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The Saddam Oil Contracts and What Can Be Done

Sandra T. Vreedenburgh*

I. INTRODUCTION

On the evening of March 19, 2003, President Bush addressed the nation in a televised speech in which he stated, "American and coalition forces are in the early stages of military operations to disarm Iraq, to free its people and to defend the world from grave danger."1 Operation Iraqi Freedom has since been a subject of great debate and criticism.2 Although Saddam Hussein is no longer in power and an interim government is in place, questions remain unanswered concerning the future of Iraq. The answers will depend on how Iraq contends with its history and Saddam Hussein's past actions with respect to Iraq's oil industry as oil once was, and can be again, the largest source of natural wealth for the country.3 The purpose of this paper is to analyze the status of the Saddam Contracts, to understand why they are being challenged and to offer compromises on how Iraq's oil industry should be handled with the best interests of the Iraqis in mind. The nations which are parties to the Saddam Contracts4 are battling for recognition of the Saddam Contracts in order to preserve their initial and future investments worth billions of dollars.5 They do so by scrutinizing and questioning the actions and motives of the United States. In response, the United States, suggests that the people of Iraq

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3. The oil contracts of Saddam Hussein's regime, whether simply negotiated or actually entered into, will be referred to as the "Saddam Contracts."

4. Hereinafter referred to as the "Pre-War Multinationals".

5. See http://www.msnbc.com/modules/iraqoil/contracts/default.htm (listing the known contracts as of December 2002, the estimated developments costs and the daily production statistics).
need to decide the future of their oil industry, and that contrary to what the Pre-War Multinationals allege, the United States does not want the oil for itself. This paper will illustrate that the Pre-War Multinationals will find it difficult to win this battle against the United States.

Before addressing the topics of this paper, it is necessary to understand the history of Iraq's oil industry. Section II begins with an overview of this history and concludes with the events that led to, and a description of, the Pre-War Multinational investments. Section III is divided into two parts: Part A not only analyzes the legitimacy of the Saddam Contracts, it illustrates that the issue of legitimacy is at the core of events surrounding Iraq's oil industry. From Operation Iraqi Freedom and the fall of Saddam, to the liberation of the Iraqis and the election of a permanent Iraqi government, legitimacy must be debated and established in order for Iraq to rebuild and develop. Recognizing that legitimacy is at the forefront of the debate regarding Iraq's oil industry explains why the status of the Saddam Contracts is questioned in Part B. In Section IV A extreme alternatives are presented. These alternatives are extreme in that, rather than benefiting Iraq, the Pre-War Multinationals, and the United States, they only benefit one or two of the parties, at the expense of the other. In Section B a different set of alternatives is addressed. This paper finds a middle ground and offers compromises from which all three parties can benefit. The analysis does not end here, as Iraq has an insurmountable amount of debt with which it has to contend through proceeds of its only source of wealth, its oil. How Iraq's debt is handled will have a direct impact on the future of its oil industry and will impact any past, present and future investments of foreign multinational companies. Section V provides three alternatives that will be beneficial to Iraq and its debt-holders without crippling the oil industry.

II. PRE-WAR MULTINATIONAL INVESTMENTS

Iraq has experienced a tumultuous history under various foreign rulers. Under a mandate established after World War I, Britain placed Faisal on the throne of Iraq, and Iraq's 1924 Constitution created a parliamentary monarchy which provided Britain with indirect

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control. Because Faisal was not an Iraqi, and a monarchy was a foreign concept to the people of Iraq, he was unable to gain the Iraqis' confidence and consequently, political instability was fueled and lasted into the 1970's. In 1932, Iraq became a sovereign nation, yet it remained under a British-created monarchy and it was still mired with ethnic, religious, economic, and political conflicts. The discontent towards the monarchy culminated in a military revolution in 1958 which placed General Abd al Karim Qasim as the ruler of the new Republic of Iraq. Qasim's inability to quell the existing political instability and ethnic conflicts led to his overthrow by the Baath party a year later. In 1970, the Baath party issued a Provisional Constitution as a means to institutionalize its rule which culminated in Saddam Hussein's presidency in 1979. For decades, Saddam corrupted the judicial system, dealt ruthlessly with any opposition to his rule and his party, and kept Iraq in constant conflict in order to rule by executive order and keep Iraq in a state of national emergency.

In spite of Saddam's dictatorship, Iraq's oil industry experienced expansion under his regime. Oil was first discovered in Iraq in 1927. However, between 1927 and the early 1950's, the IPC consortium restricted expansion of Iraqi oil because the major partners of the

9. Id. at 4.
10. Iraq as an Independent Monarchy in HISTORY OF IRAQ, at 1 at http://www.countryreports.org/history/iraqhist.htm (last visited Nov. 2003) (explaining there were conflicts between Sunni and Shia tribes, Assyrians and Kurds, pan-Arabists and Iraqi nationals).
18. Id.
19. IPC stands for Iraq Petroleum Company Limited which was created in 1929.
consortium could find cheaper oil elsewhere and focused their attention in developing those markets. It wasn't until the nationalization acts of 1972-74 that Iraq's oil industry grew and developed with the Baath party's demand that Iraq's oil fields be explored and discovered. Another result of this nationalization was that oil multinationals lost control of the oil business in Iraq. Prior to 1972, because these multinationals controlled oil production, known as "upstream," they kept most of the profits and gave the producer governments only a small share. Once Iraq nationalized its oil industry, it took control over its own oil production. Consequently, the multinational oil companies were forced to upstream elsewhere, such as in the North Sea and West Africa, in order to maintain their level of profits. But because production costs were higher and less money was being made, these corporations eventually abandoned upstream to move towards more profit-making activities, known as "downstream," such as refining, retailing, transportation of tankers and pipelines, and petrochemicals. Meanwhile, back in Iraq, in spite of the loss of foreign investment, the oil industry expanded, but this growth was short-lived for two reasons. First, rather than being distributed to the Iraqi people who could then re-invest their wealth in Iraq, the oil revenues were constantly diverted to Saddam Hussein and the members of the Baath party in what is described as a "highly organized form of institutional plunder." Second, the eight-year Iran-Iraq War which began in 1980 and the Gulf War that resulted from Iraq's invasion of Kuwait in 1990 crippled the oil industry and the ensuing U.N. sanctions marked the end of this expansion.

During the 1990's, multinational oil corporations reconsidered upstream as a means of making money through arrangements that would give them shares of crude oil reserves. Foreign investors looked to Iraq's oil industry once again. They began to negotiate and enter into oil contracts with Iraq in the hopes of reaping huge profits once the

22. Id. See also Iraq: Law Nationalizing the Iraq Petroleum Company, 11 I.L.M. 846 (1972).
24. Id.
25. Id.
27. Paul, supra note 23.
29. Chalabi, supra note 17.
U.N. sanctions were lifted. Some of these Pre-War Multinationals are as follows: CNPC of China for the Al-Ahhab oil field, PetroVietnam for the Amara oil field, Lukoil of Russia for the West Qurna field, Tatneft, Suyzneftegaz and Stroytransgas-Oil of Russia for the Rafidian field, TotalFinaElf of France for Bin Umar, Pertamina of Indonesia for exploration of Block 3 of Western Desert, and Oil and Natural Gas Corporation of India for exploration of Block 4 of Western Desert. This list is not inclusive, yet it illustrates that monumental investments in Iraqi oil have been made by multinational corporations worldwide. Also illustrated by this list is the fact that it appears that the United States holds no direct oil contracts with Iraq. Consequently, the Pre-War Multinationals reason that this is why the United States can easily claim that the Saddam Contracts should be invalidated with the rise of a new Iraqi government. The Pre-War Multinationals explain, however, that the Saddam Contracts were not fictitious and do not simply disappear because of a change in regime. The United States, while appreciating the Pre-War Multinationals’ view, can counter on the grounds of legitimacy thereby illustrating that its suggestion of invalidation is not selfishly motivated.

III. Legitimacy and Saddam Contracts

In May 2003, the United States appointed Thamir Ghadhban as the interim head of Iraq’s oil ministry. On May 24, 2003 Mr. Ghadhban either suspended or cancelled at least three Saddam Contracts, and stated that the remaining Saddam Contracts would be examined on their economic and legal merits. These actions and statements illustrate that there will be two fronts for challenging old contracts—a legal front in which the legitimacy of the contracts is questioned, and a

31. Id.
33. Id.
34. Paul, supra note 23.
36. Id.
37. Id.
38. Id.
41. Pre-War Contracts, supra note 39.
broader economic front in which the ministry likely will claim that deals made under Hussein were politically motivated and were not economically fair for Iraq.\textsuperscript{42} Section A, \textit{infra}, focuses on the legal front with an analysis of whether Saddam Hussein was a legitimate ruler. Section B, \textit{infra}, then summarizes the status of the Saddam Contracts in light of the questions of legitimacy. With regard to the economic front, Mr. Ghadhban's statements are consistent with the Doctrine of Odious Debts. Alexander Sack, a Franco-Russian legal theorist of the twentieth century, gave shape to the legal doctrine of odious debts, which will be discussed in more detail in Section V. Briefly, this doctrine espoused the theory "that liability for public debts should remain intact, for these debts represent obligations of the state."\textsuperscript{43} According to Sack, odious debts, however, are debts incurred and not used for the benefit of the citizens of the state.\textsuperscript{44} Consequently, they should be repudiated by the new government.\textsuperscript{45} Iraq, in order to rebuild and survive, must be able to determine the fate of its oil.\textsuperscript{46} Yet advocating the continuity of the Saddam Contracts draws an analogous situation with odious debts. The Saddam Contracts were entered into by Saddam Hussein for his benefit.\textsuperscript{47} By requiring the Iraqis to honor those contracts would be analogous to forcing citizens of a country to repay the debts incurred by its dictator without their consent. In many countries, "individuals do not have to repay if others fraudulently borrow in their name, and corporations are not liable for contracts that their chief executive officers or other agents enter into without the authority to bind the corporations."\textsuperscript{48} Likewise, the Saddam Contracts were entered into without the consent of the Iraqi people and should, therefore, be subjected to thorough examination in order to determine which ones will truly benefit Iraq as a whole.

\textsuperscript{42} Id.


\textsuperscript{44} ALEXANDER SACK, Les effets des transformations des Etats sur leurs dettes publiques et autres obligations financiers, Recueil Sirey (1927).

\textsuperscript{45} Id.


\textsuperscript{47} Drollas, \textit{supra} note 28.

A. Legitimacy

The Saddam Contracts are challenged because Saddam Hussein’s reign is challenged on the theory that “[t]he legitimacy of contracts with sovereign nations ultimately rests upon the legitimacy of the nations’ rulers, who, in effect, act as agents for the state.”

In other words, if a government or ruler is not legitimate, any decisions or actions it takes should not be recognized, enforced or validated by its citizens, by other nations or by multinational corporations.

Some may argue that a summary of Saddam Hussein’s rise to power illustrates that the legitimacy of his regime may be highly questionable. The Revolution of 1958 marked the beginning of a period of coups and coup attempts. For example, General Qasim was in power until he was assassinated in 1963 by the Baath party and replaced with Colonel Abdul Salam Arif as President. Shortly thereafter, President Arif ousted the Baath government. In 1968, the Baath party regained control, overthrew the Arif regime, and designated Ahmad Hasan al-Bakr as President of Iraq and Chairman of the Revolutionary Command Council (RCC). In 1979, President and Chairman al-Bakr named Saddam Hussein his successor. The Provisional Constitution of 1970 gave ultimate authority to the Baath regime, and the Baath party ruled through the RCC which enacted legislation by decree. Since then, Saddam Hussein ruled by fiat. The fact that Saddam Hussein has been re-elected again and again is problematic as some may argue that these national elections illustrate his legitimate rule. In 1995, Saddam Hussein won 99.6% of the vote, or one voter in about 3,000 voted against him. In 2002, he won 100% of the vote. In reality, however, Saddam Hussein has been the only candi-

50. Coups, Coup Attempts, and Foreign Policy, *supra* note 12 at 1.
52. *Id.*
53. *Id.*
54. *Id.*
56. Iraq Profile, *supra* note 51.
date, the Kurds, the primary opposition, were not required to vote, and the ballots had the following “single question, ‘Do you choose to re-elect Saddam Hussein?’ followed by the choices, a) Yes or b) Yes.” These election tactics, coupled with “a sophisticated security structure, a vast network of informers, and extreme brutality in dealing with dissent,” permitted Saddam Hussein to create a dictatorship which can be described as a reign of terror, election or no election. It is reasonable to conclude that Saddam Hussein was a dictator who ruled without the consent of the Iraqis, and as a result, he lacked constitutional legitimacy.

Based on this history and the unique election methods, it is not unreasonable for the United States to classify the Saddam Contracts as illegitimate, as they stem from an illegitimate ruler who never had the authority to enter into them, and suggest their invalidation. The Pre-War Multinationals, in turn, in an attempt to preserve their contracts, allege that the United States’ attack on Iraq and subsequent establishment of the interim government face the same legitimacy scrutiny because the attack had no explicit approval from the U.N. Security Council. They argue that, without U.N. approval, the United States’ unilateral attack lacked legitimacy, as re-enforced by Secretary General Kofi Annan’s statement to the U.N. General Assembly on September 12, 2003, that “there is no substitute for the unique legitimacy provided by the United Nations.” Without a legitimate attack, any subsequent action, such as the creation of an interim government, would not be valid either.

This point of view, however, may be too rigid as the U.S. attack can not be classified as unilateral simply because it did not have the support of Germany, Russia, or France. In reality, the United States was supported by what has been referred to as the “coalition of the

62. Rubiner, supra note 60 at A17.
63. Perito, supra note 55.
64. Saddam Crimes, at http://www.sciri.btinternet.co.uk/English/Saddam_Crimes/saddam_crimes.html.
willing" which comprises of Britain, Australia, Turkey, Bulgaria, Kuwait, Oman, Qatar, and at least forty other nations. Further, there were at least a dozen resolutions passed by the United Nations prior to Operation Iraqi Freedom through which the United States may glean authorization for its actions. The end of the Gulf War was marked by U.N. Resolution 687 which established that Iraq would unconditionally agree to destroy its weapons of mass destruction. Despite its acceptance, Iraq refused to comply with the inspections and monitoring conditions imposed by the resolution. Subsequently, the U.N. passed resolution after resolution concerning Iraq’s disarmament. A Joint Resolution, passed in October of 2002, authorized the President of the United States “to take appropriate action” in order to bring Iraq into compliance, and it recalled U.N. Resolution 687 which authorized “the use of all necessary means” to compel Iraq to disarm. In November of 2002, Resolution 1441 was passed as “a final opportunity [for Iraq] to comply with its disarmament obligation [or] face serious consequences as a result of its continued violations of its obligations.” The stated objectives of this resolution were to “restore international peace and security [and] to ensure full and immediate compliance by Iraq.” In light of Iraq’s “unremitting policy of concealment and resistance,” coupled with the resolutions passed concerning its defiance, it can be argued that the United States had all the authority necessary to mount Operation Iraqi Freedom.

For those who remain unconvinced, Resolution 1483, passed in May of 2003, can be viewed as concluding the debate as to whether the U.S. attack was legitimate or not. Historically, the U.N. has granted retroactive approval to invasions as illustrated with the U.S.-led inva-

73. Stevens, supra note 71 at A14.
75. United States Congress: Public Law 107-243 (Joint Resolution to Authorize the Use of United States Armed Forces Against Iraq), 41 I.L.M. 1440 (2002).
77. Id.
78. Stevens, supra note 71, at A14.
sion of Kosovo in 1999.\(^7^9\) Likewise, Resolution 1483 not only reaffirmed the necessity of Iraq's disarmament, but it recognized that the United States, the United Kingdom, and Ireland are occupying powers with which the United Nations and the people of Iraq need to work in order to reaffirm the sovereignty of Iraq.\(^8^0\) In essence, the U.S.-led attack on Iraq and its subsequent occupation of Iraq have been recognized by the United Nations. Based on these facts, the Pre-War Multinationals face an uphill battle in trying to invalidate the actions of the United States.

With regard to the interim government, the Pre-War Multinationals fear that the United States, through its control of Iraq, will embark on a "binge of regime-toppling" that will install governments more friendly to the United States\(^8^1\) which would allow U.S. control over the politics and subsequently, the resources and economic policies of the world.\(^8^2\) They fear that U.S. control over Iraqi oil has been already set in motion since the United States established the interim government and the United States appointed the Ministry of Oil.\(^8^3\) The Pre-War Multinationals, therefore, bring forth the possibility that the interim government lacks legitimacy because it was neither derived from law nor from society\(^8^4\) but from a U.S.-led attack, and as such, "[it] neither has the power to issue an independent decision, or the power to carry it out."\(^8^5\) As a result, any cancellation of the Saddam Contracts by the interim government would be invalid. In response to this argument, one can look to the histories of the U.S. occupations of Japan and Germany to illustrate that U.S. involvement neither leads to regime-toppling nor illegitimate governments. After World War II, both countries were under Allied occupation, and as a result of U.S. influence, the "rebuilding of German democracy and the reconstruction of postwar Japan are examples of successful institutional and cultural transformations that expand the realm of the possible in democratization."\(^8^6\) But if one were to follow the analysis of

\(^7^9\) Greenberger & Bravin, \textit{supra} note 65, at A13.
\(^8^3\) Pre-War Contracts, supra note 39.
\(^8^5\) \textit{Id.} (quoting Wisal al-Azawi, dean of political science college at al-Nahrain University).
the Pre-War Multinationals, then the subsequent governments of Germany and Japan would have to be declared illegitimate, and consequently, all of their actions would have to be invalidated. Not only would it be impossible to invalidate almost six decades worth of development and progress, but it would make no sense to do so. Further, Germany and Japan are considered as two of the nine global powers which make up 70% of the world’s economy, are pivotal in expanding international trade, have sophisticated militaries of their own, and are formidable opinion leaders. How could this be possible if the United States had toppled their regimes and controlled their politics and economies? While one can appreciate that the Pre-War Multinationals just want to protect their interests, the arguments they present, when viewed in light of the U.N. resolutions and the history of the United States occupation of Germany and Japan, are weak.

The legitimacy debate between the United States and the Pre-War Multinationals needs to be resolved to avoid any stalling of much needed development of Iraq’s oil industry. Because both parties have divergent views, perhaps the only way in which to move beyond this issue is to start focusing on the restoration of the rule of law in Iraq. The framework of the rule of law is based on the consent of the people governed and their equality with one another. In other words, the rule of law provides the foundation for democracy because it is grounded in the idea that people are equal. The theory behind the rule of law is that through a democracy, a government will be elected by its people, and because it is the people who have voted, the government will be recognized by its voters. There will be no question of legitimacy because legitimacy will have “derive[d] from the consent of the governed: the people of Iraq.” The elected Iraqi government can then decide what to do with the Saddam Contracts with less fear that its decisions will be mired with doubts of legitimacy. It is important to note, however, that the democracy that evolves from the rule of law does not simply mean holding elections. For example, Paddy Ashdown, the high representative of Bosnia stated,

In Bosnia, we thought that democracy was the highest priority and we measured it by the number of elections we could organize. In

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87. Global Powers in Changing Times, Mar. 2003, available at http://www.ipsos-pa.com/globalpowers/docs/IPSOSGlobalPowers072203.pdf. This is a limited syndicated quarterly report which reports on public opinions in the U.S., Canada, UK, France, Germany, Japan, Russia and Spain in order to monitor the stability and change in the world. Id.
88. Perito, supra note 55.
89. Id. See also El Fadl, supra note 16.
hindsight, we should have put the establishment of rule of law first, for everything else depends on it: a functioning economy, a free and fair political system, the development of civil society, and public confidence in police and courts."\textsuperscript{91}

Once the rule of law is established in Iraq, with a concentration in restoring equality and economic stability, a constitution is drafted and ratified, and a democratic election takes place for a permanent government, Iraqi leaders will gain the legitimacy that is needed in order to make and implement decisions that will affect their country and their citizens.

\textbf{B. \textit{Status of the Saddam Contracts}}

As previously stated in Part One, Thamir Ghadhban has cancelled or suspended three Saddam Contracts. Russia's LUKoil contract for the development of West Qurna and China's CNPC contract for Al-Ahdab were two of those three, and the third has not been disclosed.\textsuperscript{92} Mr. Ghadhban explained that all the remaining contracts would be re-evaluated and examined and that new contracts would be announced.\textsuperscript{93} The remaining Pre-war Multinationals will just have to wait as the interim government decides whether to respect or invalidate their contracts.\textsuperscript{94} It is clear that the reasoning behind these decisions lies in the issue of legitimacy. Yet, in light of the arguments presented in Section A \textit{supra}, there is the possibility that the decisions of the interim government may not be respected either. For example, since the U.N. lifted sanctions in Iraq on May 22, 2003, LUKoil is in negotiations with the interim government arguing that it can and will fulfill its obligations under the West Qurna contract.\textsuperscript{95} Additionally, CNPC has since denied the cancellation of its contract.\textsuperscript{96} Others have even taken the view that when the U.N. passed the resolution to end sanctions on Iraq, because there was no mention of the Saddam Con-
tracts, the contracts were automatically voided\textsuperscript{97} by virtue of omission. For example, Russia, during these U.N. negotiations, never once mentioned its concerns regarding the status of the Saddam Contracts and the effect the removal of the sanctions would have on them.\textsuperscript{98} This omission is important in light of the fact that the Pre-War Multinationals entered into these Saddam Contracts for the purpose of being the first to reap profits from oil once the sanctions were lifted.\textsuperscript{99} The silence on the part of the Pre-War Multinationals has led some to believe that they tacitly agreed to the cancellation of the Saddam Contracts. These differing view points illustrate that the current status of the Saddam Contracts is, at best, uncertain.

IV. Alternatives

In spite of the diverse and opposed views on the status of the Saddam Contracts, there are numerous ways in which Iraq can treat them and manage its oil revenues. At the very least, the decisions should be made by the permanent Iraqi government. If Iraq needs guidance from foreign multinationals and governments, then this advice should not be unilaterally given by any one nation. Nations as a group should cooperate with Iraq and each other in order to ensure that the interests of one foreign nation and its multinational company are not paramount. It is impossible to find one solution that will please all parties. This Section offers a two-part analysis of what can be done. Section A presents a series of extreme alternatives in which one or two parties can reap all the benefits of Iraq's oil. Section B concludes with a series of compromises that are beneficial to all parties, in particular to the people of Iraq.

A. Extreme Alternatives

1. Invalidation of Saddam Contracts

One extreme alternative is the invalidation of the Saddam Contracts, which, for reasons already stated above, is the least attractive solution for the Pre-War Multinationals and most beneficial to the United States. One could argue that invalidation does not close the door on their involvement in Iraq's oil industry. For example, the Pre-War Multinationals could suggest re-negotiations of the Saddam Contracts with the new government. But in all fairness to the Pre-War

\textsuperscript{97} K. Hanly, Existing Iraq Oil Supply Contracts Void - Envoy, at http://www.forbes.com/markets/newswire/2003/05/22/rtr980485.html
\textsuperscript{98} Id.
\textsuperscript{99} Paul, supra note 23.
Multinationals, why re-negotiate and risk less favorable terms when, thanks to the Saddam Contracts, they are already "in the driver's seat" with long-term contracts for oil fields ripe with resources?\textsuperscript{100}

Invalidation, however, is also not in the best interest of Iraq. While declaring a contract void or rejected is a simple task, the consequences and repercussions can be complicated. On the one hand, the Pre-War Multinational could walk away and cut its losses, but on the other, it could take legal action, and this is when the complication sets in. LUKoil, for example, has threatened to arbitrate this matter in Geneva.\textsuperscript{101} For security and to guarantee the payment of any award against Iraq, LUKoil could attempt to impound any tankers carrying Iraqi oil until the arbitration is settled.\textsuperscript{102} The consequence of declaring the LUKoil contracts void could tie up development of Iraq's oil industry until a resolution has been reached.\textsuperscript{103} While this is a reasonable concern, there are two possible results. The first is that Iraq could call its bluff. In other words, if LUKoil provides it with a notice to arbitrate, Iraq could simply refuse to appear before the arbitral panel. Iraq could risk an award against it, but that, alone, would not give LUKoil the ability to collect on the award, whether it is a sum of money or a demand for specific performance under the Saddam Contracts. LUKoil would probably have to seek enforcement of the award in a court in Iraq or Russia, but the national courts could choose to cancel the award instead. Even if the award is enforced, if Iraq chooses not to honor it, LUKoil would be forced, once again, to go through the court systems in order to seize property and discharge the claims asserted. This process could take years and cost a lot of money. The second is that the arbitration could resolve the issue by allowing the Pre-War Multinationals and the Iraqi government an opportunity to meet and settle on a re-negotiated contract. In spite of this possible positive outcome, in a country devastated by years of tyranny and misappropriation of wealth, reconstruction and progress need to be immediate rather than burdened by the risk of or actual litigation or arbitration.

\textsuperscript{102} \textit{Id.}
\textsuperscript{103} \textit{Id.}
2. Nationalization

Nationalization is defined as the host country's taking of property of a foreign investor within its territories for purposes of economic or social reform.¹⁰⁴ This extreme would occur to the detriment of the Pre-War Multinationals and the United States as the new Iraqi government would be in total control of its oil industry. While nationalization may be viewed as a country's attempt to reclaim its sovereignty and to protect its citizens from foreign encroachment,¹⁰⁵ it can backfire and do more harm to the nation as a whole. Mexico is an excellent example. Nationalization of the Mexican oil industry occurred in 1938 when President Lazaro Cardenas expropriated the oil fields in the name of preserving and defining Mexican sovereignty.¹⁰⁶ As a result, oil revenues were directed solely to Mexico, through a state-owned company called PEMEX.¹⁰⁷ While nationalization defined Mexico as a sovereign state, it also defined the few members of society who would profit the most.¹⁰⁸ Resources were misallocated, other sectors of the economy, such as industry and agriculture, were ignored and there was excessive borrowing allowed by the growth in oil reserves.¹⁰⁹ Eventually, Mexico was faced with a $100 billion debt, a devaluation of the peso, and an oil industry that fell behind demand.¹¹⁰ Mexico was then forced to abandon nationalization and move towards a policy of restructuring and privatization in order to survive and attract foreign investment.¹¹¹ Although the goal to become an independent, self-sufficient and wealthy nation is commendable, Mexico has shown that nationalization is not the means to achieve or sustain it.

If Iraq needs another example, it needs to look no further than its own country and the Nationalization Acts of 1972-74. As already mentioned earlier, when the oil industry was nationalized, all the wealth of the Iraqis was diverted to those in power. Nationalization did not serve to strengthen Iraq as a sovereign nation or enrich the Iraqi people. Instead, it created "rancorous relations between the [oil] companies and the [Iraqi] government, rocked the international

¹⁰⁴. Greta Gainer, Nationalization: The Dichotomy Between Western and Third World Perspectives in International Law, 26 How. L.J. 1547, 1548 (1983).
¹⁰⁶. Id.
¹⁰⁷. Id. at 88.
¹⁰⁸. Id. at 89.
¹⁰⁹. Id. at 96.
¹¹⁰. Id. at 96.
¹¹¹. Jensen, supra note 105, at 103-104.
oil industry,"\textsuperscript{112} and deprived the Iraqis of their property. The oil worth produced in Iraq since 1968 totals approximately $580 billion in revenue, yet the country remains poor due to Saddam Hussein's pillaging, squandering, and dissipation of Iraq's oil resources.\textsuperscript{113} With Saddam Hussein no longer in power, nationalization may not result in the same gross misappropriation of wealth. However, there is no guarantee that the same situation will not resurface once a permanent government is in place because nationalization means control of the nation's wealth in the hands of only those in power. In essence, nationalization would not serve to benefit any of the parties involved.

3. Privatization and Economic Reform

Privatization will be addressed in this subsection because it is the extreme opposite of nationalization. Economic reform is the first step towards rebuilding Iraq with a strong foundation for democracy to flourish.\textsuperscript{114} The reasoning is that a guarantee of economic well-being and fair and equal distribution of wealth guard against poverty and tyranny.\textsuperscript{115} Germany pre-World War II illustrates this theory.\textsuperscript{116} Throughout Adolf Hitler's rule, there was neither economic protection of public or personal property nor promotion of individual economic liberty.\textsuperscript{117} Through legislative manipulation, Hitler was legally able to constrain economic freedom, confiscate private property, nationalize industries, and consolidate his power in order to create a totalitarian regime\textsuperscript{118} through which he maintained and strengthened his control. Had Hitler focused instead on economic reform in which property was protected and wealth evenly distributed, Germany's history would have been different. The same holds true for Iraq. Saddam Hussein controlled the country's wealth through which he augmented and secured his own power. Economic reform through privatization of Iraq's oil industry would have redistributed this wealth. Now that Saddam Hussein is no longer in power, Iraq can begin to privatize.

\begin{itemize}
\item \textsuperscript{112} Paul, \textit{supra} note 23.
\item \textsuperscript{113} Drollas, \textit{supra} note 28.
\item \textsuperscript{115} Bay, \textit{supra} note 114; Beard, \textit{supra} note 114.
\item \textsuperscript{116} Bay, \textit{supra} note 114; Beard, \textit{supra} note 114.
\item \textsuperscript{117} Bay, \textit{supra} note 114; Beard, \textit{supra} note 114.
\item \textsuperscript{118} Beard, \textit{supra} note 114.
\end{itemize}
Privatization of the oil industry as a means in which economic freedom and equality can be promoted in Iraq is illustrated by the success of privatization in Latin America, specifically in Argentina, Colombia and Peru. In the 1990’s Latin America underwent a series of economic reforms which began with the privatization of state-owned oil industry because it was seen as the largest opportunity to raise revenue.\(^{119}\) Privatization of Argentina’s Yacimientos Petroliferos Fiscales (YPF) was complete in 1993.\(^{120}\) YPF’s privatization has since been credited for the reversal of years of declining oil production, an influx of foreign direct investment, and a turnaround of the oil industry through new sources of substantial investment and technology.\(^{121}\) Colombia’s efforts to privatize have also led to foreign investments that will allow Columbia to upgrade its pipelines and to increase its explorations and drilling of oil fields.\(^{122}\) Additionally, privatization has led to the discovery of two billion barrels of reserves in Columbia’s oil fields.\(^{123}\) The privatization of Peru’s Petroperu will raise $3 billion for the country.\(^{124}\) Privatization brought foreign investment of capital, expertise, and technology which culminated in discoveries of more natural resources and opportunities of wealth for Latin America and its citizens. Iraq, on the other hand, is suffering from a run-down oil industry crippled by years of U.N. sanctions that prevented importation of technology and capital essential for maximizing its oil production.\(^{125}\) Through privatization, however, Iraq can import the help it needs to develop its natural resources, as Latin America has done. Privatization will also keep the oil revenues away from control of only the government and those in power, thereby ensuring that history, as in Germany and Iraq, will not repeat itself.

4. U.S. Billion Dollar Aid to Iraq

On October 17, 2003, Congress voted in favor of President Bush’s request for $87 billion for Iraq and Afghanistan,\(^{126}\) of which $20 bil-


\(^{120}\) Id.

\(^{121}\) Id.

\(^{122}\) Id.

\(^{123}\) Id.

\(^{124}\) Id.


lion would be for the rebuilding of Iraq.\textsuperscript{127} The Senate voted that $10 billion of this money would be a loan and repaid through future oil revenues.\textsuperscript{128} Although this is a generous offer on behalf of the United States, this creates a number of problems. Does this mean that the United States has a lien on all of the oil revenues until this loan is repaid? Can the United States use this loan as leverage for gaining additional reconstruction contracts in Iraq? Can the United States use this loan to ensure that its interests are protected at the expense of other nations and the Iraqi people? In light of all the necessary development and reconstruction needed in Iraq, can the United States even expect to get all if its money back? When a Pre-War multinational enters into another contract for oil development and exploration, how much of the revenues will go to the United States and how little will the Iraqi people get? Who will be responsible for the accounting and how can Iraq ensure that the accounting is adequate and precise? The leverage the United States will have could create a situation analogous to that of Saddam Hussein's regime in that the wealth of the Iraqi people will be allocated to the U.S. government instead of to the people of Iraq. Foreign investment will decrease as multinationals will not invest in a nation whose profits are going to a third party. Without foreign investment, a nation wishing to develop and modernize will not be able to do so,\textsuperscript{129} and the Iraqi people, once again, will suffer economically as they did under Saddam Hussein.

5. Executive Order 13303

President Bush signed Executive Order 13303, Protecting the Development Funds for Iraq and Certain Other Property in Which Iraq Has an Interest, on May 22, 2003.\textsuperscript{130} The pertinent part of this Order is Section 1(b) which states that any judicial process or judgment is prohibited with respect to:

all Iraqi petroleum and petroleum products, and interests therein, and proceeds, obligations, or any financial instruments of any nature whatsoever arising from or related to the sale or marketing thereof, and interests therein, in which any foreign country or a national thereof has any interest, that are in the United States, that

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128. Firestone, \textit{supra} note 126.


\end{flushleft}
hereafter come within the United States, or that are or hereafter come within the possession or control of the United States persons.  

This basically means that any U.S. oil company in Iraq is shielded from any liability that may arise from any connection with Iraq’s oil, from breach of contract, from any damages from oil spills, from any labor rights violations, and even from payment of taxes owed to Iraq.  

While the Bush Administration claims that this fund is only to protect the oil industry on behalf of the Iraqi people, the language of EO 13303 is clear in shielding U.S.-based corporations from any civil or criminal liability in the United States post-Saddam Hussein.  

Tom Devine, legal director for the non-profit legal firm, Government Accountability Project, describes this as a “blank check for corporate anarchy [as it] cancels the concept of corporate accountability and abandons the rule of law.” This statement illustrates the fear that this Executive Order serves to benefit only American multinational businesses at the expense of Iraq and its citizens.

As a counter-argument, however, one needs to look at the Executive Order in its entirety. The goal is to protect Iraqi oil from attachment, threat of attachment, or other judicial process in order to ensure the reconstruction and restoration of Iraq, the maintenance of peace and security in Iraq, and the development of Iraq’s infrastructure and institutions are achieved. In light of these objectives, the Executive Order might not be so threatening. Further, there is debate as to whether a federal executive act could prevail, or supercede, international law. There are also allegations that the Presidents of the United States have increased their powers by ruling and legislating through legislative order. Further analysis into these topics is out of the scope of this paper, however, these concerns at least illustrate that executive orders may not be always accepted with open arms.

6. Service Contract

The service contract is considered as extreme in terms of the damage ultimately suffered by Iraq, because of the contract’s profit-shar-
ing structure. The service contract is an agreement between a foreign company and the host country in which the former agrees to provide services and information for the development of the oil resources in exchange for a fee or a share of the production.\textsuperscript{138} There are three types of service contracts: the pure service contract, the technical assistance agreement, and the risk service contract,\textsuperscript{139} but for purposes of this section, only the pure service contract will be discussed. The pure service contract requires the foreign company to perform a specified service for a specified flat fee.\textsuperscript{140} While this is straightforward and simple, it is unattractive to multinational corporations because they provide no right to production or sharing of the profits.\textsuperscript{141} More importantly, it is not advantageous to the Iraqis in relation to the issue of foreign investment. Foreign investment can bring into Iraq "needed capital, skills, and know-how, either producing goods needed for the domestic market or contributing new exports."\textsuperscript{142} Companies are in business to maximize shareholder wealth. If they cannot profit from their contracts with Iraq, their fiduciary duties to their shareholders will require that they invest their capital, expertise and technology elsewhere, and Iraq will not develop to its fullest potential. Iraq should avoid entering into service contracts with regard to its oil industry to ensure that it remains attractive to foreign investors.


\textsuperscript{139} Id. at 40. The technical assistance agreement is almost identical to the pure service contract, except that the foreign company agrees to provide the host country with technical assistance such as training in and providing equipment for the exploration, development and production of oil. Id. at 40-41. The foreign company receives a flat fee, but it also receives reimbursement for any expenses incurred as well as a fee based on a certain level of production. Id. at 41. Under the risk service contract, the foreign company explores a specified area in order to evaluate its potential for production. Id. at 41. It does so by using its own capital and with understanding that if nothing is discovered, it receives no payment. Id. at 41 (citing R. MikeSELL, \textit{PETROLEUM COMPANY OPERATIONS AND AGREEMENTS IN THE DEVELOPING COUNTRIES} 21 (1984)). Only once there is actual production is the foreign company reimbursed for its exploration expenses. Id. at 41. Additionally, the foreign company never obtains any rights to this specified area. Id. at 41.

\textsuperscript{140} Id. at 40.

\textsuperscript{141} Id. at 40 (citing Barrows, \textit{International Trends and Latest Changes in Oil Laws, Concession, and Production-Sharing Agreements Worldwide}, 1983 Inst. on Int'l Oil & Gas L. at A-1, A-14).

7. Law of Occupation

While the Law of Occupation is not necessarily an alternative as the United States' is already occupying Iraq, it needs to be addressed as Secretary of State, Colin Powell, stated that the United States, whatever its actions, would act "consistent with international law with respect to the responsibilities of an occupying power." The Law of Occupation, which applies when a foreign military is in force in a country without that country's consent, provides the United States with certain rights and obligations within and towards Iraq. Pursuant to Article 43 of the Hague Convention Respecting the Laws and Customs of War on Land:

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all 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.

In other words, while the occupying power has the authority to do what is necessary to preserve order, it must maintain and respect existing laws and regulations. Only in the event that preservation of existing laws is impossible or harms the safety and development of the occupant, can the occupying power consider repealing old laws and enacting new legislation. In light of this exception, the United States can choose to invalidate the Saddam Contracts in the name of exterminating any reminder of Saddam Hussein, take over the oil fields and develop the fields themselves. The Law of Occupation, however, requires that the acts of the occupier must be solely for the benefit of the occupied population’s benefit. This Law, therefore, serves a triple purpose. It assuages the Pre-War Multinationals that the United States can only channel the oil revenues to meet the Iraqis' needs, and that it cannot use any oil revenues for its direct benefit without being in breach of the Hague Convention. It prevents the United States from claiming control over “the undetermined rights of

144. Perito, supra note 55.
145. Id.
146. Id.
148. Id.
foreign contractors, joint venturers and concessionaries.”

And most importantly, it ensures that the Iraqis will be the beneficiaries of their oil and its revenue.

B. Compromises

The Pre-war Multinationals would prefer the retention and enforcement of the Saddam Contracts because their investments would remain unchanged. The benefits of contract sanctity, however, are not unique to the Pre-war Multinationals, as the Iraqis’ best interest will be served as well. Contract sanctity would deter any damage to the investment climate of the oil industry worldwide, it would allay any fears that the United States will encourage invalidation in order to place its multinational corporations in better standing for future oil contracts in Iraq, and as stated earlier, it would prevent arbitration or litigation from hindering any development. Regardless, it is clear that contract sanctity is not a viable option in light of the statements of Thadmir Gadhban, the U.N.’s authorization of a U.S.-led multinational force in the restructuring and rebuilding of Iraq, and the fact that a panel of Iraqi oil experts, sponsored by the U.S. State Department, has recommended that every contract relating to oil in Iraq should be reviewed on a “case-by-case basis.” Each nation will want what is best for its corporations, and rather than having one winner, there are compromises to which all parties can be amenable for mutual benefit. Compromising would steer the Pre-war Multinationals away from legal proceedings and the questions of legitimacy would no longer need to be debated. The focus then could be solely on the rebuilding and development of Iraq.

What Iraq needs is to have a lot of companies doing business in Iraq. Private-sector companies, as history has shown, have been the


catalyst for economic growth in the West, as small family partnerships and state-approved monopolies gave way to independent companies that "drove the first great age of globalization." Multinational companies like to make money, and Iraq's oil fields provide fertile ground for investments. Compromising on what happens with the Saddam Contracts is the first step in creating a symbiotic relationship between Iraq and multinational companies. The compromises, however, are subject to two conditions precedent. Condition number one is invalidating the Saddam Contracts and starting over with a clean slate. Condition number two is to open all the oil contracts to bidding, at the same time, to all multinational corporations interested in doing business with Iraq.

1. Afghanistan as a Model

Following the attacks of September 11, 2001, the war on terrorism turned the world's attention to Afghanistan. After decades of war and conflict, the United Nations brokered talks in Bonn, Germany, for the rebuilding and restructuring of Afghanistan. Through these meetings, it was decided that there would first be a six-month interim administration established in Afghanistan, followed by a two-year transitional administration, and finally, a permanent government elected nationally. All of this would be done through the auspices of the United Nations. It would be an international approach rather than a unilateral approach through which one nation could secure a favorable position through protective and independent involvement in the creation of a permanent government. If Iraq would follow this model, Iraq would have a timeline in which to establish itself as an independent and recognized democracy with which multinational corporations worldwide will have security and faith in investing and doing business.

2. Establishment of a "Steering Committee"

Members of the private sector of the economy need to lend their business, financial, and intellectual expertise in the rebuilding of Iraq because the revival of its economy will depend on foreign investment,
project development, and job creation.\textsuperscript{158} These jobs and projects can be created and implemented once a stable and attractive investment climate is established in Iraq, and this environment can be achieved by implementing policies that ensure transparency, legal recourse, sound corporate governance, and liberal foreign trade policies.\textsuperscript{159} Iraq can be guided and educated in implementing and creating these policies through a “steering committee” comprised of business leaders.\textsuperscript{160} The business leaders would come from all over the world to ensure that Iraq would receive well-rounded and diverse expertise. This steering committee would then accelerate, supervise, and monitor the execution of these policies, as well as oversee the reform necessary in post-Saddam Iraq.\textsuperscript{161} Once these measures to eliminate and prevent corruption are adopted, foreign multinational corporations will feel secure in investing and doing business in Iraq, and with this influx of investment, jobs will be created, poverty will decline, the quality of life for the Iraqis will improve, and stability will be rooted.\textsuperscript{162} Iraq will become a healthy and rich nation.

3. Modern Concession

The modern concession grants a company “the exclusive rights to explore, search, and drill for, produce, store, transport, and sell Petroleum”\textsuperscript{163} during a specified number of years and in a specified area.\textsuperscript{164} This type of contract requires that the company holding the concession follow a development schedule and a work program.\textsuperscript{165} Once the specified time period lapses, the company then relinquishes that part of the oil field it was working on.\textsuperscript{166} It also allows for bonus payments to the company if certain levels of production are met or exceeded, and it allows for royalties and rental payments to the host country based on performance.\textsuperscript{167} The host country has the choice of receiv-

\begin{itemize}
\item \textsuperscript{158} Privatization and the Globalization of Energy Markets, supra note 119.
\item \textsuperscript{160} Id.
\item \textsuperscript{161} Id.
\item \textsuperscript{162} Id.
\item \textsuperscript{163} Smith & Dzienkowski, supra note 138 (quoting Abu Dhabi Specimen Draft Oil Concession Agreement, art. 34, \textit{reprinted in} K. Blinn, C. Duval, H. Le Leuch & A. Pertuzio, \textit{International Petroleum & Exploitation Agreements: Legal, Economic, & Policy Aspects} 33-42 (1986)).
\item \textsuperscript{164} Id. at 36.
\item \textsuperscript{165} Id.
\item \textsuperscript{166} Id.
\item \textsuperscript{167} Id. at 37.
\end{itemize}
ing these payments in cash or in kind,\textsuperscript{168} which allows the company some flexibility with its capital. Finally, the company agrees to pay the host country a specified amount for tax on its income earned through this concession,\textsuperscript{169} thereby ensuring that the host country can increase its revenue proportionately with the increase in production of its resources. The modern concession is attractive to both multinational corporations as well as to the host country. Applied in Iraq, the modern concession will provide continuous benefits to the multinationals and the Iraqi people. When companies invest in Iraq, capital enters Iraq. With capital, Iraq can offer incentive bonuses to companies that exceed levels of production, and higher levels of production lead to higher royalties and taxes paid to Iraq. The win-win result is clear: companies are happy because they are profiting and the Iraqi people are happy because their country is being developed.

4. Production-Sharing Agreement

This agreement will require the establishment of a state oil company.\textsuperscript{170} It is an agreement which grants a foreign company the right to explore and develop an area, and in turn, the state oil company recovers its costs and a specified amount as profit.\textsuperscript{171} Indonesia has used this type of agreement since the 1960's.\textsuperscript{172} Petramina, Indonesia's state oil company, usually enters into this agreement with a foreign company for thirty years.\textsuperscript{173} The foreign company is required to establish a work program which must be first approved by Petramina.\textsuperscript{174} Once approved, the foreign company pays Petramina a management fee to supervise and facilitate this work program.\textsuperscript{175} As compensation, the foreign company deducts its operating costs from the gross production, and the remainder of the production is then divided 65%-35% between Petramina and the foreign company, respectively.\textsuperscript{176} Like the modern concession, the foreign company must also

\textsuperscript{168} Id. at 37.
\textsuperscript{169} Smith & Dzienkowski, supra note 138, at 37.
\textsuperscript{170} Id.
\textsuperscript{171} Id. at 37-38.
\textsuperscript{172} Id. at 38 (citing R. MIKESSELL, PETROLEUM COMPANY OPERATIONS AND AGREEMENTS IN THE DEVELOPING COUNTRIES 21 (1984)).
\textsuperscript{173} Id. (citing Model Production Sharing Contract Between Petramina and Private Companies, reprinted in K. BLINN, C. DUVAL, H. LE LEUCH & A. PERTUZIO, INTERNATIONAL PETROLEUM & EXPLOITATION AGREEMENTS: LEGAL, ECONOMIC, AND POLICY ASPECTS, app. at 27 (1986)).
\textsuperscript{174} Id.
\textsuperscript{175} Smith & Dzienkowski, supra note 138, at 38.
\textsuperscript{176} Id.
pay taxes on income earned to Indonesia. This agreement is attractive to host countries because of its ability to control the manner of the work performed through the approval process. Although the profits of a foreign company are limited to 35%, the risk that an area of land is unproductive is mostly borne by the host country. In Petramina’s situation, if land is unproductive, it receives nothing. For Iraqis, this arrangement would bring in the technology needed for exploration and development of its oil fields, as well as the capital necessary to rebuild Iraq.

5. Participation Agreement

Participation agreements are developed through compromise between foreign companies and host countries of the Middle East. These agreements require that the foreign company and the state oil company or host country merge to create a joint operating company for development and exploration of the oil fields. The foreign company then provides the expertise and technology as well as capital to the joint company while the other party contributes the land. The joint company will be managed by representatives of both parties, and the ownership is usually equal, though the host country or state oil company may negotiate to have a 1% advantage over the foreign company. There is little risk to both parties as this agreement is rarely entered into prior to assessing whether an oil field will be productive or not. In other words, a foreign company is usually already developing and exploring an oil field through another type of contract, and once the field is producing and developed, both parties can renegotiate to form this joint operating company. Multinational corporations and Iraqis will benefit as both parties manage the oil fields, both manage the revenues, and both share equally in the expenses and profits. This is a relationship in which both parties complement one another through cooperation.

6. Trust Fund

A trust is defined as “a legally recognized and enforceable arrangement . . . whereby one or more persons (trustees) take title to prop-
Iraq oil belongs to the people of Iraq. One way to give this oil back to the Iraqis, while ensuring that each Iraqi receives his/her proportionate share, is to create an oil investment trust, and then distribute the oil proceeds through dividends. An example of this system is Alaska's Permanent Fund. The 1959 Constitution of the State of Alaska stipulates that the natural resources of Alaska belong to the residents of Alaska. In 1969, Alaska auctioned off drilling rights to Prudhoe Bay in the form of leases, thereby netting $900 million. In 1976, the residents of Alaska voted to approve the creation of the Alaska Permanent Fund savings trust as a means to ensure that these oil revenues would not run out in the future. Twenty-five percent of all revenue from natural resources is deposited into this trust, and each year, every Alaska resident is entitled to a dividend payment. Meanwhile, the principal of the trust is invested and cannot be spent without the majority vote of the people. To date, this trust is worth approximately $23 billion.

While this system has worked in Alaska, Iraq is a different situation. It has been subjected to a dictatorial regime for over thirty years throughout which the oil revenues have been either squandered by or diverted to those in power. Additionally, while Alaska had a constitution already in place, Iraq's interim government is still in the process of rewriting its constitution. Finally, it would take years to develop the trust fund with revenues from Iraqi oil, and there is the legitimate fear of the state being in control of Iraqi oil once again. One solution to these concerns would be to present each Iraqi citizen with a voucher, whose minimum price is guaranteed by the Central Bank of Iraq, which could be traded in for dividends once the trust is developed. Iraqis would have the choice of holding on to the vouchers or selling them to either foreign businesses or other Iraqis, and using

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186. Drollas, supra note 28.
187. Id.
188. AK Const. art. VIII, § 2.
189. Alaska, Revenue, Permanent Fund Dividend Division Organization at http://www.pfd.state.ak.us/OVERVIEW.HTM.
190. Id.
191. Id.
192. Id.
194. Barringer, supra note 152.
196. Id.
these proceeds however they wish.\textsuperscript{197} The oil industry would not suffer regardless of what the Iraqis decide to do with their vouchers based on the following reasoning: if the Iraqis choose to hold on to the vouchers, then those managing Iraqi oil will be responsible for and accountable to the holders.\textsuperscript{198} On the other hand, if the Iraqis sell them to foreign companies, the oil industry would run efficiently in order to protect the interests of these investors, and the country would receive its proportionate share of revenues through taxes, job creation, and further foreign direct investment.\textsuperscript{199} While it may take years to accumulate wealth, the trust, if run by the Iraqis, can serve as security for future wealth, and it can guarantee that each Iraqi citizen will own and control his/her proportionate share of oil.

7. Trade-Offs

The Pre-War Multinationals want their interests protected through enforcement of the Saddam Contracts. The United States wants "a piece of the pie" or an appropriate share of the oil industry through invalidating them. The Iraqis want what is rightfully theirs. To benefit all three parties, a trade-off system could be implemented.\textsuperscript{200} In other words, in exchange for supporting the United States in its attack and occupation of Iraq, the Pre-war Multinationals would gain access to Iraqi oil.\textsuperscript{201} This access would be guaranteed by the United States, as the occupying force in Iraq. The U.S. would no longer be victim to diplomatic isolation as the U.S.-led coalition would have the support of the other nations of the United Nations\textsuperscript{202} and the Pre-war Multinationals, in turn, would not be shut out of oil profits by U.S. companies. The people of Iraq will not have its oil industry tangled in legal proceedings, they will receive the technology and expertise needed to expand their oil industry, and they can begin to collect on the revenues produced by investments made by companies worldwide. The one danger is that there is no guarantee that the permanent government of Iraq would honor trade-offs made by the United States\textsuperscript{203} at this point in time. Aside from this potential risk, the trade-off would serve as an immediate, albeit short term, solution to the debate over the status of the Saddam Contracts.

\textsuperscript{197} Id.
\textsuperscript{198} Id.
\textsuperscript{199} Id.
\textsuperscript{200} Richardson, \textit{supra} note 149, at 74.
\textsuperscript{201} Id. at 74.
\textsuperscript{202} Barringer, \textit{supra} note 152.
\textsuperscript{203} Richardson, \textit{supra} note 149, at 74.
8. Insurance

Multinational corporations, regardless of how powerful or rich, take risks every time they do business abroad. These risks are not just economic.204 There are political risks as well, as countries with which these corporations do business may experience government instability, terrorist activities, blockage of currency, and expropriations.205 A common phenomenon is what political economist, Raymond Vernon, described as "the vulnerability of firms with large fixed investments to find the terms of their operating agreements changed, or renegotiated, once their operations are in place and have proved successful."206 This is what Pre-war Multinationals are experiencing now – their contracts may or may not be repudiated or breached by the interim Iraqi government. The way to deal with this political risk is to transfer it through the use of insurance.207 Host countries can also provide insurance to foreign investors. For example, the Iranian government urged approval of legislation that would protect investments in Iran’s Free Trade Zones, such as the Gulf islands of Kish and Qeshm and the southeastern port of Shabahar on the Oman Sea.208 It also would protect against any losses if another revolution or expropriation occurred.209 While the types of coverage are limited, and the cost of the premiums is high and the applications and legal arrangements are complex210 for political risk insurance, it is a means through which foreign investment can be attracted. The Pre-war Multinationals, the United States, and Iraq should work together to promote political risk insurance and to find additional sources to provide coverage.

205. Id.
206. Id. at 88 (quoting Raymond Vernon, Sovereignty at Bay: The Multinational Spread of U.S. Enterprises (1971)).
207. Id. at 56. The Multilateral Investment Guaranty Agency (MIGA), a branch of the World Bank, the Overseas Private Investment Corporation (OPIC), owned by the United States government, and other private insurance companies, such as Zurich or the American International Group, offer this type of political risk insurance. See http://www.miga.org. MIGA offers coverage for transfer restrictions, which is protection against losses from inability to convert local currency, expropriation, breach of contract and war, and civil disturbance. Id. OPIC offers coverage only for inconvertibility, expropriation, and political violence. See http://www.opic.org.
209. Salamy, supra note 208.
V. More Alternatives

In light of the spirit of compromise of the Pre-War Multinationals and the United States, a quick and efficient resolution to the status of the Saddam Contracts is possible. Unfortunately, Iraq's foreign debt is estimated to be at least $350 billion, and there are questions concerning Iraq's ability to repay this amount. This debt will have an impact on Iraq's oil industry as this natural resource may be the only means by which the debt can be repaid. For example, as the largest holders of Iraqi debt, Russia and France hoped to capitalize on Iraq's oil fields in order to recover its debts, especially once the U.N. sanctions were lifted. Iraq's other creditors may attempt to attach oil proceeds for repayment. Regardless of how the Saddam Contracts will be treated, this debt will need to be addressed and resolved in order to permit Iraq to develop into a wealthy, independent nation. If the post-Saddam Iraq assumes this debt outright, it would cripple itself economically. With all these considerations in mind, the Pre-war Multinationals offer three alternatives: the Doctrine of Odious Debt, bilateral negotiations and the intervention of the Paris Club.

A. The Doctrine of Odious Debt

This doctrine originated in 1898 with the Spanish-America War in which the United States cancelled Cuba's Spanish debts on the grounds that Spain incurred the debts for reasons contrary to the best interests of the Cubans and that the Cubans did not consent. Alexander Sack, explained: [If a despotic power incurs a debt not for the needs or in the interest of the state, but to strengthen its despotic regime . . . this debt is odious . . . .] This debt is not an obligation for the nation; it is a regime's debt, a personal debt of the power that has incurred it, consequently it falls with the fall of this power.

211. Reconstructing Iraq: Those Odious Debts, ECONOMIST, Oct. 18, 2003, at 13. This article explains that South Korea is owed in excess of $10 billion and the debt and war reparations owed to lenders, commercial banks, and other governments is estimated to be $350 billion. Id.
212. Solomon, supra note 49 (explaining that Russia's debts were incurred from Soviet-era military sales, and France was Iraq's most important arms supplier).
213. Id.
216. Solomon, supra note 49.
217. SACK, supra note 44.
While this doctrine exists and offers a beneficial resolution to the Iraqis, there are traps that exist in applying this Doctrine. This Doctrine has not been used often, and it is not an established international principle. Further, there are concerns surrounding who will classify which debts as odious and which debts as legitimate, as well as how there can be assurances as to the truthfulness of the classification. For example, if the institution charged with the classification is sympathetic to the plight of developing nations, it could randomly declare a debt as odious in order to keep the poor country from paying it. Additionally, debt forgiveness could start "a bad precedent, casting doubt over lending to all sorts of countries . . . that might one day transition to a better, democratic regime."

The United States, however, has advocated and applied this Doctrine. On June 16, 2003, Congress passed the Iraqi Freedom From Debt Act (hereinafter referred to as the "Act") "to call for the cancellation of loans made to Iraq by multilateral financial institutions." In Section 2 of this Act, Congress reasoned that debt cancellation is "an essential tool" as well as "an effective development tool" for rebuilding a nation and addressing humanitarian needs of a country devastated by war and bad leadership. It further reasoned that these loans were incurred to benefit the Baath party and Saddam Hussein through "lavish palaces, secret police, prisons and illegal weapons programs" rather than for the benefit of the people of Iraq, thereby proving that Iraq's debt is truly odious as it did not benefit the people of Iraq. Section 2(3) of the Act explains:

According to international precedent, debts incurred by dictatorships for the purposes of oppressing their people or for personal purpose may be considered 'odious'. In cases where borrowed money is used in ways contrary to the people's interest, with the knowledge of the creditors, the creditors may be said to have committed a hostile act against the people. Under such reasoning, such debts may be questioned.

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218. Solomon, supra note 49 (explaining that this Doctrine was applied after the Russian Revolution in 1917 and may be applied to South Africa's apartheid-era debts).
219. Id.
221. Id.
224. Id. § 2(1).
225. Id. § 2(2).
226. Id. § 2(3).
Congress then cited Cuba as the first example of odious debt cancellation when the United States took it over from Spain in 1898.\(227\) As per Congress, this Act "would remove a major impediment to poverty reduction and economic growth in Iraq, enable Iraq to invest its resources in health care, education, and poverty reduction, and give Iraq a fresh start in the post-war period."\(228\) This Act is to serve as a precedent for all other debt holders to either cancel or greatly reduce its debts owed by Iraq.\(229\) While this is a gracious and generous offer on behalf of the United States, the fact remains that Russia and France are the largest debt holders in Iraq, and the United States has no Iraqi debt.\(230\) In order to get France and Russia on board, they need to realize that Iraq is a unique case unlikely to set any sort of precedent due to its exceptional circumstances.\(231\) The facts are that a regime change finally occurred after twelve years of U.N. economic sanctions and that the people of Iraq have been mired in poverty.\(232\) With Saddam Hussein gone, Iraq has a chance to reclaim its wealth, and the best way to promote this is through debt forgiveness.\(233\)

B. Bilateral Negotiations

To avoid any surprises or ill-will to the nations holding these debts, another solution to debt resolution would be through bilateral negotiations. While this is no guarantee that the debtor-nations will retrieve all they are owed, it is an equitable solution, as only those parties with a stake are involved. The permanent government could establish a creditors committee,\(234\) and through negotiations, these nations may be able to get partial compensation, especially through reconstruction business, a transfer of crude oil and future oil contracts, and business in Iraq.\(235\) This will also prevent any lawsuits filed against Iraq that would hold up any reconstruction or development of the nation.\(236\)

\(227.\) Id. § 2(4).
\(228.\) Id. § 2(9).
\(229.\) Iraqi Freedom From Debt Act: House Bill supra note 223, § 3(b).
\(232.\) Id.
\(233.\) Id.
\(234.\) Solomon, et al., supra note 214 (referring to Min Su Kwang, Executive VP in charge of foreign contracts of Hyundai).
\(235.\) Id.
\(236.\) Id. (explaining that South Korea has already filed lawsuits in New York and London, but is willing to settle these once a permanent Iraqi government is in place).
C. Paris Club

The Paris Club is the third and final alternative to debt resolution. It is an informal composition of creditor countries that restructures government debt.\(^{237}\) Formed in 1956, it consists of nineteen permanent member countries,\(^{238}\) yet other countries can be invited to participate on a case-by-case basis.\(^{239}\) Restructuring includes changing and lengthening the time of repayment, deferring some payments completely, or reducing interest charges.\(^{240}\) Debt cancellation is not an option.\(^{241}\) Pursuant to its rules and regulations, the decisions are made on a case-by-case basis and by consensus.\(^{242}\) By using the Paris Club, there will be multilateral agreements as to how Iraq's debts should be treated, rather than a unilateral decision reached by the United States. For the debtor-nations not part of the Paris Club and not invited to join the Paris Club, this alternative is still beneficial as it can be used as a model on how debt restructuring can be achieved. All the debtor-nations can form one international committee, modeled after the Paris Club, specifically to adjudicate the debts of Iraq.

VI. Conclusion

It is evident from this paper, that there is no simple solution that will equally please all parties involved. It is also clear that compromise is the key. Perhaps discussions can begin with regard to the creation of an international arbitral body similar to the Iran-United States Claims Tribunal. In 1981, the Iran-U.S. Claims Tribunal was established pursuant to the Algiers Accord in order to settle claims arising out of debts, expropriation, and contracts affecting property rights between the United States and Iran.\(^{243}\) For some, this Tribunal has been

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238. These members are: Austria, Australia, Belgium, Canada, Denmark, Finland, France, Germany, Ireland, Italy, Japan, Netherlands, Norway, Russian Federation, Spain, Sweden, Switzerland, United Kingdom, and United States. See http://www.clubdeparis.org.
239. The following countries have been invited to participate: Abu Dhabi, South Africa, Argentina, Brazil, Korea, Israel, Kuwait, Mexico, Morocco, New Zealand, Portugal, Trinidad and Tobago, and Turkey. See http://www.clubdeparis.org.
240. Davis et al., supra note 214.
241. Id.
243. Salamy, supra note 208, at 291. These claims arose from several years of increasing hostility between the United States and Iran and culminated in Iran seizing U.S. hostages. In response, the President of the United States froze Iranian assets located in U.S. banks. Id. at 287-89. Months later, the United States and Iran negotiated the release of the hostages and the assets, signed the Algiers Accord, and brought inter-governmental and private-party state claims before the Tribunal as a means to resolve any claims existing prior to 1981. Id. at 289.
described as "the most significant arbitral body in history" as it has successfully resolved "almost all of the approximately 4,700 private U.S. claims" and is in the process of adjudicating a number of inter-governmental claims. Likewise, disputes surrounding the Saddam Contracts may be resolved through an equivalent international body. Regardless of whether or not arbitration is the path taken, the Pre-War Multinationals, the United States, and Iraq need to cooperate and create a multilateral approach in resolving their disputes. As with Afghanistan, the United Nations should be involved in the establishment of the permanent government in Iraq in order to ensure that one country's interests will not prevail to the detriment of the Iraqi people. Finally, businessmen and legal scholars from around the world should begin to discuss forming a steering committee through which Iraq can receive valuable advice, management, and training with regard to its oil, the establishment of rule of law, and foreign direct investment.


246. Id.