive bodies.<sup>242</sup> The aforesaid instruction further highlights the role assumed by the auditor in terms of having a fair opinion on how sound the financial reports are.<sup>243</sup> Further, the relevant instructions identify a model for how an auditor's report should be with a view to stressing disclosure and transparency and revealing any information that may affect operations and the financial position.<sup>244</sup> Evaluating the joint stock company listing-oriented disclosure requirements, as set forth in the Provisional Financial Securities Market Law No 74 of 2004, is a preliminary step to enhancing the ISX disclosure and transparency practices and those of companies listed for trading therein. Additionally, it highlights the measures adopted by the ISX against listed companies which are non-compliant with disclosure and transparency requirements. Such measures may amount to imposing criminal punishments against offices of such non-compliant companies.<sup>245</sup>

Despite all of the above, this study claims that disclosure and transparency requirements are far from according with the approved international standards. There is a host of other information that must be disclosed by joint stock companies, especially those ISX-listed, including: the shareholding structure and voting rights; the policies adopted to determine compensation for directors and executives and the details of their qualifications and how independent they are; commercial dealings with parties connected to the company; predictable risk factors; employee-related and other stakeholder issues; and company payments to external auditors for non-auditing services.<sup>246</sup>

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<sup>242</sup> Thomas Doherty, *Improving Investor Protection in Iraqi Joint Stock Companies* (USAID-TIJARA Provincial economic growth program, July 2011) 7.

<sup>243</sup> Invest in Iraq. 'Join Stock Company' (28 December 2012) <<http://www.invest-in-iraq.com/join-stock-company/>> accessed 17 February 2014.

<sup>244</sup> Thomas Doherty, *Improving Investor Protection in Iraqi Joint Stock Companies* (USAID-TIJARA Provincial economic growth program, July 2011) 8; Latif Jabr Koman, *Commercial Companies: A Study in Iraqi law* (Mustansiriya University 2008) 167-169 (In addition to the abovementioned provisions, Accounting Rule No 6 provides for disclosure of information related to accounting data and policies, thus setting up a general framework for financial report-related disclosure requirements. Also, this Rule serves as a complementary provision for other disclosure requirements of the Accounting Rules adopted by the Iraq Supervisory and Accounting Standards Council. Rule 6 provides for a number of principles and key provisions to be observed by companies when meeting disclosure requirements, including detailed disclosure by financial reports and information annexes thereto of all monetary matters and issues with potential effect(s) on users' assessments and decisions, and appropriate development so that any ambiguity and/or misunderstanding can be easily eliminated to ensure that contents best meet the disclosure and transparency requirements. Rule 6 disclosure requirements provide for disclosure of policies and accounting methods, information to disclose in the management report, and disclosure in the external auditor's report). *ibid.*

<sup>245</sup> Invest in Iraq. 'Join Stock Company' (28 December 2012) <<http://www.invest-in-iraq.com/join-stock-company/>> accessed 17 February 2014.

<sup>246</sup> Thomas Doherty, *Improving Investor Protection in Iraqi Joint Stock Companies* (USAID-TIJARA Provincial economic growth program, July 2011) 1.

Disclosure of information and other relevant content serves as a catalyst to upholding shareholders', and other stakeholders', ability regarding company control and elimination, or at least mitigation, of conflict of interest/insider information caused by insider corruption. In addition, such information must be developed by accredited and qualified accountants and audited by independent auditors.<sup>247</sup>

Furthermore, there are gaps due to inadequate local accounting standards and auditing methods. These gaps are commensurate to the low level of company commitment to disclosure and transparency requirements as well as the inadequacy of the measures necessary to ensure the independence and professional standard compliance of auditors.<sup>248</sup> Equally concerning is the level of disclosure exercised by such auditors regarding their fees for auditing and non-auditing services related to the annual management report. Moreover, currently applicable accounting and auditing standards are merely informational rather than obligatory due to the fact that they are not part of any applicable laws and/or regulations.<sup>249</sup>

As regards Founders Committee<sup>250</sup> responsibilities, the Companies Law No 21 of 1997 provides for the formation of a board of directors for joint stock companies and identification of responsibilities and assignments of respective members.<sup>251</sup> However, this study finds the formation of joint stock company boards to be lacking a comprehensive approach towards the necessary assignments. Many key issues are not addressed by the Law, including: Firstly, separation between supervisory and management tasks within a definite board structure.<sup>252</sup> Such separation ensures that clear responsibilities of both executive and non-executive board members are realised via a one-level board structure (but with a clear and explicit separation between the board of directors and the executive management), or via a two-level board where the first tier consists of the supervisory board and the second of the executive board. Secondly, lack of provisions promoting independent directors and members of board-related committees (ie the supervisory and auditing committee, and the compensation committee).<sup>253</sup> Thirdly,

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<sup>247</sup> Latif Jabr Koman, *Commercial Companies: A Study in Iraqi law* (Mustansiriya University 2008) 171. (Translated from Arabic Language by Author).

<sup>248</sup> *ibid.*

<sup>249</sup> Invest in Iraq. 'Join Stock Company' (28 December 2012) <<http://www.invest-in-iraq.com/join-stock-company/>> accessed 17 February 2014.

<sup>250</sup> Article 16, Paragraph 3/2 of the Companies Law No 21 of 1997, stipulates that 'The Founders Committee's duties shall end with the election of the board of directors.'

<sup>251</sup> Thomas Doherty, *Improving Investor Protection in Iraqi Joint Stock Companies* (USAID-TIJARA Provincial economic growth program, July 2011) 1.

<sup>252</sup> Invest in Iraq. 'Join Stock Company' (28 December 2012) <<http://www.invest-in-iraq.com/join-stock-company/>> accessed 17 February 2014.

<sup>253</sup> Thomas Doherty, *Improving Investor Protection in Iraqi Joint Stock Companies* (USAID-TIJARA Provincial economic growth program, July 2011) 5.

legislative shortcoming concerning the determination of directors and non-executive members who may exercise independent tasks with potential conflict of interest risks. Selection criteria of various board-related committee members, especially when it comes to the financial and auditing fields, are not provided for. Nothing less ambiguous are the assignments and duties of board-related committees and contents of reports submitted periodically to the board of directors. It is noteworthy that the Iraqi Companies Law No 21 of 1997 does not require boards of directors to set up appointment and governance committees. Supposedly, such committees would be responsible for the nomination of qualified persons to compete for board membership for the supervision of all governance-related issues.<sup>254</sup> Finally, lack of clarity in terms of describing and identifying assignments and duties of board chairperson and directors, including supervision, addressing potential conflict of interests with managers, directors and/or shareholders. Such conflicts may involve misuse of assets and transactions with parties concerned, ensuring integrity and independence of accounting, auditing and financial reporting practices, enforcement of appropriate internal control particularly when it comes to risk management, financial and operational control, how compliant a company is with applicable laws and regulations, independent evaluation of directors' performances as well as those of board-related committees, supervision of effective governance procedures and introduction of changes and amendments where and when necessary.<sup>255</sup>

#### ***5.3.3.4 Outdated Regulation of Commercial Agencies***

The Commercial Agencies Law No 51 of 2000 is one of the major laws contributing to attracting foreign investors, as investors refer to available prospects prior to investing their money in a new market like Iraq. There are several laws regulating trade and economic activities in Iraq, but they are still incompatible with economic changes and the post-2003 market economy-oriented approach. The Commercial Agency Law No 51 of 2000 serves as an example of laws still socialist in nature.<sup>256</sup> It hinders the operation of foreign companies and commercial agents in Iraq as it includes security-related provisions that meet the desires of the then ruling regime. For example, article 4.1 of the said Law requires a commercial agent to be

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<sup>254</sup> Invest in Iraq. 'Join Stock Company' (28 December 2012) <<http://www.invest-in-iraq.com/join-stock-company/>> accessed 17 February 2014.

<sup>255</sup> Thomas Doherty, *Improving Investor Protection in Iraqi Joint Stock Companies* (USAID-TIJARA Provincial economic growth program, July 2011) 6.

<sup>256</sup> Sami Abdel-Nasser. 'Analytical vision of the Commercial Agency Law' (2012) <<http://www.baghdadchamber.com/modules.php?name=News&file=article&sid=12958>> accessed 21 March 2014. (Translated from Arabic Language by Author).

pro-government. Accordingly, and as per the said provision, a commercial agency may not be permitted under the pretext of not having a pro-government attitude.<sup>257</sup> This holds particularly true considering the government, rather than the judiciary's, power to issue and/or revoke any such agency. Article 4, Paragraph 4 of the Law No 51 of 2000<sup>258</sup> does not allow for the registration of more than three commercial agencies for either individuals or companies, thus hindering the development of small enterprises as well as the operations of companies with multiple commercial activities.<sup>259</sup> In a provision inapplicable in any other country worldwide, the Commercial Agencies Law No 51 of 2000 does not permit any Iraqi merchant or foreign company to conclude a commercial agency, but rather only allows a willing foreign company to select an Iraq-based<sup>260</sup> agent by way of an application filed with the Commercial Agency Register, which is responsible for providing such company with the names of commercial agents in order to select the appropriate one. Article 14 of the Iraqi Commercial Agencies Law No 51 of 2000 prevented governmental bodies from dealing with commercial agents for the purposes of provision with commodities and services—a requirement that seems strange and unjustified. Other harsh provisions include Article 15, which holds any person performing commercial agency activities prior to licensing punishable with imprisonment for a term commensurate with the violation. If the enforcement of such punishments was by reason of security under the former regime, it is absolutely unjustified today. Imprisonment can be replaced with a fine.<sup>261</sup> In contrast, and contrary to the harsh provisions of Article 15, the Commercial Agencies Law No 51 of 2000 allows the Minister of Trade to exempt any person from the Iraq-based commercial offices requirement, the Iraq-based commercial chamber membership requirement, and the trade name requirement.<sup>262</sup> Yet, what does this exemption power signify? It means that it is possible to issue commercial agent licences based on personal and partisan loyalties rather than helping real traders conduct their activities.<sup>263</sup>

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<sup>257</sup> *ibid.*

<sup>258</sup> Reporting that , Paragraph 4 of the Law No 51 of 2000 stipulates that 'Registration of more than three agencies for the one natural or legal person shall not be allowed; all agencies in excess of the number mentioned shall be cancelled according to the concerned commercial agent'.

<sup>259</sup> Salam Al-Quraishi, 'The Importance of Amending the Law of Commercial Agencies' (2012) 3 Business prospects 18. (Translated from Arabic Language by Author).

<sup>260</sup> Sami Abdel-Nasser. 'Analytical vision of the Commercial Agency Law' (2012) <<http://www.baghdadchamber.com/modules.php?name=News&file=article&sid=12958>> accessed 21 March 2014.

<sup>261</sup> Salam Al-Quraishi, 'The Importance of Amending the Law of Commercial Agencies' (2012) 3 Business prospects 18. (Translated from Arabic Language by Author).

<sup>262</sup> *ibid.*

<sup>263</sup> *ibid.*

The Iraqi government has diagnosed the shortcomings of the Commercial Agencies Law No 51 of 2000, hence its efforts to make necessary amendments. Accordingly, the Iraqi Government set up a specialist committee with members from the following bodies: Ministerial Cabinet counsellors, the Ministry of Finance, the Ministry of Planning, the Ministry of Trade, and the Shura Council. The Committee stated that its mission is to abolish provisions falling foul of economic and commercial developments and to add new provisions that are in line with the prevailing legal and economic values.<sup>264</sup> However, the amendments suggested to the Commercial Agencies Law No 51 of 2000, should they be endorsed, will not introduce a drastic change to the general trend of the present law. Nouri Al-Bajari, a member of the Iraqi Parliament Economic Committee, described the amendments as 'being tinged with socialism and will not keep up with the market economy orientation'. For example, the suggested amendments ignore the amendment needed to Article 1 of the Law on regulation of the agency activities and likening the same to socialist interests as well as the pro-government requirement and requiring any commercial agent to be an Iraqi and Iraq-based. Therefore, the Iraqi Parliament has twice declined the amending of the Commercial Agencies Law No 51 of 2000.<sup>265</sup>

#### ***5.3.3.5 Institutional Capabilities of Iraqi Judiciary***

Undoubtedly, the Iraqi judiciary has adopted a number of steps to win foreign investors interested in Iraq.<sup>266</sup> However, there are many challenges ahead, which are obstacles to creating a national world-class judiciary.

The challenge encountered by the Iraqi judiciary is the unmet dire needs of judicial institutions in terms of resources, training, and facilities. Lack of experience in foreign investment disputes, international arbitration, training for judges, and court officers or employees are the major concerns.<sup>267</sup> Court administrations still feature many administrative technique problems on a large scale, all of which are obsolete. Such techniques include keeping case records, not integrating records, and primitive and weak exchanges of information. These methods are causing a lot of concern owing to the resulting potential disclosure of case

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<sup>264</sup> Sami Abdel-Nasser. 'Analytical vision of the Commercial Agency Law' (2012) <<http://www.baghdadchamber.com/modules.php?name=News&file=article&sid=12958>> accessed 21 March 2014. (Translated from Arabic Language by Author).

<sup>265</sup> *ibid.*

<sup>266</sup> Christina J Sheetz & Matthew T Simpson, 'Rethinking the Future: The Next Five Years in Iraq' (2008-2009) 24 *Am U Int'l L Rev* 181.

<sup>267</sup> Adnan Almrjani, *Impact of the Judiciary Independence* (Najaf, Al Nibras 2008) 215. (Translated from Arabic Language by Author).

details.<sup>268</sup> Foreign investors' trust the Iraqi judicial system has been compromised by political interferences with judicial work,<sup>269</sup> mainly in the form of personal safety threats against judges, thus undermining the efficacy of judicial institutions.<sup>270</sup> Terrorist attacks against judges may well cast shadows on the country's judicial institutions because investigations and trials are usually followed by threats and violence against judges concerned, thus compromising their abilities to fairly and impartially look into cases. Most judges lack knowledge of personal security details or sufficient training therein. Other areas of lacking include provisions of a judicial safe house, safe workplace, and firearms license. A total of 58 judges and 70 judicial officers were killed between 2003 and 2012.<sup>271</sup> Furthermore, outdated legislations and delayed legal reforms undermine the integrity of the judiciary and Iraq's abidance to international obligations under international law.<sup>272</sup> Clearly, this leads to delayed judgments. As a result of the enforcement of the De-Baathification Law, many judges have been relieved of office on the grounds of being members of the Baath Party.<sup>273</sup> As a result, only 750 judges remain to serve nation-wide judicial needs. Despite the fact that the appointment of judges is a top priority for the SJC, it has been slow and accompanied by a lack of experience among new judges in handling specific issues such as foreign investment disputes.<sup>274</sup>

## 5.4 Conclusion

Following the dictatorship fall of 2003, Iraq's reconstruction has come to the forefront. The CPA and the Iraqi Government endeavoured to open the doors of Iraq to investments and introduced investment law reforms. This chapter has shown that the reformists have ignored the facts on the ground to make propaganda gains in the post-conflict era. The failure to rehabilitate the investment environment has been due to the inappropriate or irrelevant strategies and policies which supported the CPA initially, and the influential political parties

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<sup>268</sup> United Nations Environment Programme (UNEP), *Iraq Institutional Capacity Assessment Report* (June 2006).

<sup>269</sup> Adnan Almrjani, *Impact of the Judiciary Independence* (Najaf, Al Nibras 2008) 216.

<sup>270</sup> United Nations Environment Programme (UNEP), *Iraq Institutional Capacity Assessment Report* (June 2006).

<sup>271</sup> Judiciary. 'Martyrs of judges' (2012) <<http://www.iraqja.iq/shheedq.php>> accessed 7 Feb 2014.

<sup>272</sup> American Bar Association, 'Judicial Reform Index for Iraq' (July 2006) <<https://apps.americanbar.org/rol/publications/jri-iraq-2006.pdf>> accessed 12 Mar 2014.

<sup>273</sup> Jeffrey J Coonjohn and Zuhair Al-Maliki. 'Chaos in the Courts Can Iraq's Embattled Chief Justice Fend-off Presidential Strategists' (2013) <<http://jjcoonjohn.com/wp-content/uploads/2013/02/Chaos-in-the-Courts-.pdf>> accessed 16 Feb 2014 (The Chief Justice was removed from service on the grounds of being a member of the Baath Party). Jeffrey Coonjohn, a Senior Policy Advisor working in the Middle East, North Africa, and Central Asia commented, 'Valentine's Day was none too sweet for Iraq's Chief Justice Medhat al-Mahmoud this year. The 79-year old jurist awoke to find himself ignominiously ousted from his post as a result of having once been Saddam Hussein's personal legal advisor'.

<sup>274</sup> American Bar Association, 'Judicial Reform Index for Iraq' (July 2006) <<https://apps.americanbar.org/rol/publications/jri-iraq-2006.pdf>> accessed 12 Mar 2014.



later on. One of the more significant findings to emerge from this chapter is that foreign investors shy away from investing in Iraq despite the incentives and guarantees offered, and despite huge efforts aimed at investment environment reform. The conclusions that can be drawn from this chapter relate to insecure and political instability, financial and administrative corruption, outdated laws, ineffective investment authorities, red tape, and devastated infrastructure. These facts serve as evidence of the complete failure of the post-2003 Iraq reconstruction campaign.

This chapter proves that Iraq, despite managing to overcome some obstacles in the past, has run into some longstanding and persistent limitations in addition to the newly introduced risks. The results of this investigation show that the limitations addressed in the post-2003 investment environment in Iraq remain on the ground due to the current approach, which is ineffective, non-comprehensive and insufficient. Implicitly added to this analysis is that fact that the hindrances outweigh reform efforts. Hindrances, in their most damaging form, are terrorist attacks against foreign investors. No less damaging is the conflict between political components and the insurgency contributing to the sectarian tensions and taking the country to civil war. Therefore, rehabilitating the investment environment amid these conditions leaves reformers with a difficult choice that may end up with adverse results that fall foul of the economic reconstruction objectives. This holds particularly true if planning and/or enforcement come to failure, or if there is a failure to adopt appropriate mechanisms and strategies. Failure to address such limitations and hindrances is ascribed mainly to the far-from-credible approach as well as the knowledge limitations of reformers. Accordingly, and as long as the Iraqi investment environment is full of such hindrances, the challenge here is to develop an effective and enforceable roadmap with a view to creating a pro-foreign investment environment.

# Chapter VI: Roadmap to Reform the Investment Environment of Iraq<sup>1</sup>

## 6.1 Introduction

There is no “silver bullet” for foreign investor aversion to Iraq. Nevertheless, there are certain reforms that may well alleviate foreign investors’ concerns and establish a sustainable investment friendly environment. The objective behind the Investment Environment Rehabilitation Roadmap, considering how damaged such environment is because of the conflicts in Iraq, is to serve as a guideline for overall policies and strategies that aim at attracting foreign investors and pave the way for reconstruction in Iraq decades after conflicts. While taking into account the peculiarities of the prevailing crises and conflicts, taking this Roadmap for a flexible paradigm would serve well the prevailing conditions and contribute to rehabilitation efforts for a safe growth-enabling environment and Iraqi economy. How indispensable this Roadmap is, is reflected in the fact that Iraq has always failed to achieve valuable progress in reconstructing the investment environment despite the tremendous efforts by the Iraqi legislature and Government in the facilitation of investment projects.<sup>2</sup> As a result of these efforts, there were attempts in post-2003 Iraq to establish and sustain an attractive foreign investment climate.<sup>3</sup> However, this study has shown that reforms have not been successful, even highlighting the likely risks of slipping back into conflict.<sup>4</sup> The reasons behind this is that Iraq, following decades of wars and disputes, has emerged with extremely limited institutional capabilities at all levels. The 2003–2014 reform period was not much different from the years of conflicts; institutions are still too weak to fulfil their missions, and there is a lack of good governance, a poor rule of law, violations of human rights, weak democratic institutions, poverty, and damaged social fabric.<sup>5</sup> Despite billions of US dollars spent on fixing such problems, the response has remained sluggish and largely ineffective due to the

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<sup>1</sup> This Chapter is an expanded and revised version of the Author article’s, Nidham G Al Abasey, 'Cakes without Sugar: Reasons behind Foreign Investor Reluctance to Enter Mesopotamia' (2013) 41 Syracuse J Int’l L & Com 145.

<sup>2</sup> Ned Parker, 'Iraq We Left Behind: Welcome to the World's Next Failed State' (2012) 91(2) Foreign Aff 94.

<sup>3</sup> Conor Mc Carthy, 'The Paradox of the International Law of Military Occupation: Sovereignty and the Reformation of Iraq' (2005) 10 J Conflict & Sec L 43.

<sup>4</sup> Antony Blinken, 'Is Iraq on Track: Democracy and Disorder in Baghdad-Morning in Mesopotamia' (2012) 91(4) Foreign Aff 152.

<sup>5</sup> Ned Parker, 'Iraq We Left Behind: Welcome to the World's Next Failed State' (2012) 91(2) Foreign Aff 94.

cumulative effect of obstacles such as terrorism, corruption, and political conflicts that have hindered the reconstruction of Iraq.<sup>6</sup>

Accordingly, the reform policy proposed here is intended to cover Iraq-based problems and obstacles, while understanding that recommendations are not restricted to the investment framework but rather seek to address all obstacles to a viable investment (and other) environment(s). For these reasons, this study examines the procedures to support stability and pave the way to re-gain foreign investors' trust in Iraq. The Roadmap, as proposed for reforms discussed herein, take for a guide the general framework proposed by the OECD workshops, which is based on two reformative mainstays: (1) reforming of government; and (2) introducing amendments to laws and the investment environment in Iraq.<sup>7</sup> Meanwhile, the study takes an in-depth look into proposing remedies for partial problems while addressing various details that make up the investment climate.

This chapter aims at identifying the requirements of a friendly investment environment and coordinating activities that yield stability and prevent any relapse into violence—an objective attainable through supporting the development of a vision tackling the inherent cases of conflict. Promoting civil peace is a top priority for all reconstruction and development activities in post-conflict eras. This should be a constant policy in full coordination with peace and security establishment and enforcement efforts. Then ensures completion of all present reform efforts, followed by reviewing foundations of the Iraqi investment environment promotion and encouragement plans. Other factors of support include coordination with effective powers related to investment. It goes without saying that looking into investment climate rehabilitation processes in post-conflict eras would facilitate using such processes to rebuild the war-torn state and turn them into a river of political, economic and social reforms.<sup>8</sup> Such Roadmap is a standard strategic framework that fully highlights the whole spectra of potential investment projects in Iraq within a healthy environment.<sup>9</sup> The Roadmap further provides guiding rules to translate overall strategies into risk-addressing and obstacle-eliminating processes, thus paving the way for a holistic view on the investment climate

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<sup>6</sup> David Brent Grantham, 'Caveat Investor: Assessing the Risks and Rewards of IOCs Entry into Iraq' (2010) 3 J World Energy Law Bus 304; Antony Blinken, 'Is Iraq on Track: Democracy and Disorder in Baghdad-Morning in Mesopotamia' (2012) 91(4) Foreign Aff 152.

<sup>7</sup> OECD, *Supporting Investment Policy and Governance Reforms in Iraq* (OECD 2010) 7.

<sup>8</sup> Christina C Benson, 'Jus Post Bellum in Iraq: The Development of Emerging Norms for Economic Reform in Post Conflict Countries' (2011-2012) 11 Rich J Global L & Bus 315.

<sup>9</sup> Rahim Mooloo and Alex Khachaturian, 'Foreign Investment in a Post-Conflict Environment' (2009) 10 J World Investment & Trade 341.

rehabilitation process. In so doing, this Roadmap is based on the lessons learnt from Iraq reconstruction efforts that date back to 2003 of which several weaknesses have been highlighted including non-comprehensive reforms, which perplexed the economic and legal scene into the indecisive situation between central and open economy; lack of necessary knowledge to initiate a holistic reform scheme for the pre-2003 more-than-three-decade-old imbalances; and some reform schemes that have proven inappropriate to the Iraqi case as most are borrowed models of reconstruction.<sup>10</sup> All things considered, there is urgent need for reconstruction institutions to translate their commitment to reform into credible enforcement.

Adopting this Roadmap is intended to achieve positive results for the future of foreign investment in Iraq through providing a coordinating and solid strategy that may well help accelerate the planning and enforcement of rapid reforms and send positive messages to investors about the Iraqi investment climate turning from a ravaged conflict into a stability-blessed one; this will create more foreign investor opportunities and, as a result, more long-term sustainable development opportunities. Finally, this chapter will make legal proposals for better guarantees offered to investors and easier investment creation across investment processes under the umbrella of law-abiding institutions.

## **6.2 The Rationales to Reform the Investment Environment of Iraq**

The Iraqi Investment Environment Reform Framework contains a whole host of visualisation and recommendations aimed at restoring foreign investors' confidence in Iraq's investment climate considering the fact that it is a post-war and dispute environment. The key title of a pro-investment strategy must enshrine reform efforts based on a knowledge with full plan to determine the priorities for the promotion of investment environment. However, this will only be achieved with a sincere political will that adopts comprehensive strategies to reform the investment environment that has become desolate from foreign investors. Further, and given the principle of guaranteeing the future of foreign investors' projects, the reform visualisations include a number of foundations necessary to ensure efficient and neutral Iraqi public bodies.<sup>11</sup> General requirements of institutions in an investor-attracting environment include full respect by all persons, institutions, bodies, the public and private sector, and the state itself to applicable laws which must be enforced on an equal footing while ensuring independent

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<sup>10</sup> Christopher J Coyne and Adam Pellillo, 'Economic Reconstruction amidst Conflict: Insights from Afghanistan and Iraq' (2011) 22 *Defence Peace Econ* 627.

<sup>11</sup> Paul D Callister, 'Identity and Market for Loyalties Theories: The Case for Free Information Flow in Insurgent Iraq' (2006) 25 *St Louis U Pub L Rev* 123.

commitment thereto and observing the minimum limit of international standards. This concept, ie the rule of law, requires additional measures to be in place, including co-decision making, legal certainty and arbitrariness prevention. The rule of law in a post-war environment is a requirement stressed by the United Nations Commission on Human Rights, which increasingly recognises the importance of enhancing efforts exerted by UN bodies to ensure effective and swift action to reinstate the rule of law and justice management in post-war environments.<sup>12</sup> Countries coming out of wars, crises and conflicts are vulnerable to weak or absent rule of law, inefficient status of law and justice enforcement, and a larger scale of human rights violations. Such position is aggravated by the lack of public trust in state authorities and resource shortages.<sup>13</sup>

Enforcement of the rule of law in post-2003 war Iraq, particularly as being part of the foreign investment climate rehabilitation strategy, requires concentration on limitations to the whole investment process.<sup>14</sup> Simply, the rule of law, for these purposes, aims at developing all bodies and institutions with direct relations with investors, especially the NIC and the relevant local authorities, while adopting an overall approach to enforce the rule of law as it is the means of regulating all state-run institutions.<sup>15</sup> Consequently, it is essential to put in place all tools that ensure the rule of law with a view to a long-term and sustainable institutional capacity in Iraq to respond to and enforce reform requirements.<sup>16</sup> These tools provide a cornerstone to any reform project as they are associated with how capable a state is to introduce real reforms through rule of law to all parties. The focal point to bring about the rule of law is to address strategic and technical needs to facilitate the rule of law locally.<sup>17</sup> Key considerations include the real need for a political commitment to accountability and to boost initiatives on transparency in disputes involving foreign party (ies), the importance of special attention to enforcement of protecting intellectual property rights, the need to clearly understand the

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<sup>12</sup> Jenia Iontcheva Turner, 'Justice, Rule of Law, and Economic Reconstruction in Post-Conflict States' (2007) 8 *Stud Int'l Fin Econ & Tech L* 253.

<sup>13</sup> *ibid.*

<sup>14</sup> Bart S Fisher, 'Investing in Iraq: Legal and Political Aspects' (2004-2005) 18 *Transnat'l Law* 71; Rahim Moloo and Alex Khachaturian, 'Foreign Investment in a Post-Conflict Environment' (2009) 10 *J World Investment & Trade* 341.

<sup>15</sup> OECD, *Supporting Investment Policy and Governance Reforms in Iraq* (OECD 2010) 111-116.

<sup>16</sup> *ibid* 111.

<sup>17</sup> Rahim Moloo and Alex Khachaturian, 'Foreign Investment in a Post-Conflict Environment' (2009) 10 *J World Investment & Trade* 341.

investment-related dispute settlement laws, and providing for sound and valid legal procedures.<sup>18</sup>

The rationale behind adopting the rule of law for the purposes of reform stems from it being a key component of economic development as it provides a legal and predictable environment that is capable of protecting foreign investments.<sup>19</sup> Iraq suffers from eclectic rule of law, weakly performing judicial bodies, lack of professional and bureaucratic skills, the violent and provocative and incitement-driven political culture and the volatile society divided along sectarian and ethnic lines. Accordingly, the rule of law is urgently required, as the lack of accountability in enforcement of trust-building measures would render it difficult to establish and sustain reforms.<sup>20</sup>

### **6.3 Reform the Critical Challenges**

By showing that the Iraqi government's strategy has not effectively addressed these challenges, this paragraph highlights the mechanisms of dealing with the pressing risks, by reformulating the relation between the government layers, the need to address security challenges by modernisation of the strategies for confronting terrorism, and combating the corruption flu.

#### **6.3.1 Reformulate the Relation between the Government Layers**

This section proposes a plan to reformulate the relations between the federal government with the regional and governorate governments.<sup>21</sup> The solution is to have a strong federal government that shows the utmost respect to both the rights and identities of semi-federal entities and minorities. This involves a partial and gradual transfer of power as per the nature of the administrative unit—be it a province or a governorate.<sup>22</sup> This power distribution vision would develop to address the dilemma of resource distribution and public services that account

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<sup>18</sup> Abdul Malik Mahmud, 'Investment in Iraq, Reality or Illusion?' (2012) 83 *Alra'ud* magazine 8. (Translated from Arabic Language by Author).

<sup>19</sup> It is noteworthy that the World Bank increasingly adopts the idea that effective, efficient and integral legal and judicial systems are necessary for economic development. On this basis, World Bank projects worldwide have been established to cover legislative aspects of economic and commercial reforms, judicial training, court advancement and land management. Kristen E Boon, 'Open for Business': International Financial Institutions, Post-Conflict Economic Reform, and the Rule of Law' (2006-2007) 39 *NYU J Int'l L & Pol* 513.

<sup>20</sup> Ned Parker, 'Iraq We Left Behind: Welcome to the World's Next Failed State' (2012) 91(2) *Foreign Aff* 94; Paul R Williams and Matthew T Simpson, 'Rethinking the political future: an alternative to the ethno-sectarian division of Iraq' (2009) 24 *Am U Int'l L Rev* 191.

<sup>21</sup> Haider Ala Hamoudi, 'Notes in Defense of the Iraq Constitution ' (2012) 33(5) *U Pa J Int'l L* 1117.

<sup>22</sup> Paul R Williams and Matthew T Simpson, 'Rethinking the political future: an alternative to the ethno-sectarian division of Iraq' (2009) 24 *Am U Int'l L Rev* 191.

for a significant part of internal conflicts. With a view to putting such solutions into force, constitutional provisions, which have brought these disputes to life, must be reconsidered.<sup>23</sup> The 2005 Constitution of the Republic of Iraq<sup>24</sup> adopts both a federal and decentralised system of government. In other words, Iraq has only one province ie Kurdistan, with the future bearing the omens of further provinces. As regards non-provincial governorates, they are governed by means of decentralised administration. Governorates exercise large-scale administrative and financial powers. Further, they are not subject to the supervision or control of any administrative power as provided for in the 2005 Iraqi Constitution as well as in the Non-Provincial Governorates Law No 21 of 2008.<sup>25</sup> Employment of both federalism and decentralism has resulted in disputes concerning, *inter alia*, competencies, natural resources, services, and public utilities between the Federal Government on the one hand, and the Province and Governorate Governments on the other; or between the Province and the neighbouring governorates.<sup>26</sup>

Competence distribution mechanisms between the Federal Government and the Province have resulted in either exclusive or joint management. Article 110 of the 2005 Constitution provides for exclusive powers of the Central Authority.<sup>27</sup> Article 114, however, regulates the joint powers between Federal and Provincial authorities despite the decentralised system of administration adopted by governorates. Consequently, causing non-provincial governorates to exercise the same powers of the Province(s) has resulted in a mixed system of federalism and decentralism.<sup>28</sup> Moreover, a simple reference to facts would reveal that the Centre–Province disputes have always been the result of the ambiguous Article 114 concerning whether the Federal or the Provincial power should prevail.<sup>29</sup> A claim stands that the priority in joint powers, as per sound logic, should be for federal authorities rather than the Provincial counterparts. Further, Article 114 provides for vesting powers in the Federal Authority in the

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<sup>23</sup> Haider Ala Hamoudi, 'Notes in Defense of the Iraq Constitution ' (2012) 33(5) U Pa J Int'l L 1117.

<sup>24</sup> The 2005 Constitution of Iraq, as well as the abolished 2004 Law of Administration for the State of Iraq for the Transitional Period, has adopted federalism in a reaction to the strict central government before 2003. This meaning has been put forward by Article 52 of the 2004 Law of Administration for the State of Iraq for the Transitional Period. According to the aforesaid Law, Kurdistan is a federal province with a host of powers. Sabah Al-Bawi, 'Influences of Ambiguity of Constitutional Provisions on the Administrative System of Iraq' (2012) 33 U Pa J Int'l L.

<sup>25</sup> The Non-Provincial Governorates Law No 21 of 2008 published in the Official Gazette, issue 4070 of 31/03/2008.

<sup>26</sup> Paul R Williams and Matthew T Simpson, 'Rethinking the political future: an alternative to the ethno-sectarian division of Iraq' (2009) 24 Am U Int'l L Rev 191.

<sup>27</sup> *ibid.*

<sup>28</sup> Haider Ala Hamoudi, 'Notes in Defense of the Iraq Constitution ' (2012) 33(5) U Pa J Int'l L 1117.

<sup>29</sup> Paul R Williams and Matthew T Simpson, 'Rethinking the political future: an alternative to the ethno-sectarian division of Iraq' (2009) 24 Am U Int'l L Rev 191.

first place (but subject to the coordination or consultation with the Province(s)) but not vice versa.<sup>30</sup> Nonetheless, Article 115 of the Constitution paves the way for Centre–Province/Governorate disputes as it provides for prevailing laws of Provincial and non-Provincial Governorates when it comes to joint Federal–Provincial powers in the event of a dispute.<sup>31</sup> Further complications are brought in by Article 121, Paragraph 2 of the Constitution: ‘Second: In case of a contradiction between regional and national legislation in respect to a matter outside the exclusive authorities of the federal government, the regional power shall have the right to amend the application of the national legislation within that region.’ Therefore, the above-quoted provision violates an established rule of the parliamentary system: priority, in case of federal and provincial conflict of laws, is to the federal law. Accordingly, the Iraqi Constitution has come up with legislative anomalies that owe their origins only to imagination which have eventually materialised into a bizarre federal system to which no likeness with any constitution worldwide can be suggested.<sup>32</sup>

Concerning decentralism applicable in Iraqi Governorates, Article 122, Paragraph 2 of the Constitution provides: ‘Second: Governorates that are not incorporated in a region shall be granted broad administrative and financial authorities to enable them to manage their affairs in accordance with the principle of decentralised administration, and this shall be regulated by law.’<sup>33</sup> Considering the above-quoted provisions, the Constitution adopts decentralism for non-provincial governorates.<sup>34</sup> However, Article 122, Paragraph 5 wipes out this conception: ‘The Governorate Council shall not be subject to the control or supervision of any ministry or any institution not linked to a ministry. The Governorate Council shall have independent finances’.<sup>35</sup> Accordingly, decentralism is not a reality. This produces a conflict: decentralism adopted an ostensibly role in their work, underscoring failings.<sup>36</sup> Further, there is no justification for the lack of any supervisory body serving as a federal authority. Clearly, this may well bring about the disintegration of the administration of the country.<sup>37</sup>

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<sup>30</sup> Sabah Al-Bawi, 'Influences of Ambiguity of Constitutional Provisions on the Administrative System of Iraq' (2012) 33 U Pa J Int'l L.

<sup>31</sup> Paul R Williams and Matthew T. Simpson, 'Rethinking the political future: an alternative to the ethno-sectarian division of Iraq' (2009) 24 Am U Int'l L Rev 191.

<sup>32</sup> *ibid.*

<sup>33</sup> Sabah Al-Bawi, 'Influences of Ambiguity of Constitutional Provisions on the Administrative System of Iraq' (2012) 33 U Pa J Int'l L.

<sup>34</sup> *ibid.*

<sup>35</sup> Constitution of the Republic of Iraq of 2005.

<sup>36</sup> Haider Ala Hamoudi, 'Notes in Defense of the Iraq Constitution ' (2012) 33(5) U Pa J Int'l L 1117.

<sup>37</sup> Paul R Williams and Matthew T Simpson, 'Rethinking the political future: an alternative to the ethno-sectarian division of Iraq' (2009) 24 Am U Int'l L Rev 191.



Upon analysing the above-quoted constitutional provisions, it is clear that the Constitution has adopted federalism as the mechanism that allows smooth power exercising and non-central control. In other words, it seeks to ward off the aggressively unjust and oppressive former centralised regime.<sup>38</sup> However, the Iraqi Constitution has not adopted the well-known federal system, but rather introduced key changes thereto so that enforcement of federalism is a bumpy road that may lead to the disintegration of Iraq into smaller countries.<sup>39</sup> The decentralism so adopted, as the perfect model of administration, is accompanied by violation of the relevant rules as it wipes out a key mainstay—controlling/supervising works of local authorities. Giving governorate councils large-scale administrative and financial powers and sparing them any control/supervision will cause the disintegration of the administrative unity of Iraq, thus serving as a contributor to higher corruption and financial loss potentials.<sup>40</sup>

Constitutional revision of power distribution between the central government and Kurdistan Province on one hand and the central government and other non-provincial governorates on the other is the starting point for constitutional reform. Despite the current decentralised administration of governorates, the current administrative structures adopt an unsteady approach toward Kurdistan, but a strong approach toward other governorates.<sup>41</sup> Federalism and decentralised administration have not been enforced effectively in the modern sense of the concept, while public governorate-based directories are nothing short of 'seconded' circuits of various centralised ministries.<sup>42</sup>

A reformist paper about the decentralisation policy must address the administrative and structural organisation at the province level, in the Kurdistan Province, in non-provincial governorates, roles and responsibilities at each level, mobilisation and allocation of resources,

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<sup>38</sup> Radha Iyengar and Jonathan Monten, 'Is There An "Emboldenment" Effect? Evidence from the Insurgency in Iraq' (March 2008) National Bureau of Economic <<http://www.nber.org/papers/w13839>> accessed 15 February 2014.

<sup>39</sup> Paul R Williams and Matthew T Simpson, 'Rethinking the political future: an alternative to the ethno-sectarian division of Iraq' (2009) 24 Am U Int'l L Rev 191.

<sup>40</sup> Jeremy Sarkin and Heather Sensibaugh, 'Why Achieving Reconciliation in Iraq Is Possible: Suggestions for Mechanisms and Processes Including a Truth and Reconciliation Commission' (2008) 23 Fletcher J Hum Sec 15 June 2013 <<http://ssrn.com/abstract=1283729>> accessed 8 February 2014.

<sup>41</sup> Christina J Sheetz & Matthew T Simpson, 'Rethinking the Future: The Next Five Years in Iraq' (2008-2009) 24 Am U Int'l L Rev 181.

<sup>42</sup> Michael J Kelly, 'The Kurdish Regional Constitution within the Framework of the Iraqi Federal Constitution: A Struggle for Sovereignty, Oil, Ethnic Identity, and the Prospects for a Reverse Supremacy Clause' (2010) 114 Penn St L Rev 707.

institutional development, and capacity building.<sup>43</sup> A reformist paper must be based on a comprehensive survey of all existing laws and practices that could be developed through consultative measures adopted in conjunction with the concerned parties.<sup>44</sup>

A large part of obstacles faced by foreign investments in Iraq has been due to the conflict of federal, provincial, and governorate laws that is not clearly regulated by the Constitution. Therefore, amending Articles 115 and 121, Paragraph 2 of the Iraqi Constitution<sup>45</sup> is a key issue because the Article prioritises the Province Law in reference to the distribution of powers in the event of a dispute with the federal government. In contrast, other specific Articles refer to the federal law as the dominating law when applied to cases of dispute between provincial or governorate laws. Surely, this trend is compatible with sound legal logic.<sup>46</sup> The other suggestion is amending Article 122.5 of the Iraqi Constitution, which allows Provincial Councils to disobey the laws of the central legislature. Paragraph 2 of this Article gives governorates large administrative and financial powers, but relevant laws do not identify such large powers. Accordingly, the provision results in a dispute between the central government, which is annoyed by the concept of powers, and the governorates, which demand an expanding interpretation.<sup>47</sup>

Amending the legislative framework, which governs the distribution of joint powers, will scale down conflicts between provincial and central bodies. Once the need to strengthen the Federal Government and streamline the powers thereof with the Province and the Governorates<sup>48</sup> is honoured, it will be time to allocate gradual powers to self-government that suits the diverse Iraq and the needs of local administrations. It may be helpful to upgrade the ability to manage the regional diversities of Iraq. This is attainable through assisting the leading soft-liners of Iraq, be they individuals and/or entities. Clearly, this aims at continuing the nationwide economic and political stability via taking primary steps towards vesting powers in

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<sup>43</sup> Radha Iyengar & Jonathan Monten, 'Is There An "Emboldenment" Effect? Evidence from the Insurgency in Iraq' (March 2008) National Bureau of Economic <<http://www.nber.org/papers/w13839>> accessed 15 Feb 2014.

<sup>44</sup> Paul R Williams & Matthew T Simpson, 'Rethinking the political future: an alternative to the ethno-sectarian division of Iraq' (2009) 24 *Am U Int'l L Rev* 191.

<sup>45</sup> Article 115 of the Iraqi Constitution and which read: 'all powers not stipulated in the exclusive powers of the federal government belong to the authorities of the regions and governorates that are not organized in a region. With regard to other powers shared between the federal government and the regional government, priority shall be given to the law of the regions and governorates not organized in a region in case of dispute'.

<sup>46</sup> Christina J Sheetz & Matthew T Simpson, 'Rethinking the future: The next five years in Iraq' (2008-2009) 24 *Am U Int'l L Rev* 181.

<sup>47</sup> Sabah Al-Bawi, 'Influences of Ambiguity of Constitutional Provisions on the Administrative System of Iraq' (2012) 33 *U Pa J Int'l L*.

<sup>48</sup> For example, providing for nullifying local government measures violating federal government laws.

local administrative personnel, while ensuring better harmony with the central government. These efforts, however, must be coupled with enacting new laws and adopting new governmental measures to establish a framework allowing a fair allocation of resources nationwide.<sup>49</sup> However, former efforts must be boosted by devising joint committees aiming at taking up the level of communication between the central government and the local governments or the Provincial Government.<sup>50</sup> Yet, such committees should not serve as a replacement for the judiciary, but rather should work on settling disputes pursuant to the Constitution prior to referring them to the judiciary.

Governorates have their respective needs due to the discriminatory policy of the former regime which caused some governorates to be underprivileged.<sup>51</sup> Further, some governorates have suffered more during wartimes, particularly borderline governorates such as Basra. These conditions have led to exceptional preferences for such governorates. For example, the Petrodollar Project has been adopted to allocate to Basra one US dollar per oil barrel exported by the oil-producing governorates.<sup>52</sup> For the purposes of equality, financial preferences to poor governorates must be time-limited to meet the needs of each governorate, with these contributions dedicated to development efforts in such governorates.<sup>53</sup> Establishing a successful system for the distribution of wealth in Iraq requires a clear interpretation of Articles 111 and 112 of the Iraqi Constitution<sup>54</sup> up to enactment of the Oil & Gas Law.<sup>55</sup> As a consequent step, the central government is required to develop and enforce transparency and accountability systems that ensure a better exploitation of resources out of decentralisation;

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<sup>49</sup> Jeremy Sarkin and Heather Sensibaugh, 'Why Achieving Reconciliation in Iraq Is Possible: Suggestions for Mechanisms and Processes Including a Truth and Reconciliation Commission' (2008) 23 Fletcher J Hum Sec 15 June 2013 <<http://ssrn.com/abstract=1283729>> accessed 8 February 2014.

<sup>50</sup> Christina J Sheetz and Matthew T Simpson, 'Rethinking the future: The next five years in Iraq' (2008-2009) 24 Am U Int'l L Rev 181.

<sup>51</sup> Radha Iyengar and Jonathan Monten, 'Is There An "Emboldenment" Effect? Evidence from the Insurgency in Iraq' (March 2008) National Bureau of Economic <<http://www.nber.org/papers/w13839>> accessed 15 February 2014.

<sup>52</sup> Paul R Williams and Matthew T Simpson, 'Rethinking the political future: an alternative to the ethno-sectarian division of Iraq' (2009) 24 Am U Int'l L Rev 191.

<sup>53</sup> Jeremy Sarkin and Heather Sensibaugh, 'Why Achieving Reconciliation in Iraq Is Possible: Suggestions for Mechanisms and Processes Including a Truth and Reconciliation Commission' (2008) 23 Fletcher J Hum Sec 15 June 2013 <<http://ssrn.com/abstract=1283729>> accessed 8 February 2014.

<sup>54</sup> The Government of the Kurdistan Province insists on the "existing field" phrase in Article 112, which provides for the control of oil and gas matters by the oil-producing provincial and governorate governments. This means that newly discovered fields will be controlled directly by the relevant province and/or governorate. The Central Government, in turn, insists on Article 111 of the Constitution, which reads, "Oil and gas are owned by all the people of Iraq in all the regions and governorates." *ibid*.

<sup>55</sup> Jeremy Sarkin and Heather Sensibaugh, 'Why Achieving Reconciliation in Iraq Is Possible: Suggestions for Mechanisms and Processes Including a Truth and Reconciliation Commission' (2008) 23 Fletcher J Hum Sec 15 June 2013 <<http://ssrn.com/abstract=1283729>> accessed 8 February 2014.

otherwise, state-driven anti-red-tape efforts will grow more costly, with more chances for wider-scale corruption. The central government can play a key role in formulating public policies to attract investors, controlling the public, evaluating institutions that are in direct contact with investors, and supervising the decentralised opportunities available for investment.<sup>56</sup>

Another key point requires transparent and fair attention—the mechanism adopted to calculate Kurdistan Province’s share of the public budget. Kurdistan receives 17% of the public budget annually. Each year, this share comes under fire and is disputed by the Federal Government and the remaining governorates claiming that the Kurdistan Province was given 17% of the net public budget in 2005 due to a political deal without giving the least attention to the proportional distribution of populations across the other governorates. They further claimed that the correct percentage should be 12.5% only. As for Kurdistan, the Province has started from 2012 to claim its entitlement to a higher percentage of the budget on the grounds of a growing population. Therefore, a global census has become essential for governorates to bring these non-ending problems to an end. Establishing the transparent and fair constitutional frameworks with a view to just distribution of wealth may well contribute to alleviating the intensity of conflicts and restoring the missing trust between the various layers of government. In yet another step to boost the sense of fairness between all components, legislative frameworks must be coupled with executive measures at the Federal Government level. These measures should take the form of equal opportunities and equal access to services such as electricity, fresh water,<sup>57</sup> and employment opportunities.<sup>58</sup>

Considering all of the above, Iraq needs to restore the trust of the Province, the Governorates and minorities<sup>59</sup> through enforcement of right-enshrining legislations, while

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<sup>56</sup> Christina J Sheetz & Matthew T Simpson, 'Rethinking the future: The next five years in Iraq' (2008-2009) 24 *Am U Int'l L Rev* 181.

<sup>57</sup> During Saddam Hussein’s era, control of operation and distribution aspects of Iraq-wide electricity stations were central, ie Baghdad-based. Electricity was available in the capital and the pro-Saddam regions. In return, several Iraqi governorates were left without electricity. After 2003, and despite the growing powers over electricity stations, operation is still lagging behind needs as it accounts for only 40% of nationwide real needs. The reason behind this is the outdated electricity grid, the upgrading of which was stopped in the early 1980s, not to mention the post-2003 contract-related corruption in the electricity sector. Abdul-Hussein Tariq, *Economic Development and Workforce Planning in Iraq* (2nd edn, Dar Al Adalah 2013) 191.

<sup>58</sup> Christina J Sheetz and Matthew T Simpson, 'Rethinking the future: The next five years in Iraq' (2008-2009) 24 *Am U Int'l L Rev* 181.

<sup>59</sup> There are two key ethnicities, the Arabs and the Kurds, in addition to other ethnic and religious minorities, such as the Armenians and the Assyrians. Jeremy Sarkin and Heather Sensibaugh, 'Why Achieving Reconciliation in Iraq Is Possible: Suggestions for Mechanisms and Processes Including a Truth and Reconciliation Commission' (2008) 23 *Fletcher J Hum Sec* 15 June 2013 <<http://ssrn.com/abstract=1283729>> accessed 8 February 2014.

keeping public bodies above political clashes. Full enforcement of Article 106 of the Iraqi Constitution is a must to end many of the conflicts in Iraq. For the mechanism provided for in Article 106 to come to fruition, good governance must have the upper hand in Iraq.<sup>60</sup> Such disputes and conflicts have been a stumbling block to establishing a healthy foreign investment environment, even leading foreign investors to lose confidence in Iraqi laws. Penalties have been imposed on foreign companies owing to their agreements with Kurdistan without the consent of the federal government. These penalties have caused a hostile atmosphere between provincial councils and Kurdistan on one hand and the central ministries on the other.<sup>61</sup>

### **6.3.2 Strengthening Anti-Terrorism Efforts**

Boosting security stability is a key cornerstone to building an investment attracting environment. As far as decade long terrorism stricken Iraq is concerned, efforts of combating terrorism require the following:

#### ***6.3.2.1 Combating the Financing of Terrorism***

The government should consider adopting new legislation on confiscation of assets, money-laundering, and combating terrorism financing with a view to allowing more room for law enforcement that hinders financing terrorism and organised crime.

#### ***6.3.2.2 Fighting Terrorism According to the Rule of Law***

Iraq's anti-terrorism efforts should move ahead while focusing on the rule of law by litigating imprisoned terrorists using the applicable Iraqi laws.<sup>62</sup> The government should ensure joint responsibility of all bodies concerned with enforcing applicable laws while moving ahead with the capacity building of key government bodies and officials to combat terror and international organised crime per existing laws.<sup>63</sup> Furthermore, the government is required to work with the international community to update the laws and tools used to stand against fast-growing criminal and terrorist networks.<sup>64</sup>

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<sup>60</sup> *ibid.*

<sup>61</sup> Paul R Williams & Matthew T Simpson, 'Rethinking the political future: an alternative to the ethno-sectarian division of Iraq' (2009) 24 *Am U Int'l L Rev* 191.

<sup>62</sup> *ibid.*

<sup>63</sup> *ibid.*

<sup>64</sup> *ibid.*

It is essential to exert tremendous effort to enforce court orders and judgments and step up cooperation between the judiciary and Judgment Enforcement Office of the Ministries of Justice and Interior.<sup>65</sup> The unending prison breaks by terrorism condemned inmates must be stopped. Government officials should honour final judgments through improved administrative and criminal mechanisms.<sup>66</sup>

### ***6.3.2.3 Cooperating Widely in Counter-Terrorism Efforts***

The government should expand its cooperative efforts across its federal, provincial, and local system of government to combat terrorism, whether Iraq-based or otherwise. Careful exchanges of information between several government bodies, along with ensuring joint but carefully distributed roles and procedures between local anti-terrorism departments and all federal security agencies is the best means of combating major threats.

## **6.3.3 Combat Corruption Flu**

### ***6.3.3.1 General Framework of Combat Corruption***

Iraq is a country infested with corruption, thus becoming a major challenge to development. Consequently, this phenomenon must be addressed and contained, particularly in the present stage as Iraq looks forward to opening its doors to foreign investors. However, this will only be achieved with a sincere political will that adopts strict strategies to eradicate corruption that has become rampant across state institutions.<sup>67</sup> The key title of an anti-corruption strategy must enshrine good governance based on strong accountability authorities with full powers to monitor the performances of governmental and political bodies.<sup>68</sup> Further, such a strategy must go hand in hand with economic reforms since corruption has resulted in poor governmental performance across public services that impact the poor. Administrative corruption has led to declining human development indicators, such as in education and health sectors.<sup>69</sup> In other

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<sup>65</sup> Christina C Benson, 'Jus Post Bellum in Iraq: The Development of Emerging Norms for Economic Reform in Post Conflict Countries' (2011-2012) 11 Rich J Global L & Bus 315.

<sup>66</sup> OECD, *Supporting Investment Policy and Governance Reforms in Iraq* (OECD 2010) 9-10.

<sup>67</sup> Robert E Lutz, 'On Combating the Culture of Corruption' (2003-2004) 10 Sw J L & Trade Am 263.

<sup>68</sup> Abbas Al-Yasiri, 'Corruption in the Form of Bureaucracy: The Investment Projects as a Case Study' (2013) 79 Journal of the Kufa University 352.

<sup>69</sup> After 2003, statistics reveal that corruption has lowered human development allocations and contributed to distorted governmental expenditure, with large amounts of money dedicated to restructuring some ramshackle industrial sectors but only to no significant gains to the Iraqi economy. In turn, there have been some priority sectors that would have contributed to developing the Iraqi economy should they have received such allocations, including oil refining, sulphur-based industries, electricity generation, etc; *ibid*.

words, financial and administrative corruption in Iraq have produced a fragile rule of law and lowering governmental revenues due to higher rates of bribery, fraud, and tax evasion, as well as strong impacts on diminishing Iraq-bound foreign investments.<sup>70</sup>

Therefore, elimination of corruption is linked to the presence of a democratic system of government that provides a suitable environment for an integrated political system capable of achieving integrity.<sup>71</sup> This study claims that the multi-partisan system based on rotation of power would most likely prevent a single political wing from solely occupying positions of power, and could turn the opponent wing, with parliamentary minority, into a checking and balancing wing to the government, thus detecting the latter's faults and minimising corruption. Rotation of power holds all top government institutions accountable for their performances, thus cutting the blood lines to the key corruption artery and impunity-causing powers. Accordingly, a government would be under constant monitoring. Despite all the advantages of a democratic system, it may not, if misused, provide sufficient solutions to corruption. Democracy in post-2003 Iraq has failed to confront corruption in spite of all the achievements realised by Iraq in this respect.<sup>72</sup> However, Iraq's political rights rating came down from 5 to 6, according to the World Freedom Index 2013.<sup>73</sup> Yet, the same year witnessed Iraq bringing up the rear among Arab countries in terms of corruption rampancy.<sup>74</sup> Political quotas have been a key reason behind the distorted nascent democracy in Iraq. Thus, a balanced democratic system must be devised which is away from political quotas but capable of eliminating corruption.<sup>75</sup>

This study emphasises the need for strengthening democratic transition at both state and society levels through effective participation in monitoring and scientific execution of development projects. Another requirement is to eliminate all aspects of economic, social and

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<sup>70</sup> Abdul Malik Mahmud, 'Investment in Iraq, Reality or Illusion?' (2012) 83 *Alra'ud* magazine 8.

{ عبد الملك محمود، "الاستثمار في العراق، واقع أم وهم؟" }

<sup>71</sup> Jeffrey Coonjohn, 'Corruption in Post-Conflict Environments an Iraqi Case Study' (2012) <<http://www.kcdme.com/Corruption%20in%20Post-Conflict%20Environments%2002.02.2012.pdf>> accessed 14 Feb 2014; Nancy Birdsall and Arvind Subramanian, 'Saving Iraq from Its Oil' (2004) 83 *Foreign Aff* 77.

<sup>72</sup> Antony Blinken, 'Is Iraq on Track: Democracy and Disorder in Baghdad-Morning in Mesopotamia ' (2012) 91(4) *Foreign Aff* 152.

<sup>73</sup> Freedom House. 'Freedom in the World 2013: Iraq' (2013) <<http://www.freedomhouse.org/report/freedom-world/2013/iraq>> accessed 8 January 2014.

<sup>74</sup> Michael L Ross, 'Will Oil Drown the Arab Spring? Democracy and the Resource Curse' (2011) 90 *Foreign Aff* 2.

<sup>75</sup> Jeffrey Coonjohn, 'Corruption in Post-Conflict Environments an Iraqi Case Study' (2012) <<http://www.kcdme.com/Corruption%20in%20Post-Conflict%20Environments%2002.02.2012.pdf>> accessed 14 Feb 2014; Nancy Birdsall and Arvind Subramanian, 'Saving Iraq from Its Oil' (2004) 83 *Foreign Aff* 77.

legal discrimination between various segments of society, especially women and the elderly. Article 29, Paragraph First/A of the Iraq Constitution needs to come into full force as it alleviates poverty and achieves social justice:

The family is the foundation of society; the State preserves its entity and its religious, moral and patriotic values'. The State guarantees the protection of motherhood, childhood and old age and shall care for children and youth and provides them with the appropriate conditions to further their talents and abilities.<sup>76</sup>

A key democratic reformist principle is to promote a culture of transparency and information circulation to the public and to create an environment that encourages the public to stand up to corrupt practices and whistleblow the same. Further, and considering the long years of war and internal conflicts, there is an urgent need to boost the values of tolerance and openness to others.<sup>77</sup> Certain reasons are behind corruption rampancy, including the lack of accountability to corrupt practices, the thing that caused a larger scale of public funding misuse.<sup>78</sup> Accordingly, Iraq needs to establish a strong and independent judiciary that receives full support from an integral and efficient police so the first can investigate illegal practices and work effectively to ensure fair court-based proceedings. Equally important is to settle cases of corruption swiftly.<sup>79</sup> Undoubtedly, this requires highly qualified personnel and state-of-the-art technical and financial capabilities at the disposal of the judiciary and supporting authorities. Specific judicial procedures must be in place regarding redemption of public funds from condemned fugitives under state-fund embezzlement cases and hunting them down in conjunction with INTERPOL in order to claim illicit gains they realised.<sup>80</sup> It also necessary to have an effectively working prosecutor-general to enforce financial disclosure laws on officials and their families to ward off illicit enrichments.<sup>81</sup> The prosecutor-general is also required to enforce Article 138, Paragraph 1/C of the Iraqi Constitution, which reads: 'The Council of Representatives may remove a member of the Presidency Council with a three-fourths majority of its members for reasons of incompetence and dishonesty.'<sup>82</sup> In turn, the legislative body is

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<sup>76</sup> Constitution of the Republic of Iraq of 2005.

<sup>77</sup> Abbas Al-Yasiri, 'Corruption in the Form of Bureaucracy: The Investment Projects as a Case Study' (2013) 79 Journal of the Kufa University 352. (Translated from Arabic Language by Author).

<sup>78</sup> Ned Parker, 'Iraq We Left Behind: Welcome to the World's Next Failed State' (2012) 91(2) Foreign Aff 94.

<sup>79</sup> Nabil Jaafar, 'A Proposed Strategy to Address Corruption in the Iraqi Economy' (2012) 12 Journal of the Basra University 156. (Translated from Arabic Language by Author).

<sup>80</sup> Abbas Al-Yasiri, 'Corruption in the Form of Bureaucracy: The Investment Projects as a Case Study' (2013) 79 Journal of the Kufa University 352.

<sup>81</sup> Nabil Jaafar, 'A Proposed Strategy to Address Corruption in the Iraqi Economy' (2012) 12 Journal of the Basra University 156.

<sup>82</sup> Constitution of the Republic of Iraq of 2005.



required to closely monitor the executive power, thus preventing the latter from misusing its powers for private interests.<sup>83</sup>

Any solutions proposed to combat corruption without considering the role of media would certainly be short of sufficient. The fourth power—the media—plays a huge role in curtailing corruption in democracies considering the media's ability to freely communicate with the public and thus coming by accurate information on corrupt practices and communicating the same to citizens.<sup>84</sup> Means of mass media in Iraq are still smarting under huge hindrances related to the security and safety of media personnel and difficulties in obtaining information, thus minimising the media's ability to investigate and unveil corruption.<sup>85</sup> However, parts of the Iraqi media have been contributing to unveiling massive cases of corruption, including the corrupt practices in the oil for food programme.<sup>86</sup> To have this democratic axis developed, a law must be enacted to provide protection to media personnel and ensure easy access to information. A further necessity is to boost media independence and isolation from any political aims to ensure neutrality, on the one hand, and on the other hand, to promote transparency across media institutions to be genuinely honest in combating corruption.

The anti-corruption strategy in Iraq is required to assign a larger role to the non-governmental organisations (NGOs).<sup>87</sup> Article 43, Paragraph 1 of the Iraqi Constitution encourages the formation and work of NGOs as it reads: 'First: The State shall seek to strengthen the role of civil society institutions, to support, develop and preserve its independence in a way that is consistent with peaceful means to achieve its legitimate goals. This will be organised by law.'<sup>88</sup> This would add to the effective role assumed by civil society institutions in spotting and revealing information on corrupt practices. To ensure professional and fair NGOs, members capable of combating corruption must be nominated, and this is a

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<sup>83</sup> Nabil Jaafar, 'A Proposed Strategy to Address Corruption in the Iraqi Economy' (2012) 12 *Journal of the Basra University* 156.

<sup>84</sup> Ali Wetwet, 'The Phenomenon of Corruption in Iraq: An Analytical Study' (2007) 3 *Journal of Wasit University of Human Sciences* 407. (Translated from Arabic Language by Author).

<sup>85</sup> Zahra Mohammed, 'Ways to Combat Financial and Administrative Corruption in Iraq' (2011) 27 *Baghdad College of Economic sciences University* 295. (Translated from Arabic Language by Author).

<sup>86</sup> BBC News Channel, Wednesday, 7 September, 2005, 20:49 GMT, available at <[http://news.bbc.co.uk/1/hi/world/middle\\_east/4232629.stm](http://news.bbc.co.uk/1/hi/world/middle_east/4232629.stm)> accessed 15 Mar 2014.

<sup>87</sup> Nabil Jaafar, 'A Proposed Strategy to Address Corruption in the Iraqi Economy' (2012) 12 *Journal of the Basra University* 156. (Translated from Arabic Language by Author).

<sup>88</sup> Constitution of the Republic of Iraq of 2005.

society-based responsibility. NGOs may well assume a significant role in establishing the rule of law to protect public finances against any form of misuse.<sup>89</sup>

Taxation reforms must be effective in addressing corruption. Taxes have a significant role in many countries as one of the revenue sources that help states plan their financial policies. A successful taxation system is measured through how effective such a system is in terms of realising large amounts of money to help a state fulfil its developmental goals.<sup>90</sup> Yet, tax evasion and bribes taken by tax personnel have prevented the realisation of such goals. Accordingly, reforming the taxation system in Iraq requires a reconsideration of the ascending tax rates, which is up to 15%, applied to fixed incomes since it is a key reason behind tax evasion.<sup>91</sup> Article 28, Paragraph 1 of the Iraqi Constitution serves this purpose as it reads: 'First: No taxes or fines may be imposed, amended, exempted or pardoned from, except in accordance with law'.<sup>92</sup> In addition to disambiguation tax-related legal provisions to enable taxpayers to calculate the same, and there is a need to adopt transparency requirements to limit the power of tax officers to use estimation in putting relevant laws into force.<sup>93</sup> Tax awareness is very limited in Iraq.<sup>94</sup> Therefore, telling taxpayers that their taxes would contribute to social development is an essential means of bringing tax policies to success. Nothing less important is customs reform, which accounts for a foreign trade major component and contributes to economic development.<sup>95</sup> Therefore, customs reforms would result in higher customs revenues and minimise commodity trafficking.<sup>96</sup> A way to achieve this reform is to review certain weak provisions of the Customs Law No 23 of 1984.<sup>97</sup> The said provisions have in common the

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<sup>89</sup> OECD, *Supporting Investment Policy and Governance Reforms in Iraq* (OECD 2010) 164-167.

<sup>90</sup> Monica Bhatia and Sophie Ashley, 'How the OECD Is Promoting Tax Transparency' (2012-2013) 23 *Int'l Tax Rev* 27.

<sup>91</sup> Nabil Jaafar, 'A Proposed Strategy to Address Corruption in the Iraqi Economy' (2012) 12 *Journal of the Basra University* 156.

<sup>92</sup> Constitution of the Republic of Iraq of 2005.

<sup>93</sup> Zahra Mohammed, 'Ways to Combat Financial and Administrative Corruption in Iraq' (2011) 27 *Baghdad College of Economic sciences University* 295. (Translated from Arabic Language by Author).

<sup>94</sup> Abdul-Hussein Tariq, *Economic Development and Workforce Planning in Iraq* (2nd edn, Dar Al Adalah 2013) 7. (Translated from Arabic Language by Author).

<sup>95</sup> Nabil Jaafar, 'A Proposed Strategy to Address Corruption in the Iraqi Economy' (2012) 12 *Journal of the Basra University* 156. (Translated from Arabic Language by Author).

<sup>96</sup> Security reasons have been behind the rampant corruption across customs authorities. The poor state control over areas with armed confrontations and terrorist attacks has contributed to the weakening functional performance and blackmail by Al-Qa'dah terrorist organisation. For example, the General Customs Authority has lost control over Iraqi customs authorities across the Syrian and Jordanian borders. This has resulted in commodities flowing in and out without observing established operation controls or weight and scale fixings. Rahim Al-Uqailee, 'Corruption in Iraq hampered investment' (2012) 117 *The Judiciary* 12. (Translated from Arabic Language by Author).

<sup>97</sup> The Customs Law No 23 of 1984 published in the Official Gazette, issue 2985 of 19/03/1984. Zahra Mohammed, 'Ways to Combat Financial and Administrative Corruption in Iraq' (2011) 27 *Baghdad College of Economic sciences University* 295.

empowering of customs personnel to estimate taxes, a power that opens the door widely for corruption.<sup>98</sup> Transparent customs procedures, when it comes to fulfilment of transactions, is another urgent requirement to provide merchants, clearance agents and citizens with in-depth knowledge of what they are required to, thus helping them to avoid blackmailing and bribing. In addition, customs authorities must coordinate with other supporting governmental bodies such as border patrols and coastguards.<sup>99</sup> It is also necessary to track money crossing borders, its sources and related bank accounts to minimise money laundering which has become rampant in Iraq since 2003.<sup>100</sup> A key priority for the Iraqi Government is to adopt a strategy to effectively enforce the Anti-Money Laundering Law No 93 of 2004.<sup>101</sup> The effective enforcement mechanisms allow the Central Bank to monitor all financial institutions under its control and be committed to developing appropriate policies to scale down money laundering. The Anti-Money Laundering Intelligence Office should be vested with wide powers and report to the Central Bank while being fully independent in exercising its powers. Every effort should be made to ensure highly qualified persons are in top positions at the aforesaid Office. Stricter instructions must be given to all bodies concerned to forthwith investigate the sources of cross-border money movements. If any reason arises to doubt any such movement, the same must be brought to the knowledge of the Office.<sup>102</sup> In the same vein, and to prevent the smuggling of Iraqi oil and oil derivatives, there must be effective and rapidly enforced solutions to enable the state to contain this phenomenon.<sup>103</sup> For this to occur, an Anti-Oil Trafficking Authority could be created with fair and efficient members, while working on immediate removal of non-official ports and marinas that contribute to the phenomenon.<sup>104</sup> Better coordination between the Ministry of Oil on the one hand and the Ministry of Defence and the Ministry of Interior on the other hand is required to develop a fully-fledged plan to guard pipelines and oil

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<sup>98</sup> Abbas Al-Yasiri, 'Corruption in the Form of Bureaucracy: The Investment Projects as a Case Study' (2013) 79 *Journal of the Kufa University* 352. (Translated from Arabic Language by Author).

<sup>99</sup> Another example includes improved and more serious coordination with the Ministry of Health regarding standardisation and quality control considering its key role in unveiling contaminated goods, such as drugs and foods that may have adverse effects on citizens' health. Further, the customs police must show stronger action in combating smuggling and trafficking. This is attainable through providing police personnel with state-of-the-art devices to detect cases of fraud re cross-border commodities and goods. Zahra Mohammed, 'Ways to Combat Financial and Administrative Corruption in Iraq' (2011) 27 *Baghdad College of Economic sciences University* 295.

<sup>100</sup> Haider Ala Hamoudi, 'Notes in Defense of the Iraq Constitution' (2012) 33(5) *U Pa J Int'l L* 1117.

<sup>101</sup> Anti-Money Laundering Act No. 93 of 2004 published in the *Official Gazette*, issue 3984 of 06/01/2004.

<sup>102</sup> Nabil Jaafar, 'A Proposed Strategy to Address Corruption in the Iraqi Economy' (2012) 12 *Journal of the Basra University* 156. (Translated from Arabic Language by Author).

<sup>103</sup> Antony Blinken, 'Is Iraq on Track: Democracy and Disorder in Baghdad-Morning in Mesopotamia' (2012) 91(4) *Foreign Aff* 152.

<sup>104</sup> Zahra Mohammed, 'Ways to Combat Financial and Administrative Corruption in Iraq' (2011) 27 *Baghdad College of Economic sciences University* 295. (Translated from Arabic Language by Author).

installations and locations. At the international level, Iraq must seek to conclude agreements with neighbouring countries to cooperate on anti-trafficking/smuggling operations.<sup>105</sup>

At another level of the anti-corruption strategy in Iraq, changes and reforms must be introduced to the civil service institutions considering the numerous fields of reform required therein, such as the organisational structures of state institutions, management of civil servants' affairs, and civil service laws. This aims at replacing corrupt systems with highly qualified ones to allow room for transparency, accountability and control over government employees, and considering high performance standards for appointments. An effective governmental and administrative structure is a prerequisite for good economic performance. Institutional reforms further require widening and developing administrative training bodies to rehabilitate employees to cope with the nature of new assignments associated with governmental institution management, while observing high-integrity standards.<sup>106</sup>

Focusing on optimal techniques to use human resources and boost their role in economic processes is also required and attainable through linking salaries to productivity performance levels as much as possible.<sup>107</sup> As for employee evaluation and promotion criteria, they need objective and transparent mechanisms free from nepotism. There is also an urgent need to adopt state-of-the-art methods of combating administrative corruption, eg e-government where Internet-based ICT can be used to modernise government processes and enable as many employees as possible to have access to information.<sup>108</sup> An e-government would have better transparency and less administrative corruption as it minimises improvised actions that allow corruption. Further, an e-government increases the chances of unveiling corruption through having detailed information on financial transactions, thus allowing ample room to track corrupt practices based on information sharing between governmental institutions.

Anti-corruption efforts should also extend to the Iraqi public budget.<sup>109</sup> The public budgeting and revenue generation in Iraq focus more on the rules, procedures and regulations than on economic efficiency. Therefore, governmental financial aspects must be modernised with a view to achieving improved budget administration and lower corruption levels.

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<sup>105</sup> *ibid.*

<sup>106</sup> OECD, *Supporting Investment Policy and Governance Reforms in Iraq* (OECD 2010) 212-214.

<sup>107</sup> Abdul-Hussein Tariq, *Economic Development and Workforce Planning in Iraq* (2nd edn, Dar Al Adalah 2013) 198. (Translated from Arabic Language by Author).

<sup>108</sup> Abbas Al-Yasiri, 'Corruption in the Form of Bureaucracy: The Investment Projects as a Case Study' (2013) 79 *Journal of the Kufa University* 352. (Translated from Arabic Language by Author).

<sup>109</sup> *ibid.*

Developing the budget requires the establishing of an ad-hoc office to provide budget-relevant information with full transparency. The legislative body as well as the general public should be allowed to review the development and expenditure mechanisms to enable accountability measures against violators and detection of corrupt practices.<sup>110</sup> Another requirement is to vest state revenues and expenditure monitoring powers with the Federal Board of Supreme Audit (FBSA) and other institutional auditors to enable them to detect and address budget-related corruptions.<sup>111</sup> Periodic assessment and review mechanisms of development and investment projects must be devised to ensure accurate execution, detect squandering and losses, and consider financing priorities for the public interest. Iraq needs further efforts within the framework of boosting the legislative–auditing bodies’ relations to achieve common and integral control procedures.<sup>112</sup> Auditing bodies have experience that should be integrated with the large-scale powers of the legislative bodies through exercising their supervisory role over the executive power.<sup>113</sup> As a precaution against corruption, the budget must be passed after adding all additional increasing oil prices and other revenues to the public budget. No part thereof may be spent unless listed as part of the budget and controlled by the same procedures followed when approving the budget.<sup>114</sup>

Anti-corruption requirements entail reforming the governmental purchase and contract regulation since public tendering is a key field of large private–public transactions, thus becoming the most likely field of corruption of all forms, including bribery and quota distribution along political and/or sectarian lines.<sup>115</sup> This is reflected in the post-2003 war era, with a clear image of a failed (domestic and foreign) purchase and contract regulation that results in squandered public funding and low-quality projects.<sup>116</sup> Therefore, there is an urgent need to introduce quick reforms to minimise corrupt governmental contract practices and turn them into more efficient actions. Reforms can take the form of recommendations to the Iraqi Government to award contracts via competitive processes and transparent mechanisms.<sup>117</sup>

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<sup>110</sup> Abdul-Hussein Tariq, *Economic Development and Workforce Planning in Iraq* (2nd edn, Dar Al Adalah 2013) 199.

<sup>111</sup> *ibid.*

<sup>112</sup> Nabil Jaafar, 'A Proposed Strategy to Address Corruption in the Iraqi Economy' (2012) 12 *Journal of the Basra University* 156. (Translated from Arabic Language by Author).

<sup>113</sup> Zahra Mohammed, 'Ways to Combat Financial and Administrative Corruption in Iraq' (2011) 27 *Baghdad College of Economic sciences University* 295. (Translated from Arabic Language by Author). }

<sup>114</sup> *ibid.*

<sup>115</sup> Nabil Jaafar, 'A Proposed Strategy to Address Corruption in the Iraqi Economy' (2012) 12 *Journal of the Basra University* 156.

<sup>116</sup> Zahra Mohammed, 'Ways to Combat Financial and Administrative Corruption in Iraq' (2011) 27 *Baghdad College of Economic sciences University* 295.

<sup>117</sup> *ibid.*

Transparency is particularly required for bid-envelope opening as it should be carried out in public and in accordance with applicable disclosure rules.<sup>118</sup> Further, exercising internal and strict monitoring controls when handling bids is a must to ensure an independent legal mechanism that guarantees competition and wards off bribery-based agreements and private relationships. When it comes to auditing and supervision, Iraq needs to follow a legal mechanism to control contract awarding, execution and realisation of its developmental goals.<sup>119</sup> Further, contracts should be awarded to well-established companies with good reputation in their respective fields of operation to ensure timely execution of projects as per contract terms and conditions to avoid contract-related larcenies by fake companies or poor execution. As regards planning, contracts awarded must undergo feasibility studies to ensure their compatibility with the public economic and social development plans.<sup>120</sup>

Combating corruption requires strong political decisions and will that hold in high esteem the public interest and preservation of national resources that are being drained by corrupt practices.<sup>121</sup> Despite the importance of the reforms highlighted above, stronger trust-based relations between the government and the public must be realised through investigating previous and current corrupt practices that have harmed the public interest. Accordingly, bridging the trust gap requires practical confiscation measures against corruption-generated properties.<sup>122</sup>

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<sup>118</sup> Nabil Jaafar, 'A Proposed Strategy to Address Corruption in the Iraqi Economy' (2012) 12 *Journal of the Basra University* 156.

<sup>119</sup> *ibid.*

<sup>120</sup> OECD, *Supporting Investment Policy and Governance Reforms in Iraq* (OECD 2010) 225-231.

<sup>121</sup> Christopher J Coyne, 'The Economic Reconstruction of Iraq' (2010) SSRN <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1550867](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1550867)> accessed 15 Jan 2014.

<sup>122</sup> *ibid.*

### 6.3.3.2 Private Framework of Combat Corruption

Several agencies such as the Commission of Integrity,<sup>123</sup> the Inspector General,<sup>124</sup> and the Board of Supreme Audit<sup>125</sup> assume the burden of combating corruption in Iraq. The growing corruption rates in Iraq are due to the double-control, balance, and law enforcement standards, with actions of the judiciary and parliamentary powers also being in a similar position. All the above mentioned bodies have been pressured to achieve certain results and have hence caused damage to the overall anti-corruption system. There are key procedures that should be established by the government for effectively combating corruption.

#### 6.3.3.2.1 Strengthening Anti-Corruption Institutions

Effective leadership for any agency or organisation is determined by the employment authority. In Iraq, integrity bodies still need to boost the appointment of Commission of Integrity employees and public inspectors by the House of Representatives, as provided for in relevant law, by moving away from the political quota-based trend. Filling future vacancies by means of the random choice of public inspectors by supervising bodies (such as the best employees of the Board of Supreme Audit) would be a means of ensuring fair appointments. The same applies to the Central Bank of Iraq and Office for Reporting Money Laundering. Moreover, procedures and measures requiring determination of beneficiary owners to prevent and disclose transfers of criminal revenues should be legislatively endorsed.<sup>126</sup> Furthermore, there is an urgent need to activate and build the capacities of the Office for Reporting Money Laundering

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<sup>123</sup> Commission of integrity. 'About Commission of integrity (COI)' (2013) <[http://www.nazaha.iq/en\\_news2.asp?page\\_namper=e2](http://www.nazaha.iq/en_news2.asp?page_namper=e2)> accessed 21 Feb 2014. A key anti-corruption body, established by virtue of Decree No. 55 of 2004 issued by the Interim Coalition Authority. This Order has been abolished by enactment the Law of the Integrity Commission No. 30 of 2011 published in the Official Gazette, issue 4217 of 14/11/2011. A key distinctive feature of it is its independence from the Government and parliamentary supervision. It has been established to enforce the anti-corruption laws, public service standards, and conduct social awareness campaigns that add to stronger demand for transparent and clean leadership that can be held accountable. *ibid*

<sup>124</sup> Iraqi Oil Ministry. 'Inspector General' (2013) <[http://www.oil.gov.iq/moo/feeds.php?lang=en&page\\_name=inspector\\_&id=104](http://www.oil.gov.iq/moo/feeds.php?lang=en&page_name=inspector_&id=104)> accessed 16 Jan 2014. It is charged with conducting reviews and audits of and investigations into ministerial works to check for any abuses of power and violations of laws governing public service. *ibid*.

<sup>125</sup> The oldest controlling institution as it dates back to 1927 as per Law No. 17. *See* Board of supreme Audit. 'Board's law' (2013) <[http://d-raqaba-m.iq/pages\\_en/about\\_law\\_e.aspx](http://d-raqaba-m.iq/pages_en/about_law_e.aspx)> accessed 9 Mar 2014. Formerly the Public Audit Office, it aims at conducting financial auditing to check corruption, fraud, and misuse of public funds for the purposes of disbursement and use. *ibid*.

<sup>126</sup> According to Article 52 of The Uncac Convention, The Convention text is available online at <[http://www.unodc.org/pdf/corruption/CoC\\_LegislativeGuide.pdf](http://www.unodc.org/pdf/corruption/CoC_LegislativeGuide.pdf)> accessed 17 Feb 2014.

of the Central Bank of Iraq and develop new systems to settle conflicts of interest between the integrity officers.<sup>127</sup>

### **6.3.3.2.2 Improving Accountability**

Better accountability practices require the adoption of a group of measures, such as annual submission of financial statements to the Board of Supreme Audit and House of Representatives, regulating disclosures of income and ensuring submission to the Commission of Integrity, including capacity building to use such disclosures to expose corruption, and developing integrity, accountability, and control capacities of parliament members and governorate board members, particularly in major fields such as oil and gas, public finance, public expenditure constraints, corruption, and law enforcement.<sup>128</sup> Similarly, the containment of political influence to weaken the control and influence of government employees is required.<sup>129</sup> Financing political parties and disclosure of sources thereof should be regulated. The enforcement of effective anti-corruption measures at supreme levels (including imprisonment sentences commensurate with relevant crimes), prevention of criminal revenues from falling into the hands of corrupt persons, and development and enforcement of long-term capacity-building programmes for combating the corrupt practices of government officials at all levels of civil service are required. In addition, government capacity should be enhanced to combat corruption and nepotism through the promotion of a professional civil service that adopts transparent policies of human resources management, including the existing efficiency-based systems and clarifying the role of the applicable Code of Conduct.<sup>130</sup> Iraq needs sustained assistance to establish an anti-money-laundering system in order to detect, investigate, freeze, confiscate, and return lost assets and to immediately boost initial legal cooperation with neighbouring countries and countries further from its borders. These steps should be followed by a list of public officials to be monitored and developed in this respect. Finally, control, monitoring, and supervisory bodies need a better level of inter-coordination, especially between the Board of Supreme Audit and Commission of Integrity.<sup>131</sup>

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<sup>127</sup> Zahra Mohammed, 'Ways to Combat Financial and Administrative Corruption in Iraq' (2011) 27 Baghdad College of Economic sciences University 295. (Translated from Arabic Language by Author). }

<sup>128</sup> Nabil Jaafar, 'A Proposed Strategy to Address Corruption in the Iraqi Economy' (2012) 12 Journal of the Basra University 156. (Translated from Arabic Language by Author).

<sup>129</sup> Zahra Mohammed, 'Ways to Combat Financial and Administrative Corruption in Iraq' (2011) 27 Baghdad College of Economic sciences University 295.

<sup>130</sup> Nabil Jaafar, 'A Proposed Strategy to Address Corruption in the Iraqi Economy' (2012) 12 Journal of the Basra University 156. (Translated from Arabic Language by Author).

<sup>131</sup> Rahim Al-Uqailee, 'Corruption in Iraq hampered investment' (2012) 117 the judiciary 12. (Translated from Arabic Language by Author).



### **6.3.3.2.3 Complying with International Commitments**

Despite approving the United Nations Convention against Corruption by virtue of Law No. 35 of 2007, Iraqi legislators are required to adopt all necessary measures to ensure effective enforcement of the said Convention and observe the provisions thereof in all laws enacted thereby.<sup>132</sup> To achieve this goal, it is time to approve Article 12 of the Convention, which regulates mechanisms of control, supervision, and accountability adopted by the State in cooperation with the private sector. Furthermore, working on harmonising internal codes of conduct for public servants and internationally and regionally approved rules is a must.<sup>133</sup> Other measures Iraq needs to undertake include international cooperation to combat money-laundering crimes and coordinate efforts for the same, approval of the principle of exchangeable international judicial assistance and international cooperation in criminal and civil fields, and confiscation of corruption-generated revenues and returning the same to the country of origin. Finally, electronic means for detecting and following up on corruption and cross-border corruption-generated revenues must be implemented.<sup>134</sup>

## **6.4 Upgrades Needed for Institutions and Sectors**

### **6.4.1 Public Sector Modernisation**

Good governance and sound government are key prerequisites for success in any field, including economic growth leading to social welfare and realisation of justice among citizens.<sup>135</sup> Good decision making is a key mainstay for development. Accordingly, good governance is a large-scale concept that covers mechanisms, processes, relations and institutions through which citizens can express their interests, exercise their rights and duties, and settle their disputes. Considering that wide-range concept, an investment environment can be reformed only through developing the capacities of a country across all sectors and at all levels.<sup>136</sup> Governance structure differs from time to time and from one place to another, not to

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<sup>132</sup> Robert E Looney, 'Reconstruction and Peacebuilding under Extreme Adversity: The Problem of Pervasive Corruption in Iraq' (2008) 15 *Int'l Peacekeeping* 424.

<sup>133</sup> Nabil Jaafar, 'A Proposed Strategy to Address Corruption in the Iraqi Economy' (2012) 12 *Journal of the Basra University* 156.

<sup>134</sup> *ibid.*

<sup>135</sup> Cristina-Dana Mitu, 'Study on the Role of Public Administration in the Modernization of State' (2012) 4 *Contemp Readings L & Soc Just* 527.

<sup>136</sup> *ibid.*

mention the topics thereof. Therefore, it is a 'flexible' concept. However, it will be dealt with here as far as Iraqi investment environment reforms are concerned.<sup>137</sup>

While economic diversification and boosting the private sector are the foundations of growth with a view to successful models, they can come to fruition only with reforms and public sector reforms.<sup>138</sup> The Iraqi government structure is infested with over-centralism, overlap between positions, poor coordination between ministries, outdated data systems and lack of analyses thereof, masked unemployment across various governmental institutions, and lack of sound mechanisms for citizens to be involved with decision making.<sup>139</sup> Consequently, reforms require modernisation of the functional structure of state institutions, regulation of relations between them, and creation of a professional and effective system that ensures participation by, and representation of, all citizens. Reforming the public sector requires building more capacities to create a successful management and crisis-responding system. Development necessities require private sector employment generation through enabling the private sector rather than ignoring it amidst the overwhelming public sector.<sup>140</sup> Developing the civil services is a major concern if the state is determined to upgrade its capacities, enforce accountability, respond to changes, and honour its obligations to developmental targets, particularly at a time when the government seeks to attract foreign investors. Commitment to reforming investment commissions and authorities, through a top-down reform model, is the key to introducing changes to various levels of administration.<sup>141</sup>

An essential aspect of governmental sector reform efforts in Iraq is to check records to exclude persons with no experience and integrity. Thousands of employees have been used in the public sector after 2003 on the basis of loyalty to the ruling parties or bribery. This has had negative impact on the performance of public institutions and created a state of conflict between employees who looked for top government management positions. This relapse in the Iraqi public sector requires a comprehensive approach to address institutional reforms. Purging Iraqi public institutions is complicated and extremely challenging.<sup>142</sup> Accordingly, sustainable

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<sup>137</sup> Christopher J Coyne, 'The Economic Reconstruction of Iraq' (2010) SSRN <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1550867](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1550867)> accessed 15 Jan 2014.

<sup>138</sup> Paul R Williams and Matthew T Simpson, 'Rethinking the political future: an alternative to the ethno-sectarian division of Iraq' (2009) 24 Am U Int'l L Rev 191.

<sup>139</sup> *ibid.*

<sup>140</sup> Abdul-Hussein Tariq, *Economic Development and Workforce Planning in Iraq* (2nd edn, Dar Al Adalah 2013) 244. (Translated from Arabic Language by Author).

<sup>141</sup> *ibid.*

<sup>142</sup> Abbas Al-Yasiri, 'Corruption in the Form of Bureaucracy: The Investment Projects as a Case Study' (2013) 79 Journal of the Kufa University 352. (Translated from Arabic Language by Author).

reforms should involve effective measures to streamline the performance of employees at public institutions, and an assessment of how committed employees are to professional and behavioural standards of public positions (top among which are non-profiteering from public positions and financial integrity), all of which are key requirements of any reform meant for the Iraqi public sector.<sup>143</sup> The other field of reform may include the adoption of new and effective monitoring and follow-up measures, effective handling of complaints, reforming legal frameworks which regulate the disciplinary measures, creating guiding codes of conduct, offering fair and sufficient salaries, and providing appropriate equipment and infrastructure. It is equally necessary to conduct a comprehensive assessment of cancelling or creating new institutions.<sup>144</sup>

The Iraqi public sector faces the crisis of transformation from a central to an open economy. The institutional context is now perplexed and blundering. In many cases, the public sector has remained for very long time, and still employs a large number of employees beyond its real needs.<sup>145</sup> Therefore, the study suggests that re-planning the role of public institutions is a key point in scheduling reforms. The socialist background of the public sector institutions should be changed into open economy institutions, as the establishment of the latter will contribute strongly to reforming the Iraqi investment climate in two ways: (1) the pro-open economy institutions can assume a critical role in encouraging the private sector, which has been weakened by the socialist decades-long approach; and (2) an open economy would require rescinding the formerly adopted socialist legislations that were appropriate to the work of several public centrally minded institutions.

#### **6.4.2 Remove Bureaucratic Obstacles**

The key suggestion for a reformist plan starts with the initiation of a comprehensive scheme concerning the Law of Civil Service and Public Administration. This scheme should enhance the links between civil service and administrative reforms, enhance public finance management, and build provincial capacities to provide non-central services.<sup>146</sup>

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<sup>143</sup> Zahra Mohammed, 'Ways to Combat Financial and Administrative Corruption in Iraq' (2011) 27 Baghdad College of Economic sciences University 295.

<sup>144</sup> *ibid.*

<sup>145</sup> Abdul-Hussein Tariq, *Economic Development and Workforce Planning in Iraq* (2nd edn, Dar Al Adalah 2013) 248. (Translated from Arabic Language by Author).

<sup>146</sup> OECD, *Supporting Investment Policy and Governance Reforms in Iraq* (OECD 2010) 28.

Reforms of the Law of Civil Service should adopt the key values of modern management, namely efficiency-based appointments; performance assessments and evaluations; successful planning; role determination; delineation of responsibilities and relationships between civil servants, ministers, and other elected officials; and codification of ethical values and standards for the benefit of the society.<sup>147</sup> In addition, there is a need to establish secondary legislation to strengthen the civil service compliance framework and links between civil service and administrative reforms.<sup>148</sup>

In a nutshell, Iraq needs to establish integrated e-governance to wipe out forms of financial and administrative corruption and provide services (absent red tape) to investors through state-of-the-art e-portals across public institutions.<sup>149</sup>

### **6.4.3 Rehabilitation Infrastructure**

The Iraqi Government should take up achieving good economic growth ratings as a key priority, an endeavour that requires a comprehensive and advanced programme to develop and enhance the existing infrastructure. The major challenge to this programme is the electricity sector because securing current and future electricity needs by the most cost-efficient means is inevitable to push forward the country's economic growth and reduce production costs.<sup>150</sup>

To upgrade the infrastructure in Iraq, the government should establish a supreme council for the reconstruction of infrastructure with the mission of planning, overseeing, and coordinating efforts of the concerned ministries in accordance with an explicit future vision. The proposed council needs specialist management in the field of infrastructure and economy. Further, the Iraqi infrastructure database should have complete and continuously up-to-date data. In addition, there must be a specialist bank concerned primarily with financing various infrastructure projects for low interest rate loans while seeking to manage such loans in a manner that secures necessary liquidity for infrastructure service projects without compromising the development of such services on the grounds of lack of necessary liquidity.<sup>151</sup> Meanwhile, there must be deliberate and constant endeavours to encourage

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<sup>147</sup> Abbas Al-Yasiri, 'Corruption in the Form of Bureaucracy: The Investment Projects as a Case Study' (2013) 79 *Journal of the Kufa University* 352. (Translated from Arabic Language by Author).

<sup>148</sup> *ibid.*

<sup>149</sup> *ibid.*

<sup>150</sup> Hussein Tamimi. 'Iraq Needs to Rehabilitate and Expand Infrastructure Investment through the Gate' (2013) <<http://nenospace.forumotion.com/t973-iraq-needs-to-rehabilitate-and-expand-infrastructure-investment-through-the-gate>> accessed 22 March 2014. (Translated from Arabic Language by Author).

<sup>151</sup> Abdul-Hussein Tariq, *Economic Development and Workforce Planning in Iraq* (2nd edn, Dar Al Adalah 2013) 250. (Translated from Arabic Language by Author).

infrastructure-based investments in accordance with modern finance schemes such as concession and management contracts, which secure private sector involvement by realising double digit return ratings in return for provision of quality services and maintenance for such projects. Unequivocally, this requires a competitive approach, private sector involvement, fewer restrictions to these markets, and regulation of the same as per market economy rules.<sup>152</sup>

#### 6.4.4 Developing the Iraqi Financial Market

There are a number of key recommendations to enhance the Iraqi financial market, the most significant among which is increasing cooperation opportunities between Iraqi financial market components in terms of their respective services and amending the existing financial and banking legislations that regulate and control operations of non-banking economic institutions to ensure compatibility with market-driven economy requirements, develop performance among such institutions, use E-Systems to run their work, and ensure sufficient legal guarantees to win investors' trust.<sup>153</sup> Relevantly, an extensive durable database must be created for public entities in the Iraqi financial market to enable decision makers to make objective decisions regarding entities working therein. Another key step is providing a non-banking financial entity friendly investment climate by encouraging the creation of market-making companies, investment guarantors, and finance companies, including small and medium loan companies.<sup>154</sup> Further, banks and companies must be encouraged to issue bonds allowed under Companies Law No. 21 of 1997, as doing so is a key tool to increasing capital and developing investment awareness of good revenues.<sup>155</sup> Working on developing clear mechanisms and directives to transform the central Iraqi economy to a market-driven economy adds up to taking the aforementioned steps. These actions would help dispel the ambiguities, difficulties, and gaps posed by such transformation during the transitional period.<sup>156</sup>

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<sup>152</sup> *ibid*; Rahim Moloo and Alex Khachaturian, 'Foreign Investment in a Post-Conflict Environment' (2009) 10 J World Investment & Trade 341.

<sup>153</sup> Abdul-Hussein Tariq, *Economic Development and Workforce Planning in Iraq* (2nd edn, Dar Al Adalah 2013) 201; Christopher J Coyne, 'The Economic Reconstruction of Iraq' (2010) SSRN <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1550867](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1550867)> accessed 15 Jan 2014.

<sup>154</sup> Sameeksha Desai, *Post-conflict Microfinance: Assessment and Policy Notes for Iraq* (JENA Economic Research Papers 060, September 2007) 9-11.

<sup>155</sup> Latif Jabr Koman, *Commercial Companies: A Study in Iraqi law* (Mustansiriya University 2008) 150. (Translated from Arabic Language by Author).

<sup>156</sup> Abdul-Hussein Tariq, *Economic Development and Workforce Planning in Iraq* (2nd edn, Dar Al Adalah 2013) 224.

As far as banks are concerned, the banking sector is the main finance channel for investments in Iraq. Consequently, banking and investment activities are indivisible components for sustainable development. Banking reforms can be realised through creating a financial system capable of mobilising finances and redistributing them to serve investment activities. Reforms can seek to restructure and introduce drastic changes to the banking sector in Iraq with a view to mobilising domestic savings, minimising capital migration, and attracting a part of foreign investment inflows.<sup>157</sup> For financial and banking system reforms to be effective, they must form part of a more comprehensive strategy of change and structural economic reforms across the national economy.

The key requirement here is for the banking reforms to take effect gradually,<sup>158</sup> starting from governmental then private banks to all components of the financial and banking sector, including non-banking financial institutions as well as monetary and financial market components.

The reformist suggestion is envisaged through establishing a banking reform authority to develop reform policy. The general framework of the authority starts with diagnosing the current limitations and ends with developing a list of the laws and procedures requiring amendment, rescission or replacement with new laws that should thereupon be submitted to the Parliament for consideration and passing. As for upgrading the banking sector in order for it to be more effective, attention to the following considerations is required: Firstly, credit, risk and liquidity assessment as per the Basel Committee on Banking Supervision in terms of efficiency and efficacy. Secondly, ensuring better supervision and computer systems to establish transparency pursuant to internationally approved standards. Thirdly, developing an efficient insurance system for bank deposits. Then, allowing banks to set banking services fees on a competitive basis to bring about better banking services. Next, introducing higher paid and authorised capital maximum so as to enable banks to fulfil their present and future commitments—a step that will enable Iraqi banks to act swiftly on capital transfers and create a safety indicator for banking conditions as per the standards of the said Basel Committee.<sup>159</sup>

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<sup>157</sup> *ibid.*

<sup>158</sup> This could be through selecting a bank to be a reform model to be adopted by other banks. The bank so selected would adopt modern means of banking and financial service marketing; *ibid.*

<sup>159</sup> The Basel Committee on Banking Supervision is a forum for regular cooperation to enhance understanding of main supervisory issues and improve the quality of banking supervision on an international scale. The Bank for International Settlements (BIS). 'Basel Committee on Banking Supervision' (2013) <<http://www.bis.org/bcbs/>> accessed 8 January 2014.

Lastly, reconsidering the banking accounting system to upgrade the same to accommodate all businesses and modern banking services.

The other proposal is all about creating an association for all private banks, to be called ‘The Iraqi Banks Association’ which will serve as the voice of these banks and as a link between the private banking sector and the international banking sector. A banking development institute should be established and tasked with the mission to develop research papers and studies and build the capacities of employees as well as those wishing to work for both private and public banks. There should be a continuous training mechanism approved to build the capacities of the bank employees and cope with developments in international banks that have come to compete with the Iraqi banks in the local market, while focusing on training new recruits in line with specialist promotion training courses. Training missions should be assigned to international banking think-tanks in order to come into contact with latest technologies and transfer international experiences to emerging Iraqi banks. Other aspects of banking reforms may be with a view to enhancing the banking culture. This requires a wider-scale use of Automated Teller Machines (ATMs) and e-payment authorisation, and providing better banking services through adopting the scientific principles of borrowing as established by international banks. Further, the government should not interfere with credit facilities but rather leave the whole matter to banks according to internationally applicable banking standards. The Central Bank should be independent—an objective achievable through avoiding any government interference with the key functions of the Central Bank, that is, enforcement of the monetary policy which is economy-based and thus having no room for government/political interference.<sup>160</sup> Meanwhile, the governmental banks must keep continuous their partnership with private banks, especially in the short term, while avoiding any banking market upheavals caused by abrupt withdrawal by major and most influential governmental banks such as Al-Rafidein and Al-Rashid banks.<sup>161</sup> However, for the time being, the aforesaid governmental banks may be allowed full freedom to take economic decisions away from the central government. In turn, governmental banks would be responsible for their integrated financial performance during the transition period into private sectors. Established

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<sup>160</sup> Abdul-Hussein Tariq, *Economic Development and Workforce Planning in Iraq* (2nd edn, Dar Al Adalah 2013) 205; Anthony H Cordesman, 'Economic Challenges in Post-Conflict Iraq' (2010) Center for Strategic & International Studies 2012 <[http://csis.org/files/publication/100317\\_IraqEconomicFactors.pdf](http://csis.org/files/publication/100317_IraqEconomicFactors.pdf)> accessed 25 January 2014.

<sup>161</sup> Sahar Nasr, *Iraq: Banking Sector Reform: Implementation Status & Results* (The World Bank P113337, 2013) 2.

economic freedom, when taking decisions by governmental banks, would provide the necessary climate prior to transformation into full privatisation of the banking sector.<sup>162</sup>

Privatisation of the Iraqi banking sector requires enhanced competitive edge to stand up to openness in the outer world. Accordingly, the Iraqi banking sector must be up to international competition standards, particularly in financial and banking services. Competitiveness-enhancing factors for Iraqi banks, in addition to the above, are: Firstly, assuming the role of comprehensive banks instead of sector-based or functional performance adopted by most banks prior to banking liberalisation. Comprehensively performing banks assume all traditional and non-traditional functions (specialist, investment and business banks) through diversifying their businesses and functions to meet the needs of each and every client.<sup>163</sup> Consequently, such banks work on diversifying their sources of finance, mobilising as many savings as possible across all sectors, providing credit services to all sectors, and providing various and renewing services.<sup>164</sup> This involves upgrading banking financial services via updating present banking services or developing new services such as e-commerce, joint loans, deposit certificates, supporting debts, leasing and other similar services. Secondly, moving to mergers to capitalise on size advantages, as some banks find themselves incapable of keeping up with market competitiveness mainly due to size considerations and the inability to face risks associated with their banking activities. This trend of action would enhance the competitiveness across the Iraqi financial market, particularly as Iraqi banks are open to international commercial banking in post-2003 Iraq.<sup>165</sup>

#### **6.4.5 Activating the Role of Investment Commissions**

For addressing institutional obstacles, it is hereby suggested to introduce a “Liaison Department” to serve as a linking point between the NIC and other ministries and bodies concerned, for better understanding and coordination. The suggested structure of such Liaison Department is based on assigning the management thereof to the NIC, with deputy ministers accounting for other members.<sup>166</sup> Ministries that are directly concerned, such as the Ministries

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<sup>162</sup> Bart S Fisher, 'Investing in Iraq: Legal and Political Aspects' (2004-2005) 18 *Transnat'l Law* 71.

<sup>163</sup> Christina C Benson, 'Jus Post Bellum in Iraq: The Development of Emerging Norms for Economic Reform in Post Conflict Countries' (2011-2012) 11 *Rich J Global L & Bus* 315.

<sup>164</sup> *ibid.*

<sup>165</sup> Anthony H Cordesman, 'Economic Challenges in Post-Conflict Iraq' (2010) Center for Strategic & International Studies 2012 <[http://csis.org/files/publication/100317\\_IraqEconomicFactors.pdf](http://csis.org/files/publication/100317_IraqEconomicFactors.pdf)> accessed 25 January 2014.

<sup>166</sup> Mohammed Al-Musawi, 'Weaknesses in the Performance of Investment Commissions' (2013) 18 *Baghdad of Legal Science* 350. (Translated from Arabic Language by Author).



of Finance, Planning, Housing and Construction, and Industry, should be introduced as members of the suggested Department along with other members belonging to the ministries and bodies as needed in a manner commensurate with their roles in support investment projects.

This study suggests entrusting the Ministry of Finance with obtaining approvals from the ministries and government bodies in the course of any potential investments. This is because the Ministry of Finance owns all public lands that are not allotted to other ministries or bodies. Thus, the Ministry of Finance is supposedly responsible for the determination of all land available for investments, contacting other ministries to ensure that these are free of current or proposed activities by such ministries, and establishing the viability of introducing investments thereto. This suggestion ensures full knowledge and determination of the lots available for investment and thus enhances investment planning and promotion. Another benefit is minimising the red tape associated with obtaining a host of ministerial approvals.

## **6.5 Reforming Laws and Enhancing Adjudicative Capacity**

The purpose of this subsection is to seek the relevant benefits and offer them in the form of a “guiding manual” for the Iraqi Government for use in order to handle its investment-environment problems, mainly by amending and modernising investment environment laws.

### **6.5.1 Activation of the Protection of intellectual Property**

At the centre of the reform efforts is the establishment of effective institutions to deter violations against intellectual property rights, which should begin in conjunction with the launch of a public awareness campaign to respect these rights.<sup>167</sup> In a related development, unifying the rules of property rights scattered in several laws under a single law is also necessary. Likewise, legal wording contained in the legislation of property rights should be clear and not allow for more than one interpretation. Additionally, the country’s intellectual property laws should be identical to the provisions of the TRIPS agreement. These reforms as well as their role in the protection of intellectual property will lead to the acceleration of Iraq’s accession to the WTO.<sup>168</sup>

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<sup>167</sup> Abdul Malik Mahmud, 'Investment in Iraq, Reality or Illusion?' (2012) 83 *Alraúd* magazine 8. (Translated from Arabic Language by Author).

<sup>168</sup> Bashar Hikmet Malkawi, 'Iraq's Accession to the WTO: Commitments and Implications' (2007) 6(2) *JITLP* 14.

### 6.5.2 Enforcement of International Arbitration Awards

The Iraqi Investment Law allows for national arbitration as per Iraqi laws or international arbitration through referral to any internationally recognised arbitration body, as provided for under Article 27/4.<sup>169</sup> However, this Article is inconsistent with provisions of the Law on Enforcement of Foreign Judgments in Iraq No. 30 of 1928 because it does not include any provision for enforcing foreign arbitration judgments in Iraq.<sup>170</sup> Furthermore, Article 1 of the aforesaid law requires that for a foreign judgment to be enforced in Iraq, it needs to be issued by a foreign competent court formed outside Iraq.<sup>171</sup>

As long as there is no law allowing for the enforcement of foreign judgments, Article 27/4 of the Iraqi Investment Law is futile. This is further complicated by the fact that Iraq is not a party to international conventions on arbitration. Consequently, as a procedural guarantee for settlement of investment disputes, efficient arbitration is up to standard in Iraqi legislation. Therefore, this paper proposes amendment of Law No. 30 on Enforcement of Foreign Judgments in Iraq of 1928 in order to provide for enforcement of arbitration judgments as per the terms and conditions required thereof.<sup>172</sup>

The above analysis clarifies that the enforcement mechanism of foreign arbitration decisions has terminated all efforts exerted to identify or develop effective settlement mechanisms for foreign investment disputes in Iraq.<sup>173</sup> Therefore, signing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York 1958, has become inevitable because arbitration clauses in foreign contracts require enforcement of arbitration awards.<sup>174</sup> This shall become a reality only by joining the said Convention, entering into bilateral international agreements, or enactment of a new Iraqi arbitration law.

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<sup>169</sup> Reporting that Article 27, Paragraph 4 of the Investment Law No. 13 of 2006 stipulates that “If one of the parties to a dispute is subject to the provisions of this law, they may, at the time of signing the agreement, agree on a mechanism to resolve disputes including arbitration pursuant to the Iraqi law or any other internationally recognized entity”.

<sup>170</sup> Abdul Hamid El Ahdab & Jalal El Ahdab, *Arbitration with the Arab Countries* (Kluwer Law International 2011) 251.

<sup>171</sup> Saleh Majid, 'Arbitration in Iraq' (2004) 19 Arab L Q 267.

<sup>172</sup> Abdul Hamid El Ahdab & Jalal El Ahdab, *Arbitration with the Arab Countries* (Kluwer Law International 2011) 251.

<sup>173</sup> Hamzeh Haddad, 'Enforcement of Foreign Judgments and Award in Jordan and Iraq' (1989) 2013 <<http://www.aiadr.com/aiadr%20re/2.pdf>> accessed 5 Feb 2014.

<sup>174</sup> *ibid.*

### **6.5.3 Promote Independence and Capabilities of the Judiciary**

Iraqi courts are key players in investment dispute settlements. Accordingly, it is imperative for the courts to have the power to deal with foreign investment contracts. This shall be a key milestone to back up upgrading capacities and establishing judicial independence and security.

#### ***6.5.3.1 Boosting Judicial Independence***

In seeking an independent judiciary, there is a dire need to provide a sufficient number of judges and judicial courts to boost the course of civil and commercial proceedings. Through judicial education and capacity building, the SJC will be able to maintain high professional standards for new judges. The much sought after independent judicial system can be shielded from political influence by enforcing laws that provide immunity to the judiciary. In addition, a relevant suggestion is making more information and statistics regarding cases available to the general public in order to spread awareness on legal culture and judicial transparency.<sup>175</sup>

#### ***6.5.3.2 Upgrading Judicial Capacities***

Judicial newcomers' capacities must be built alongside efforts to educate current judges through systemic training, continuous learning, and updating relevant curricula. The Judicial Development Institute assumes a key role in such continuous learning efforts. Long-term activities can be technologically updated along with state-of-the-art means of reviewing and presenting cases.<sup>176</sup> Advanced training for the judiciary in commercial and civil laws, as well as effective use of the commercial structure of cases and handing down judgments are among areas of desired development.<sup>177</sup> Additionally, commercial and civil legal proceedings must be upgraded to promote a scientific and technical court environment. Systemic reviews and continuous improvements in enforcement of judgments (especially foreign arbitration judgments) and court orders will contribute to better judicial capacities.<sup>178</sup>

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<sup>175</sup> American Bar Association, 'Judicial Reform Index for Iraq' (July 2006) <<https://apps.americanbar.org/rol/publications/jri-iraq-2006.pdf>> accessed 12 Mar 2014.

<sup>176</sup> *ibid* 25-27.

<sup>177</sup> *ibid*.

<sup>178</sup> Medhat Al-Mahmoud, *The Judiciary in Iraq* (3rd edn, Judicial Institute 2011) 127. (Translated from Arabic Language by Author).

### **6.5.3.3 Enhancing Judicial Security**

Judicial reforms in Iraq require short-term consideration of the joint responsibility of the Supreme Judicial Council (SJC) and the Ministry of Interior (MoI) for judicial security. This objective is attainable via a judicial security plan clarifying the MoI's or SJC's responsibility for judicial security. This plan shall cover details of personal security, court security, and safe and secure houses for judges.<sup>179</sup>

## **6.6 Initialise Private Sector and Society**

### **6.6.1 Support the Private Sector**

The private sector is the backbone of any market-oriented economy, with a huge role in allocating resources and channelling them into the most efficient uses, in addition to adopting an open approach towards the global economy and capitalising on appropriate opportunities in this respect.<sup>180</sup> Yet, and despite the seemingly adopted open door policy in post-2003 Iraq, the private sector has not been allowed effective room in reconstruction efforts in Iraq. The private sector in Iraq is still weak because it has been denied the role of a real development partner.<sup>181</sup> The Iraqi National Development Plan 2010–2014 stresses the public–private partnership in various forms of partnership such as concession agreements.<sup>182</sup> The aforesaid plan also includes opening the door for direct and indirect foreign investments, while continuing with developing law and legislations which regulate governmental measures and promote a competitive edge for Iraq in dealing with businessmen and investors.<sup>183</sup> However, facts indicate that the public sector still receives a ‘most-favoured’ treatment in the fields where it competes with the private sector. Added to this is the inability of the banking sector to assume a bigger role in widening the credit circle and providing loans necessary to encourage medium-and small-scale enterprises. This has claimed its toll on strengthening the private sector to assume its key role in a market-oriented economy.<sup>184</sup>

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<sup>179</sup> *ibid.*

<sup>180</sup> Surya P Subedi, *International Investment Law: Reconciling Policy and Principle* (Hart Publishing 2008) 166.

<sup>181</sup> Anthony H Cordesman, 'Economic Challenges in Post-Conflict Iraq' (2010) Center for Strategic & International Studies 2012 <[http://csis.org/files/publication/100317\\_IraqEconomicFactors.pdf](http://csis.org/files/publication/100317_IraqEconomicFactors.pdf)> accessed 25 January 2014.

<sup>182</sup> The Iraqi Ministry of Planning, *Development Plan 2010-2014* (319/12, 2009) 109.

<sup>183</sup> *ibid* 109-111.

<sup>184</sup> Anthony H Cordesman, 'Economic Challenges in Post-Conflict Iraq' (2010) Center for Strategic & International Studies 2012 <[http://csis.org/files/publication/100317\\_IraqEconomicFactors.pdf](http://csis.org/files/publication/100317_IraqEconomicFactors.pdf)> accessed 25 January 2014.

In fact, reformers should understand that the economic imbalances are largely due to the weak performance of the ministries and public governmental bodies. Therefore, is it inevitable to promote the private sector and pave the way for the same to assume its role in upgrading the efficacy of the national economy through optimal use of resources and increasing the ability of the Iraqi economy to adapt flexibly, particularly to the rapid technical and economic changes worldwide?<sup>185</sup> The above objective can be achieved by increasing the contribution of the non-oil private sector in the Gross Domestic Product (GDP) in the manner that reflects the leading role of the private sector in diversifying the economy away from the oil exports. Promoting a strong private sector would increase its relative contribution to external trade through higher incentives and technical aids that are to upgrade its competitiveness in global markets. Moreover, private investments would alleviate financing burdens assumed by the government especially when it comes to infrastructure projects. Finally, private sector contribution would bring about better service sectors (the management of which has been a failure at the hands of the government) including transportation, electricity and water.<sup>186</sup>

### **6.6.2 Corporate Governance**

Adopting joint stock company governance in Iraq is a critical requirement to deal with cases of financial and accounting corruption, particularly when it comes to developing financial reports and adopting high-quality standards in the field of measurement and accounting disclosure.<sup>187</sup> No less important is the necessity to have a clear stance on shareholders' as well as others stakeholders' rights. Conversely, another key requirement is to clearly and explicitly identify the responsibilities of directors and key executives, while boosting the independence of auditors, and upgrading necessary accounting processes by means of a unified computerised system that is compatible with international accounting standards.<sup>188</sup>

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<sup>185</sup> It is noteworthy that a wider private contribution to the national economy, through financing some economic activities and enlarging its involvement in the economic development and enabling it to assume its role in investments and financing side by side with sectors qualified for economic contribution, is not a sufficient requirement to bring development to fruition and diversify the economic base unless there is an appropriate economic climate that encourages increasing investment across such sectors. Abdul-Hussein Tariq, *Economic Development and Workforce Planning in Iraq* (2nd edn, Dar Al Adalah 2013) 49. (Translated from Arabic Language by Author).

<sup>186</sup> *ibid* 213-215.

<sup>187</sup> Sahar Nasr, *Republic of Iraq: Financial Sector Review* (The World Bank 2012) 76.

<sup>188</sup> *ibid* 84.

Adopting company governance in Iraq, and enforcement of relevant principles such as the analytical review of the legal and supervisory framework governing such companies, is required to identify how contributory the same is to establishing these principles and revealing the shortcomings thereof.<sup>189</sup> These reform-requiring shortcomings are the promotion of shareholders' rights in terms of their representation at annual general assembly meetings and their role in discussions and decisions related to meeting agendas. Such needed reform relates to providing shareholders with necessary information on meeting agendas, financial report briefings, the auditor's report, the management report, and any other information that may have a strong impact on their investment decisions.<sup>190</sup> In addition, disclosure and transparency requirements, as well as those of adopting internationally accredited auditing and accounting standards, must be fulfilled. There is also unquestionable need to clearly identify independence terms for directors, board-related committee members and auditors.<sup>191</sup>

In light of the above, this study recommends the formation of an independent action committee concerned with corporate governance.<sup>192</sup> Such committee should consist of experts, professionals and representatives from both the private and public sectors in Iraq with a view to achieving a better understanding of corporate governance issues and realising the changes sought after across various fields according to the following: Firstly, accounting and auditing fields that require the formation of a committee are to be assigned the materialisation of a number of missions in the manner that best promotes corporate governance. This can be achieved through: reviewing relevant laws, regulations and instructions, proposing necessary changes in a manner that is compatible with general principles of corporate governance such as the Companies Law No 21 of 1997, the Provisional Financial Markets Law No 74 of 2004 and the Unified Accounting Regulation and relevant directives; conducting a comprehensive evaluation of the Iraqi Accounting and Auditing Standards Council to identify fields requiring changes such as authority jurisdiction and bodies currently represented therein and how contributory they are to the achievements and success of the Council; assessing the financial and non-financial requirements that must be met by the Council to ensure and boost its independence; recommending obligatory or optional adoption of international accounting and

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<sup>189</sup> *ibid* 70.

<sup>190</sup> Anthony H Cordesman, 'Economic Challenges in Post-Conflict Iraq' (2010) Center for Strategic & International Studies 2012 <[http://csis.org/files/publication/100317\\_IraqEconomicFactors.pdf](http://csis.org/files/publication/100317_IraqEconomicFactors.pdf)> accessed 25 January 2014.

<sup>191</sup> *ibid*.

<sup>192</sup> See the section of public sector modernisation of this chapter at 329-332; Sahar Nasr, *Republic of Iraq: Financial Sector Review* (The World Bank 2012) 199.

auditing standards based on the results of the review that should be conducted by the committee concerned for laws, regulations and directives as detailed above as well as for results of the Auditing Standards Council achievements review.<sup>193</sup> Secondly, legal and regulatory considerations that require the formation of a committee are to be assigned the following tasks: proposing amendments to the Companies Law No 21 of 1997 to include additional provisions to boost Iraqi shareholders' rights, particularly minority shareholders, while identifying foreign shareholders' rights pursuant to the Iraqi Investment Law No 13 of 2006; and studying the recommendations and suggestions provided by the auditing and accounting committee regarding amendments to laws, regulations and directives, adopting international auditing and accounting standards, proposing other laws on bankruptcy, expropriation and other laws, submitting the same to the bodies concerned and recommending passing the same by such bodies.<sup>194</sup>

### 6.6.3 Preparing the Society

The ability to rehabilitate the social structure in the new Iraq faces a host of difficulties due to the deeply rooted and large-scale damages resulting from years of wars and conflicts. These conditions have resulted in a social structure with civil voids, intolerance and disrespect of others. It is noteworthy that xenophobia is alien to the Iraqi society; it is the result of the psychological status of Iraq following the strict economic siege between 1991 and 2003 which inflicted severe damage upon Iraqi society at all levels, especially in terms of health and nutrition.<sup>195</sup> This worsened in the aftermath of the Baghdad invasion and the associated serious consequences, most notably the failure to enforce security and the dismantling of the Iraqi army and security services with longstanding experience in combating terrorism, thus leaving Iraq an easy prey to terrorism.<sup>196</sup> This also holds true on the investment and economic levels as corruption-related scandals associated with reconstruction efforts have deepened the negative feelings towards the objective behind the invasion of Iraq.<sup>197</sup>

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<sup>193</sup> Sahar Nasr, *Republic of Iraq: Financial Sector Review* (The World Bank 2012) 99-130.

<sup>194</sup> Latif Jabr Koman, *Commercial Companies: A Study in Iraqi law* (Mustansiriya University 2008) 285. (Translated from Arabic Language by Author).

<sup>195</sup> Anthony Arnone, 'Iraq under Siege: The Deadly Impact of Sanctions and War' (2001-2002) 25 *Suffolk Transnat'l L Rev* 275; Noah Feldman, *What We Owe Iraq: War and the Ethics of Nation Building* (New Jersey Princeton University Press edn, New Jersey Princeton University Press 2006) 16; Perveen Ali, 'I am Iraq-Law, Life and Violence in the Formation of the Iraqi State' (2011) 7 *Utrecht L Rev* 4.

<sup>196</sup> James P Pfiffner, 'US Blunders in Iraq: De-Baathification and Disbanding the Army' (2010) 25 *INS* <<http://ssrn.com/abstract=1548083>> accessed 18 March 2014.

<sup>197</sup> Robert E Looney, 'Reconstruction and Peacebuilding under Extreme Adversity: The Problem of Pervasive Corruption in Iraq' (2008) 15 *Int'l Peacekeeping* 424.

Rebuilding Iraqi society must aim at conducting a comprehensive awareness process based on social and political education through educational media channels to achieve the sought-after post-conflict Iraq. Awareness must also focus on key matters including sparing foreign investors the blame for the political decisions of the investor's government. Clearly, foreign investors, whose countries have not been involved in conflicts with Iraq, are the least vulnerable to security risks such as the Chinese companies operating in the south of Iraq.<sup>198</sup>

Another noteworthy point is that the efforts aiming at restoring trust and peaceful coexistence with foreigners inside Iraqi society may take some time if these are meant to be based on sound foundations. The time factor is essential in transformations of societies that have been inculcated with xenophobia and dealing with foreigners as enemies and investors as colonisers. Accordingly, this requires patience and understanding on the part of foreign investors of the harsh conditions experienced by the Iraqi society in terms of economic siege and wars. Further, there is a commitment on the part of foreign investors, especially oil companies, to abstain from interfering with domestic affairs or disputes in one party's favour at the expense of another.<sup>199</sup> In turn, it will be very useful to find direct social communication channels with society and expound on the objectives and other initiatives. This approach would have a positive impact on changing the stereotype of the heavily armed foreigners as conceived by Iraqis. The NIC should cooperate with civil society organisations, as they can constitute the bodies concerned with eliminating such psychological obstacles and prepare the whole society to deal more positively with foreign investors, particularly for those working in investments.

When seeking to rehabilitate the social base with a view to attracting foreign investors to Iraq, it must be preceded by general reform steps within Iraqi society. The key features of such steps must spring from equal citizenship rights regardless of ethnic or sectarian affiliations, gender equality, building civil society mechanisms, enshrined freedom of the press, and of explicit criticism to leading government figures. Yet, most importantly is the effective enforcement of legislations on the rights and freedoms mentioned above. Such social reforms would contribute to restoring a vital and efficient society and civil bodies. Consequently, the next step (ie adopting an open approach to other societies and cultures) will be easier. This is

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<sup>198</sup> Abdul Malik Mahmud, 'Investment in Iraq, Reality or Illusion?' (2012) 83 *Alra'ud* magazine 8. (Translated from Arabic Language by Author).

<sup>199</sup> Iraq Directory. 'Exxon Mobil-Kurd oil deal spat spotlights Iraq's juggling act between politics and investment' (12/28/2011) <<http://www.iraqdirectory.com/DisplayNews.aspx?id=17846>> accessed 14 March 2014.



an impossible mission especially since Iraqi society has received thousands of foreigners before 1990.<sup>200</sup>

## 6.7 Conclusion

In today's critical stage of Iraq's modern history, efforts to attract foreign investors are underway. Foreign investors have always been reluctant to break into this harsh investment environment given its particularities, such as the military force driven transformation from a dictatorship to a democracy and the transformation from a socialist to a liberal system of government. This has resulted in Iraq's inability to apply democratic ways of government and its fragile relationship with liberalism, which hinders its financial and economic openness with the rest of the world widely. Further, the current socialist laws of commerce and economy are still in force alongside new liberal laws, thus leading to a conflict between laws meant to regulate the same aspects of an action.

The reform strategy has explained the central importance of comprehensive enforcement of the investment environment rehabilitation in the relevant political, legal, economic and social areas. This chapter has given an account of and the analysis for the widespread use of treatment of the conflict of authority, upgrading security capabilities, enhancing transparency and developing the private sector.

The reform strategy adopted herein takes into account the enforcement of the rule of law to provide well-established foundations for society and state as per the democratic principles of government and a soundly performing economy. Effective law enforcement is of growing importance in attracting and retaining foreign capital in view of the increasing competition in this regard. According to the analysis provided herein, which is compatible with relevant international indexes, the rule of law in Iraq is nothing short of inconsistent. Therefore, the roadmap proposed calls for better separation of powers and a truly independent judiciary as the latter serves as the backbone of the rule of law. The judiciary ensures the enforcement of justice and a fair ruler in a manner that guarantees the necessary balance between power and obligations provided that such way of action would not compromise individual law-enshrined rights based on equality, while guarding against marginalisation, exclusion, and extremism. One of the more significant findings to emerge from this chapter is that the governance option

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<sup>200</sup> Mohammed Dulaimi, 'Iraq' in Peter Fenn, Michael O'Shea and Edward Davies (eds), *Dispute Resolution and Conflict Management in Construction An international review* (E & FN Spon 1998) 119.

could lead a vital role in determining and prioritising reform objectives through the contribution of the rule of law in the development of the wide range of sectors targeted of the reform agenda. The second major finding in this chapter is to present solutions an effective for the determinants that show why foreign investors are reluctant from the Iraqi investment environment. The reason behind the above proposal is to highlight the Iraqi case. The growing rebellions since 2003 against the coalition forces, as the occupation forces, and then against the Iraqi Government for sectarian and ethnic reasons, resulted in mistrusting the political system and hence the lack of political stability and security. In turn, this led to weak institutional performance with the rule of law reaching a breaking point.<sup>201</sup> In a nutshell, and to ensure sound enforcement of all reforms, the Government needs to be fully credible when it comes to rebuilding the rule of law.

This study proves that the mission to create a foreign investment-friendly environment, despite being economic and legal in nature, is all subject to initial political decision. Therefore, partial reforms at the level of investment laws or related sectors would yield conflicts between old and modern concepts and mechanisms. To a large extent, partial reforms, as evidently proven in the investment environment rehabilitation in Iraq, are ascribed to the lack of a comprehensive vision and strategic planning. The study further shows the importance of ensuring an appropriate timing for introducing reforms. Capitalising on the 2003 experience, shortly after Baghdad's fall and the Civil Administrator's assumption of power, Iraq opened its economy to foreign investors with a large package of 'liberal' laws. However, the timing was one of the reasons behind its failure. To open the long strictly centrally positioned Iraqi economy so quickly meant an inevitable conflict with the centralist legacy that is deeply rooted across the country. Other reasons included the long blockade on Iraq and the resulting economic seclusion. Therefore, Iraqi institutions failed to accommodate and deal with such drastic changes.

More concentration on optimal strategy to rehabilitate the investment environment in Iraq would help the reformers to establish a greater degree of accuracy on this matter. The next chapter therefore moves on to discuss a conclusive approach to determine the reasons behind the reluctance of foreign investors and provide solutions for reforms, and makes research contribution in the future studies of the post-conflict investment environment.

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<sup>201</sup> Paul R Williams & Matthew T Simpson, 'Rethinking the political future: an alternative to the ethno-sectarian division of Iraq' (2009) 24 Am U Int'l L Rev 191.

## Chapter VII: Conclusion

The main conclusions of this thesis are that traditional threats to foreign investors remain unresolved, and that Iraq continues to be a risky foreign investment environment. This is in spite of the efforts of the Iraqi regime and its legislators to encourage foreign investment. It has failed to do so, and that investment remains quite limited. Reform issues have by no means been fully addressed; Iraq remains in a state of conflict, whereas the reform plan to rehabilitate the country was designed to suit a post-conflict period.

### 7.1 Answering the Questions

The study has developed a central question in addition to secondary questions to provide evidence and arguments throughout the thesis to show how answers can meet to achieve the purpose of this study. The aim here is to provide definitive answers to questions. In this context, the main question looks into the reasons behind the failure of Iraq's strategy to reform the investment environment. The study argues that the main reason behind Iraq's inability to attract foreign investments is that the investment environment of Iraq is still in a conflict period, rather than a post-conflict period, while the reform plan to rehabilitate the same has been designed to suit the post-conflict period. Moreover, reforms have lost the political credibility necessary for enforcement. Obviously, reform efforts have been swallowed by corrupt pockets.<sup>1</sup>

The secondary questions have been proposed successively over the chapters. What is the effective reform strategy for a post-conflict environment in order to attract foreign investments?<sup>2</sup> This study provides the answer on the basis of adopting a reform policy that is capable of providing national guarantees and international assurances to foreign investments in addition to profitable investment opportunities.

What is the impact of conflicts on the investment environment? Iraq has a discouraging history with foreign investors. Therefore, the study examines, in Chapter Three, the concerns of history repeating itself. Considering the foremost risks across Iraq's legacy with foreign investors, they have been proven to be the nationalisation of foreign investments and changing legislations after each political change. By the end of the 2003 conflict in Iraq, what were the

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<sup>1</sup> See Section 5.3.1.2 of this thesis.

<sup>2</sup> See Chapter Two of this thesis.

key aspects of the rehabilitation of the investment environment? This was the secondary question in Chapter Four. Iraq enacted the liberal Investment Law No 13 of 2006, which provided for an Iraqi economy widely open to foreign investors along with several guarantees and incentives. Other legal amendments include some investment-supporting sectors, particularly the banking sector and intellectual property rights.<sup>3</sup> Investment Law No 13 of 2006 prohibited confiscation or nationalisation, whether wholly or partially, save in respect of final judgments.<sup>4</sup> The aforesaid Law has approved the legislative stability principle so that no retroactive impact may afflict the guarantees, exemptions, and rights of investors.<sup>5</sup>

Since the thesis sets out the unsuccessful efforts to establish a healthy environment in Iraq and the resulting failure to attract foreign investors, Chapter Five explored how to prove this hypothesis. The proof was based on a review and analysis of the far-from-addressing obstacles that are still inherent in the investment climate in Iraq. Evidence has been supported with the conclusions on Iraq's rankings and ratings in international indices related to foreign investment.

The bleak image of the Iraqi investment environment has entailed questions on the ideal strategy to develop and enhance that environment in Iraq: this was the subject matter of Chapter Six. Despite the fact that the reform roadmap, as developed by this thesis, is lengthy and ramose, it can be summarised as the necessary political will to end domestic disputes and boost security and public order. Clearly, this means a move from the conflict to the post-conflict period and entails combating corruption and the ratification of international agreements on guarantees for foreign investors as these are necessary measures that must be taken before proceeding with the development of any new reform plan. Considering all these scenarios, this study provides a roadmap to address the abovementioned limitations.<sup>6</sup> Having learnt the key lessons regarding the previously failing reform efforts, the new scenario to rehabilitate the investment climate in Iraq provides a deep insight into the matter. In addition, new reforms are intended to ensure integration and clarity but still require sincere will for enforcement. Considering the fact that an investment environment is a ring in the interrelated and mutually affective political, legal, economic, and social chain, the proposed strategy has therefore

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<sup>3</sup> US Department of State. '2013 Investment Climate Statement–Iraq' (February 2013) <<http://www.state.gov/e/eb/rls/othr/ics/2013/204661.htm>> accessed 12 Jan 2014.

<sup>4</sup> Article 12, Paragraph 3 of the Iraqi Investment Law No. 13 of 2006 published in the Official Gazette, issue 4031 of 17/01/2007.

<sup>5</sup> Article 13 of the Iraqi Investment Law No. 13 of 2006 published in the Official Gazette, issue 4031 of 17/01/2007.

<sup>6</sup> See Chapter Sixth of the thesis (Roadmap to reform the investment environment of Iraq).

adopted the comprehensive reform approach which is linked to the rehabilitation of the investment environment.

## **7.2 Final Framework of the Thesis Findings by Chapters**

Chapter One consists of the Introduction, in which a roadmap of the study was provided. In line with the increasing foreign interest in business in Iraq since 2003, the conclusions herein will contribute to identifying the nature of risks facing those foreign investors who are willing to come to Iraq, or are already operating there. Further, these conclusions will serve as a basis for those interested in foreign investments generally, and particularly investments in Iraq. The study features an analysis of the investment climate in Iraq in terms of old and new advantages and risks, and is followed by a review of those efforts to rehabilitate the investment climate that have failed to meet expectations. The study goes on to analyse the reasons for the failures and identifies the serious obstacles to investment in Iraq. Finally, the study reaches definite conclusions that can be utilised as a roadmap for investment reforms in Iraq. Since no other academic study has tackled the above issues in the manner of this study, it is hoped that it will constitute an indispensable contribution to the body of material to be found in European libraries. The study reiterates the findings of previous literature on the importance of regulating a safe environment, free from the traditional risks facing foreign investors. It will also provide additional answers to the challenges that will inevitably emerge over the coming years when business is conducted in Iraq, given the somewhat blurry solutions currently available within a conflict environment.

Chapter Two reviewed the foreign investment environment in the post-conflict countries. The analytical review focused on the legal framework for conducting investments in those countries. The investment environment in post-conflict countries was found to be disappointing in terms of attracting and retaining foreign investments, hence the undeniable need for reforms. Research indicates that foreign investors calculate risks in a post-conflict environment and balance them against the potential revenues from investment opportunities. The chapter provided additional evidence of the challenging and detrimental nature of some of the factors that limit the creation of a climate favourable to attracting foreign-investors. The limitations covered herein were: the legal framework, which is discouraging to foreign investors; the dictatorships and the impact they have had upon the stability of the investment climate; wars; domestic political conflicts, terrorism, financial and administrative corruption, bureaucracy, and the deteriorated infrastructure. A foreign investor studies the human and

material factors available to protect his investments, including the legal guarantees against risks in the host country. Often, the physical safety of the investment is the first among many concerns. Investors will conduct an accurate analysis of the effect of the various risks, and a prioritised list of them will enable decisions to be taken on whether or not to proceed.

The arguments of this chapter indicated that the provision of guarantees against expropriation and the existence of stable national legislations will serve to establish a pro-investment environment. However, the legal literature suggests that an investment environment requires further action to ensure its safety and attractiveness. This chapter also argued the case that international agreements provide the most credible and acceptable guarantees, compared to guarantees at a national level offered by the host country. These conclusions pointed to the need for several courses of action for understanding and addressing the environment of foreign investments in post-conflict countries. The clear conclusion was that the private sector can assume a vital role in determining and prioritising reform objectives through the contribution of the business community to the development of the reform agenda. A government cannot on its own divine the needs of investment. This is rather the responsibility of the private sector in terms of the prioritisation and scheduling of the reform agenda. In addition, the provision of investment incentives and privatisation are useful means of attracting foreign investors into a high-risk environment. The chapter revealed various perceptions concerning the optimal strategy for reforming the post-conflict investment environment.

Chapter Three described the consequences of conflicts from an analytical perspective, and demonstrated the negative effects of conflicts, wars and political and economic disarray on the foreign investment climate in Iraq. The high degree of risk was found to be due to political instability, the insecurity resulting from the fragility of peace, the legal uncertainty due to changing legislation and weakened judicial institutions, the huge failures throughout the market, and damaged economic institutions. Consequently, it was stated that an investment environment cannot attract foreign investors amidst enduring phases of coups, genocides, wars, economic sanctions, and a total lack of democratic and legal institutions. This chapter found that in the period of pre-democratic Iraq, i.e., prior to 2003, the strategy adopted by the political regime then in power had a generally negative impact on foreign investment, resulting in a non-friendly foreign investment environment. The most obvious finding to emerge from this study was that the former regime's investment-reforming policies, generally speaking, were incautious and highly sensitive to political provocations—a combination of qualities entirely incompatible with developmental reform. There was a lack of flexibility and hard-line

mechanisms for the treatment of investors. Further harm was done by the inward-looking policy caused by deliberate dictatorial policies of keeping a poor population under the heel of a repressive government.

Chapter Four examined the changes and amendments introduced to the Iraqi investment environment in terms of their effectiveness in attracting new foreign investors and upgrading Iraqi investments in line with international standards. This chapter assessed Iraq's policies of establishing a favourable investment environment through the enactment and enforcement of liberal investment laws providing equal incentives for both national and foreign investors. The fall of Saddam Hussein in 2003 by the US-led coalition forces was the launching point for reform efforts at all levels. Part of these reforms involved the rehabilitation of the investment climate and opening the doors of the Iraqi economy to foreign investors. The chapter described the reform strategy that was instigated in order to introduce drastic changes to the foreign investment environment in Iraq. The immediate purpose was to rehabilitate this environment following a long period of war and conflict. Iraq has made significant progress in the reconstruction of its economy and investors have shown considerable interest in the country, as evidenced by the influx of investors in the past few years. Undoubtedly, the reforms are a long-term endeavour, and although there are currently few positive indications, it is also true that fruition does not take place overnight.

Chapter Five asserted that the reform efforts conducted by the Civil Administration for purposes of supervising reconstruction efforts in Iraq—led first by Paul Bremer and then by legislators and the Iraqi Government—have failed to establish a safe investment environment. Furthermore, the attractiveness of that environment to foreign investors remains very limited. Despite the large-scale reforms, post-2003 Iraq found itself in a free-market economic system and new economic circumstances, requiring the State to provide the appropriate investment climate and to enact supporting legislations in respect thereof. Investment Law No 13 of 2006 was part of this approach. With the aim of creating a stable, reliable and corruption-free investment environment, reforms were introduced to ensure appropriate protection for intellectual and physical property rights, fair labour laws, pro-private sector strategies, and anti-“red-tape” measures through the creation of investment authorities to facilitate the handling of investor affairs.

However, with continuing sectarian and ethnic tensions and the failure of the institutions concerned to fulfil their planning and enforcement missions, Iraq is turning into an

incubator for international terrorism. The country is also rife with financial and administrative corruption. These and other limitations have derailed the reform process and hindered the capacity to pass ad hoc legislation within the reform plan. As a result, the efforts to instigate reforms have been insubstantial and have failed to make a significant impact on the investment environment. This theoretical description of the deteriorating Iraqi investment environment translates into numerical values across various international investment indicators. It was found that potential investors have formed increasingly negative impressions of Iraq. This study therefore endorses, to a certain extent, the Iraqi Government's claim that many of the investment limitations are a legacy of the former dictatorship, i.e. the Saddam era of 1979–2003). Generally speaking, however, it is the situation that has emerged under the democratic post-2003 regime that has proved to be more detrimental to the Iraqi investment environment. Political conflicts, failure to impose the rule of law and terrorism, as well as financial and administrative corruption, are the major post-Saddam investment limitations. The reforms instigated between 2003 and the present time have failed to address either the problems inherited from the previous regime or those that emerged subsequently, thus derailing the reform efforts.

In fact, the institutions tasked with reform are themselves failure-stricken. Oddly enough, the reform of institutions has not been part of the reform process. For example, the intellectual property rights protection laws, amended after 2004 as part of the reform programme, were not effectively enforced due to deficiencies in the rule of law and the corruption of the authorities tasked with protecting intellectual property rights. Political and administrative corruption have hindered the role of the National Investment Commission (established post-2006), which was charged with developing a comprehensive policy to attract and retain foreign investments in Iraq.

The situation described above means that the solutions devised have not been adequate to the new investment challenges, and furthermore there has been an inability to address the inherent prior limitations. The most pessimistic conclusion of this study was derived from an analysis of Iraq's rankings in international indices. Iraq has the lowest ranking in all indices reviewed from 2003 up to 2013. Despite the slightly improved performance indicated by some indices at various times, these are insufficient to support the claim that the investment environment in Iraq is recovering or improving.



Chapter Five demonstrated that Iraq continues to lack a healthy and competitive investment climate for foreign investors. Consequently, the adoption of a clear strategy to enhance the investment climate is required. The chapter also showed the usefulness of studying those approaches adopted over the years that resulted in better index positions for Iraq. The aim should be to assess and to adopt those aspects that foster success amidst the immensely difficult political and security conditions that currently apply. Analytically speaking, this study revealed to foreign investors the seriousness of the future risks for the establishment of an investment environment in Iraq.

Chapter Six addressed the question of the ideal solution for the rehabilitation of the foreign investment environment in Iraq, particularly as the strategies for attracting that investment have hitherto failed. The chapter draws a roadmap for investment reform in Iraq through addressing the weaknesses of the strategies previously adopted. It suggests the following points for incorporation into a new reform strategy:

*Firstly*, for the proposed strategy to come to fruition, the political will, which marks a critical launch point for reform strategies, must be present in a manner reflecting sincere desire to eliminate obstacles. This conclusion supports the differentiation between the post-2003 superficial reforms in Iraq and the key reforms aimed at introducing a real change that minimises foreign investment limitations. A large part of post-2003 reforms aimed only at providing a better image of the coalition forces, the occupation forces, and the Iraqi Government as a replacement to the preceding dictatorship.<sup>7</sup> In terms of the proposed roadmap for investment reform and success, it is necessary to commit to decisive solutions. Reform will come first among such solutions and will entail credible decision making through adopting new approaches to ensure their reformative effectiveness. Further, efforts aiming at creating a healthy investment in Iraq will succeed only when reform credibility is proven in order to send a strong message to willing investors. In turn, the whole reform process will be doomed to failure if recanted on or enforced formally or distortedly. The reform, to be enforceable, requires an established legitimacy to appease the warring parties across Iraqi society since

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<sup>7</sup> For example, during the era of Iraq Civil Administrator Paul Bremer, there was expansive creation of new supervisory authorities such as the Integrity Commission and Inspector General. Yet, Iraq's ranking in Transparency International started to fall. The said newly created authorities led to overlaps and restrictions to the Federal Board of Supreme Audit (FBSA), the Iraqi supervisory body since 1927, under which work bribery rates have been within acceptable ranges in Iraq. The democratic government of Iraq, however, embarked on expanding the governmental ministerial structure to increase from 24 ministries in 2003 to 43 ministries in 2010. Ned Parker, 'Iraq We Left Behind: Welcome to the World's Next Failed State' (2012) 91(2) *Foreign Aff* 94; Antony Blinken, 'Is Iraq on Track: Democracy and Disorder in Baghdad-Morning in Mesopotamia' (2012) 91(4) *Foreign Aff* 152.

exclusion from power results in a number of interactions that eventually build up into hindrances to the most sought-after reforms. Moreover, such will should have room for sustainable peace mechanisms through reaching fair and just agreements with rebels to scale down rebellion or contain its manifestations as much as possible.

*Secondly*, the most urgent requirement, according to this study, is the one related to the investment authorities and safe investment zones, as introducing developments to the same and eliminating red-tape obstacles therein would be a strong leap forward to attract large numbers of investors. Furthermore, and to provide a safer investment climate, safe investment zones must be expanded considering the successes they witnessed in some sectors, particularly the energy sector.

*Thirdly*, one of the most important considerations to the establishment of a clear roadmap based on this study for reform is institutional governance. Governance is an essential need of Iraqi institutions considering the potentials of this style of management which is based on disclosure and transparency—components that are almost absent from the administrative system in Iraq or at least not overwhelmingly sufficient. It is also proven that adopting a transparent and fair system would create guarantees against corruption and mismanagement, even serving as a catalyst for the development of key free-market values and boosting the Iraqi economy to international competitiveness levels to attract more foreign investments. An effective economic governance system, a requirement highlighted herein, would serve to provide a degree of trust that is necessary to sound economic performance. Consequently, establishing institutional governance would help pave the way to attracting sustainable resources for foreign investments while providing numerous competitive edges. These conclusions clearly lead to the unquestionable need for corporate governance, as it adopts certain mechanisms that allow a society to ensure that corporate governance is being exercised to protect the properties of investors and lending institutions. Banking governance, however, is clearer as an essential reform object. Banks are difference from companies in that their failure affects more people and weakens the financial system itself, thus being detrimental to the whole economy.<sup>8</sup>

*Fourthly*, this study finds that constitutional reform of the wealth distribution mechanism, based on fair and clear foundations, may well eliminate a large part of the present conflict between the Federal Government, the Provincial Government or the non-provincial

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<sup>8</sup> Anthony H Cordesman, 'Economic Challenges in Post-Conflict Iraq' (2010) Center for Strategic & International Studies 2012 <[http://csis.org/files/publication/100317\\_IraqEconomicFactors.pdf](http://csis.org/files/publication/100317_IraqEconomicFactors.pdf)> accessed 25 January 2014.

governments. Amending the Constitution must include real re-distribution of powers among government layers through the adoption of two essential rules: a strong federal government that is capable of ensuring territorial unity, and the grant of gradual and real powers to the Province as well as the governments. Further, this study concludes that, as part of the reform plan, the Iraqi investment climate is in dire need of amending or enacting new laws that ensure the enforcement of foreign arbitration awards, the amendment of intellectual property laws to match TRIPS-applicable rules, the amendment of trade and company laws to adopt the economy market concepts, and the enactment of the oil and gas law.

*Fifthly*, this study identifies the key far-from-reformed obstacles of the investment environment, followed by suggestions for the Iraqi legislators and government for the development and enhancement at the level of the investment environment. This conclusion requires further legislation tantamount to the International Investment Law, in addition to the ratification of relevant international conventions and considering the conclusion of more bilateral investment agreements, as these measures would send positive messages about how serious the incentives and legal guarantees for foreign investments are in Iraq. Equally important is the appropriate consideration of challenges facing the investment authorities and public service bodies concerned as these may well affect the development efforts to enhance Iraq's rankings in foreign investment-related organisations worldwide. To a large extent, codes to shield investment authorities from political influences should be adopted. Meanwhile, initiatives developed by investment authorities, who are designed to attract foreign investors, must have the necessary political support.

*Finally*, promoting a pro-foreign-investment culture in local, closed communities is an essential effort that must involve better legal awareness of foreign properties. The federal government can contribute to the benefits of foreign investments. Furthermore, the social role of the government and civil society organisations may be evident in managing the means of contact with foreign investors and local communities to break the psychological barriers that form a part of the legacy of the colonisation era further awakened by the 2003 occupation of Iraq.

### **7.3 Future Prospects**

Studying investment limitations in a new environment like Iraq has set new prospects for future larger-scale studies. There are a number of issues that require more research and analysis.

Accordingly, this study suggests the following points for future research papers: Firstly, prior to addressing the Iraqi case, it would be useful to address the risks in an investment environment of the post-conflict countries. How sufficient the rules of national laws are in terms of providing protection for foreign investors against potential violation, would be a good point of consideration. Secondly, concerning Iraq, there is a need for further studies to identify political, legal, or economic changes in post-2003 Iraq and their impact on foreign investment. Such studies would raise several questions of which changes have had negative impacts on foreign investments. Based on the conclusions of such studies, reform efforts could be directed at factors with negative impacts on foreign investment. Thirdly, it would be interesting to assess the impacts of legislative changes upon investor attraction, ie the 'liberal' Investment Law No 13 of 2006. On a larger scale, there is also a need to conduct studies to identify expected advantages for Iraq upon joining the WTO and how contributory this would prove to be in attracting more Iraq-bound investments. Further studies could also identify the results of Iraq joining bilateral and multilateral investment treaties. Then, there are several future applied studies that could be useful to test legislative incentives for investor attraction, including tax exemptions, protection of intellectual property rights, and adopting international arbitration to settle investment-related disputes. Next, more studies on foreign investments in certain sectors of the Iraqi economy, such as housing, tourism or energy, could assist more detailed and accurate comparisons in terms of a given sector making more progress than others. The same would also open the door to observations on cross-sector or sector-specific limitations, thus giving reformists a wider view of all sectors and therefore a better level of accuracy when it comes to taking reform decisions. Finally, future studies on foreign investment limitations in Iraq, which address each and every limitation individually, could provide deeper insights into the dimensions and course actions of each limitation.

These topics, and many others about the emerging investment climate in Iraq, would require scientific and applied studies, as well as legal, political, and economic studies with a view to creating a sound investment environment that is capable of attracting and retaining foreign investments. This would help achieve the long-awaited development in Iraq.

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### **C. Journal Abbreviations**

Adel L Rev	The Adelaide Law Review
Alta L Rev	Alberta Law Review
Am J Comp L	The American Journal of Comparative Law
Am J Int'l L	American Journal of International Law
Am Soc'y Int'l L Proc	American Society of International Law Proceedings

Am U Int'l L Rev	American University International Law Review
Arab L Q	Arab Law Quarterly
Arb Int'l	Arbitration International
Ariz J Int'l & Comp L	Arizona Journal of International and Comparative Law
Austl Int'l L J	Australian International Law Journal
Austl Rev Int'l Eur L	Austrian Review of International and European Law
Baltic Y B Int'l L	Baltic Yearbook of International Law
Brown J World Aff	Brown Journal of World Affairs
BYIL	British Yearbook of International Law
BYU Int'l L & Mgmt R	BYU International Law & Management Review
Can Yb Int'l L	Canadian Yearbook of International Law
Cap U L Rev	Capital University Law Review
Cardozo J Int'l & Comp L	Cardozo Journal of International and Comparative Law
Cato J	Cato Journal
China L Rep	China Law Reports
Contemp Readings L & Soc Just	Contemporary Readings in Law and Social Justice
Currents: Int'l Trade L J	Currents: International Trade Law Journal
Defence Peace Econ	Defence and Peace Economics
Denv J Int'l L & Pol'y	Denver Journal of International Law and Policy
DePaul Bus & Comm L J	DePaul Business & Commercial Law Journal
Entrepreneurial Bus L J	Ohio State Entrepreneurial Business Law Journal
Eur Bus L Rev	European Business Law Review
EUR ECON REV	EUROPEAN ECONOMIC REVIEW
Eur J Int'l L	European Journal of International Law
Eur J L Reform	European Journal of Law Reform
Fed B News & J	Federal Bar News & Journal
FIU L Rev	The FIU Law Review
Fletcher F Wld Aff	Fletcher Forum of World Affairs
Fletcher F World Aff	The Fletcher Forum of World Affairs

Fletcher J Hum Sec	Fletcher Journal of Human Security
Fordham Int'l L J	Fordham International Law Journal
Fordham L Rev	Fordham Law Review
Foreign Aff	Foreign Affairs
Ga J Int'l & Comp L	Georgia Journal of International and Comparative Law
Geo J Int'l Aff	Georgetown Journal of International Affairs
Geo L J	The Georgetown Law Journal
Geo Mason U CRL J	George Mason University Civil Rights Law Journal
Geo Wash Int'l L Rev	George Washington International Law Review
GLOB GOV	Global Governance
Global Trade & Cust J	Global Trade and Customs Journal
Guild Prac	Guild Practitioner
Hamline L Rev	Hamline Law Review
Harv Int'l L J	Harvard International Law Journal
Hastings L J	The Hastings Business Law Journal
Homeland Security Rev	Homeland Security Reviews
Hum Rts & Int'l Legal Discourse	Human Rights & International Legal Discourse
Hum Rts	Human Rights
IJBM	International Journal of Business and Management
Indon & Commer T	Industrial and Commercial Training
inFocus Q	inFocus Quarterly
INS	Intelligence and National Security
Ins Counsel J	Insurance Counsel Journal
Intertax	Intertax Journal
Int'l & Comp L Q	International and Comparative Law Quarterly
Int'l Bus L J	International Business Law Journal
Int'l Fin L Rev	International Financial Law Review
Int'l J	International Journal
Int'l L	The International Lawyer

Int'l Peacekeeping	International Peacekeeping
Int'l Rev Intell Prop & Competition L	International Review of Intellectual Property and Competition Law
Int'l Tax Rev	International Tax Review
Int'l Trade & Bus L Rev	International Trade and Business Law Review
J Conflict & Sec L	Journal of Conflict and Security Law
J Energy & Nat Resources L	Journal of Energy & Natural Resources Law
J Int'l Arb	Journal of International Arbitration
J Int'l Bus & L	Journal of International Business & Law
J Int'l Econ L	Journal of International Economic Law
J Marshall Rev Intell Prop L	John Marshall Review of Intellectual Property Law
J Transnat'l L & Pol'y	Journal of Transnational Law & Policy
J World Energy Law Bus	Journal of World Energy Law & Business
J World Investment & Trade	The Journal of World Investment & Trade
J World Investment & Trade	Journal of World Investment and Trade
J World Trade L	Journal of World Trade Law
J World Trade	Journal of World Trade
JAmH	Journal of American History
JEL	Journal of Economic Literature
JITLP	Journal of International Trade Law and Policy
L & Pol'y	Law & Policy
Law & Bus Rev Am	Law and Business Review of the Americas
Law & Contemp Probs	Law and Contemporary Problems
Law & Fin Mkt Rev	Law and Financial Markets Review
Law Amer	Lawyer of the Americas
LBJ J Pub Aff	Lyndon B. Johnson School of Public Affairs
Legal Stud F	Legal Studies Forum
Lewis & Clark L Rev	Lewis & Clark Law Review
Loy L A Int'l & Comp L Rev	Loyola of Los Angeles International & Comparative Law Review

MANAGE FINANC	Managerial Finance
Manchester J Int'l Econ L	Manchester Journal of International Economic Law
Me L Rev	Maine Law Review
N C J Int'l L & Com Reg	North Carolina Journal of International Law and Commercial Regulation
Neth Yb Int'l L	Netherlands Yearbook of International Law
Nw J Int'l L & Bus	Northwestern Journal of International Law & Business
NYL Sch J Int'l & Comp L	New York Law School Journal of International and Comparative Law
NYU Env'tl LJ	New York University Environmental Law Journal
NYU J Int'l L & Pol	New York University Journal of International Law and Politics
Ohio N U L Rev	Ohio Northern University Law Review
Pace L Rev	Pace Law Review
Penn St Int'l L Rev	Penn State International Law Review
Penn St L Rev	Penn State Law Review
Polish Y B Int'l L	Polish Yearbook of International Law
Rev Financ Stud	Review of Financial Studies
Rich J Global L & Bus	Richmond Journal of Global Law and Business
S Afr J on Hum Rts	South African Journal on Human Rights
S African L J	South African Law Journal
S C J Int'l L & Bus	South Carolina Journal of International Law and Business
San Diego Int'l L J	San Diego International Law Journal
Sec & Hum Rts	Security and Human Rights
Seton Hall L Rev	Seton Hall Law Review
Soc F	Social Forces
Sri Lanka J Int'l L	Sri Lanka Journal of International Law
St Louis U Pub L Rev	St. Louis University Public Law Review
Stan J Int'l Stud	Stanford Journal of International Studies
Stat L Rev	Statute Law Review



Stud Int'l Fin Econ & Tech L	Studies in International Financial, Economic, and Technology Law
Student Advoc	Student Advocate
Suffolk Transnat'l L J	Suffolk Transnational Law Journal
Suffolk Transnat'l L Rev	Suffolk Transnational Law Review
Sw J L & Trade Am	Southwestern Journal of Law and Trade in the Americas
Syracuse J Int'l L & Com	Syracuse Journal of International Law and Commerce
Trade L & Dev	Trade, Law and Development
Transnat'l L & Contemp Probs	Transnational Law and Contemporary Problems
Transnat'l Law	Transnational Lawyer
U C Davis J Int'l L & Pol'y	U.C.Davis Journal of International Law & Policy
U Miami L Rev	University of Miami Law Review
U Pa J Int'l L	University of Pennsylvania Journal of International Law
U S F L Rev	University of San Francisco Law Review
Unif L Rev	Uniform Law Review
USAK Y B Int'l Pol & L	USAK Yearbook of International Politics and Law
US-China L Rev	US-China Law Review
USF L Rev	University of San Francisco of Law Review
Utrecht L Rev	Utrecht Law Review
Va J Int'l L	Virginia Journal of International Law
Vand J Transnat'l L	Vanderbilt Journal of Transnational Law
Vand L Rev	Vanderbilt Law Review
VJTL	Vanderbilt Journal of Transnational Law
Whitehead J Dipl & Int'l Rel	Whitehead Journal of Diplomacy and International Relations
Y B Islamic & Middle E L	Yearbook of Islamic and Middle Eastern Law
YJIL	The Yale Journal of International Law

