

THE CHAMBER OF COMMERCE OF THE  
UNITED STATES OF AMERICA

# IRAQ BUSINESS INITIATIVE

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INVESTMENT CLIMATE UPDATE:  
DECEMBER 2008  
THE DEVELOPMENT FUND FOR IRAQ (DFI)



1615 H STREET, N.W.  
WASHINGTON, D.C. 20062

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## INTRODUCTION

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*Aram Zamgochian*  
*Senior Advisor, U.S. Chamber of Commerce*

This month's Investment Climate Update – prepared by the Iraq Initiative's Counsel, David Tafuri, Esq. – focuses on the legal protections for the Development Fund for Iraq (DFI) and the extension of protections for Iraqi assets in the UN Security Council and under U.S. law. As background, in May of 2003 following the liberation of Iraq in March of that year, the Central Bank of Iraq-Development Fund for Iraq (DFI) account was created at the U.S. Federal Reserve Bank of New York at the request of the Coalition Provisional Authority (CPA) Administrator.

Subsequently, a part of the fund was transferred to Iraq, and the DFI-Baghdad account was opened at the Central Bank of Iraq for cash payment requirements. The fund also eventually received money (US \$1.724 billion) from seized and "vested" Iraqi bank accounts, and funds seized by coalition forces (\$926.7 million).

The DFI has been disbursed primarily for the wheat purchase program, the currency exchange program, the electricity and oil infrastructure programs, equipment for Iraqis security forces, and for Iraqi civil servant salaries and ministry budget operations. Bottom line for business: recent UN Security Council action to extend the protection of Iraqi DFI assets is a positive step in promoting a more stable and predictable investment climate. In our Law in Focus section below, we'll help you understand what this development means for your business.

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## ECONOMIC CLIMATE UPDATE

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Each month, we examine key commercial and legal developments of interest to our Iraq Business Initiative Members. This month's developments include:

- **Provincial Elections Next Month:** Iraq's provincial elections are set for 31 January 2009. In these elections, Iraqi voters can vote for individual candidates – something not possible in past elections because of the use of closed lists that were largely dominated by sectarian parties.

- A record number of candidates have signed up to run for the coming elections. Many believe successful provincial elections will move Iraq a step closer to reconciliation because some groups, especially Sunni Arabs, are currently underrepresented on the councils.
- Elections will take place in all of Iraq's provinces except Kirkuk and the three provinces in the Kurdish Region.
- **Small Business Development Fund Re-Launched:** A U.S. \$100 million Iraqi government fund for the creation of small businesses was re-launched recently. The fund will provide loans up to U.S. \$500,000 for small businesses through an arrangement with private banks and the Ministry of Planning.
  - The fund was initiated during the Saddam Hussein regime, but ceased operating in 2003.
- **Iraqis Returning Home:** As the security situation has improved, UNHCR and other organizations have observed large numbers of Iraqis returning to Iraq. Between June and October 2008, an estimated 140,000 Iraqis returned.
- **New Project to Remove Salinity from Iraqi Farmland:** Iraq has begun a new program to reinvigorate land rendered infertile by salt water. This program requires pumping fresh water under the soil. It has showed success in other countries such as Australia. The program is also aimed at improving the water quality in the Tigris and Euphrates.
- **Iraqi Oil Revenues Increase:** Iraq's oil revenues for 2008 (through the month of November) are estimated at U.S. \$60 billion, up from U.S. \$41 billion in 2007 and U.S. \$31 billion in 2006.
- **Iraq Signs \$144 million Contract with Tenaris:** The Government of Iraq approved a U.S. \$144 million dollar contract with Argentine company Tenaris Oil Field Services. Tenaris will provide casing and production pipes for use in the drilling of an estimated one hundred new oil wells.
- **Nippon Oil Announces Talks to Build Oil Refinery:** The Japanese company Nippon Oil Exploration announced that it is in talks with the government of Iraq to build an oil refinery worth between U.S. \$5 and 10 billion.

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## LEGISLATIVE UPDATE

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This section summarizes recent action and upcoming priorities for Iraq's Council of Representatives (parliament). **NOTE:** this month we provided our members with a separate update on the agenda and Iraq-related priorities relating to the incoming 111<sup>th</sup> Congress.

### IRAQ'S COUNCIL OF REPRESENTATIVES

- On 23 December, the Council of Representatives (COR) passed a law authorizing the presence of troops from the non-U.S. coalition countries (those countries which have not yet signed SOFA agreements like the U.S.). In the same law, the Council of Representatives suspended CPA Order No. 17.
  - By suspending CPA Order No. 17, the government of Iraq has eliminated certain conflicts in the law resulting from its passage of the SOFA agreement.
  - The suspension of CPA Order No. 17 removes the legal basis under Iraqi law for the immunity of U.S. contractors (both DOD and State), in line with the provision in the SOFA which states that Iraq will have legal jurisdiction over contractors.
- Iraq's Federal Supreme Court (the highest court responsible for interpreting the Constitution) overturned a decision by the Council of Representatives to strip one of its members of immunity for visiting Israel. In restoring the legislator's immunity, the Court ruled that the Constitution provides a fundamental right to travel.
- The Council of Representatives passed the Independent High Commission for Human Rights law. The law establishes an independent commission to monitor potential human rights abuses by the government.
  - The Constitution of Iraq required the establishment of a commission, but disagreement over its formation delayed passage of the law. The UN has pledged to assist with the selection of commission members and with setting up the commission.

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## LEGAL FRAMEWORK UPDATE

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This section analyzes the legal and regulatory framework in Iraq with a focus on how it impacts foreign investors. This month's update focuses on legal protections for the Development Fund for Iraq and the extension of protections for Iraqi assets in the UN Security Council and under U.S. law.

### OVERVIEW AND BACKGROUND

Under procedures set up in 2003, all of Iraq's oil revenues are first deposited into an account with the Federal Reserve Bank of New York, known as the Development Fund for Iraq (DFI). The government of Iraq withdraws from that account to satisfy budget requirements. The DFI holds more than \$20 billion. A second account holds Iraq's foreign reserves, now more than \$40 billion.

Beginning in 2003, the UN Security Council and the U.S. Government put in place immunity protections for the DFI and revenues from Iraq's oil exports to ensure that they would be available for the reconstruction of Iraq and would not become entangled in legal actions for debts and claims arising from the Saddam Hussein regime. The UN Security Council and the Bush Administration justified these protections on the grounds that redirection of financial resources from the continued reconstruction of Iraq would harm Iraq's stability.

The claims against Iraq stemming from the Saddam Hussein regime could consume billions of dollars and make it difficult for Iraq to sell its oil around the world, where foreign courts could attempt to seize oil assets to satisfy judgments.

Iraq faces nearly U.S. \$26 billion in claims under the UN Compensation Commission—mainly from Kuwait—, more than U.S. \$50 billion in debts to other countries, and a plethora of civil suits and judgments—especially in the U.S.—arising from Iraq's alleged support of terrorist acts.

Because UN authority for the Multi-National Force in Iraq expires at the end of this year, there has been considerable uncertainty as to whether the protections contained in the UN mandate for the DFI and Iraq's oil assets would be kept in place. Last week, the UN passed a new resolution to extend these protections for at least another year. However, it is not yet clear how long the protections under U.S. law, embodied in Presidential Executive Orders and a Presidential Waiver, will be kept in place.

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## THE LAW IN FOCUS I: THE DFI & IRAQ'S OIL REVENUES

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- On May 22 2003, the UN Security Council passed Resolution 1483 under its Chapter VII authority which gives the UN broad powers to act to maintain peace and security. Resolution 1483 established the DFI account and provides strong protections for the DFI and for Iraqi oil assets from attachment or seizure. Specifically, paragraph 22 of resolution 1483 provides that:
  - “...petroleum, petroleum products, and natural gas originating in Iraq shall be immune, until title passes to the initial purchaser from legal proceedings against them and not be subject to any form of attachment, garnishment or execution”
  - “all states shall take any steps that may be necessary under their respective domestic legal systems to assure this protection”
  - “proceeds and obligations arising from sales thereof, as well as the Development Fund for Iraq, shall enjoy privileges and immunities equivalent to those enjoyed by the United Nations”
- The immunity granted in Resolution 1483 is wide-ranging. It protects against the seizure of Iraqi petroleum assets throughout the entire production cycle.
  - For instance, Italian claimants attempted to seize an oil tanker carrying Iraqi crude oil, but were unable to do so because of the UN Security Council immunities.
- **Cooperation of Member States:** Paragraph 26 of the resolution requires all Member States and international and regional organizations to contribute to implementation of the immunities provided for in the resolution.
- **Authority:** UN Security Council resolution 1546 and other resolutions relating to Iraq provide further authority for the immunity of Iraqi assets.
- **Set to Expire:** Resolution 1483 and the other resolutions protecting Iraqi assets are set to expire at the end of 2008 along with the expiration of the Chapter VII authorization, for and mandate of, the multinational force.

- **Government of Iraq Priority:** The government of Iraq made it a priority to obtain an extension of all immunities for the DFI and its oil assets. To that end, on December 7 Prime Minister Maliki sent a letter to the UN Security Council stating that because of the frailty of the economy and the nature of reconstruction efforts, Iraq continues to seek protection for its reconstruction and development by obtaining an extension of the immunities provided for by the UN Security Council. At Iraq's urging, the U.S. also agreed in the Status of Forces Agreement passed last month to assist the government of Iraq in obtaining an extension of the UN immunities.
- **New Resolution:** On 22 December 2008, the Security Council passed resolution 1859, extending the protections for Iraqi assets. All fifteen members of the Security Council voted in favor of the resolution. The Security Council noted the progress of Iraq in the security, political and economic fields, but recognized the country still needs regional and economic support.
- **United Nations Security Council Resolution 1859:**
  - The new resolution 1859 extends the procedure established in paragraph 20 of resolution 1483 for depositing proceeds from sales of petroleum into the DFI and for the monitoring of those proceeds until December 31, 2009.
  - It extends the immunity provisions in paragraph 22 of resolution 1483 for the DFI and all Iraqi petroleum assets until December 31, 2009.
  - It provides two exceptions to the broad immunity of Iraqi assets from legal action, which were also present in the earlier resolutions: (1) that they shall not apply with respect to any final judgment arising out of a contractual obligation entered into by Iraq after June 30, 2004; and, (2) that they shall not apply to claims for liability for damages in connection with an ecological accident, including an oil spill.
  - The resolution has a new requirement that the Security Council review the extension of provisions relating to the DFI, including the immunity provisions, by June 15, 2009.
  - The resolution also notes that Iraq has reaffirmed its commitment to resolve the debts and settle the claims inherited by the previous regime, and to continue to address those debts and claims until they are resolved.
- **Possibility of Extension After 2009:** To obtain an extension of the immunities and protections for Iraqi assets after 2009, the government of Iraq would have to

make a new request to the UN Security Council. Given the support for 1589, it is possible the Security Council would grant another extension, but it will be much more difficult next year and likely will only be granted if Iraq can demonstrate it has made significant progress in dealing with the pending claims and judgments against it.

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## THE LAW IN FOCUS II: U.S. PROTECTIONS FOR THE DFI AND IRAQ'S OIL REVENUES

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- **Presidential Action:** President Bush has taken steps to provide additional layers of protection for Iraqi assets in the U.S. and to ensure that U.S. courts cannot be used to seize or attach Iraqi assets.
- **Executive Order 13290:** On March 20, 2003, President Bush signed Executive Order 13290 which provided for the confiscation of Iraq's frozen assets and the vesting of those assets in the US Treasury, which in turn placed them in the DFI for use in the post-war reconstruction efforts in Iraq.
  - At the time of confiscation, Iraq's frozen assets totaled approximately \$1.72 billion.
  - The Executive Order excluded from confiscation those Iraqi assets ordered attached by US courts in satisfaction of terrorist suit judgments prior to March 20, 2003. However, it made Iraq's frozen assets unavailable to those who obtain judgments against Iraq after March 20, 2003.
- **Executive Order 13303:** On May 22, 2003, President Bush signed Executive Order 13303 which states that the threat of attachment or other judicial process against the DFI, Iraqi petroleum and Iraqi petroleum products obstructs the orderly reconstruction of Iraq. The Order provides that any attachment, judgment, decree, lien, execution, garnishment or other judicial process is prohibited and deemed null and void with respect to:
  - the Development Fund for Iraq, and
  - all Iraqi petroleum and petroleum products, and interests therein, and proceeds, obligations, or any financial instruments of any nature whatsoever arising from or related to the sale or marketing thereof ....

- **Set to Expire:** The protections for the DFI and Iraq’s oil revenues in Executive Order 13303 are set to expire in May 2009. President-Elect Obama’s Administration has not indicated whether he will renew the Executive Order.
- **Congressional Action:** Notwithstanding the Executive Order, Congress has repeatedly taken action that President Bush deemed a threat to Iraqi assets in the U.S. Most recently, in December 2007, Congress passed the National Defense Authorization Act (NDAA) for FY2008 which made numerous changes to the Foreign Sovereign Immunities Act terrorist State exceptions, including provisions to facilitate the attachment of assets of defendant States in the U.S. The provision of the NDAA bill which made these changes is section 1083, also known as the “Lautenberg Amendment.”
- **Veto:** In December 2007, President Bush vetoed the NDAA because of section 1083, stating that it would make Iraq’s assets vulnerable to seizure and would jeopardize Iraq’s economic development and security.
- **Waiver:** As a result, in January 2008 Congress passed a new bill, virtually identical, but with a new section that provided with respect to Iraq, the President may waive section 1083’s provisions. The bill authorized the President to:
  - waive any provision of section 1083 with respect to Iraq, insofar as that provision may, in the President’s determination, affect Iraq or any agency or instrumentality thereof, if the President determines that – (A) the waiver is in the national security interest of the United States; (B) the waiver will promote the reconstruction of, the consolidation of democracy in, and the relations of the United States with, Iraq; and (C) Iraq continues to be a reliable ally of the United States and partner in combating acts of international terrorism.
- **Waiver of Section 1803 for Iraq:** On January 28, 2008, the President signed the NDAA into law. On the same day, he signed a waiver of all provisions of section 1083 with respect to Iraq and any agency or instrumentality thereof.
- **Expiration of Waiver:** By its terms, the waiver does not have a deadline on which it expires. However, if the next Administration wanted to do so, it could rescind the waiver. Moreover, Congress could pass a new provision overriding the waiver, or putting in place other mechanisms for attachment of Iraqi assets. Should Congress choose to do so, President-Elect Obama's Administration will have to decide whether to veto or take other action to try to protect Iraqi assets against seizure or attachment in U.S. courts.

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## ABOUT THE AUTHOR

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**David Tafuri, Esq.** assists clients on international business, litigation, and public policy matters. Mr. Tafuri is experienced in finding creative, multi-forum solutions for clients facing problems in the United States and overseas. He has tried cases in federal and state court and has particularly strong capability in resolving matters involving international law. Mr. Tafuri also serves as the Counsel for the U.S. Chamber of Commerce's Iraq Business Initiative. Most recently, Mr. Tafuri returned from 15 months in Iraq, where he served as the Department of State's Rule of Law Coordinator for Iraq at the U.S. Embassy Baghdad. He was responsible for advising the U.S. Ambassador and staff on the Iraqi justice system. He also designed and managed justice development programs for the U.S. Government and led a joint U.S. military and civilian team responsible for drafting the strategic plan to strengthen the Iraqi justice system. During his time in Iraq, he managed a number of U.S. Government contractors and non-profit organizations responsible for implementing Iraq reconstruction efforts.



*David Tafuri, Esq.  
Of Counsel, U.S. Chamber Iraq Initiative*