Occupation Law and Foreign Investment in Iraq: How an Outdated Doctrine Has Become an Obstacle to Occupied Populations

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The final cause of law is the welfare of society. The rule that misses its aim cannot permanently justify its existence.¹ Such is the predicament of occupation law, the international legal doctrine controlling the authority of an interim administration in an occupied territory during a military occupation.² The doctrine’s fundamental purpose is to achieve a balance between restraining the conduct of an occupying power, while simultaneously empowering an occupied population.³ To achieve this purpose, Article 43 of the Hague Convention,⁴ which codified the doctrine, states that an occupying interim administration shall respect the laws of the occupied territory as they existed prior to an invasion “unless absolutely prevented” from doing so.⁵ Yet, considering the nature of modern international occupation, occupation law no longer achieves this balance because the nineteenth century social and political institutions that drove the doctrine’s development are not applicable to twenty-first century society. In modern occupations, often the sole motivation for invasion is to transform the whole of a society. Therefore, occupation law’s prohibition against allowing an occupier to change any law of an occupied territory is simply no longer a cogent, sensible, or functional limita-

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⁵. Id.
tion. Indeed, in a modern occupation, Article 43’s uncertain reach hinders the occupied population’s prospects for recovery.

The doctrine, scarcely applied during the twentieth century, has re-emerged as the international community increasingly uses military force to induce structural transformations of oppressive governments. Because of this scarce application, occupation law, however, has not adapted to several significant economic and societal developments. Chief among these developments, and the focus of this Comment, is the emergence of foreign investment as a linchpin of modern international economics.6

The importance of foreign investment’s role in developing countries cannot be overstated. It is widely recognized that, if properly harnessed, foreign investment brought by multinational corporations from developed countries benefits the growth and restructuring of a state’s developing economy.7 The United Nations Commission on Trade and Development (“UNCTAD”) estimates that foreign affiliates of nearly sixty-four thousand multinational corporations generate over fifty-three million jobs worldwide, accounting for the largest source of external financing in developing countries.8 In fact, today the inward flow of foreign capital through equity in local companies, reinvested earnings, and intra-company loans (foreign direct invest-

6. Foreign direct investment (“FDI”), used in this Comment interchangeably with foreign investment, involves the creation of new businesses or investment in existing businesses in a country other than the home country of the corporation. 2 RALPH H. FOLSOM, INTERNATIONAL BUSINESS TRANSACTIONS § 25.1, at 277 (2d ed. 2002). The investment includes capital transfer to underwrite a newly created entity, creating a long-term relationship and reflecting a lasting interest. See id. “It means ownership and control of the enterprise abroad.” Id.; see also PFIZER CORP., WHO WE ARE, ABOUT PFIZER, at http://www.pfizer.com/are/mn_about_all.html#worldwide (last accessed Sept. 17, 2004). Pfizer is a company headquartered in New York that discovers, develops, and manufactures prescription medicine. On its website the company lists three American locations and thirty-four foreign manufacturing and research and development locations in, inter alia, Brazil, China, Hungary, Philippines, Senegal, and Turkey. Id.

7. M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 94 (1994). Theoretical conflicts marked the growth of foreign investment law. The classical theory of investment, endorsed primarily by capital-exporting developed countries, took the position that foreign investment was wholly beneficial to the host state. Id. at 38-43. In contrast, the dependency theory endorsed by capital-importing developing countries, argued that foreign investment relegated the host’s economy to a subservient, peripheral status in the world economy. Id. at 43-45. Most modern thought takes a middle road, attempting to harness foreign investment to maximize benefits while concurrently working to reduce potential negative side effects. Id. at 45-50.

Foreign investment has become crucial to enhancing and modernizing the critical areas of infrastructure that create the foundation of a developing country's economy, such as energy production, telecommunications, and transportation. Additional economic benefits of foreign investment for developing countries include the efficient use of resources, technology transfer (including organizational and managerial skills), positive employment effects (jobs are created, though generally after an initial rise in unemployment), and improved productivity of local firms.

Occupation law's failure to account for the importance of foreign investment in developing economies has created a problem in modern occupation. Modern occupation is frequently undertaken to transform the occupied society. Therefore, the occupier is often attempting to rehabilitate a society as a whole. This likely requires the modernization of oppressive political and legal structures. Yet, occupation law persists in circumscribing change in a territory's law "unless absolutely prevented," thus restricting the latitude necessary to effectively steer an occupied territory into modern international economics. Considering the importance of foreign investment in such a transition, the uncertain legal authority of an interim administration to change foreign investment laws is a detriment to an occupied population.

Iraq, after the American-led invasion of March 2003, is a clear example of occupation law's failure. In September 2003, Iraq's Finance Minister Kamel al-Kailani announced United States-authorized economic reform measures that abolished almost all restrictions on foreign direct investment. The measures, instituted by the American interim administration, the Coalition Provisional Authority ("CPA"), were intended to unravel the foreign investment restrictions instituted by the former regime and trigger a flow of foreign investment. The

9. Id.
14. Id.
United States role in drafting economic measures sparked considerable controversy however, and international concern persists over the validity of economic measures implemented prior to the establishment of a fully sovereign Iraqi government.\textsuperscript{15}

The medical and pharmaceutical supply industries' attempts to attract foreign investment highlight the legal uncertainty that occupation law has created for foreign investors attempting to invest in occupied Iraq. Nearly a year after the American-led invasion, the State Company for Drugs and Medical Supplies ("SCDMS") announced plans to strike new marketing and distribution deals with foreign drug manufacturers and producers of other medical supplies.\textsuperscript{16} Since the end of major combat in May 2003, the country is critically short of pharmaceutical products despite soaring demand.\textsuperscript{17} Thus, local pharmacists and health officials view privatization and foreign investment in the industry as the key to igniting the production of high-quality drug supplies from a collapsed manufacturing infrastructure.\textsuperscript{18}

Privatization and the introduction of foreign investment to the Iraqi market, as SCDMS has proposed, would, however, effect a radical change in Iraq. Prior to the invasion, Saddam Hussein ("Hussein") and his regime controlled a highly centralized drug market and the private sector pharmaceutical industry was extremely restricted, operating only on a minimal, ad hoc basis.\textsuperscript{19} Under United Nations ("UN") sanctions—a consequence of Iraq's 1990 invasion of Kuwait—import restrictions on technology, mechanical equipment, and other materials needed for drug manufacturing severely hampered the country's state manufacturing facilities.\textsuperscript{20} The proposed privatization would open considerable opportunities for foreign direct investment and would allow foreign multinational drug manufacturers the opportunity to establish a permanent presence in an as-yet untapped drug market.\textsuperscript{21}

Yet, with the shape of Iraq's political future still insecure, foreign pharmaceutical corporations are currently hesitant to commit capital to Iraq to build the type of manufacturing facility that SCDMS

\begin{itemize}
  \item \textsuperscript{15} Id.
  \item \textsuperscript{16} Id.
  \item \textsuperscript{17} Id.
  \item \textsuperscript{18} Id.
  \item \textsuperscript{19} Id.
  \item \textsuperscript{20} Id.
  \item \textsuperscript{21} Id.
\end{itemize}
needs. Though foreign manufacturers may enter into marketing agreements with state companies such as SCDMS for the sale and distribution of their products in Iraq, these relationships are highly unlikely to develop into a catalyst for greater foreign direct investment in manufacturing, which at a minimum requires a stable and predictable legal framework regarding foreign investment. As a result, Iraqi companies are unable to attract the expertise, technology, and funding that foreign investment supplies. In turn, the companies are unable to meet the increasing demand of the Iraqi population.

SCDMS is indicative of a larger problem in Iraq. In order to meet growing demand, both state-run companies and private companies in vital sectors are seeking foreign investment to ignite their production. Yet, more than a year after the end of official combat, foreign investment remains largely absent in Iraq. A significant reason: occupation law prevents legal certainty in the CPA’s changes to Iraq’s foreign investment code. Foreign corporations are concerned that their capital will receive no legal protection once it is invested in Iraq.

It is against this backdrop—an emaciated economy starved under Hussein’s rule, occupied by a foreign military, and struggling back to life—that the inquiry begins into why the century old doctrine of occupation law prevents legal certainty in an occupied territory’s foreign investment law. Clearly, the current violence in Iraq is a threshold issue for foreign investors; however, in occupied and transitional societies generally, economic growth and military insecurity are related concerns. This Comment concludes that the international legal doctrine that controlled the United States occupation in Iraq is an obsta-

22. See id. (predicting that uncertainties in the state of Iraqi law will likely forestall foreign direct investment for at least two years).
23. Id.
24. Id.
26. See id.
27. Indeed, this phenomenon is already apparent in Iraq. Banerjee and Cushman state:

The economy [in Iraq], like the guerilla war that is holding it back, cannot be measured as much as sensed. But on one question, bankers and borrowers, soldiers and Iraqi politicians, day laborers and urbane professionals all agree: economic recovery and security are inextricably linked. In a recent poll of Iraqis . . ., 98 percent of those responding said creating more jobs would be “very effective” in improving security.

Id.
cle to protecting the foreign investment that is so desperately needed in Iraq’s transitional economy. Thus, with Iraq as the example, this Comment advocates fundamental alterations to occupation law regarding the ability of an occupier to change foreign investment laws. These changes would realign the doctrine’s fundamental purpose—protection and empowerment of an occupied population—with the modern realities of occupation and international economics.

Part I of this Comment examines why occupation law governs the legality of the American dominated occupation. The doctrine’s history and development are then discussed. Part II describes occupation law’s contribution to the uncertain effect of the CPA’s liberal foreign investment orders, particularly Order 39,28 that alter previous Iraqi commercial law. The section establishes that occupation law’s influence on the enforcement of occupied Iraq’s foreign investment code renders traditional contractual protections used by foreign investors, such as stabilization clauses, an ineffectual means of mitigating against the risks of investment.

Finally, in Part III, this Comment concludes that in order to achieve occupation law’s objective of restraining an occupier’s power while empowering the occupied population, the doctrine’s restrictions preventing an occupying power from changing the foreign investment laws of an occupied territory must be relaxed. In light of the transformational motives of modern occupation and the pervasiveness of foreign direct investment in developing economies, this section shows that an occupier must be able to create a stable legal regime for foreign investment. To achieve the proper balance between restraining the occupier’s power and empowering the occupied population, the political structures and foreign investment codes of neighboring similar countries should be examined and combined to establish a “lowest common denominator” limit on the ability of an occupier to change foreign investment law, thus creating a balance between the need to allow the legal changes required to attract foreign investment and the need to respect the inherent sovereignty of an occupied population. As an illustration of this principle, the foreign investment codes of Iran, Saudi Arabia, and Jordan are examined as a means of creating a lowest common denominator for foreign investment in Iraq. This Comment ultimately concludes that the proposed lowest common denominator of foreign investment in Iraq is

strikingly similar to the foreign investment law implemented by the CPA.

I. The Occupation of Iraq

To frame the impact that foreign investment has had on the modern application of occupation law, it is important to understand the manner in which occupation law is imposed and the societal structure that drove its origination. The United Nations Security Council’s (“Security Council”) failure to legitimize America’s invasion of Iraq through a formal resolution and the resultant imposition of occupation law in Iraq, as well as the doctrine’s uneven application historically, highlight that there is no standard formula for how, when, or to what extent occupation law will apply in the context of modern occupations. Further, the nineteenth century origins of the doctrine illustrate its modern failure. These issues are discussed in this section.

A. Legality of the American Dominated Occupation

In March 2003, American, British, and Allied forces invaded Iraq to depose Hussein’s government. Whatever the legality of Operation Iraqi Freedom, when the United States and its allies exercised control over Iraqi territory, occupation law immediately applied to their subsequent actions, including repairing destroyed infrastructure, managing Iraq’s significant oil industry, punishing war criminals, altering Iraqi law, and handing power back to a sovereign Iraqi government.

The United States government strongly opposed UN control over any post-war occupation of Iraq. The application of occupation law in Iraq, coupled with America’s desire to maintain control of the occupation, had profound implications for the American CPA. Had a

30. See Scheffer, supra note 2.
31. See id. at 850.
Security Council Resolution authorized a UN-controlled civilian administration, as was done in Kosovo, the new civilian authority could have undertaken the transformational tasks of enhancing the humanitarian, political, and economic well-being of the Iraqi people with unquestioned legal authority. Instead, on May 22, 2003 the Security Council, acting under Article 41 of the UN Charter, passed Resolution 1483 “recognizing the specific authorities, responsibilities, and obligations under applicable international law of these states as occupying powers,” which it then specified as “in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907.” This created a hybrid resolution, legitimizing and empowering the United States actions and occupation, while simultaneously proscribing certain actions outside of the restrictive occupation law doctrine.

Though several occupations have taken place since 1990, including those under UN-supported humanitarian intervention, Iraq is the first time that the Security Council has resorted to occupation law to govern a foreign military’s control of an occupied area. Thus, although the CPA was charged with transforming Iraqi society, it was explicitly constrained by the very provisions of occupation law that the Security Council omitted in empowering the interim administration in, for example, Kosovo. The Security Council applied a legal straight jacket, even while it authorized the CPA to steer Iraq’s transformation.

34. See Scheffer, supra note 2, at 850; U.N. Charter art. 103 (“In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”). The U.N. Charter is available in 1 A COMPREHENSIVE HANDBOOK OF THE UNITED NATIONS: DOCUMENTARY PRESENTATION IN TWO VOLUMES 107 (Min-Chuan Ku ed., 1978).
37. Id.; see also, Thomas D. Grant, The Security Council and Iraq: An Incremental Practice, 97 Am. J. Int’l L. 823, 824–25 (2003) (examining the adoption of Resolution 1483 by the Security Council and the authority that was established by the Resolution).
38. See Scheffer, supra note 2, at 852. Indeed, Resolution 1483 may have thrown the complete blanket of occupation law over the United States, where it may not have universally applied. Occupation law is not a preememptory norm of international law because of the varying circumstances of occupation; all provisions are not always applied. By explicitly articulating that the international law of occupation applies in Iraq, however, the Security Council restricted the United States option of claiming exceptions to the full doctrine. See generally id. at 844–47.
from dictatorship to representative government. The legal constraints placed on the CPA through occupation law significantly limited the ability of the CPA to establish the necessary legal structure to secure the foreign investment essential to a successful transformation of Iraq from an occupied land to a newly independent nation.  

B. The Development of Occupation Law

Signed on October 18, 1907, the Hague Convention IV Respecting the Laws and Customs of War on Land41 ("Hague Convention"), codified the culmination of prescriptive efforts undertaken throughout the nineteenth century by national courts, military manuals, non-binding international instruments, and legal scholars.42 The Hague Convention created the international legal doctrine of occupation law. The doctrine rests upon the principle that the actual or threatened use of force is an unacceptable means of attaining sovereignty over territory.43 Because there is a general presumption against occupation, the rules of occupation seek to strike a balance between enabling an occupier to act, while also limiting an occupier's administrative powers as a means of preventing it from ignoring the welfare of the occupied population.44

The drafters designed the Hague Convention to control short-term occupations after a military conquest and before the signing of a peace treaty, at which time a defeated government would resume sovereignty.45 The clear separation between ruling governments and everyday economic and social concerns of nineteenth century European society shaped the Hague Convention.46 Sovereign governments fought one another, but fundamental structures of sovereign states

40. A fair response is that this issue is moot so long as the United States goes to the UN before occupying another country. Given the United States "War on Terror" and the tension on the Security Council resulting from the invasion of Iraq, however, the prospect of future occupations governed by occupation law rather than a Security Council Resolution is not merely academic.

41. Hague Convention, supra note 4. See also Adam Roberts, Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967, 84 AM. J. INT'L L. 44, 53 (1990), stating: Whether or not a state is a party to [the Hague] Convention is of limited significance, because the annexed Hague Regulations have since at least 1946 been widely and authoritatively viewed as embodying customary international law [and therefore binding on all states that have not persistently objected to the Convention].


43. Id. at 3.

44. Goodman, supra note 3.

45. Id. at 1580–81.

46. Id. at 1591.
did not differ radically, as many operated economies pursuant to the same, general laissez-faire economic philosophies.\textsuperscript{47} During a military occupation, the ousted sovereign would merely wait beyond the occupied borders, making his rightful return once the conflict ceased.\textsuperscript{48} At the turn of the twentieth century the Hague Convention, in effect, functioned as a pact between heads of state, providing that if one leader was temporarily ousted, a trustee (the occupier) would manage the territory before returning sovereignty to the rightful ruler once hostilities ceased.\textsuperscript{49}

In the post-World War II occupations of Italy, Germany, and Japan the Allied powers claimed exceptions to the applicability of the Hague Convention, compromising its status and authority.\textsuperscript{50} This poor record of adherence led to the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War\textsuperscript{51} ("Geneva Convention"), which attempted to redefine occupation law and resuscitate its waning influence.\textsuperscript{52}

The Geneva Convention recast the purpose of occupation law. First, it delineated a bill of rights for the occupied population, creating a set of internationally approved guidelines for the lawful administration of occupied territories.\textsuperscript{53} Second, it shifted the emphasis from political elites to society at large.\textsuperscript{54} As a result, contemporary occupation law, guided by both the Hague and Geneva Conventions, focuses on the interests of the indigenous community under occupation rather than the wishes of the ousted government.\textsuperscript{55} Concepts of self-determination make the modern doctrine less an agreement among sovereigns and more a tool for protecting and empowering the occupied population.\textsuperscript{56}

The Hague and Geneva Conventions create a paradox of uncertainty for a modern-day occupier. Despite the key role of economic recovery in an overall reconstruction effort, neither of the Conventions specifically address the precise extent of an occupier's power to undertake economic development in occupied territories. Consider-

\textsuperscript{47} Id.
\textsuperscript{48} Id. at 1580–81.
\textsuperscript{49} Id.
\textsuperscript{50} Benvenisti, The International Law of Occupation, supra note 12, at 59.
\textsuperscript{52} Benvenisti, The International Law of Occupation, supra note 12, at 59.
\textsuperscript{53} Id. at 105.
\textsuperscript{54} Id.
\textsuperscript{55} See id. at 6.
\textsuperscript{56} Id. at 6, 105.
ing the role of economics in modern occupation, this failure significa-
cantly undermines an occupier’s attempts to spur economic recovery
and reform. Nonetheless, the Hague and Geneva Conventions pro-
vide the framework for evaluating an occupier’s rights and duties to
develop the territory under its occupation by precluding legal changes
“unless absolutely prevented.”\textsuperscript{57} This incongruity is where the
doc-trine’s failure to adjust to modern economic realities is most glaring
and most in need of significant realignment.

II. Law in Occupied Iraq: Did the CPA Have Authority to
Change Iraqi Foreign Investment Law?

“Everybody knows we cannot wait until there is an elected govern-
ment here to start economic reform . . . The dilemma will be to
make changes in such a way that new laws will survive the elected
Iraqi government.”\textsuperscript{58}

Foreign investors are vital to modernize Iraq’s economy and en-
sure the success of its new government. Yet, they are not investing
their capital and expertise in Iraq. For example, why has no major
foreign drug manufacturer signed a joint venture agreement with
SCDMS to build and operate a manufacturing facility in Iraq to meet
the demand of the Iraqi drug market? One reason is the lack of clear
legal protection for their investments against the political decisions of
a future Iraqi sovereign. Thus, the question is how the international
community can create as much legal certainty as possible for foreign
investment in occupied Iraq before the Iraqi people form their own
sovereign government. This section examines the uncertainty that re-
sults from the interplay between occupation law, CPA Orders, previ-
ous Iraqi Commercial Law, and stabilization clauses in “state
contracts”\textsuperscript{59} that traditionally protect foreign investors from the subse-
quent political decisions of a host government. This section concludes
that the current legal regime that limits the ability of an occupier to
make necessary economic developments in an occupied territory fails

\textsuperscript{57} Samira Shah, \textit{On the Road to Apartheid: The Bypass Road Network in the West Bank}, 29

\textsuperscript{58} Pratap Ravindran, \textit{The Arithmetic of Annexation}, BUS. LINE, Sept. 12, 2003, at *2,
available at 2003 WL 62535660 (last accessed Sept. 5, 2004) (omission in original) (quoting
Coalition Provisional Authority Administrator, L. Paul Bremer).

\textsuperscript{59} State contracts are contracts between a foreign private legal individual and a state
controlled economic entity. Thomas W. Waelde & George Ndi, \textit{Stabilizing International In-
estment Commitments: International Law Versus Contract Interpretation}, 31 TEX INT’L L.J. 215,
to account and allow for the foreign investment that is necessary for the successful transition from a once-occupied state to sovereignty.

A. Article 43 of the Hague Convention

Section III, Article 43 of the Hague Convention states:

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.60

Read strictly, the CPA had to respect Iraqi constitutional and commercial law as it stood before the invasion unless absolutely critical to its own security.61 Thus, occupation law prevented the CPA from changing local law even if change was needed to begin economic development.62 An examination of CPA Orders and Iraqi commercial law shows that, despite this seeming restriction, the CPA deviated from Article 43.

B. Conflicting Law in Post-Invasion Iraq: CPA Orders Versus Iraqi Commercial Law

Before Hussein’s assent to power, Iraq had the most progressive legal regime in the Middle East.63 Hussein’s domination of the Iraqi economy and over a decade of sanctions, however, resulted in the stagnation of Iraq’s commercial code, including its foreign investment law. The result is an economy in disrepair, characterized by a glut of inefficient state run companies that dominate several key industries. During the occupation, the CPA assumed law-making power and enacted sweeping changes to several areas of law, including CPA Order 39,64 which overhauled Iraq’s foreign investment law, particularly The Companies Law 21 of 199765 (“the Companies Law”). The questiona-

60. Hague Convention, supra note 4, at art. 43.
61. Part II.D further explores how previous tribunals have interpreted “absolutely prevented.” See infra Part II.D.
62. See Goodman, supra note 3, at 1587.
63. See generally U.S. Dep't of Commerce, Overview of Commercial Law in Pre-War Iraq 1 (Sept. 12, 2003) (draft), http://www.export.gov/iraq/pdf/iraq_commercial_law_current.pdf (last accessed Sept. 5, 2004). Many basic elements of Iraqi contract law are similar to those in Western legal systems. See id. at 4 (noting specific differences between Iraqi contract law and Western legal systems). As an example, while many other Muslim countries do not allow parties to charge interest, in Iraq this practice is permissible, although limited in commercial and banking transactions. See id.
64. Coalition Provisional Authority Order 39, supra note 28.
ble authority of the CPA to change Iraq's foreign investment law combined with the inherent conflict between Order 39 and the Companies Law clearly creates uncertainty for investors.

1. Iraqi Commercial Code Before the Invasion

The Iraqi Civil Code is the primary source of Iraqi commercial law, particularly regarding the formation, discharge, and dissolution of contracts. In addition to the constitutional limitations of Article 18 prohibiting foreign ownership of "immovable property," Iraq's commercial law restricts non-Arab foreign corporations' access to the Iraqi market.

The Companies Law governs private sector corporate formation in Iraq. Resident citizens of Arab countries are subject to "national treatment" in many areas of Iraqi Law, including the Companies Law. With respect to establishing, operating, or simply owning shares in an Iraqi business, however, non-Arab foreigners are severely restricted from accessing Iraq's market. Principally, under Article 12 of the Companies Law, non-Arab residents may not be a founder, shareholder, or partner in an Iraqi company.

Foreign nationals from both Arab and non-Arab countries may, however, participate in projects with Iraqi companies on a contractual basis for the completion of a specific project so long as they do not obtain any equity capital in the Iraqi company. Additionally, foreign companies carrying out activities in Iraq as part of an agreement with an Iraqi government agency or with certain companies wholly or partly owned by government entities may establish branch offices in Iraq. Initially, the non-Arab foreign company must certify with the Registration of Companies Department in the Iraqi Ministry of Trade that it complies with the Arab Boycott of Israel and that it will main-

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67. U.S. DEP'T OF COMMERCE, supra note 63, at 1, 6-8.
68. See id. at 5. The Companies Law allows for four main types of business entities: (1) joint stock: five or more shareholders permitting public participation in which the liability of each is limited to the nominal value of his share; (2) limited liability company: two to twenty-five shareholders whose liability is limited to the nominal value of his share; (3) collective partnership: two to ten natural persons with unlimited joint and personal liability; and (4) individual enterprise: a single person with unlimited liability. See id.
69. Id.
70. Id. at 6.
71. See id. at 6–7.
72. See generally MITCHELL BARD, JEWISH VIRTUAL LIBRARY, THE ARAB BOYCOTT (2004), at http://www.jewishvirtuallibrary.org/jsource/History/Arab_boycott.html (last accessed...
tain its records in Arabic. Branch offices may then conduct limited business activities within the scope of approved contracts and must employ at least two people, one of whom is an Iraqi. Under the Companies Law, therefore, a non-Arab foreigner could not directly invest in a company doing business in Iraq.

The example of SCDMS highlights the restrictions that the Companies Law places on both Iraqi companies seeking foreign capital and non-Arab foreign investors attempting to gain equity in an Iraqi company. Because the Companies Law prohibits non-Arab foreign ownership of an Iraqi company, it would be illegal for SCDMS to solicit a joint venture with non-Arab foreign pharmaceutical corporations to provide the capital, technology, and expertise needed to build and operate a modern manufacturing facility. Furthermore, a non-Arab foreign pharmaceutical company could not own equity in an Iraqi company, limiting its profits and access to the Iraqi market to distributorship and marketing deals specific to narrowly approved projects with state-run companies. These are the very contracts that the director of SCDMS criticizes as insufficient to meet current demand. Finally, the Companies Law requires compliance with the Arab Boycott of Israel, thus eliminating the capital and expertise of nearly all North American, European, Asian, and African corporations.

2. CPA Order 39

In contrast to the Companies Law, the CPA enacted Order 39, completely overhauling Iraqi foreign investment law by eliminating almost all barriers to entry for outside investors. Additionally, it spurred

Sept. 5, 2004). The Arab Boycott is primarily a creation of the Arab League and has broken down even among its own members following the Oslo Agreements of 1993. Nineteen countries, however, met in April 2004 to discuss tightening the Boycott. See id.

73. Id. at 7.

74. Id. Within the scope of the contract, representative offices may act as liaisons to collect information, purchase tender documents, and contact clients with whom they have an existing business relationship. Id.

75. Id. at 8.

76. An influx of humanitarian aid accompanied the violence of the invasion. See, e.g., Ariana Eunjung Cha, Iraqi Hospitals on Life Support; Babies Dying Because of Shortages of Medicine and Supplies, WASH. POST, Mar. 5, 2004, at A1. This additional supply only highlights SCDMS's problem. Once hostilities cease, and international aid decreases, the drop in supply will only enlarge the gap between supply and demand. As such, the marketing and licensing deals will enable SCDMS to supply that much less of the market. See generally Baggili, supra note 13, at *2--*3.
passage of other CPA Orders that further modify the legal requirements for forming a private business or establishing a branch office.

Order 39 "replaces all existing foreign investment law" and entitles foreign investors to legal protection "no less favorable than those applicable to an Iraqi investor." Moreover, Order 39 abolishes all limits on the percentage of foreign ownership in a newly formed or existing Iraqi business. Foreign investors may establish their presence in Iraq through a wholly owned subsidiary, a joint venture with an Iraqi investor, a branch office, or a direct acquisition of an Iraqi company. Finally, foreign investors may obtain full and immediate payment of profits, shares, dividends, and proceeds from the sale or other disposition of their foreign investments, interests, or royalties. There are no requirements that a foreign investor's profits remain in Iraq.

Order 39 includes few limits on foreign investment. A foreign investor may not purchase the rights of disposal and usufruct of private real property, though renewable forty-year licenses are available. Additionally, Order 39 prohibits foreign ownership in three sectors of the economy: the "natural resources sector," the banking industry, and the insurance industry.

The CPA enacted other changes in the wake of Order 39. Order 64, which also significantly amends the Companies Law, allows a foreign or domestic juridical or natural person the right to acquire membership in an Iraqi company "as founder, shareholder, or partner." Further, the Ministry of Trade, subject to authority granted by the CPA, announced Ministerial Instruction No. 149 ("Ministerial Instruction"), governing the registration of branches and trade repre-

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77. Coalition Provisional Authority Order 39, supra note 28, § 3(1).
78. Id. § 4(1).
79. Id. § 4(2).
80. Id. § 7(1).
81. Id. § 7(2)(d)(i)–(iii).
82. Id. § 8(1)–(2). Under the provision, however, a new Iraqi sovereign may review even these renewable forty-year licenses. See id.
83. Id. § 6(1).
84. See id.
86. Id. § 1(14).
sentation offices by foreign companies.88 Following the dictates of Order 39, the Ministerial Instruction allows a branch office to operate in the name of a business entity organized under the laws of a foreign country and prohibits a business's foreign character from disqualifying its registration to conduct business in Iraq.89

Order 39 and its progeny completely overhaul Iraqi commercial law, in particular, its foreign investment law. Iraqi companies are now more freely able to enlist foreign investment to meet Iraqi demand. There are no longer restrictions on foreign ownership of Iraqi businesses, and foreign corporations may immediately repatriate profits. Also eliminated are requirements that foreign companies abide by the Arab Boycott of Israel. A foreign investor now receives the same treatment in an Iraqi court as an Iraqi business owner.

Again, SCDMS is instructive when examining the efficacy of these changes. If Order 39 controls, SCDMS may solicit foreign investment from the most efficient bidder in order to attract the capital, technology, and expertise to build the manufacturing infrastructure necessary to meet the demands of the Iraqi market. A foreign corporation can now own all or part of SCDMS. As an owner, a foreign corporation may make the decisions necessary to build the proper manufacturing infrastructure, as well as decide how best to market and distribute products. Additionally, the foreign investor will have legal protection in Iraqi courts for the enforcement of its contracts and protection of its profits, making the risks of the Iraqi market more tolerable. Foreign corporate ownership stands on the same footing as Iraqi ownership. Although the registration process for branch offices remains difficult, its functions are no longer restricted to communication regarding a specific project.

Yet, Order 39 remains questionable under occupation law. Article 43 of the Hague Convention requires an occupier to honor the existing law of an occupied territory “unless absolutely prevented” from doing so. Therefore, the CPA’s legal authority to undertake this overhaul of Iraq’s foreign investment code is uncertain under Article 43, leaving foreign investors in a quandary. Do the provisions of Order 39 allow them to freely invest in the Iraqi market, or do the restrictions of the Companies Law prevent the legal entrance of non-Arab foreign capital? Will the new Iraqi government use this legal uncertainty as a political tool if it does not want to uphold the terms of a contract

88. Id. § 1(1).
89. Id. § 1(2).
between a foreign investor and a state-run or private company that was signed under CPA authority, before the new Iraqi government came into power?

C. Impact on Stabilization Clauses: Traditional Contractual Provisions Protecting Foreign Investment from Political Risk Do Not Solve Uncertainty

The legal uncertainty in Iraq has a profound impact on foreign investors seeking to enter the Iraqi market. Foreign investors often encounter both legal and political uncertainty when investing in developing countries with transitional economies. Thus, in today’s modern economic framework, where a government lacks the functioning internal mechanisms of sovereignty such as law and order and an independent and effective judicial system, a foreign investor will commonly use contractual provisions to protect against risk. Unfortunately, these contractual clauses are not likely to be an effective means of mitigating against risk in Iraq.

Primary among the clause typically included in a foreign investor’s contract with a “host” government are stabilization clauses—contractual provisions that specifically address political risk. These clauses have at least three dimensions: international, contractual, and governmental. The clause creates an “anchor” law that neutralizes the host state’s sovereign legislative power to affect any contractual right or property right located in its territory. Generally, stabilization clauses provide that if any governmental action adversely affects the economics of an agreement, the parties will readjust the terms to return the parties to their respective financial positions as they existed at the time the agreement was signed. Specifically of concern to for-

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90. Waelde & Ndi, supra note 59, at 223.
91. See Margarita T.B. Coale, Stabilization Clauses in International Petroleum Transactions, 30 DENV. J. INT’L L. & POL’Y 217, 220–23 (2002); Waelde & Ndi, supra note 59. Stabilization clauses are one of many tools that protect international investments. Id. Other contractual tools include choice of law clauses, arbitration clauses, and renegotiation clauses. Coale, supra, at 220 n.23. Additionally, governments may provide insurance for managing the risks of foreign direct investment. For example, in the United States the Overseas Private Investment Corporation is a statutorily-created government agency that serves this function. See 22 U.S.C. §§ 2191–99; 2 FOLSOM, supra note 6, § 25.1, at 641–49.
93. SORNARAJAH, supra note 7, at 328 (1994).
eign investors are: (1) laws regulating a country’s fiscal regime, including tax laws and foreign investment laws concerning limits on access to the domestic market; (2) contractual and proprietary rights and titles; (3) the ability to sell and repatriate profits earned; and (4) labor, safety, and environmental standards consistent with international norms.95

Stabilization clauses are not foolproof and do not protect against all risk. Agreements with governments, particularly regarding issues that the government or its instrumentalities have no power of commitment over, are inherently unsafe.96 This creates enormous ambiguity in an occupied country, like Iraq, where an interim administration makes significant legal changes. To the extent a foreign investor can perform due diligence to ascertain the validity of Iraq’s national law, there cannot be a legitimate expectation that a stabilization clause will be enforced, particularly when negotiated in the face of the interim government’s questionable legal authority to agree to such clauses.97 If the stabilization clause works to prevent a sovereign from ignoring its contractual obligations, a foreign investor, knowing the legal uncertainty Order 39 created under Article 43, cannot legitimately anticipate that a future elected Iraqi government will respect the terms of the contract. Without some guidance as to whether Order 39 is a “permitted” anchor law of a stabilization clause under Article 43, foreign investors will be unable to protect their investments through contractual terms.

This inherent insecurity lies at the heart of questions surrounding foreign investors’ reliance on CPA Orders in Iraq. As a result of Article 43, the interim government and the CPA have questionable authority to agree to a contract with a foreign investor, restricted only by the liberal provisions of Order 39. Clauses inserted into contracts cannot modify occupation law’s existing restrictions on the CPA to respect, unless absolutely prevented, Iraqi law as it existed before the occupation. Further, if the CPA Orders are not legitimate, a future Iraqi government is not committed to refrain from exercising its sovereign and legislative rights because of the requirements in a stabilization clause.98 Given this uncertainty, it is not surprising that foreign investors are not rushing to invest in the Iraqi market.

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95. See Waelde & Ndi, supra note 59, at 220.
96. Id. at 236.
97. See id.
98. See id.
D. No Clear Precedent Exists to Determine the Standards of Article 43

Was Order 39 in accordance with Article 43 when it was adopted? Whether stabilization clauses, signed pursuant to Order 39, protect a contract does not depend on the validity of the stabilization clauses themselves. Rather, their validity is dependent upon the legitimacy of the anchor law. Thus, Order 39, the anchor law for foreign investors in Iraq, determines the validity of the stabilization clause. Therefore, an initial inquiry is necessary to determine whether the CPA had the authority, as an interim administration under occupation law, to create new laws that serve as the anchor law in a stabilization clause.

There is no coherent analysis of the economic powers of occupant legislators. This is due in large part to occupation law’s uneven application in the second half of the twentieth century, at the very time when international economics began to fundamentally alter relationships between states. Despite the importance of economics in the international community’s increased interventions, the interrelation between modern economics and occupation law is deficient because Security Council Resolutions, which omit the more restrictive provisions of occupation law, have governed most modern occupations.

Article 43 of the Hague Convention dictates that an occupier must respect the laws in force prior to the occupation unless doing so is “absolutely prevented.” The term “absolutely prevented” has never been literally interpreted. In the least, it means that new laws may only supplement existing law and must satisfy Article 43’s requirements, and ambiguities should be resolved in favor of the domestic law in place before an invasion and against any contrary orders implemented by the occupant. Considering the fluidity and pace of mod-

99. See Ernest H. Feilchenfeld, The International Economic Law of Belligerent Occupation 145 (photo. reprint 1971) (1942) (arguing that when examining an occupation “[t]he most important consideration . . . is that of international legality: Were the measures of the occupant in accordance with international law when they were adopted?”).
100. See, e.g., Mazzini, supra note 92, at 369 (quoting an international arbitration proceeding between Texaco and Libya: “[A] State cannot invoke its sovereignty to disregard commitments freely undertaken through the exercise of this same sovereignty and cannot, through measures belonging to its internal order, make null and void the rights of the contracting party which has performed its various obligations under a contract.”).
101. See Feilchenfeld, supra note 99, at 87.
102. Hague Convention, supra note 4, at art. 43.
103. Feilchenfeld, supra note 99, at 89.
104. Id.
ern society, the precedent of Article 43 provides no clear answer regarding the legality of an occupant order.\textsuperscript{105}

Following an occupation, the return of an occupied territory to full sovereignty creates a new "jurisdiction" in which occupation measures may be rescinded, recognized, or given a final force that they did not possess during the occupation.\textsuperscript{106} Indeed, after an occupation the new sovereign has wide latitude to rescind occupation-time orders that modify private contractual relationships.\textsuperscript{107} In countries whose courts have judged the validity of laws created during an occupation, Article 43 serves as an important standard of the law’s viability after the occupation. Historically, there is a strong tendency to recognize as "permitted," \textit{viz.}, enforceable, those acts that meet international legality under Article 43 and to find unenforceable those that do not.\textsuperscript{108} Though international tribunal precedent is scarce regarding which acts are "permitted" under Article 43, two courts have analyzed how an occupant’s economic regulations affect private interests.

First, following the German occupation during World War I, Belgian mixed arbitral tribunals decided several cases relating to economic regulations imposed by the Germans during the occupation. In 1918, the Court of Appeals of Brussels upheld a German decree regulating the exorbitant price of produce.\textsuperscript{109} The court found that by enacting the decree, the German occupant had "acted in the place of the legitimate authority which for the time being had been ousted, and in conformity with the provisions of Article 43."\textsuperscript{110} In contrast, the Court of Appeals of Liége refused to uphold any German decrees, holding that they were never laws and that the German occupants had no right to legislate.\textsuperscript{111} Finally, in 1925, the Court of Appeals of Brus-

\textsuperscript{105} See \textsc{Julius Stone}, \textit{Legal Controls of International Conflict} 698 (Rinehart & Co., Inc. 1954); \textsc{Feilchenfeld}, \textit{supra} note 99, at 151 (stating a comprehensive law on occupation would include, "\[w\]hat effect does a returning sovereign give to the acts of the occupants?").

\textsuperscript{106} See \textsc{Feilchenfeld}, \textit{supra} note 99, at 144.

\textsuperscript{107} \textit{Id.} at 145, 147.

\textsuperscript{108} \textit{Id.} at 147 (noting competing arguments prior to 1914). One school of thought argued that all occupant decrees should be recognized because "social life would be paralyzed if people knew that the end of hostilities would mean a fatal dissolution of all results of the occupation." \textit{Id.} Yet another group, however, limited recognition to those permitted decrees under international law, arguing that "'otherwise a few weeks' occupation might possibly result in . . . obligations . . . which would prejudice the legal government for a generation.'" \textit{Id.} (internal citations omitted).

\textsuperscript{109} \textit{Id.} at 148.


\textsuperscript{111} \textit{Id.}
sels upheld a German decree increasing the cost of supplying gas, holding that "'the circumstances of war-time, and particularly the increase in the cost of raw materials and the necessity for providing the needs of the population, in fact justified the measures taken by the occupying authorities.'"^112

The second tribunal to consider the application of Article 43 is the Israeli Supreme Court, which has overseen the Israeli government's occupation of the Palestinian territories since 1967.113 In light of the many UN pronouncements asserting that Israel has very limited economic rights in the occupied territories and condemning Israel for alleged exploitation of resources, the Court has failed to establish a clear line of precedent regarding Israeli conduct under Article 43.114

In a case arising from an employment dispute where an Israeli Regional Commander issued an order amending the Jordanian law^115 making it possible to appoint members of an arbitration council, the court observed that an occupant has a duty to respect the occupied population's welfare.116 The Court held that an "'occupation brings in its wake social, economic and commercial changes'" and, as such, "'Article 43 should, therefore, be interpreted with reference to . . . the duty to regulate economic and social affairs.'"117 The Court found the proper inquiry to be "'whether the motive for the change was the furtherance of the occupant's interests or concern for the welfare of the civilian population.'"118 In the case of the arbitration panel, the order was held to be not beyond the occupant's jurisdiction because it only completed the machinery set up under Jordanian law, which would not otherwise have been able to operate.119

In contrast, the Israeli Supreme Court also considered the Israeli government's purchase of the company supplying electricity to the West Bank.120 The Court held that in the absence of special circumstances, an occupant should not introduce legal modifications, which,
even if they do not alter existing law, would have a far-reaching and prolonged impact on the occupied territory.\textsuperscript{121}

If the Iraqi courts, in a new "jurisdiction," or the International Court of Justice ultimately hear a case interpreting Order 39 under Article 43, the unclear precedents from both the Belgian and the Israeli courts would provide no specific guidance. This is particularly true because those courts did not make their decisions within the context of the transformational nature of modern occupation. The precedent from the Israeli court, specifically that an occupant should not enact legal change that has a prolonged impact on the occupied society, creates a paradox because those occupation measures that most empower an occupied population, \textit{viz.}, those that fundamentally alter the institutions of the occupied territory, are the same ones that are most likely to have a prolonged impact. This empowerment and change, in fact, is at the very core of what a modern occupation hopes to achieve.

Further, these adjudications fail to address the primary concerns of foreign investors, principally stability and investment protection, because any decision will not come until after a sovereign Iraqi government is in place and accepts or repudiates the standards of Order 39. From the perspective of the foreign investor, the unclear substantive standards of occupation law and the delayed adjudication resolving that uncertainty in Iraq are not simply a disincentive to invest—they are a critical deficiency.\textsuperscript{122}

III. Effective Occupation Requires that an Occupier Have Limited Authority to Change an Occupied Territory’s Foreign Investment Laws

Two conclusions arise from an analysis of the current status of occupation law in the context of modern society. First, occupation law should allow for an occupier’s efforts to change, with certainty, existing foreign investment laws in the occupied territory in support of an effort to initiate economic reform. Second, while an occupier should have the power to change foreign investment laws, occupation law should not be a carte blanche for the occupier. Rather, to achieve its central balance between restraining an occupying power and em-

\textsuperscript{121} \textit{Id.}

\textsuperscript{122} See Jack I. Garvey, \textit{Regional Free Trade Dispute Resolution as Means for Securing the Middle East Peace Process}, 47 \textit{Am. J. Comp. L.}, 147, 158 (1999) (arguing in the context of the Palestinian Territories that a lack of substantive standards and a system to implement such regulations creates a disincentive for foreign investment).
powering an occupied population, occupation law should allow an occupying administration to implement foreign investment changes only with reference to a "lowest common denominator" limiting principle. This principle would allow the occupier to make only those legal changes suggested by the prevailing foreign investment norms of surrounding countries with similar social structures. Thus, in the instance of Iraq, what is an acceptable level of change may be determined, in part, by the foreign investment codes of neighboring countries with political institutions similar to those that a future Iraqi government is likely to develop.

Such a fundamental change to occupation law is vital because given the contemporary purpose of protecting an occupied population and the importance of foreign investment in a successful transition from occupation, the doctrine’s current restrictions are so far removed from reality that even those nations inclined to obey the law will find it difficult to do so. The motivation and frequency of occupations at the turn of the twenty-first century are in stark contrast to the circumstances that gave rise to the Hague Convention in 1907 and the Geneva Convention in 1949. First, occupation is now often an international effort and, whatever the motivation, in few of these conflicts is there a government in exile waiting to return. Second, foreign investment is now an integral part of a developing economy and exists in even the most secluded countries of the world. Because of these fundamental changes in the circumstances of occupation, occupation law must adapt to allow change to an occupied territory’s foreign investment laws.

A. Modern International Occupation

Modern occupation serves a completely different purpose today than it did at the turn of the twentieth century or even following World War II. As the law governing occupation, the guidelines of the Hague and Geneva Conventions remain the controlling international law, yet they fail to address the proper role of an occupier in the development of economic, social, and educational infrastructures. In light of the transformational motivation of modern occupation, this restriction risks causing economic stagnation, the continued impoverish-

123. See Goodman, supra note 3, at 1607.
124. See id. at 1591.
125. See generally SORNARAJAH, supra note 7, at 92 (discussing the rise of foreign investment in developing states and the apparent inconsistency within these foreign investment laws).
ment and backwardness of an occupied population, and, consequently, the ultimate failure of the occupation.\textsuperscript{126}

Modern occupation seeks to transform the very institutions that occupation law has traditionally attempted to protect. However, economic globalization, transportation and communications advances, and the spread of human rights law in the last half of the twentieth century have resulted in the diminishing recognition of the very principle of inviolable national sovereignty that is the foundation of occupation law.\textsuperscript{127} In addition to these broad trends, the end of the Cold War reinvigorated multinational institutions such as the Security Council and the North Atlantic Treaty Organization ("NATO"), whose increased activity served only to accelerate the trend of diminishing inviolable sovereignty.\textsuperscript{128} Indeed, most modern interventions are responses to internal conflicts. The international community is becoming increasingly intolerant of atrocities committed on a scale that imperils whole societies and of rulers who use repressive measures to deny their own people the right to fair and representative government.\textsuperscript{129} This is a fundamental change because as recently as the 1980s internal conflicts were considered untouchable on the theory that intervening would violate sovereignty. As a signal of this change, in early 1999 two separate interventions responded to internal violence. NATO responded to Yugoslav and Serbian forces entering the separatist province of Kosovo with an eleven-week air attack.\textsuperscript{130} Three months later the Security Council authorized an international force to enter East Timor to halt the violent attacks of Indonesian-supported militias targeting those voting against the integration of East Timor into Indonesia.\textsuperscript{131}

The success of these interventions depended (and still does in those interventions that are ongoing) largely on a close cooperation between military and civilian actors, as well as the resources committed to the civilian effort.\textsuperscript{132} Despite the intense focus on the military

\begin{thebibliography}{99}
\bibitem{126} Benvenisti, The International Law of Occupation, supra note 12, at 105.
\bibitem{129} Scheffer, supra note 2, at 860.
\bibitem{131} Id. at 107–08.
\bibitem{132} Id. at 120.
\end{thebibliography}
aspects of these operations, modern interventions are complex, multi-layered efforts extending well beyond the use of military power. In fact, military power is often the first phase of an engagement that eventually results in a long-term international involvement in transforming society, building institutions, and bringing about economic stability.

Occupation law was not designed for such transformational purposes. While the humanitarian conditions of the occupied society are a paramount concern of the Hague and Geneva Conventions, these regulations restrict the very institutional transformations that mark modern occupations. An occupier that displaces a repressive leader seeking to radically transform a society in political, judicial, and economic collapse requires far more latitude for transformational development than was anticipated under the conventions.

B. Foreign Investment in Occupied Economies

In order to attract foreign investment in occupied territories an interim government must have latitude to create a clear legal regime—one that foreign investors trust will guarantee access to the market and investment protection. Indeed, the benefits of foreign direct investment are precisely what countries emerging from a stagnated political, economic, and social infrastructure desperately need. Because fundamental change to society motivates modern occupation, an economy developing under occupation is undergoing significant structural changes that make foreign investment a critical

133. Id.
134. Id. at 109–10 (discussing this in the context of Kosovo and East Timor).
135. Scheffer, supra note 2, at 849.
136. See id.
137. See Lieutenant Colonel Mark Martins, No Small Change of Soldiering: The Commander’s Emergency Response Program (CERP) in Iraq and Afghanistan, ARMY LAWYER, Feb. 2004, at 1, 2 n.12. Economic success is a key ingredient to slowing insurgencies and the larger overall goals of transition:

“Success in counterinsurgency goes to the party that achieves the greater popular support. The winner will be the party that better forms the issues, mobilizes groups and forces around them, and develops programs that solve problems of relative deprivation. This requires political, social, and economic development. Security operations by military and police forces, combined with effective and legitimate administration of justice, provide the necessary secure environment in which development can occur.”

Id. (quoting the U.S. Dep’t of Army, Field Manual 3-07, Stability Operations and Support Operations (2003)).
component of the occupation.138 Both the Kosovo and Afghan interim administrations faced this same issue and both passed liberal foreign investment laws, demonstrating foreign investment's critical role in developing an occupied economy.

Bitter debate surrounded reconstruction and privatization in Kosovo following NATO's extensive bombing campaign in 1999.139 The United Nations Interim Administration in Kosovo ("UNMIK"), mandated by Security Council Resolution 1244/1999,140 is notably not bound by the restrictions of occupation law despite the fact that the Security Council did not sanction NATO bombing.141 UNMIK was hesitant to privatize what was in essence seized state property, but decided that the economic future of Kosovo was too important to wait for a final peace settlement permanently establishing Kosovo's legal status.142

In January 2001, Bernard Koucher, the Special Representative of the Secretary General in Kosovo, signed Resolution No. 2001/3 "On Foreign Investment In Kosovo."143 Kosovo's revised foreign investment law states that its purpose "is to create certain legal guarantees necessary to make Kosovo more attractive to foreign investment."144 The law guarantees foreign investors "national treatment,"145 while allowing "wholly-own[ed] and wholly control[led] [foreign] business organizations in all sectors of the economy,"146 except for a limit of forty-nine percent foreign ownership in the manufacture and distribution of military products.147 Finally, the revised law provides that "parties to a foreign investment may specify any arbitration . . . procedure upon which they agree . . . [and] any judgment resulting from such an

138. See generally Kennedy, supra note 11, at 144–45 (discussing the economic benefits of foreign investment accrued by the host economy); see also supra notes 5–10 and accompanying text.
140. S.C. Res. 1244, supra note 33.
141. See S.C. Res. 1483, supra note 36. Compare id. (noting "obligations under applicable international law of these states as occupying powers"), with S.C. Res. 1244, supra note 33 (stating no similar obligation under international law).
142. Eviatar, supra note 139. Foreign direct investment in the Federal Republic of Yugoslavia has increased from just under $100 million in 2000 to over $300 million in 2001. Id.
144. Id. § 1.
145. Id. § 3.
146. Id. § 5.
147. Id. § 6.
agreed procedure shall be . . . enforceable . . . in any . . . court of competent jurisdiction in Kosovo.”

Likewise, in Afghanistan many experts considered an investment-friendly environment the key to the survival of Hamid Karzai’s interim government. The Afghan “Law on Domestic and Foreign Private Investment” is strikingly similar to Kosovo’s revised foreign investment law. The Afghan law’s purpose is “to encourage and protect . . . foreign private investment.” The law provides foreign investment in all sectors of the economy, one hundred percent foreign ownership, ten to thirty-year leases of real estate, complete repatriation of profits, and requires due process of law for appropriation and just compensation if appropriation occurs.

Only limited foreign investment has come to Afghanistan following the American invasion, due in large part to military instability. Some foreign capital, however, is reaching Afghanistan. For example, Afghan Wireless Communication Company, a joint venture between an Afghan expatriate living in New York City and Karzai’s interim government, has invested fifty million dollars to create a wireless cell phone network in Kabul and four other cities. Additionally, the Hyatt Corporation, along with three Turkish construction firms and the Afghanistan Reconstruction Company, is planning a forty million dollar five-star hotel across the street from the American Embassy.

The new foreign investment laws in both Kosovo and Afghanistan exemplify that one necessary component of successful transformation under an occupying power is economic development and growth.

148. Id. § 17.
151. Id. at art. 1.
152. Id. at art. 3.
153. Id. at art. 4.
154. Id. at art. 14.
155. Id. at art. 15.
156. Id. at art. 22.
158. See id.
159. See id.
One of the principal requirements for this economic growth is foreign investment. The success in attracting foreign investors to both Kosovo and Afghanistan evinces the benefits of creating more liberal foreign investment laws in occupied territories like Iraq and, as such, highlights the need for occupation law to adapt in the face of this modern reality.

C. A Limit on an Occupier’s Power: Foreign Investment Laws of Iraq’s Neighbors

Though an occupying power must have the authority to alter an occupied territory’s foreign investment law, in order to achieve occupation law’s fundamental balance this authority must have limits. It bears reminding that foreign investment is pervasive in the modern international economy and, if properly utilized, is a vital component of any developing economy. In general, a host country will attempt to harvest foreign direct investment’s benefits by encouraging investment while simultaneously placing restrictions on it to reduce the negative effects that unrestricted access may have on its economy. The host country will do this by imposing restrictions primarily on the right of access to the market and on the form of foreign investment available. In terms of access, foreign capital is primarily restrained at three points: (1) entry of capital into the market, (2) during business operations within the host country, or (3) upon withdrawal of profits. In addition, there are a myriad of limits on the form of foreign direct investment, such as: (1) prohibitions in total sectors of the host economy, (2) limits on domestic private investment, and (3) in sectors where foreign direct investment is allowed, equity percentage limitations for individual projects.

This Comment advocates change only to the extent that the neighbors of an occupied territory employ these general standards. Indeed, by examining how similarly situated countries balance foreign investors’ access to their domestic market, one can ascertain how to properly achieve occupation law’s balance for an occupied territory. Thus, the means by which an occupied territory’s neighbors limit for-

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161. Id.
162. See supra text accompanying notes 7-11.
163. 2 FOLSOM, supra note 6, at 286.
164. Id.
165. Id. at 286-87.
166. Id. at 289-90.
eign direct investment creates a lowest common denominator regarding foreign investment in the given region. This lowest common denominator would serve as a legitimate estimate of how a future elected government would draft a foreign investment law, while also serving as the proper check on an occupier’s power. The result of this limited authority to change the occupied territory’s foreign investment law more fully achieves occupation law’s fundamental balance and is more cogent with the modern reality of occupation and international economics.

This standard would, for example, have allowed the United States to alter Iraqi foreign investment law with some certainty in a way that is beneficial to the Iraqi population, but that does not exceed the best estimate of how a future elected Iraqi government would draft a foreign investment law. The scope of the CPA’s authority to change Iraq’s foreign investment law may be determined by evaluating the foreign investment laws of Iraq’s neighbors, namely, Iran, Saudi Arabia, and Jordan. Considering the political makeup of these countries, many of which are governed by various forms of Islamic law, a view of their foreign investment laws creates a common thread that limits an occupier’s power to change the laws of an occupied territory.

1. Iran

The Islamic Republic of Iran is a theocratic republic, with a constitution based on the precepts of Islamic law.\textsuperscript{167} The highest authority in Iran is the “Leader,” who exercises supreme political and religious power.\textsuperscript{168} The second highest authority is the president, who is directly elected by the people for a term of four years.\textsuperscript{169} The Iranian Legislature, currently called the Sixth Majlis, is a 290 member body of popularly elected representatives.\textsuperscript{170} All laws passed by the Majlis must receive approval from the Council of Guardians, which is comprised of six faqihs (clerical Islamic canonists) appointed by the Leader and six jurists proposed by the head of the Judiciary and elected by the


Majlis.\textsuperscript{171} After approval by the Council of Guardians, legislation must also be endorsed by the President.\textsuperscript{172}

Despite being Iraq's most fundamentally Islamic neighbor, the Iranian government has recently begun to actively court foreign investment. In 2002, Iran passed the Encouragement and Protection of Foreign Investment Act ("the Act").\textsuperscript{173} The Act allows foreign investment in all sectors of the economy open to domestic private companies.\textsuperscript{174} Foreign ownership is, however, capped at twenty-five percent of market share in any given sector of the economy and thirty-five percent of an individual industry.\textsuperscript{175} The Act provides foreign investors the same rights, support, and facilities provided domestic investors,\textsuperscript{176} and, subject to the approval of the Foreign Investment Board, a foreign investor is free to repatriate profits earned in Iran.\textsuperscript{177}

In fact, Mohammad Khazai, head of Iran's Foreign Investment Organization, has stated, "Drastic economic changes in the past two decades have turned the phenomenon of globalization of trade into an undeniable reality."\textsuperscript{178} Passing the Act in 2002 has significantly enhanced Iran's ability to attract foreign direct investment. Between passage of the Act in 2002 and June 2003, Iran attracted $3.3 billion in foreign direct investment, comprised of forty-five projects with investors from thirty-four countries.\textsuperscript{179} The volume of investments in this eighteen month period accounts for one-third of Iran's total investment during the previous decade.\textsuperscript{180}

2. Saudi Arabia

Saudi Arabia is a monarchy with a constitution governed according to Islamic law, though several secular codes have been introduced.\textsuperscript{181} The 120 member Consultative Council is the Saudi legislative body, though the King remains the final arbiter of state af-

\textsuperscript{171} Id.
\textsuperscript{172} Id.
\textsuperscript{174} Id. at art. 3.
\textsuperscript{175} Id. at art. 2(D).
\textsuperscript{176} Id. at art. 8.
\textsuperscript{177} Id. at art. 10.
\textsuperscript{179} Id.
\textsuperscript{180} Id.
\textsuperscript{181} CENT. INTELLIGENCE AGENCY, supra note 167.
The Kingdom, with the largest reserves of petroleum in the world, has an oil-based economy, which may resemble the economy of a future Iraq.

The Saudi Foreign Investment Act passed in 2000, creates a licensing procedure that allows a foreign investor to enter the Saudi market through joint ventures or wholly owned subsidiaries. A licensed project "enjoy[s] all the benefits, incentives, and guarantees enjoyed by a national project." The law allows foreign ownership of real estate and provides that a foreign investor can remove equity or profits from the Kingdom.

Saudi Arabia has attracted nearly $12.5 billion in foreign capital since changing its foreign investment law in 2000. While foreign investment has primarily integrated into the manufacturing sector and the services sector, the Saudi Arabian General Investment Authority has stated that it expects cumulative investments to reach nearly $900 billion over the next twenty years.

3. Jordan

The Hashemite Kingdom of Jordan is a constitutional monarchy based on Islamic law. The executive power is vested in a Council of Ministers appointed by the King, which is accountable to a two-house parliament. The King appoints the forty members of the Upper House, while the eighty deputies of the Lower House are elected by popular vote.


183. CENT. INTELLIGENCE AGENCY, supra note 167.


185. Id. at art. 5.

186. Id. at art. 6.

187. Id. at art. 5(2).

188. Id. at art. 7.


190. The manufacturing sector received $8.64 billion. Id.

191. The services sector received $6.48 billion. Id.

192. Id.; see also Aramco, Sumitomo, Red Sea Refinery, MIDDLE E. OIL & GAS REV., May 9, 2004, at *1, available at 2004 WL 55868503 (announcing plans for a major Red Sea refinery project agreement between Saudi Aramco and Sumitomo Chemicals of Japan).


194. Id.

195. Id.
The Investment Promotion Law of 1995\textsuperscript{196} eased restrictions on foreign corporate ownership in Jordan.\textsuperscript{197} The law reduced bureaucratic impediments and regulatory procedures and thus was a major step in creating the administrative and policy framework needed to attract foreign investment.\textsuperscript{198} The new foreign investment law allows foreign investment in all projects and sectors,\textsuperscript{199} removing the fifty percent ceiling on foreign equity ownership in certain sectors,\textsuperscript{200} while reducing minimum capital requirements.\textsuperscript{201} Additionally, investors may repatriate capital and profits at their discretion.\textsuperscript{202} Finally, foreign companies are free to open branch offices in Jordan once they have obtained a contract.\textsuperscript{203}

The increase in foreign investment accompanying the liberalization of Jordan's foreign investment law is the most pronounced of the mentioned countries. The Jordanian government reports that foreign direct investment rose from $627 million in 1995 to $2.4 billion in 2002.\textsuperscript{204}

D. Lowest Common Denominator for Iraq

Under this new interpretation of Article 43, the foreign investment laws of Iran, Saudi Arabia, and Jordan would have helped define the scope of the CPA's authority to alter Iraq's foreign investment law. Indeed, each of Iraq's three neighbors has enacted new, more liberal foreign investment laws attempting to attract foreign investors.\textsuperscript{205} The

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\textsuperscript{197} See id.
\textsuperscript{200} JORDAN FOREIGN INV. BD., FAQs (2000), at http://www.jordaninvestment.com/faqs.htm (last accessed Sept. 21, 2004). The fifty percent ownership ceiling remains in the mining, construction, contracting, and retail and trade services sectors. \textit{Id}.
\textsuperscript{201} Investment Promotion Law, \textit{supra} note 199, at art. 6.
\textsuperscript{202} \textit{Id} at art. 9.
common themes that emerge from analyzing the three are, in the end, more similar to Order 39 than to the Iraqi Companies Law of 1997. These revised foreign investment laws create much more liberal access to foreign investors in their respective domestic markets than was allowed by Hussein’s regime. Coupled with the importance of foreign investment in occupied territories, as revealed by the laws enacted in Kosovo and Afghanistan, these laws also form a compelling argument that, under this new interpretation of Article 43 analyzing a lowest common denominator, Order 39 would be a “permitted” regulation and thus honored by an elected Iraqi government.

First, both Order 39 and the modern foreign investment laws do not require certification of compliance with the Arab Boycott of Israel. Second, under each of these laws, foreign investors receive “national treatment”—meaning non-Arab foreign corporations receive the same treatment under the law as domestic corporations—in both access to contracts and protection of those contracts in domestic courts. Third, the laws permit full foreign ownership as a founder, shareholder, or partner in all but a few sectors of the host state’s economy. Each country limits access to various sectors such as mining or natural resource exploration or, as in Iran, foreign ownership is capped in every sector. Finally, foreign investors may repatriate their capital or their profits derived from the investment.

These threads running through Iraq’s neighbors’ foreign investment laws do not differ significantly from Order 39. Any foreign investment law passed by a sovereign Iraqi government is likely to resemble these basic characteristics. Order 39 allows for national treatment of foreign investors, full foreign ownership in all sectors except natural resources, banking, and insurance, and full repatriation of profits. However, because under Article 43 the CPA’s authority to enact such laws remains uncertain, this parallel is only secondarily important to foreign investors who are unsure of which law should guide their decision of when and how to invest in Iraq following the war.

The proposed lowest common denominator interpretation of Article 43 would alleviate many of these concerns. Foreign investors would be able to rely on the standards of Order 39 when negotiating their legal obligations with Iraqi companies, whether state-run or private. To the extent that Order 39 extends beyond the norms of the surrounding countries—perhaps in its failure to reserve a certain per-

which ranks foreign direct investment performance from 1999-2001 in 140 economies throughout the world, shows Jordan at 54, Iran at 131, and Saudi Arabia at 135. Id.
centage of a given industry for domestic ownership for example—foreign investors can self-regulate in order to insulate their risk. At the very least, clear guideposts would be created that would allow an investor to make a risk/reward determination and trust that the law that guided their contractual obligations will also guide any dispute that arises.

This interpretation also strikes the proper balance that occupation law requires. At first blush, Order 39 seems a complete overhaul of Iraqi foreign investment law, contrary to any precept of limiting an occupier’s power. Taken within the context of the laws governing Iraq’s neighbors, however, Order 39 does not seem like such a striking departure from the prevailing norms of the region. The result is a limit on the CPA’s lawmaking power and the creation of a clear legal regime regulating foreign investment that guides foreign investors’ decisions and makes the risk of the Iraqi market more tolerable. This is unquestionably a benefit to the Iraqi population as it develops a modern economy from the ruins of Hussein’s regime.

Conclusion

The final cause of law is the welfare of society. Thus, a system of law, like occupation law, that is failing to achieve this end should not be blindly accepted and sustained. Clearly it is not the purpose of occupation law to be an obstacle to an occupied territory’s development. Yet, as the current situation in Iraq illustrates, this is precisely what the law has become. To return occupation law to its proper balance of restraining an occupier while empowering the occupied population, the doctrine must alter its interpretation of Article 43 of the Hague Convention. An occupying power must have limited authority to change an occupied territory’s foreign investment law. This limit may be deduced from a lowest common denominator gleaned from the foreign investment laws of neighboring countries. Given the transformational purposes of modern occupation and the pervasiveness of foreign direct investment in developing economies, allowing an occupying interim government to change foreign investment law is a significant step in empowering an occupied population. That, in the end, is occupation law’s purpose.