

Rebuilding the Iraqi Infrastructure:

Opportunities & Risks



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Twenty-two years of wars and severe sanctions have devastated the Iraqi economy, particularly its infrastructure. The urgent need to rebuild the infrastructure of a country well endowed with natural and human resources could mean great opportunities for the international business community. The realization of such opportunities, however, is hampered by significant

obstacles. A prudent investor would hesitate to make serious financial commitments in an environment that lacks a satisfactory level of law and order, a properly functioning judiciary and an effective law enforcement mechanism.

Closely linked to security on the ground is sustainable political stability. At this stage, the coalition powers ("the Authority"), led by the U.S. as the main force of change, is the only decision maker. But the Authority is hampered by serious limitations in bringing about the desired business environment, especially when key questions have yet to be answered. Will the U.S. remain the main engine of change in Iraq? Will the U.N. have a role in rebuilding Iraq? To what extent will this role supplement, legitimize or replace the U.S. role? When will a stable Iraqi government with the needed internal support and external recognition emerge to put an end to the legal limitations that restrict the occupying Authority?

Each of these scenarios carries distinct legal ramifications and business risks with respect to undertaking investment activities in Iraq.

The U.N. Security Council Resolution 1483 ("the Resolution")

is an important source of legitimization because it is adopted under Chapter VII of the U.N. Charter, which grants the Council authority to make decisions that are binding on all U.N. member states. The Resolution refers to the coalition forces as "occupying powers" and recognizes the "specific authorities, responsibilities and obligations..." such powers are entitled to under applicable international law. In particular, the Resolution "calls upon all concerned to comply fully with their obligations under the Geneva Conventions of 1949 and the Hague Regulations of 1907," which are a universally recognized codification of relevant international law.

Irrespective of the legitimacy of the use of force, the occupying power does not acquire sovereignty over the occupied territory (Art. 47 of Geneva Convention IV). The scope of the occupant authority is administrative and generally limited to ensuring "public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." (Art. 43 of the Hague Regulations). The Resolution was precise in drawing the parameters of the occupying Authority by calling upon it "to promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future." Given these limitations, it may be very difficult to encourage foreign investment to spur economic change under current Iraqi law.

While Iraq has a long and distinguished history as a center of Islamic jurisprudence, with a civil code based on European and some Islamic legal concepts, the past few decades of the Hussain regime resulted in a number of legal

provisions which create serious challenges for prospective investors. The operative Constitution under the Hussain regime vested the State with "the responsibility for planning, directing and steering the national economy for the purpose of (a) establishing the socialist system on scientific and revolutionary foundations..." (Art. 12). Article 15 of the Iraqi Constitution states that "Public ownership and properties of the Public Sector are inviolable." In Iraq, like in many countries in the developing world, the ownership and control of infrastructure projects and services such as water, energy, transportation and telecommunication are the fiefdom of the public domain. Private property is carefully regulated (Art. 16) and ownership of real property by non-Iraqi is prohibited (Art. 18). Under the Companies Law of 1997, non-Arab foreign nationals are not permitted to either establish or acquire shares in Iraqi companies. Foreign nationals, however, may participate in joint ventures with Iraqi companies on a contractual basis for the completion of a specific project as long as they do not obtain any equity interest in the Iraqi company.

Thus, if Iraq is to attract foreign investments in infrastructure projects, prospective investors would need to be assured that any concession agreement they may conclude is governed by a suitable legal framework and signed by a properly authorized party, that such concession and related implementation agreements are not likely to be challenged in the future, and that they will obtain on a timely basis all necessary permits and authorizations to implement a project. Investors will also need assurance that they will not face serious risks that may materialize with a change of government during the life of the project. Such assurances must be granted by a properly qualified authority.

While the need for legal and institutional change in Iraq has been recognized and encouraged by the international community under the UN Resolution, currently the coalition forces are the only recognized Authority responsible for governance in Iraq. Whether the Authority's power extends to changing the constitution and basic laws and institutions in Iraq is a major question mark. Nor would an Iraqi interim administration, basically appointed by the Authority, have rights that extend beyond those that the Authority enjoys under international law, as such administration derives its actual powers and responsibilities exclusively from the

Authority as the effective occupant. Thus, it is doubtful that a contract or lease granted by the Authority the terms of which exceed the duration of the occupation would be binding on the new Iraqi representative government. However, a contract concluded between USAID or another agency of the U.S. and another contracting party, funded by U.S. resources and governed by U.S. law in many of its aspects may bear a different set of risks and possible conflict with applicable international or Iraqi law.

Infrastructure projects often entail privatization of utilities and other enterprises owned and run by a government ministry or agency and may include the transfer of real and movable property. Article 55 of the Hague Regulations confines the authority of the occupying power to that of an

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"administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile state, and situated in the occupied country." As such, the occupying power has the right to use the income or fruits of the Iraqi public property but not the right of ownership or disposal of title of such property.

Also granting new concessions or concluding contracts relating to an infrastructure project may entail revoking a concession or interfering with the property rights related to existing contracts. Change in government does not usually affect properly

concluded contracts, and does not give the occupier the right to interfere in such contracts; especially when the beneficiaries are not nationals or allies of either belligerents. The likelihood of future challenges and litigation should be carefully investigated.

In conclusion, the most apt description of the current political situation in Iraq is one of flux and great legal uncertainty. Prospective investors should be very careful in making investment commitments and obtain proper advice to ensure all necessary legal safeguards and protections are in place before moving forward.

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