

THE CHAMBER OF COMMERCE OF THE  
UNITED STATES OF AMERICA

# IRAQ BUSINESS INITIATIVE

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INVESTMENT CLIMATE UPDATE:  
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1615 H STREET, N.W.  
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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. – contains an analysis of the Status of Forces Agreement ("SOFA") between the United States and Iraq, which is on the verge of passage by the Iraqi Parliament. While the SOFA has been widely reported on in the media, there has been little commentary on the actual, on-the-ground impact it will have on operations in Iraq. Our report offers an analysis of the SOFA's impact on immunity from Iraqi courts and other key issues of interest to our Iraq Initiative Members operating, or considering operating in Iraq. We've also analyzed the Strategic Framework Agreement – a companion agreement between the U.S. and Iraq – which has not received much media attention at all, but sets forth broad new economic goals, including the promotion of foreign investment, bilateral discussions on trade, and developing Iraqi industries through partnerships with U.S. companies. As with our previous Investment Climate Updates, we strive to pinpoint the policies and trends that shape the investment climate in Iraq to facilitate targeted advocacy on behalf of our members. Bottom line for business: both the SOFA and the Strategic Framework Agreement will shape and impact the commercial relationship between the U.S. and Iraq for years to come.

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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:

- **Government of Iraq Cut Its 2009 Budget:** after meeting with the International Monetary Fund in Amman, Iraq has agreed to reduce its 2009 budget to approximately \$67 billion, down from the \$79 billion figure it previously announced. The previous budget was calculated based on an oil price of \$80 per barrel. The new budget is based on an oil price of \$62 per barrel.

- **Government of Iraq Agrees to Transparency Goals in Oil Sector:** Iraq is taking steps to implement the Extractive Industries Transparency Initiative (EITI). The EITI process reconciles government receipts with those that companies claim to have paid the government. Iraq has appointed a national EITI coordinator and has said it is open to involving civil society in the transparency process, two necessary steps. Iraq additionally must draft a work plan which explains the scope and process to become a “candidate or implementing country,” after which Iraq has two years to fully implement the work plan and for the process to be validated externally. The Middle East Director for EITI, Eddie Rich, assessed the commitment from the government as “strong.” Twenty-three countries are in the process of implementing the EITI -- no country has become fully compliant yet.
- **Update on DFI Account:** all Iraqi oil proceeds, revenues and the remainder of the Oil-For-Food program are held in the Development Fund for Iraq (DFI). Two DFI accounts are held at the Federal Reserve Bank of New York; one is unused to maintain the value of the Iraqi dinar and the other used to fund government expenditures. The International Advisory and Monitoring Board (IAMB) audits Iraq’s oil revenues under a UN mandate set to expire at the end of 2008. The Iraqi Committee of Financial Experts (COFE) will take on the oversight responsibilities for the Development Fund of Iraq. The IAMB believes that COFE is ready to take over the oversight responsibilities of the DFI. COFE has already begun a comprehensive review of the audit reports together with the Iraqi Board of Supreme Audit.
- **Central Bank of Iraq Cut Interest Rates:** on November 3 the Central Bank of Iraq (CBI) cut interest rates by one percentage point to 15%, which the bank hopes will insulate Iraq from the global financial crisis. In September, the International Monetary Fund forecast that Iraq’s economy would grow 9% in 2008, but the impact of lowered oil prices could slow economic growth. CBI’s governor, Sinan al-Shibibi, said that inflation also remains a concern for Iraq. (Iraq’s inflation rate rose from 12 to 12.9% from August to September).
- **Babel and Wasit Provinces Turned Over to Iraqi Control:** at the end of October the Coalition Forces handed over security responsibilities for both Babel and Wasit provinces through the process known as Provincial Iraqi Control (PIC). Babel and Wasit are the 12<sup>th</sup> and 13<sup>th</sup> of Iraq’s 18 provinces to return to full Iraqi control. The Government of Iraq (GOI) is now responsible for security in all of Iraq’s southern provinces. Coalition Forces will maintain around 3,800 soldiers in Babil to assist with security in a secondary role.

- **Anbar Province Continuing to Make Security Progress:** security in Anbar province, once the most dangerous in Iraq, has continued to improve dramatically. As a result, coalition forces are moving their headquarters in Anbar from Fallujah further west to the more remote Al Asad Airbase. Coalition troops in the province are down from 26,000 during the height of the surge to 34,000. Anbar's Iraqi police force meanwhile has increased from 11,000 to 28,000.
- **The Astrata Group (a U.S. company) Awarded Contract:** the Government of Iraq awarded a contract to the Costa Mesa, California based Astrata Group for it to provide Astrata's next generation GPS Vehicle Tracking and Fleet Management System (Geo-Location Platform GLP100i). The contract was awarded through the group's Iraqi partner and will provide 600 long-haul trucks, part of a fleet of 20,000 vehicles. The system will be owned and operated by the Ministry of Transportation. The ministry will use the system to monitor "unauthorized stops, route deviation, safety (distress button), voice communication, cargo tampering and general travel information such as estimated time of arrival."
- **European Countries Express Interest in Investment Opportunities in Iraq:** a delegation from Italy led by the Deputy Minister for Economic Development visited Northern Iraq to explore investment opportunities on November 16 and held a meeting of the Italian Economic Forum, which brought together Italy's Economic Commission and the Kurdish Region Chambers of Commerce. Also, Iraq foreign Minister Hoshyar Zebari met with the Swedish Minister of Commerce and a Swedish delegation on November 17 to strengthen economic ties with Sweden.
- **UNCTAD to Provide Customs and Trade Assistance:** the United Nations Conference on Trade and Development (UNCTAD) signed a memorandum of agreement October 26 granting it access to \$1.3 billion in the UN Development Group Iraq Trust Fund (UNDG ITF). UNCTAD will use the UNDG ITF to provide key assistance programs in Iraq, including its automated system of customs data program and a science, technology and innovation policy review (STIP). The STIP review will provide policy support to Iraq to shape and establish a national science, technology and innovation system to assist with reconstructing the nation's economy and accelerating its development toward a functioning knowledge-based, globalized economy.
- **American University in Iraq Providing Four Year Liberal Arts Education:** the American University in Iraq provides a four year bachelor's degrees in business, computer science or international studies and will be adding a degree in

petroleum engineering. It opened in January 2007 and its enrollment jumped from 48 students last year to 256 this year. Based in Sulemaniya, the university has plans to open campuses in Basrah and Baghdad.

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## LEGISLATIVE UPDATE

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This section summarizes recent action and upcoming priorities for the Council of Representatives (parliament) in Iraq and for the U.S. Congress.

### ❖ IRAQ'S COUNCIL OF REPRESENTATIVES

- The Council of Representatives (COR) returned from recess on November 11. It will go into recess at the end of this month or early December for the Eid al-Adha holiday, but will likely return in mid-December for a few weeks before the end of the year.
- On November 3, the Council of Representatives passed an amendment to the provincial elections law that provides for 6 seats in 3 provinces to go to religious minorities. This constitutes the final change to the provincial elections law passed on September 24 and signed into law by the Presidency Council on October 7. The Presidency Council ratified the amendment on November 8. Elections to Iraq's provincial councils are set for January 31, 2009.

### ❖ THE UNITED STATES CONGRESS

- Congress is out of session for the Thanksgiving break. Congress has not set the rest of its schedule for the year, but it is expected that Congress will hold a second lame duck session the week of 8 December.

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## LEGAL FRAMEWORK UPDATE

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### A. THE LAW IN FOCUS: The Proposed Status of Forces Agreement ("SOFA")

1. **Background on the SOFA:** The U.S. and the Iraq government are close to completing a long term agreement that will provide a new basis of authority for the presence of U.S. personnel and operations in Iraq. The agreement includes

two separate documents, a Status of Forces Agreement (SOFA) and a Strategic Framework Agreement (SFA). The SOFA will set forth the legal authority for the U.S. presence in Iraq, including for U.S. companies operating in Iraq under contracts with the U.S. government. The SFA, which has received far less media attention than the SOFA, sets forth principles and goals for the bilateral relationship between the U.S. and Iraq.

2. **Current Authority to be in Iraq:** The current source of authority for the presence of U.S. and other coalition country personnel in Iraq is UN Security Council Resolution 1790, which is set to expire on December 31, 2008. In previous years, the government of Iraq has agreed to one year extensions of the UN Security Council Resolution. The government of Iraq made clear at the beginning of this year, however, that after 2008 it did not want to operate under a UN Security Council Resolution. It then began discussions with the U.S. and other coalition countries on bilateral agreements that would govern each country's presence in Iraq. This set the stage for a dramatic change in the law governing the operations of the U.S. and other coalition countries in Iraq.
3. **Outlook for Passage of the SOFA with the U.S.:** Iraq's Council of Ministers approved of the SOFA and SFA on November 16 by an overwhelming majority. The agreements must now be ratified by the Council of Representatives (Iraq's Parliament). If a majority of the members of the Council of Representatives vote in favor of the agreements, they will go into effect on January 1, 2009. The agreements are expected to go to a third reading and then to a vote in the Council of Representatives this Wednesday November 26, 2008.
4. ***IF the SOFA Fails to Pass:*** Should the SOFA fail to pass the Council of Representatives, the following are likely scenarios: (1) Prime Minister Maliki will continue to try to win passage, but the Council of Representatives will go out of session for the Eid al-Adha holiday in early December and will not be back in session until mid-December; (2) although the government of Iraq has insisted it does not want to operate under a UN Security Council Resolution any longer, the U.S. and the government of Iraq will begin working on a back-up plan to try to extend the UN mandate, perhaps for a period shorter than a year, to give the sides more time to pass a bilateral arrangement like the SOFA in early 2009; and, (3) if neither a bilateral agreement, such as the SOFA, or a UN Security Council extension can be achieved, the Administration has stated that beginning January 1, 2009, it will pull back all U.S. forces to major bases in Iraq and not leave the bases until new authority for the U.S. presence in Iraq is

reached. This final scenario would result in a major disruption to engagement by U.S. military and civilian personnel in Iraq.

5. **Immunity of U.S. Personnel in Iraq:** Immunity for U.S. forces, civilian personnel, and contractors has been a major point of contention between U.S. and Iraqi negotiators since SOFA discussions began last Spring. The government of Iraq has been under significant pressure from the Iraqi public to eliminate the full immunity from criminal and civil liability in Iraq currently enjoyed by all coalition country personnel and contractors. According to the language of the draft SOFA currently being considered by Council of Representatives, contractors would not have immunity. The draft states, "Iraq shall have the primary right to exercise jurisdiction over United States contractors and United States contractor employees." The draft preserves at least partial immunity for U.S. forces. It states that the U.S. shall have the primary right to exercise jurisdiction over members of the U.S. forces both when they are on base and when they are off base during "duty status." Iraq, on the other hand, has the right to exercise jurisdiction over U.S. forces if they commit premeditated felonies while off base and outside of "duty status." Importantly, under the current draft, the U.S. retains the right to determine whether any particular alleged offense arose during "duty status."
6. **Impact of the SOFA on U.S. Contractor Immunity:** U.S. contractors will not immediately lose their immunity at the time the SOFA goes into effect, if approved by the Council of Representatives. This is because the current right of U.S. contractors and U.S. forces to immunity from prosecution in Iraq arises not from any international agreement, but from CPA Order No. 17, which was incorporated into the law of Iraq. CPA Order No. 17 will remain the law of the land until it is specifically repealed or amended by the Iraq Council of Representatives. It is not automatically repealed at the time the SOFA goes into effect. This is confirmed in Article 20 of CPA Order No. 17, which provides that CPA Order No. 17 "...shall not terminate until departure of the final element of the MNF from Iraq, unless rescinded or amended by legislation duly enacted and having the force of law."
7. **Draft legislation to repeal CPA Order No. 17:** Legislation has been introduced in the Council of Representatives to amend CPA Order No. 17, but has not passed. The Council of Representative is expected to pass such legislation after the SOFA is approved. At least one source has mentioned that the Council of Representatives may only rescind immunity for security contractors, and keep it in place for other types of contractors. However, it is

not possible at this time to predict what the Council of Representatives will do, especially given how controversial the issue of immunity for U.S. personnel is to the Iraqi public.

8. **Distinction in the SOFA Between DOD and Other Civilian Agency**

**Contractors:** The definitions section of the current draft SOFA clearly limits its application to contractors who provide goods, services or security to U.S. forces. Thus, by its terms, the SOFA only applies to DOD contractors in Iraq, not to other agency contractors such as State Department contractors. However, the omission of Department of State and other contractors from the current draft of the SOFA does not provide a basis for State Department and other non-DOD contractors to claim immunity in Iraq. Immunity must be specifically provided for in an international convention, international agreement or by Iraqi law. Currently, immunity for all contractors is provided for under Iraqi law in CPA Order No. 17. Thus, once CPA Order No. 17 expires, or is repealed, State Department and other civilian contractors will have no source granting them immunity from Iraqi law, unless the Iraqi legislature decides to keep in place some aspect of immunity for contractors.

9. **Timeline for Withdrawal of U.S. Forces:** As has been widely reported in the media, the draft SOFA sets a specific timeline for the withdrawal of U.S. forces. It provides that: (1) U.S. forces shall withdraw from Iraqi territories by December 31, 2011; and, (2) from all cities, towns and villages by June 30, 2009. These timelines have been reported correctly in the media.

10. **Impact on the International Zone:** There is a new provision in the current draft of the SOFA relating to the International Zone. This provision has largely gone unreported in the press. It states:

- i. The Iraqi government takes full responsibility of the International Zone as soon as this agreement goes into effect. The Iraqi government is permitted to request temporary support from the U.S. forces in tasks related to security in the international zone. When such a request is submitted, the related Iraqi authorities shall work jointly with the U.S. forces to secure the International Zone during the temporary period requested by the Iraqi government.

11. **Impact on U.S. Arrest and Detainee Authority:** The SOFA requires a number of changes in the way U.S. forces will be able to operate in Iraq. With respect to detainee authority, the U.S. forces will not be permitted to arrest

anyone without a warrant from an Iraqi judge --- a major change from existing authority. U.S. forces will be permitted to assist with arrests and detentions when Iraqi security forces request their assistance. Another substantial change to current authority is that the U.S. must release all detainees for whom there is not a valid Iraqi arrest warrant in a “safe and orderly manner,” unless otherwise requested by the government of Iraq. U.S. forces may be currently holding as many as 20,000 detainees in Iraq.

12. **Contracting Procedures:** The SOFA provides that U.S. forces should contract with Iraqi suppliers of materials and services to the extent feasible when their bids are competitive. It further provides that U.S. forces shall respect Iraqi law when contracting with Iraqi suppliers and contractors.
13. **Import and Export:** The SOFA provides that U.S. forces and U.S. contractors may import, export, re-export, transport and use any equipment, technology or supplies in furtherance of the goals of the agreement provided they are not banned in Iraq. These activities will not be subject to taxes or customs duties. Iraqi authorities have a new right under the SOFA to request that U.S. forces open for inspection in their presence any container in which such items are being imported.
14. **Other Coalition Countries:** Other members of the coalition in Iraq will have to enter into separate agreements with the government of Iraq to govern their presence in Iraq. Some countries will likely sign agreements that are identical to the one the U.S. negotiates with Iraq. The UK is reportedly negotiating an agreement with separate terms. Contractors with other coalition countries should look to the terms of those agreements for information on immunity and other issues governing their operations.

## **B. THE LAW IN FOCUS:** The Strategic Framework Agreement (SFA)

1. **Background:** the SFA has received less media attention than the SOFA. While the SOFA defines the exact terms and legal authority for the U.S. presence and operations in Iraq, the SFA defines broader goals of the bilateral relationship between the U.S. and Iraq going forward. The SFA has been described by some sources as non-binding, but this is not stated expressly in the language.

2. **Overall Goal of Long Term Cooperation:** the SFA states the desire of both countries “to establish a long-term relationship in economic, diplomatic, cultural and security fields [that] will contribute to the strengthening and development of democracy in Iraq ...”
  
3. **Economic and Energy Cooperation:** the SFA includes a section on economic and energy goals in which both countries state their commitment to “[b]uilding a prosperous, diversified, growing economy in Iraq, integrated in the global economic system, capable of meeting the essential service needs of the Iraqi people ...” To that end, the U.S. and Iraq agree in part to:
  - i. Maintain active bilateral dialogue through the U.S.-Iraq Business dialogue as well as bilateral exchanges, such as trade promotion agreements and access to Export-Import Bank programs.
  - ii. Support further integration into regional and international financial and economic communities and institutions, including membership in the WTO.
  - iii. Facilitate the flow of direct investment into Iraq to contribute to the reconstruction and development of its economy.
  - iv. Promote the development of the Iraqi electricity, oil and gas sectors.
  - v. Encourage the creation of a positive investment environment to modernize Iraq’s private industrial sector, “including through encouraging networking with U.S. industrial institutions.” (emphasis added)
  - vi. Encourage development in the fields of air, land and sea transportation as well as rehabilitation of Iraqi ports and enhancement of maritime trade.
  - vii. Maintain active dialogue on agricultural issues, help Iraq develop its domestic agricultural production and encourage increased agricultural exports.
  
4. **U.S. Support for Private Investment:** while possibly non-binding, the SFA clearly provides new support for the principle that encouraging foreign investment is a goal of the U.S. in Iraq and that the U.S. government should expend resources to support foreign investment.

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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.  
Iraq Initiative Counsel*