Private Sector Development
in the Middle East and North Africa

Supporting Investment Policy and Governance Reforms in Iraq

OECD

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Foreword

Iraq's recent political development has seen remarkable progress: a new political system and constitution have given rise to competitive elections, crucial policy development in such areas as the regulatory framework for governance and investment, and the creation or strengthening of relevant government agencies. In this context, the MENA-OECD Initiative on Governance and Investment for Development, within the framework of the International Compact for Iraq (ICI), conducted a series of capacity development workshops and policy consultations with the Iraqi government in 2007-2008, addressing the substantive reform challenges presented in this publication.

Attracting investment and creating jobs and growth in Iraq is not just a question of investment regulations and infrastructure, labour market flexibility and sound macro-economic policy. As the International Compact for Iraq explicitly stated, investment and governance are inter-linked, and the resolution of security and political challenges, good governance and the provision of basic services are pre-requisites for progress in all other areas, including economic revival. Specific governance priorities include reinforcing favourable investment and infrastructure with ethical and equitable government procedures.

Under the ICI, and through the Iraqi government-led Task Force for Economic Reforms and Private Sector Capacity, the MENA-OECD Initiative is continuing implementation of an ongoing programme of training and policy advice intended to strengthen private sector development and improve the investment climate and governance in Iraq. Current priority issues include arbitration, international investment agreements, the Iraqi investment law, one-stop shop agencies for company registration and investment licensing, anti-corruption measures, transparency in procurement, and financing for infrastructure development. A key feature of this work is the engagement of Iraq's regional peers, bringing first-hand knowledge of developments in the MENA region and providing the incentives and tangible benchmarks needed to compete in the global economy.

With renewed hope that higher growth rates and improved infrastructure and living standards may be close at hand for Iraq, this publication highlights the progress already achieved and assesses the investment and governance policy reform challenges that remain.

Acknowledgments

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Since 2007, the MENA-OECD Initiative has been involved in the promotion of economic and governance reforms in Iraq – an effort that has been recognised in the 29-30 May 2008 International Compact with Iraq annual review conference. This publication is under the authority of the Steering Groups of the MENA-OECD Initiative. The work conducted with the Government of Iraq was funded by the United States Department of State and supported by the members of the Initiative's Steering Groups.

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Introduction

1. Rebuilding Iraq: Current developments, remaining challenges

The challenges ahead for Iraq in managing economic recovery and implementing governance reforms remain considerable. While security improvements and increased oil revenues allowed economic reconstruction to take a substantial step forward over the period 2007-2008, there are still many concerns regarding the country's future, particularly in fields such as security, infrastructure, electricity production and distribution, water and fuel supply, and telecommunications. High unemployment rates remain a source of urgent concern. Reforms in governance have allowed a relative rehabilitation of Iraqi institutions and progress in the rebuilding of the state, but this process must be further consolidated. At the economic level, challenges remain numerous, with investments remaining modest due to persistent political uncertainties. The decline of oil prices since 2008 has forced the Government of Iraq (GoI) to reduce its budget for reconstruction plans, and that, combined with the failing state of the country's oil infrastructure, is likely to prolong severe financial problems, impairing the capacity of the GoI to implement its ambitious agenda. Also, as the United Nations Conference on Trade and Development's (UNCTAD) *2008 World Investment Report* emphasises, FDI inflows into Iraq have remained low – USD 448 million in 2007 – and are directed mainly at oil and petrochemical investment projects.* They have, in fact, been lower than in any of the neighbouring MENA countries apart from Kuwait.

However, Iraq has witnessed positive changes in recent years, and a number of developments afford a more optimistic outlook. Compared to the difficult period before 2007, the country has more recently seen significant security improvements and made considerable political progress. Governance and investment policy reforms have become central in this regard, with major progress made concerning legal matters and the development of institutions, and a growing awareness on the part of Iraqi officials, civil society and business of the need to develop the private sector. The country is on a steady path of legal and regulatory reforms that is cause for optimism. In addition to the domestic progress realised through 2007 and 2008, Iraq has resumed its relationships with most countries of the MENA region, and the country has furthermore been increasingly involved with the international community through enhanced international consultations and accession engagements with key international organisations (*e.g.*, World Trade Organisation).

* *World Investment Report*, *FDI/TNC Database*, United Nations Conference on Trade and Development (UNCTAD), 2008.

2. MENA-OECD engagement with the GoI: A new approach

The engagement of the MENA-OECD Initiative on Governance and Investment for Development (MENA-OECD) with Iraq supports a fairly new approach to post-conflict reconstruction efforts. As highlighted throughout existing literature on governance and investment climate reforms in post-conflict situations, no standard model exists for the efficient provision of international support. In the specific case of Iraq, some experts argue that the country has all the characteristics that have impeded economic and democratic transitions elsewhere, including an impoverished population divided along ethnic and religious lines, no previous experience with democracy and a track record of maintaining stability only under the grip of a strong autocratic government. Proponents of this analysis have argued in the past for focusing international support in conflict/post-conflict countries on governance, the rule of law and political reform as the key drivers for conflict resolution and economic reconstruction. More recently, however, experts have argued that in post-conflict situations "first generation" reform measures to strengthen the environment for investment and private sector development are of equal importance to more traditional administrative, rule of law and security related capacity-building projects.

In 2007, the GoI requested assistance from MENA-OECD given its background in the type of economic and governance reforms sought in Iraq. MENA-OECD was launched in 2004 to enhance economic growth and public sector modernization in the region by building capacity for reform design, implementation and monitoring. The initiative consists of two pillars: the MENA-OECD Governance Programme, which works on public governance reform in support of global social and economic development objectives, and the MENA-OECD Investment Programme, which supports investment reform prioritization, design and implementation targeting country-specific and regional needs to achieve sustainable economic growth and employment. At the annual review conference on the International Compact with Iraq (ICI) in Stockholm on 29-30 May 2008, representatives of the GoI acknowledged the importance of reforms supported by MENA-OECD and stated their interest in fostering further co-operation with the OECD. Successive MENA-OECD meetings held throughout 2007-2008 brought together representatives from Iraq as well as from OECD member countries and identified key obstacles to the revitalisation of the Iraqi economy, including the absence of a long-term, cohesive economic reform agenda; the lack of a dialogue with civil society, which is necessary for a functioning market economy; the persistent unattractiveness of Iraq's investment climate; the lack of management capacity; the absence of functional and complete institutions and/or legislation; the lack of enforcement of existing laws; and non-transparent administrative procedures, including corruption.

Following the Declaration issued in Paris at the High-Level Meeting on Economic and Governance Policy Reforms in Iraq, co-hosted in July 2008 by MENA-OECD and the United Nations Development Programme (UNDP), the creation of an Iraqi government Task Force for Economic Reforms and Private Sector Capacity (TFER) was agreed upon. The TFER aims to guide and support policy and legislative design, regulatory/institutional reform and project implementation concerning private enterprise and investment in order to diversify and stabilise the Iraqi economy. In carrying out its mission, the TFER will perform two key functions: 1) co-ordination and support to the national and provincial levels of the GoI and civil society stakeholders in policy and legislative design, as well as in regulatory and institutional reform; and 2) project implementation, acting as the main institutional counterpart for donor programmes focusing on private sector development.

3. Overview of contents and methodology

This publication covers both investment and governance matters and is divided into two parts: Part I contains main findings, assessments, and MENA-OECD recommendations to the GoI, while Part II provides an overview of practical tools devised by MENA-OECD to lend implementation and capacity-building support in investment and governance reforms. Regarding methodology, MENA-OECD assessments and recommendations build on data collected by staff experts in 2007 and 2008 and are complemented by the information gathered through the workshops, roundtables and meetings organised in 2008, as well as through questionnaires circulated to Iraqi representatives from both the public and private sectors.

Part I, Chapter 1, *Promoting Investment in Iraq and the MENA Region: Law and Policy*, addresses the priority of implementing Iraq's new Investment Law, adopted in 2006, through the definition of a national investment strategy and the establishment of an efficient institutional framework. The chapter benchmarks the Iraqi context against other MENA countries' successful experiences and emphasises the current challenges facing the National Investment Commission (NIC) – established by the Investment Law – and the importance of improving inter-agency relations in advancing Iraq's overall business climate. The chapter stresses that Iraqi economic recovery requires significant foreign investment inflows and that attracting investment and enhancing private sector development will significantly contribute to employment and growth.

Chapter 2, *International Investment Agreements and the Iraqi Investment Law*, first reviews the bilateral and multilateral agreements concluded by the GoI during the period 1960-1990 and further reflects on developments since 2003, such as the potential adhesion of Iraq to key international conventions and organisations (WTO, NY Convention, ICSID, etc.), a major consideration for investors. It then provides an assessment of the 2006 Investment Law, which by attracting investors is intended to promote economic growth, the transfer of technological know-how, and, most importantly, job opportunities for Iraqis. Key jurisdictional issues raised by the Investment Law are addressed, especially the division of tasks between the National and Provincial Investment Commissions (NIC, PICs) and Iraq's main national ministries.

Chapter 3, *Fighting Corruption in Iraq: Sources and Challenges*, builds on MENA-OECD preliminary observations and presents an assessment of corruption in Iraq. Corruption is particularly critical in a country like Iraq, which is rich in natural resources, has been the location of major conflicts for more than a decade and remains subject to instability and a weak rule of law. There are three parts to the chapter. First, sources of corruption in Iraq are analysed in order to assist the GoI in furthering its national anti-corruption strategy and determining a range of additional measures that could be implemented to enhance efficiency of government and market functions. A second part describes the existing legal and institutional framework to fight corruption, while the third part attempts to show to what extent this framework has proven insufficient to date and which revisions and further actions should be considered to render the Iraqi anti-corruption strategy more effective.

Chapter 4, *Improving Transparency in Government Procurement*, builds on a request made by the GoI in 2008 in response to a growing awareness of the problem of corruption in procurement. It examines Iraq's public procurement regulations and procedures, provides policy recommendations for improvement and identifies good international practices to

help Iraq fight corruption and promote integrity in public procurement. Public procurement is a government activity particularly vulnerable to corruption. Given the importance of public procurement in both economic and strategic terms, governments around the globe have grown increasingly alert to the inherent risk of corruption and the importance of preventing it by increasing transparency and accountability.

In Part II, Chapter 5, *Promoting Integrity and Preventing Corruption in the Public Service*, presents selected tools to promote integrity and prevent corruption in the public service, as discussed with GoI representatives. The expectations of citizens, businesses and civil society drive governments to ensure appropriate standards of integrity in the civil service, public authorities, public services, government-controlled corporations and government itself. Enhancing integrity and preventing corruption is thus a key consideration in the day-to-day work of public officials to maintain trust in government and public decision making. The annex presents a set of tools to help public officials make the expectation of integrity a practical reality and provides solutions for public officials and organisations wanting to better understand and implement measures for enhancing integrity.

Chapter 6, *Mapping Risks in Public Procurement*, offers a complementary inventory of the known means by which the main types of procurement contracts have been tainted by corruption. Examples chosen from EU member states show that fraud is possible even in countries with longstanding and abundant legislation, and in which numerous checks are performed by officials whose honesty is beyond reproach. Despite the controls in place, a number of government contracts give rise to errors, anomalies, fraud and misuse of public funds or corruption. Most errors and anomalies are explained by a lack of awareness on the part of the people involved – purchasing agents, accountants, auditors, etc. – and this can be corrected through training. However, fraud, misappropriation and corruption are more difficult to correct because they result from a deliberate desire to circumvent the rules, for illicit gain, and to cover up the perpetrator's actions.

4. What is next? Avenues for further co-operation

The activities engaged in by MENA-OECD with the GoI have highlighted the importance of supporting work on investment and governance challenges faced by the country. Reforms in these areas have gained attention within the international community and are widely viewed as important pillars of Iraq's reconstruction and social stabilization. Following the conclusion of its first phase (2007-2008), MENA-OECD has embarked on a new phase that is focusing on implementation challenges.

As a step forward, TFER will conduct a broad assessment of legislative, institutional and sectoral needs to assist the GoI in designing a comprehensive business climate development strategy with the support of UN-designated agencies and MENA-OECD. It was decided that the TFER would be structured around four Working Groups (Legislative Revision; Restructuring of State-Owned Enterprises (SOEs); Small and Medium Enterprise Development and Social Dialogue; Investment Policy).

It is hoped that through this work, MENA-OECD will be able to contribute to the reconstruction of Iraq and further help the GoI in the course of its fundamental economic and governance reforms. In this regard, the goals of ensuring Iraqi ownership of the policy reform agenda and closely supporting the GoI's own efforts to improve the business environment and to lead related governance reforms are essential.

PART I

Main Findings, Assessments and Recommendations

PART I

Chapter 1

Promoting Investment in Iraq and the MENA Region: Law and Policy

Introduction

Iraq faces considerable economic, political and security challenges. Although security has improved since 2007, it remains problematic, and high perceived levels of corruption in the public and private sectors, closely interlinked with a "resource curse", continue to impede government policies and deter investors. In order to overcome these serious obstacles to economic development and investment, the government of Iraq (GoI) has committed to anti-corruption and investment reforms – prerequisites for progress in all other areas.

At the Annual Review Conference on the International Compact with Iraq (ICI) in Stockholm on 29-30 May 2008, representatives of the GoI acknowledged the importance of reforms supported by the MENA-OECD Initiative on Governance and Investment for Development (MENA-OECD) and stated their interest in fostering co-operation with the OECD. The GoI has enacted a number of the structural reforms presented during the conference with a view to promoting private sector development, attracting investment, and improving governance as it affects the business environment.

At the conference and in prior meetings, GoI representatives raised a number of issues related to Iraq's investment climate, anti-corruption policies, and aid management. To address these questions, MENA-OECD and UNDP held a joint high-level meeting on 8-10 July 2008 in Paris, in which an important theme emerged: investment policy priorities for improving Iraq's business climate.

Those priorities are the subject of this chapter. It addresses them through the prism of the new Investment Law passed in 2006[1] and the subsequently created National Investment Commission (NIC). It considers the NIC's structure and mandate, how it operates, how it co-ordinates its work with other government agencies, and how MENA-OECD recommendations can make it more effective and help it contribute to formulating a national investment strategy for attracting investment to Iraq. Such issues necessarily give rise to specific considerations such as Iraq's investment policy framework, investment project jurisdiction, transparency, and the creation of "one-stop shops". Best practices in the MENA region are also discussed as sources of guidance. A summary of MENA-OECD recommendations for the NIC is provided at the end of the chapter, and strategic guidelines for investment promotion are contained in Annex 2.A1.

The New Investment Law and the National Investment Commission

In the global economy, foreign direct investment (FDI) is a key component in national strategies to achieve sustainable economic and social development. This has long been recognised by OECD countries, which are both the largest providers and largest beneficiaries of FDI worldwide. The experience of OECD countries suggests that there are, broadly speaking, two requirements for attracting high levels of FDI:

- building a stable environment conducive to business and investment through progressive macro-economic and structural policies, and legal frameworks; and

- having the capacity to compete effectively on world markets for mobile FDI.

After decades of war, sanctions, and the destruction that followed military intervention in 2003, Iraq needs significant investment inflows to rebuild its infrastructure, create employment, foster growth and – in the case of FDI – transfer modern technology and know-how. However, as the United Nations Conference on Trade and Development (UNCTAD) *2008 World Investment Report* emphasises, FDI inflows into Iraq have remained low – USD 448 million in 2007 – and are directed mainly at oil and petrochemical investment projects. They have, in fact, been lower than in any of the neighbouring MENA countries apart from Kuwait.

Although FDI started to grow in 2008, due to the relative improvement in security, Iraq is still far from safe and attracting foreign investors remains a major challenge. Nevertheless, if the security situation continues to ease, investors will gradually show more interest: a stable and predictable investment climate then becomes key to the formulation and implementation of a long-term economic and social development strategy (see Annex: *Key Policy Features of Iraq's Investment Law and Key Investment Projects*). The new Investment Law was adopted to that end. It covers all sectors of the economy with the exception of banking and insurance, and oil and gas extraction and production.

Although implementing regulations have been delayed, the Law's purpose is to attract and build technical and scientific expertise, develop human resources, create job opportunities, and remove red tape. It has also created a dedicated investment agency, the NIC.

The Law supplants the controversial Order No. 39, issued in 2003 by the Coalition Provisional Authority (CPA), and establishes equal treatment for investors, regardless of nationality. It also specifies investors' rights, benefits and obligations, and sets out tax incentives. In addition, it provides for the establishment of national and regional one-stop shops for investors to lessen administrative obstacles and cumbersome registration procedures. There is, however, a need for further measures to make the law effective – particularly high-standard implementing regulations, considered a priority by both the Iraqi government and the international community.

The authority responsible for advocacy and drafting of the country's national investment policy and guidelines and for monitoring their implementation[2] is the NIC. It was established in July-August 2007[3] under the terms of the Investment Law, together with the appointment of a board of directors and issuance of guidelines for forming regional and governorate investment commissions. The NIC falls under the administrative oversight of the Council of Ministers.

Its tasks include:

- Map investment and help determine the most promising investment opportunities.
- Build the confidence of national and foreign investors in the Iraqi investment environment.
- Encourage economic diversification and job creation.
- Facilitate licensing of investment projects and host a one-stop shop to simplify the licensing of investment projects.
- Advise the Council of Ministers on needed reforms and key investments.

- Co-ordinate investment commissions in the regions and provinces, and co-ordinate with other key government initiators of investment projects such as the oil, transport and housing ministries, and the Baghdad and provincial councils.
- Attract modern technologies to enhance Iraq's development process.
- Use and encourage best practices.

While delays have set back implementation of the Investment Law, the NIC is up and running. It has started to develop an institutional and regulatory capacity for effective investment promotion – an encouraging sign that a coherent, long-term national investment policy is taking root. However, many challenges are still to be addressed. They include producing a comprehensive investment map and investment promotion strategy.

The NIC has received numerous investment project proposals from both domestic and foreign investors. Its chairman said in 2008 that more than USD 74 billion in non-oil sector investment project proposals had been submitted by companies from the United States, Europe and Gulf Co-operation Council (GCC) countries since 2007, signalling a resumption of local and foreign investment in Iraq.[4] The NIC also issued a media release announcing that it was preparing for major investment projects and opportunities from the end of 2008.[5] Other government bodies, such as the oil, transport and housing ministries, and the Baghdad and provincial councils have also been key initiators of investment projects.

The objectives set in the Investment Law define the priorities of Iraq's national investment policy to be implemented by the NIC. These include encouraging and promoting strategic investments and attracting modern technologies to enhance Iraq's development process, diversifying its products and services base, and inciting Iraqi and foreign private sectors to invest. The aim is to facilitate investment projects, develop human resources in response to market demand, and create job opportunities for Iraqis, while protecting the rights and properties of investors.

The following key objectives concerning improvement in investment policy performance have emerged from stakeholder meetings with the NIC and other Iraqi agencies:

- Clarify questions of jurisdiction for investment projects and the division of competence between PICs and the NIC in order to clearly indicate the relevant entry point to investors when planning projects in Iraq.
- Outline the co-operation process between PICs and the NIC when an investment project has been submitted. This could take the form of administrative guidelines issued by the Council of Ministers (CoM) or the NIC.
- Streamline communications in the approval process to ensure that only key projects relevant to economic policy are approved. All projects worth over USD 250 million are the responsibility of the CoM.[6] An inter-ministerial working group involving only selected ministries should be charged with this task.

Attracting and benefiting from foreign direct investment

There is no single solution when it comes to investment promotion strategy. Each country or region needs to adopt a strategy that matches its own competitive position and requirements and takes into account its resources, culture, and aims. The MENA-OECD Working Group 1 on Investment Policies and Promotion has developed investment promotion guidelines derived from the long experience of MENA and OECD countries as

well as many other developing and transition countries. The extent to which a country wishes or is able to put the guidelines into effect is likely to be a determining factor in the levels of FDI it secures.

The investment promotion guidelines are outlined below with summary comments on how the MENA region compares against them and how it may perform better. Each guideline is followed by recommendations on how Iraq could improve its practices.

Government vision and policy on investment

Government leadership and commitment to achieving progress are fundamental to success. This entails recognition of the competitive environment for investment, the need to tackle a broad policy agenda, and to build constructive relationships with the private sector. Ideally, government should first decide on the role of foreign investment in the overall development of the national economy, underpinned by legislation and institutional structures to give proper effect to policy. Continuity of FDI policy is particularly important to investors.

A government should have a clear vision of the benefits of FDI (capital investment, increased tax revenues, exports and foreign exchange earnings, employment, skills, regional development, technology, etc.) and of its role in overall economic development strategy. That includes how it contributes to balanced regional development. Periodic evaluation of FDI policy is key. The most successful OECD and non-OECD countries usually carry out regular and comprehensive reviews of the costs and benefits of their policies and programmes and continually seek to refine their performance in response to market opportunities and trends.

MENA region: Vision and policy on investment

All MENA countries have publicly expressed interest in attracting FDI and outlined broad policies for doing so. Many express their vision very generally, however. Similarly, although they have developed increasingly professional strategies for attracting FDI (*e.g.,* targeting sectors), they often do not articulate the specific contribution they seek from FDI. Nonetheless, they do recognise the benefits – from jobs, exports, and technology transfers to regional development and the diversification of industrial sectors – as illustrated by an increasing reliance on sector cluster strategies and economic city models. Two examples are the Emergence strategy in Morocco and the Egyptian General Authority for Investment and Free Zones (GAFI), which have developed a targeted approach to attracting sector specific investment. There is growing evidence from some MENA countries that FDI attraction strategies are based on a robust evaluation system.

Steps for improving Iraq's government vision and policy on investment

With the adoption of the new Investment Law and the establishment of the NIC, the GoI has shown firm commitment to defining a broad investment strategy and providing Iraq with more effective investment promotion tools. A number of significant incentives, privileges and guarantees are offered to both domestic and foreign investors. They include:

- the guarantee of repatriation of capital and project revenues;
- the right to deal in the Iraqi securities market;
- possibility of leasing land for an investment project for a renewable term of 50 years;
- the insurance of investment projects with any national or foreign insurance company;

- opening accounts in Iraqi or foreign currency in both Iraqi and foreign banks;[7]
- obtaining residency and easier entry into or departure from Iraq;
- the guarantee that investments will be neither confiscated nor nationalised; and
- exemption from fees and taxes for ten years, renewable.

By acknowledging that Iraq has entered into a new regional and international competitive environment, the GoI has proven its understanding of the critical importance of investment for reconstruction. Furthermore, the GoI's official spokesman Ali al-Dabbagh announced in July 2008 that the national public budget in 2009 would focus primarily on investment in order to enhance human development and promote initiatives from the private sector.[8]

Enhanced government leadership remains essential for the success of a national investment policy. Iraq must therefore pursue its efforts to define a long-term, comprehensive vision of investment and decide what role FDI is to have in rebuilding the national economy. In addition to strong political will, the consolidation of the existing institutional framework and the enforcement of the rule of law will be key to building positive, lasting relationships with the domestic private sector and foreign investors.

The GoI should also commit to transforming the country into an attractive investment location at provincial, regional, and national levels. The NIC is working with several international institutions to define a comprehensive investment strategy, including designating zones to attract investment in specific economic sectors and defining the respective roles of the national and provincial investment commissions. Such a strategy must be defined in close co-ordination with line ministries, which have *de facto* responsibility for most medium and large companies in Iraq.

Communicating the vision and building consensus on policy

Successful practice in foreign investment promotion builds not only on a vision, but also on communicating that vision to society and prospective investors. It requires mobilising different interest groups across government and society and should not, therefore, be underestimated or left to an investment promotion agency (IPA) alone. IPAs can win public understanding and approval only with the continuous active support of the government. Communicating vision and reviewing policy performance through dialogue should ideally be an inclusive, objective process, which actively involves investors.

MENA region: Communicating the vision and building consensus

All MENA countries use IPA websites and promotional material to communicate their core vision for attracting investment. Increased FDI inflows in recent years have gone hand-in-hand with better communication strategies. Obviously, exciting news on large, visible projects in the region has helped to put MENA on the map in the international investor community, but there is also increasing evidence that MENA IPAs are implementing targeted communication strategies.

IPAs, like Egypt's GAFI or Tunisia's FIPA, have benefitted from professional advice. They take international rankings of the business and investment climate seriously and staff work hard with international organisations to improve each country's ranking. While the inclusion of international investor councils and business associations in investment policy-making has increased in the region, more could be done to support the contribution

of independent groupings – in particular – to educating governments on what constitutes a competitive investment environment.

Improving Iraq's investment climate by communicating the vision and building consensus

The GoI has demonstrated progress in communicating its investment vision to the Iraqi society. As its interaction with MENA-OECD illustrates, the government is consulting the international community more extensively as part of its effort to acquire better instruments for attracting foreign investment. Relations between Iraq's private sector and foreign investors have also benefited from more active and effective communication channels. The GoI, in co-ordination with the NIC, is resolutely engaged in a proactive effort to set out an effective national investment policy that will bring investors into projects across the entire country.[9]

MENA-OECD exchanges with Iraqi representatives have highlighted, however, that the GoI still has to find more effective ways of conveying to Iraqis how the national economy can best benefit from increased foreign and domestic investment. The NIC needs to lend greater support in communicating the importance of foreign investment, while the GoI must review its investment policy performance more efficiently and make its vision more inclusive. MENA-OECD recommends involving domestic investors more closely.

Establishing Investment Promotion Agency Structures

Successful practice points to the need to establish effective institutional structures. To that end, many countries have put in place dedicated IPAs and endeavoured to give them the capacity and resources to deliver results. Non-political, non-governmental institutions have yielded greater stability and continuity in structure and programmes, better withstood periodic destabilising changes in government, and been less hidebound by formal procedures that apply within ministries.

It is not uncommon for countries to establish their IPAs in stages: initially a dedicated investment promotion unit within a relevant ministry, followed by a gradual move to a more independent organisation that can develop long-term innovative strategies.

An IPA must not be another layer of bureaucracy that investors have to overcome, but a facilitator. Ideally, it should have the business skills to interface effectively with foreign investors and business partners. Economic development, which includes promoting foreign investment, is a long-term process. Even when an investment decision has been made, its benefits do not flow automatically. IPAs need to work more closely with local authorities and with development agencies to maximise the benefits of FDI.

An IPA has to be organised and run professionally to perform in the highly competitive business of attracting mobile investment, while managing the expenditure of public funds and incentives. As the government agency most in touch with foreign investors, it is a key source of feedback for government policy-makers. For all these reasons, its institutional framework should be protected from short-term political pressures that affect the efficiency of its operations. It should report to the highest political echelons (prime or senior ministerial level), which should, in turn, endorse its mandate. Only this political support can provide it with the domestic status and foreign credibility necessary to communicate effectively with investors and government agencies.

MENA region: Establishing Investment Promotion Agency Structures

Almost all MENA countries have established independent IPAs, although some have sufficient resources for general communication work only. As a rule, however, IPAs have significantly strengthened investment policy advocacy. Individual countries have made significant advances in implementing improved one-stop shops for investors, providing policy advocacy within governments on behalf of investors, and developing strategies for promoting investment in targeted sectors. One example of a policy advocacy organisation in the MENA region is Egypt's GAFI, which takes action of three kinds: it identifies issues, communicated by leading players in different sectors; it researches and gathers data to improve policy advocacy to legislators and/or ministries and agencies involved in legislative or administrative reform; and it implements policy advocacy action involving different scenarios and depending on the kind of strategy chosen.

In some countries there are strong investor groups. Facilitating their access to government policy-makers or encouraging new investor groups are actions that IPAs could usefully undertake. However, opponents to market openness and enhanced competition are well organised in the MENA region. IPAs must be provided with the means and the policy support necessary to match these countervailing forces. They should be in a position to instigate government policy reform with regard to the overall vision and strategy for the promotion of FDI, for which they should act as champions.

Many IPAs in the MENA region have set up a one-stop shop to deal with all of the needs of the incoming investor. This action, a feature of successful practice in some countries, requires political commitment and support since line ministries are not likely to reduce licensing requirements easily.

IPAs need to establish close links with investors and increase their contacts with existing industry and other groups. There is progress on this front, with information available on the MENA region indicating that investor aftercare services are becoming more common.

Improving Iraq's investment climate by Establishing Investment Promotion Agency Structures

Iraq has made significant strides towards establishing effective, competitive institutional structures with the creation of the NIC. Much hope has been placed in its capacity to bring continuity to the country's overall investment policy.

Regulations for implementing the investment law and procedures for ensuring that the NIC and other governmental agencies co-ordinate their work smoothly should be designed to enable the NIC to operate as an independent, responsible, capable authority, facilitating investment projects and flows. It should not be subject to political or governmental pressure and must be allocated the budget it needs to deliver concrete results.

The NIC should also act as a facilitator by providing state-of-the-art data and advisory services and enhance its international business and marketing capacities to interact efficiently with foreign investors and business partners.

Moreover, as the national agency most in contact with foreign investors, the NIC is ideally placed to offer policy advocacy. Insights on policy issues and reforms arise from requests from investors for information and advice, the practitioner experience of existing investors, private sector dialogue, policy task forces or committees, and international

country rankings. The NIC should have an important investment climate advocacy function and should establish a policy advocacy unit within the NIC. It could raise public awareness through media campaigns and high visibility events or target inherent deficiencies in the administrative system.

Box 1.1. **Elements of best practice in Investment Promotion Agencies (IPAs)**

Key elements of the best practice work of IPAs typically include:

- Having a good service management system which aims at priority market segments/ sectors, spells out the service offered and is clear on the delivery method.
- Using customised marketing to target clients and build relationships with them.
- Pursuing FDI in all elements of the value chain and in all business functions (*e.g.* design, purchasing, production, distribution, marketing, customer aftercare and service, research and development).
- Rooting FDI in the host country through good linkage with local suppliers, subcontractors, business partners, technical institutes and universities, etc. and through good facilitation in the post-investment phase.

Source: OECD Report: "Investment Promotion Techniques and the Role of Investment Promotion Agencies".

Professional management and service culture in IPAs

Implementing favourable and predictable legislation and establishing an IPA are measures that cannot on their own ensure a successful FDI programme. An IPA should be a professionally run organisation staffed by people who understand the mentality and business strategies of foreign investors and are committed to provide professional investment services.

Countries can create a competitive advantage by ensuring that their agencies are better than those of competitors. The most successful IPAs today act like premium service companies and often apply similar service systems and quality methods. Their approach is highly professional and efficient. They serve as *business development* agencies. They proactively seek not only to promote investment, but also to provide potential investors with business solutions and to improve the wider investment environment by liaising with government agencies and other bodies to initiate the changes needed. They are innovative in seeking investment in new and emerging sectors. They have the mandate and resources to undertake their work and are perceived as central to national development policy.

MENA region: Professional management and service culture in IPAs

IPAs throughout MENA have become serious competitors to those elsewhere. They must nevertheless further professionalise their service provision in order to match leading OECD countries in competing for FDI. Building this expertise needs high-level government commitment and a long-term approach.

Improving Iraq's investment climate: Professional management and service culture in IPAs

To emulate the successful experience of several IPAs in the MENA region, the NIC needs competent and professional personnel. They must be trained to high skill levels and

understand the challenge of investment for Iraq. They should work with external advisers to better learn to understand the mentality and business strategies of foreign investors.

In the longer term, the GoI must seek to create a competitive advantage and make sure that the NIC becomes as efficient as the best IPAs in neighbouring countries. For this purpose, it must have highly professional procedures and apply services and quality methods similar to those of its counterparts. Progressively, it should evolve into a national development agency, proactively seeking to offer business solutions to prospective investors and improving the wider investment climate by co-ordinating with the government.

Employee performance management is a systematic process by which an agency involves its employees in improving organisational effectiveness. It includes planning work and setting expectations, continually monitoring and periodically rating performance, developing the capacity to perform, and rewarding good performance. In the case of the NIC, sound management principles are fundamental. Performance expectations and goals should be clearly set. Involving employees in the planning process might also help them understand the goals of the agency: what needs to be done, why and how well. Performance standards should be measurable, understandable, verifiable, equitable, and achievable in order to hold employees accountable and reward them.

In conducting performance management and measurement tasks, the NIC will be provided with assistance in reviewing staff performance through, for instance, monitoring instruments. This will offer the opportunity to appraise how well employees meet set standards and to change any problematic standards. Continual monitoring can identify unacceptable performance during the appraisal period and provide assistance in addressing the problem effectively.

Defining the right strategy

The globalisation of business and growth of the knowledge economy have brought new dimensions to investment decisions for both countries and companies. New and changing sectors (*e.g.* information and computer technology, biotechnology, media services, and financial services) have opened new opportunities and challenges in attracting investment. Many small- and medium-sized companies are international investors and this trend is increasing. A key issue, therefore, is to recognise that not all FDI is the same.

IPAs need to carefully and realistically select strategic policy options based on the potential of certain sectors and on a clear understanding of how FDI decisions are made. They need to understand what investors seek, their view of the country as an investment location, the needs of their particular sector and company, their country's competitive advantages in attracting FDI and how they compare with those of other countries.

Typically, foreign investors are motivated by:

- Better access to markets – nationally, regionally and globally;
- Competitive labour costs, productivity, and skills availability;
- Access to raw materials at competitive costs;
- Acceptable risk, linked to a supportive policy environment with essential infrastructure (utilities, telecommunications, transport).

Addressing investor motivation is a central element of the strategic approach of successful IPAs. Similarly, showing that a business environment rates well compared to other locations may be one of the most powerful messages to send to investors.

MENA region: Defining the right strategy

Most MENA countries appear in a position to appraise their competitive position and the key factors for success in attracting FDI in various sectors. Some MENA countries have focused on tourism, construction, telecoms, financing, and downstream energy sectors as potential sources of FDI. Sector-specific knowledge and expertise is a critical requirement for determining the key competitiveness factors of an investment location. The OECD's Business Climate Development Strategy (BCDS) provides a tool for developing a targeted investment strategy that incorporates policy measures and sector-based approaches.

Improving Iraq's investment climate by defining the right strategy

Since 2003, Iraq has developed closer ties with the international investment community which have profoundly transformed the country after decades of authoritarianism and economic autarchy. According to the US Government Accountability Office's report of August 2008, Stabilising Iraq and Rebuilding Iraq – Iraq Revenues, Expenditures and Surplus, Iraq's projected oil revenues could soar to more than USD 70 billion in 2008 (GAO-08-1031). However, over-reliance on energy resources – even when they do provide considerable income – can be synonymous with greater economic vulnerability, due mainly to the volatility of oil prices on international markets. The answer is long-term economic diversification with an overall national investment strategy. Iraq's future wealth hinges on the development of new economic sectors likely to offer major investment opportunities.

The challenge facing the NIC is to recognise that FDI is manifold and requires the right, carefully selected strategic policies built on the potential of certain sectors. It must also have a clear grasp of how investment decisions are made, so as to understand what foreign investors are seeking, what their specific needs are, what perception they have of Iraq as an investment location, and how it compares with other countries in the region.

Finally, the GoI and NIC must collaborate closely to consolidate Iraq's comparative FDI advantages and communicate the successes of its investment promotion policies. They should emphasise access to raw materials at lower costs, competitive labour costs and productivity, and skills availability – particularly as Iraq has a well-educated workforce and will be able to count on the return of skilled emigrants and refugees if the improvement in the security situation since 2008 continues.

Incentives policy

Before resorting to incentives, any government should objectively evaluate and confirm whether they afford competitive advantage. Numerous surveys of investor determinants have revealed that they rank lower in importance than, for example, political and economic stability, market access, competitive cost structures, and an attractive business environment. If a location is fundamentally uncompetitive or insecure, or if the business rationale behind an investment is faulty, incentives will not change matters.

They need to be fully justified, regularly reviewed, then adjusted or phased out once they have achieved their purpose. Equally, suddenly changing or removing existing

incentive arrangements may make a location less attractive in the eyes of international investors and should be avoided.

MENA Region: Incentives policy

MENA countries often provide regulatory, financial, and fiscal incentives (the most widely practiced) within "free economic zones" (FEZs) or "special economic zones" (SEZs). Much FDI in the region has traditionally been concentrated in such zones. Their usefulness must be balanced against a country's position as a competitive investment destination and the alternative of zones offering cluster developments and business services, and not only fiscal incentives.

Improving Iraq's investment climate through an incentives policy

Over the last few years, Iraq has made great strides in developing a more investor-friendly business environment.

The Investment Law, as stated in Article 2, aims at encouraging the Iraqi and international private investors to invest in Iraq by providing facilities for establishing investment projects and enhancing their competitiveness in local and foreign markets. This objective can be realised by granting projects the necessary privileges and guarantees for their development and continuation (Article 3). In addition, the National Investment Commission shall establish secure and free investment areas with the agreement of the Council of Ministers (Article 9.7). However, provisions on the implementation procedures, objectives and incentives of these free zones are not specified in the Law.

The Law puts domestic and foreign investors on an equal footing. Chapter 3 of the Law ("Privileges and Guarantees") spells out that investors are entitled to the same advantages and guarantees and subject to the same obligations, regardless of their nationality.

Iraqi and foreign investors have, for the purposes of housing projects, the right to the use of land for a sum to be determined between them and landowners, provided there is no land speculation. The conditions regulating the allocation of land for investment in housing projects are to be set forth by the NIC subject to the approval of the Council of Ministers (CoM). Ownership of the housing units is to be transferred to Iraqis once the investment project is completed (Article 10).[10]

All investors enjoy the following benefits (Article 11):

- The right to repatriate the capital brought into Iraq and related profits in accordance with the provisions of the Law and pursuant to the instructions of the Central Bank of Iraq in an exchangeable currency after paying all taxes and debts to the GoI and all other authorities.
- The right to exchange shares and bonds listed on the Iraqi Stock Exchange, and form investment portfolios of shares and bonds.
- The right to rent or lease lands for the term of the investment project, provided that it does not exceed 50 years (renewable with the agreement of the NIC), and provided that the nature of the project and its benefit for the national economy is taken into consideration when determining the period.[11]
- The right to insure the investment project with any foreign or national insurance company deemed suitable.

- To open accounts in Iraqi or foreign currency or both at a bank inside or outside Iraq for the licensed project.

The Investment Law also sets out the following (Article 12):

- Priority in recruitment and employment is given to Iraqi workers, although non-Iraqi workers can be hired in case it is not possible to employ an Iraqi with the required qualifications and capable of performing the same task in accordance with guidelines issued by the NIC.
- Foreign investors and non-Iraqis working in the investment projects are given the right of residency in Iraq and facilitated entry and exit to and from Iraq.
- Guarantees against seizure or nationalisation of the investment project are provided by the Law in whole or in part, except for projects on which a final judicial judgment was issued.
- Non-Iraqi technicians and administration employees working in any project have the right to transfer their salaries and compensations outside Iraq in accordance with the law after paying their dues and debts to the GoI and all other entities.

Investment projects that have been licensed by the NIC enjoy exemption from taxes and fees for a period of ten years as of the date that commercial operations commence in accordance with the areas of development defined by the CoM upon suggestion of the NIC and based on the degree of economic development and the nature of the investment project (Chapter 5, Article 15.1). The CoM has the right to extend or grant additional exemptions or provide incentives, guarantees or other benefits to any project or sector or region and for the years and percentages it deems appropriate. This must be in accordance with the nature of the activity, its geographical location and contribution to employment, its effect on driving economic development and its relation to the national interest (Article 15.2).

It is worth noting that while the Investment Law generally disregards nationality, investments that are 100% foreign-owned do not receive the same tax exemptions as joint ventures between Iraqi and foreign investors. Under the terms of Article 15.3, periods of tax exemption may be extended to 15 years for joint ventures where the Iraqi investor holds a majority stake.

Investors who are granted licenses also enjoy the following exemptions:[12]

- Assets imported for investment projects, provided they enter Iraq within three years from the date on which the investment license is registered, are exempted from fees.
- Imported assets required for expanding designed project capacity by at least 15% or for developing the project with equipment that improves efficiency and/or the finished product or services are also exempted from fees. The assets must enter Iraq within three years of an investor notifying the NIC of expansion or development plans.
- Imported spare parts to be used exclusively as spare parts, and whose value does not exceed 20% of the value of the fixed assets, also benefit from fee exemptions.
- Hotels and tourist accommodation, hospitals, health facilities, rehabilitation centres, and educational and scientific facilities projects may be granted additional tax and duty exemptions on imports of furniture and materials for renovation and upgrading premises at least once every four years. Items must be imported or used within three years of the NIC's approval and exclusively for specified purposes.

The Investment Law has unquestionably established a much more investor-friendly framework and represents a major achievement after decades of a state-run economy. However, further progress is now needed, especially as many foreign investors continue to face hurdles in starting and operating businesses in Iraq.

The first – indispensable – requirement is enforcing regulations for the implementation of the Investment Law. MENA-OECD assisted the GoI in defining these regulations clearly. Another need is to protect investment in the broadest sense. This requires complementary legislation in investment-related areas like companies, labour, stocks and shares, privatisation, banks, trade, and consumer protection. Other legal measures that would be incentives for investors include legislation to encourage competition by clamping down on unfair business practices *(e.g.,* price fixing, bid rigging, abuse of power). The introduction of more efficient mechanisms for settling disputes and commercial conflicts would also be necessary. To that end, the ratification of the New York Convention on Recognition and Enforcement of Arbitral Awards and the Convention on the Settlement of Investment Disputes (ICSID) could send a positive signal to the international business community.

It is noted that the October 2009 amendment to the Investment Law rectifies several major disincentives in land ownership and leasing rights. Before, one major disincentive to foreign investors was that they did not have the right to own land. Once an investment project had been licensed by the NIC, there remained the critical step of gaining access to the needed land. Most land is owned by the Ministry of Municipalities (MoM) and the Ministry of Finance (MoF), and the NIC did not have the authority to allocate it to foreign investors. Recently, the government approved a bill to amend the investment law. The Amendment was approved by the Council of Representatives in October 2009. Foreign investors are now allowed to buy state-owned, public, and private property for the purposes of housing projects. Another especially important area of the Investment Law that calls for rethinking is its ambiguity over land leasing arrangements. Article 11 stipulates that foreign investors may lease land for a renewable period of 50 years. However, the October 2009 Amendment also helps clarify leasing procedures and renewal processes, which will help building investor confidence.

Human resources and skills development

One key area in which countries (or regions within countries) can develop competitive advantage is human skills. The role of the IPA should primarily be to interpret investor needs and instigate actions in support of policies and programmes that meet those needs.

Investment in training benefits international and domestic investors and individuals, since skills acquisition and development are crucial to the competitive status of a country. Many studies have shown that the return on investment in training and education is very high, provided that the skills acquired can be put to use. As skills learning requires long lead times – three to six years at university may be necessary to acquire high-level skills – countries should carefully plan their future needs.

MENA region: Human resources and skills development

Emphasis on human resource development is important and a sector-by-sector approach to investment promotion can be helpful in better identifying potential needs and qualifications. IPAs in MENA should be closely involved in internal debates on reforming education systems and should argue the case for more entrepreneurship-related skills

development. This is particularly true for countries seeking to specialise in new technologies and added value sectors (*e.g.,* software, biotechnology, financial services).

Improving Iraq's investment climate through human resources and skills development

The Iraqi education system was long undermined by political considerations and much of the domestic elite fled the country. Skills acquisition and development thus remain a major challenge for Iraq which, like most MENA countries, should seek to build a competitive advantage in the area of human resources to strengthen productivity.

The NIC should identify foreign investor needs and implement training programmes and initiatives that meet those needs. To that end it should draw on the know-how and assistance of the international community. Investing in training and education will benefit domestic and foreign investors, who are key to sustainable economic and social development.

Infrastructure

Countries, or regions within countries, are frequently not even considered by potential investors if their industries lack basic infrastructure. What constitutes basic infrastructure varies from sector to sector. IPAs may not be directly involved in actually providing it, although some countries have used them to that end. Their essential role lies in interpreting investors' needs and serving as proactive advocates with government to ensure the provision of infrastructure.

MENA region: Infrastructure

MENA countries have good infrastructure in comparison to some other regions, but much new and upgraded infrastructure is needed, and projects will require extensive financing. Investment and skills input from private investors will be of great benefit. IPAs have a key role to play in helping to develop contract arrangements tailored for private investors in infrastructure projects, including public utilities. Basic regulations should provide for all forms of public-private partnerships (PPPs), while finance ministries should establish their own PPP support units with close ties to units within IPAs.

Improving Iraq's investment climate through infrastructure

While Iraq has always been rich in oil and gas resources, investment in vital infrastructure has been seriously hampered by the economic sanctions imposed against Saddam Hussein's regime. Since 2003, Iraq has also suffered huge destruction. Bombing, looting, smuggling, and continuous violence have led to the collapse of the country's basic infrastructure and primary services. Although preserved and protected by private contractors, Iraq's oil infrastructure also needs to be modernised in order to reverse years of neglect. Other key infrastructure is also required, such as basic amenities like clean water and electricity, which entails large-scale repair and maintenance.

Rebuilding infrastructure is critically important and a precondition for the return of foreign investment and the development of the Iraqi private sector. This mission is, first and foremost, the task of the government with the active collaboration of the NIC.

The *Stabilising and Rebuilding Iraq* report issued by the US Government Accountability Office in August 2008 identified a set of factors that have affected the GoI's ability to spend its revenues on capital investment for rebuilding infrastructure. They include the shortage

of trained staff, weak procurement and budgeting systems, and sectarian violence. Yet the report also underlined that rebuilding efforts were nevertheless moving forward and that the GoI had allocated more than USD 15 billion to reconstruction between 2005 and 2008.

Demand is expected to be high in important and expanding sectors such as construction materials and equipment. Before 2003, Iraq produced cement, marble, bricks, glass, ceramic tiles, sand and gravel, plastic pipes, steel structures, and other materials used in construction. Many of these activities need rebuilding or revitalising. As the NIC reports, some companies have already taken advantage of investment opportunities in the construction sector.

Removing administrative barriers

Countries can significantly improve their investment climates by reducing their administrative barriers. Excessive paperwork, multiple levels of approval, and unnecessary licensing increase investors' transaction costs and often deter them from doing any future business.

Other issues leading to high transaction costs include the rule of law, personal security, arbitrary government behaviour with regards to changing the investment climate, corruption, discrimination against foreign investment, secure and regulated financial systems, free flow of capital, and international standards of accounting and arbitration.

Progress in improving the investment climate sends out important signals about a country's credentials as a location where investors feel optimistic about economic prospects and opportunities to do business. More straightforward, streamlined administrative procedures can contribute significantly to making a country appear an attractive investment prospect.

MENA region: Removing administrative barriers

Almost all MENA countries have given special attention to simplifying their administrative barriers. They have put in place government agencies and drawn up strategies to provide businesses with better, faster services and to improve transparency by reducing multiple licensing. To streamline administrative barriers, many MENA countries have successfully implemented "one-stop shops" (OSS), often hosted by their IPAs, so that investors go through a single channel to secure all the approvals necessary for their projects.

An OSS can be designed in one of two ways. First, it can be merely a single window through which investors make project applications. Second, it can wield real authority in granting licenses – with officials from the line ministries actually working from its premises, for example. This second option, which gives the IPA true licensing power, is increasingly endorsed by international good practice and emerging practice in the MENA region.[13]

Improving Iraq's investment climate through removing administrative barriers

Administrative barriers have been a major obstacle to foreign investment in Iraq due to the high transaction costs that they create for investors. In spite of the progress made with the establishment of the NIC, further efforts are needed to improve the country's institutional framework and remove the persistent bureaucratic barriers still facing investors.

The Investment Law[14] stipulates the creation of one-stop shops within the NIC and in the regional investment commissions. It states that they shall include representatives from relevant ministries to "undertake the issuing of licenses and obtain the approval of other authorities". If one-stop shops are able to successfully integrate these ministerial representatives, an important step will have been made towards facilitating licensing process for investors.

As the Investment Law stands, the NIC does not have the explicit right to grant all licenses for investment projects, and one of the most critical limits of its OSS is that it cannot allocate land for investment projects. However, an amendment to the Investment Law approved in October 2009 will empower the NIC to lease and sell state-owned land to investors for housing projects and make it responsible for establishing the implementing rules and regulations. The NIC would then become a more effective body, further reducing the licensing barriers that investors face.

Image building

Image building is critical to attract FDI. A country's positive image focuses investor attention and saves it from having to rely purely on persuading multinational companies to invest. Countries, with support from their IPAs, should undertake strategic, targeted marketing expenditure over time to improve their image as an attractive investment location. This also entails facilitating investment, servicing investors, and acting as effective intermediaries.

Image building is particularly important for countries which are newly trying to attract investment and are undergoing rapid political and/or economic reform. It is equally vital for states that have been embroiled in violence or terrorism and for small countries which receive little international media coverage.

IPAs can use basic marketing tools to promote their country in the eyes of investors. Techniques include market segmentation, direct marketing, telemarketing, investment exhibitions, missions and seminars, and direct selling where individual companies represent a key target audience.

The direct sell involves targeting the business needs of the investor. It can be a long-term process, requiring regular contact over several years before the IPA and its country spring automatically to an investor's mind. To make this approach truly effective, an IPA has to build and maintain a presence in key geographical markets. It should focus on those companies looking for the particular advantages offered by its country and foster personal contact with key decision-makers.

MENA region: Image building

Some MENA countries have made strides in projecting an attractive image, and parts of the MENA region have put themselves on the map as important destinations for FDI. Overall, however, the track records of individual MENA IPAs in selling their countries and regions to investors are mixed. Previous successful projects can crucially improve a country's image as a likely investment destination and MENA IPAs should highlight them in their promotion material.

Improving Iraq's investment climate through image building

Decades of authoritarianism and conflict have tarnished the image of Iraq among foreign investors. Image rebuilding is thus a major challenge for the GoI and a critical aspect of its efforts to attract FDI. The NIC has an important role to play in this respect, communicating with foreign investors, focusing on their needs and interests, and helping them overcome negative perceptions and fears. It must not only devote substantial, well-targeted expenditure to the task, but create and further develop marketing tools.

Servicing investors at all stages

Once potential investors have demonstrated real interest in investing in a country, the services they require should be delivered professionally, and be based on international standards acquired through co-operation with and support from international experts. All investors are different, as is the support they need. Services may include visits to the country in which they are considering investment and to investors working there. Other services could include support in negotiations, advice on legal and regulatory matters, financing arrangements, choosing locations, recruitment and training, and post-investment facilitation.

Potential investors will always be interested in visiting foreign investors already operating in country, especially if they are of the same nationality or from the same sector. An unsolicited recommendation from a fellow investor can prove a major advantage, but follow-up action on such visits is also important.

Servicing investors is not only about IPAs presenting the advantages of the country and organising visits. Follow-up action is equally important. Post-visit activities involve putting together a development package for the investor comprising ownership arrangements, training, and fiscal and/or financial incentives. IPAs should also respond to requests for assistance on matters ranging from taxation, work and residency permits, and company registration to tariffs, building permits, utility connections, and other follow-up services.

MENA region: Servicing investors at all stages

Investor aftercare is increasingly recognised as an important function on which IPAs should focus. While IPAs worldwide are developing their resources and expertise in this field, aftercare in MENA IPAs still has substantial room for improvement. It could, however, be an area on which they focus as part of their efforts to gain a distinctive competitive advantage.

Improving Iraq's investment climate through servicing investors at all stages

Like its counterparts in the rest of the MENA region, the NIC must provide, professionally and carefully, the range and high standards of investor services and aftercare outlined in the recommendations above. Servicing investors not only includes visits organised by the NIC, but effective follow-up processes. Post-visit activities involve putting together a development package for the investor comprising property, training and fiscal and/or financial incentives.

Linking foreign investment to the local economy

There is little evidence across the MENA region of a structured approach to linking foreign investment to the local economy. Accordingly, MENA-OECD recommendations on the significant improvements that can be made in this area are as valid for Iraq as for its neighbours.

Many countries see attracting new investment as a goal in itself when it is, in fact, only part of the ultimate objective. Two further strategic approaches are needed: 1) root investors in the country by encouraging them to expand their investment and the range of their business activities – from manufacturing and distribution, for example, to purchasing, design, customer care, R&D, etc.; and 2) integrate projects funded by new investors into the local economy and transfer management, marketing, and technological skills.

Skills transfer is one example of the benefits that help to root FDI in a country and lead to further investment. FDI can act as a driver of indigenous enterprise development by improving quality and service standards, establishing links with technical research institutions, developing local suppliers of goods and services, and constructively influencing education and skills training policies on a national level.

For this approach to be effective, co-operation between ministries and agencies and regular communication with the private sector are critical requirements. The ultimate aim is that the local economy should become internationally competitive in its own right. It is, however, important that foreign investors understand that integrating their investment into the local economy also strengthens their own commercial security.

Successful and competitive practice demands that host countries and IPAs take the onus of maximising the benefits of FDI through proactive and constructive partnerships with investors.

NIC structure

Despite instability and a fragile security environment, the Iraqi government has made progress towards an attractive investment climate. In this regard, it is the task of the NIC to develop a national investment strategy and supervise the multiple dimensions of investment in Iraq.

Iraq's National Investment Commission

NIC's mandate

The NIC has a multiple mandate:

- Help develop an overall investment policy and create a suitable environment for investment projects that serve Iraq's multiple development priorities – economic, social, cultural, tourism-related, and media-related. The NIC acts as a co-ordinating body for these priorities.
- Use advanced methods and processes based on international standards.
- Map investment and help determine the most promising investment opportunities.
- Enhance the investment culture (this is considered to be a social mission serving development).
- Build the confidence of national and foreign investors in the Iraqi investment environment.

- Facilitate licensing of investment projects and host a one-stop shop to simplify the licensing of investment projects.
- Co-ordinate investment commissions in the regions and provinces.

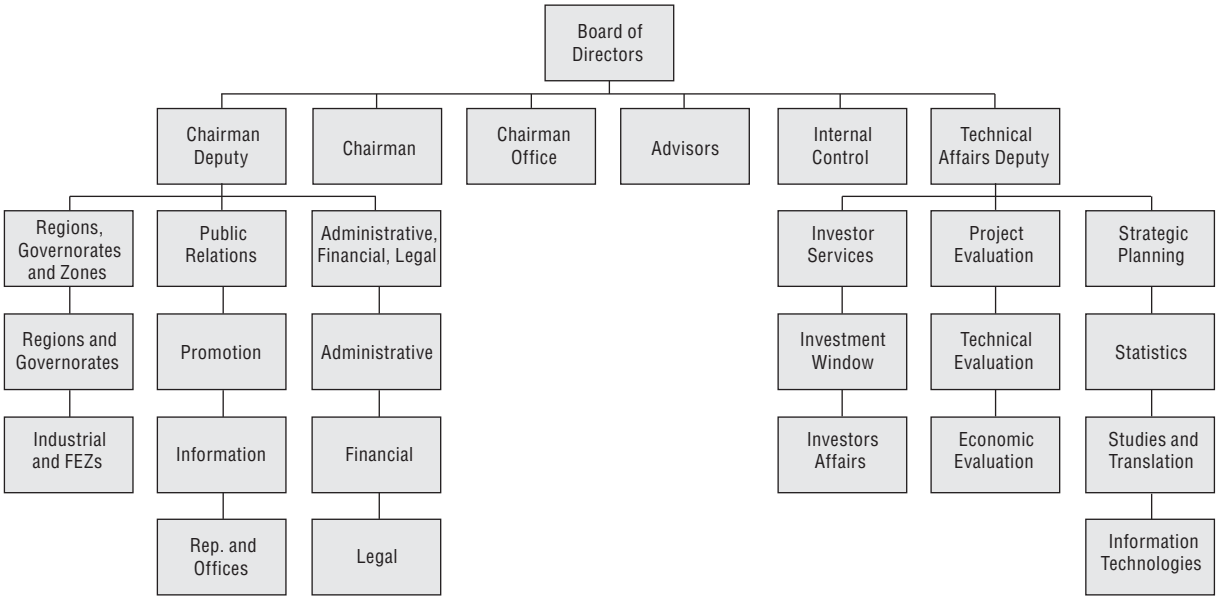
The NIC's broad mandate defines it as a body that takes the long view of investment, enabling and advocating policies and projects, and championing investment and its benefits for society – this is work that bears fruit only in the long term. The NIC may, for example, lobby to amend existing legislation with a view to establishing freer air trade. Similarly, it advises the Council of Ministers and related government agencies on priority investments and informs them of achievements that may be useful in boosting Iraq's image.

The NIC also promotes the guarantees, facilities, and incentives offered to investors through local and international media campaigns.

NIC Structure

MENA-OECD research suggested restructuring the NIC in accordance with Iraq's special needs and investment climate. Based on its *Successful Practice Guidelines on Investment Promotion* and the existing provisions of the 2006 Investment Law, MENA-OECD has advocated a structure illustrated by the figure below.

Figure 1.1. **Recommended organisation for Iraq's National Investment Commission**



Board of Directors: Iraq's Investment Law states that the Commission's Board of Directors should have nine members who are competent, specialised university graduates. Three should come from the Iraqi private sector and be appointed by the Prime Minister.

It is also proposed that up to three other private sector members – prominent businessmen, investors, or business consultants – should sit on the board.

The Board's tasks should be to:

- Supervise the NIC's administrative affairs and monitor the implementation of its action plans.

- Propose investment and promotion policies.
- Approve the NIC's budget and its financial and administrative regulations.
- Determine fees for NIC services.
- Establish branches and offices inside and outside the country.

Chairman: A ministerial-grade official (Investment Law Art. 4.2 stipulates that the NIC Chairman is nominated by the Council of Ministers for five years), vested with rights and authority, who is responsible for the NIC's activities in accordance with the Investment Law. He or she should hold a high-level degree in a field closely related to the position.

Deputy Chairman: An official with the grade of deputy minister, with rights and authority, who is highly specialised and has at least 15 years of practical experience in the field of investment or project administration. There could be two deputy chairmen, one tasked with administration-related business, the other with technical matters. One should be the senior deputy chairman.

Chairman's Office: Headed by a managerial-grade representative who should be a university graduate and have the experience and competence to take official minutes, organise the chairman's correspondence, and circulate decisions as necessary. The office's duties could be broken down into the following sub-sections: secretariat, follow-up, and correspondence.

Advisors: The chairman may appoint a number of advisors specialised in investment issues, economics, and international treaties. They would report directly to the chairman and be tasked with submitting studies, preparing periodical reports, and putting forward recommendations, in addition to formulating opinions regarding matters on which the chairman seeks advice.

Internal Control: Headed by a managerial-grade representative who should be a university graduate. This department would be tasked with auditing financial dealings and ascertaining the application of financial legislation. It would also verify the assets inventory and submit quarterly, periodical, and annual reports in instances of clear breaches of the terms of investment contracts.

Strategic Planning Department: Headed by a director general with a masters or PhD degree and at least 15 years' experience. This department would be of the utmost importance in designing investment policies. Its duties would be to:

- Develop strategy and action plans.
- Prepare interim plans for investment in accordance with the development plans and needs of the various sectors.
- Collect, classify, tabulate, and analyse statistical data.
- Prepare studies on the needs of economic sectors, publish assessments of projected investment, translate and submit them to stakeholders, publish material related to investment promotion, and translate correspondence.
- Build a database of economic parameters and Iraq's investment project needs to provide facts and figures for decision making.
- Develop state-of-the-art information management systems to serve commission activities and link it with offices inside and outside Iraq.
- Develop an e-portal for investors.
- Upgrade dedicated NICT equipment and systems.

It would include a Statistics Section, a Studies and Translation Section, and an Information Technology Section.

Project Evaluation Department: Headed by a director general with a university degree in a subject related to his or her work and at least 10 years of experience. This department would:

- Draw up project evaluation specifications.
- Train teams in project evaluation.
- Visit project sites and submit detailed reports.
- Draft economic evaluation studies to determine project feasibility and impact.
- Audit feasibility studies submitted by applicants.
- Liaise with international organisations and agencies.
- Build a database containing all project evaluation, preventive, and remedial procedures.
- Submit quarterly technical and economic reports to the Board of Directors.

This department would incorporate a Technical Evaluation Section and an Economic Evaluation Section.

Investor Services Department: Headed by a director general with a university degree and at least ten years of experience. The department would:

- Prepare project license application forms.
- Process and assess applications and secure ministerial approvals for investors.
- Follow up licensed projects with other NIC departments to ensure a high quality investment environment.
- Resolve problems that arise once a project is under way and provide investor aftercare services to ensure the successful completion of projects.

This department would comprise an Investment Services Section (one-stop shop) and an Investor Affairs Section.

Administrative, Financial, and Legal Department: Run by a director general with a university degree in administration, finance, or law and at least ten years of experience. This department would:

- Administer appointment formalities, transfers, pensions, and sanction for employees.
- Supervise the maintenance of buildings, equipment, and other commission assets.
- Administer salaries, wages, budgets, and manage stores and warehouses.
- Provide legal advice on issues referred to it, supervise contracts, and take the necessary legal procedures against investors who break the law.
- Settle investment disputes when they arise by alternative dispute resolution means.
- Audit international treaties and agreements before they are signed and participate in the negotiation of international investment agreements.
- Represent the commission in courts of law and follow up cases initiated by or against it.

This department would be made up of an **Administrative Affairs Section** under a manager with a university degree in public or business administration; a **Financial Affairs Section**, run by a manager with a university degree in accounting, auditing, or related field; and a **Legal Affairs Section** (which could become a department in its own right if its workload increased over time), headed by a manager with a degree in law.

Public Relations Department: Headed by a director general with a university degree linked to public relations and at least ten years' experience, this department would:

- Draw up and implement plans to promote the commission's activities and investment opportunities in Iraq.
- Publish promotional material.
- Build relations with the media and publish newsletters and bulletins.
- Develop communication between the commission and sectors benefiting from investment.
- Hold events inside and outside Iraq to promote attractive investment opportunities.
- Co-ordinate with investment agencies, companies, and organisations inside and outside Iraq to promote investment practices.

This department would comprise a Promotion Section, an Information Section, and a Representatives and Offices Section. All sections would be managed by able individuals with relevant university degrees and at least five years' experience – or seven years for the manager of Representatives and Offices.

Regions, Governorates and Zones Department: Headed by a director general with a university degree and at least ten years' experience, this department would:

- Co-ordinate with investment commissions in Iraqi regions and provinces to avoid any overlaps and possible conflicts.
- Conduct studies, design policies and make proposals for establishing and developing industrial and free economic zones (FEZs), joint-ventures, PPPs and business linkage programmes.
- Build a zone database with statistics on industrial zones and FEZs.
- Recommend the construction of infrastructure installations in industrial zones and FEZs.
- Supervise the management of investments and work with FEZ administrators to promote trade and propose fees and exemptions.

This department would comprise a Regions and Governorates Section and a Free Economic Zone Section, both run by managers with university degrees and at least five years experience.

Based on the model of MENA countries such as Egypt, with its General Authority for Investment and Free Zones, a specific directorate dedicated to policy advocacy could round off the internal structure of the NIC.

Relations between the National Investment Commission and other agencies

The NIC tasks of drawing up the investment strategy of Iraq, licensing investment projects, and allocating land require high-level consultation and collaboration with Iraq's main government agencies. On several occasions, Prime Minister Al-Maliki has stressed the importance of co-operation between the NIC and other ministries in order to simplify administrative procedures, particularly land allocation, and to ensure the coherence of Iraq's national investment policy.

Dialogue with key national ministries lies at the core of the NIC's effectiveness and directly affects the country's investment climate. The NIC should supervise Iraqi ministries' investment projects more closely and ensure that such projects are compatible

and are implemented as part of a coherent investment strategy. The few examples mentioned below are not exhaustive, but illustrate this challenge.

Working arrangements with government agencies

As a major oil producer and exporter with the second largest oil reserves in the world, Iraq has earmarked many areas of its land for exploration and potential production. The NIC must therefore work closely with the Ministry of Oil and obtain its approval for major investment projects. It must do the same in projects in other key economic sectors.

Due to acute power and water shortages, top priority has been given to investment projects supervised by the Ministry of Water Resources (irrigation, drainage, and dam projects) and the Ministry of Electricity (power plants and units, networks). Working with the Council of Ministers, the NIC has to ensure that the locations and technical requirements of water- and power-related projects – both public and private – do not conflict.

Other ministries require the NIC to work very closely with them on investment projects. Two particularly significant cases are the Ministry of Planning and Development, which designs Iraq's overall economic development plan and identifies strategic investment sectors, and the Ministry of Finance, responsible for (mainly government-owned) land allocation, customs administration, and free economic zones (FEZs).

The NIC needs approval from the Ministry of Construction and Housing and the Ministry of Interior and Defence before it can be sure that investment projects are in safe or protected locations. The Ministry of Environment, which evaluates projects' environmental impact, also has certain requirements of the NIC. The Ministry for Tourist Affairs is another player in site selection and land allocation, as its duties include supervising and safeguarding Iraq's archaeological, religious, and tourist sites. Land for projects in Baghdad can be allocated only with the approval of the mayor and the Supreme Committee for the Baghdad Master Plan, and, should a project make use of railway lines or airports, the Ministry of Transport must be consulted.

MENA-OECD recommendations for inter-agency co-operation

It has been suggested by Iraqis in the public and private sectors that the NIC sorely lacks channels through which it can communicate and co-ordinate its action with ministries and government bodies. In-depth research led by MENA-OECD has revealed that several ministries have investment divisions whose relations with the NIC are unclear.

The Ministries of Industry and Minerals, Planning and Development, Construction and Housing, and the Ministry of Trade all house distinct departments that license and oversee investment projects independently of the NIC. The Ministry of Planning, for instance, has a "Foreign Investments and Relations Department", while a "deputy minister" supervises investment issues at the Ministry of Industry and Minerals.

In order to improve the institutional framework and overcome constant co-ordination difficulties between agencies tasked with investment, MENA-OECD recommends significant measures to strengthen the role and effectiveness of the NIC.

Some players in Iraqi investment have called for a "Supreme Investment Council". The argument is that the oversight exercised by the Council of Ministers is too broad, and director-level co-ordination insufficient, and that an intermediate structure would guarantee increased federal oversight.

A Supreme Investment Council would bring benefits. It would improve co-ordination between the NIC, ministries, and other governmental bodies through sheer political will and ensure the effective implementation of investment projects. It would also help build consensus and enhance inter-agency cooperation mechanisms by defining broad investment orientations.

The disadvantages are that a Supreme Investment Council would add another layer to the institutional framework and may impede the conduct of critical projects by national ministries, especially those involved in restructuring state-owned enterprises (SOEs). In this light, amending the investment law could ultimately prove very risky.

However, the experience of MENA countries like Jordan and Syria with bodies similar to a supreme investment council has been encouraging. Jordan's Higher Council for Investment Promotion acts as a political forum, bringing together the Prime Minister, the Ministers of Industry, Trade, Finance, Planning, Tourism, and Transport, the governor of the Central Bank of Jordan, representatives of the Union of Chambers of Commerce and Industry, and competent representatives from the private sector. Together, they determine the country's investment policy. Similarly, ministers charged with investment matters sit on the Supreme Investment Council of Syria, which is headed by the Prime Minister, while the Board of Directors of the Syrian Investment Commission (SIC) comprises three members from the private sector, namely the chairs of the Chambers of Commerce, Industry, and Agriculture.

OECD and MENA countries have been introducing reforms to ease registration procedures for new businesses. One approach has been the advent of one-stop shops (OSS) as a service provided by IPAs. An OSS is designed to facilitate investor dealings with the licensing authorities by acting as the licensing authority itself or by streamlining and co-ordinating procedures with the different ministries and agencies involved in registration.

Making one-stop shops a success is not only an administrative and organisational challenge. They can only be as powerful as the IPAs which are hosting them, and this underscores the need for IPAs with strong policy influence. Successful OSSs have been those of which the IPAs enjoy strong support within the government – sometimes up to prime ministerial level. In this sense, an OSS can be seen as an expression of a government-wide commitment to investment policy reform. In the case of Iraq, an efficient OSS would improve communication with investors by handling their application forms and issuing licenses. In this regard, the NIC should deploy "liaison officers" who would interface with ministries and government agencies, so avoiding numerous institutional obstacles.

Another recommendation is that under-secretaries of important ministries such as the Ministries of Finance, Planning, and Municipalities sit on the NIC Board of Directors in order to improve co-ordination and mutual understanding of priorities. The integration of high-ranking representatives from national ministries could significantly improve responses to instructions issued by the NIC and secure ministerial support for the overall investment policy.

Finally, MENA-OECD recommends that the NIC incorporate private sector representatives in its Board of Directors. In addition to contributing the business perspective, they would express their views more freely than government personnel.

Candidates might include the chairs of the Chambers of Commerce, Industry, and Agriculture, and members of the business community.

If the private sector is still deemed insufficiently represented within the NIC, it could form a Joint Committee for Co-ordination. It is important that the NIC enable private sector organisations and associations to play a significant role in attracting foreign investment, because they are crucial to maintaining close relations with their foreign counterparts and investors.

Provincial investment commissions

One of the agency co-operation challenges facing the NIC is its relationship with PICs. Most Iraqi provinces have established their PICs, which grant investment licenses for numerous investment projects. It is of the utmost importance that the NIC and PICs should be able to co-ordinate their work to avoid overlap or conflict.

The 2006 Investment Law[15] empowers PICs to grant licenses to investors, to plan projects, to promote the provincial investment environment, and to open branches within their jurisdictions. The law stipulates, however, that PICs must consult the NIC, which verifies that their licensed investment projects are consistent with the national investment strategy and legal requirements. Indeed, it explicitly requires PICs to co-ordinate their work with the NIC, to draw up investment plans that do not clash with the federal investment policy, and to keep inventory of investment opportunities with initial project data for use by prospective investors. In 2009, internal regulations for the PICs were drafted and should be enacted in the course of 2010.

Further challenges for Iraq's national investment policy

The NIC faces a number of other critical challenges, such as investor relations and political independence.

Promoting investment and communicating with investors

The NIC should draw up a clear and integrated map of investment projects and opportunities which would be made available to local and foreign investors. Such a map is a priority. It should be reviewed by the Ministry of Planning or an independent consultant to verify the data submitted by PICs before the map is finally issued.

In addition to the investment map, the NIC must issue an improved investment guide in several languages, put in place a well-designed constantly updated website to announce licensed projects periodically and transparently, and continue to participate actively in fairs and exhibitions inside and outside Iraq. It may also hold investment conferences to which it should invite selected investors – both individuals and companies.

Political independence

The NIC should act transparently and independently of any political interest in order to make appropriate decisions and license investment projects in accordance with the Investment Law and other legal provisions. It must also stand as guarantor of the credibility of licensed investors and ensure they actually implement their projects. Conversely, it is NIC's duty to facilitate access to the infrastructure and services that investors need to implement their projects, the most important being electricity, water, fuel, roads, and telecommunications.

The NIC must be aloof from the partisan political considerations that have often cast a shadow on investment issues and complicated regulations, while counting on the full support of the Prime Minister and other ministers in international foreign investment promotion meetings and in encouraging visits by official and private delegations to Iraq. It is crucial that the Council of Ministers issue clear instructions to ministries with a view to support the NIC.

An additional challenge facing the NIC is legislative: a number of the 2006 Investment Law provisions are ambiguous and likely to discourage foreign investment. To enable the NIC to be more effective, they should be reviewed.

For example, the notification and reporting requirements in Article 14 paragraphs 1, 2 and 7 may discourage potential investors. If the requirements are not fulfilled within a given time period, the investment license could be withdrawn. Provisions on key personnel could also be an impediment to investment, as priority in recruitment must be given to Iraqi workers and the right to employ foreign personnel is subject to guidelines to be issued by the NIC (Article 12.1). The investor-State dispute settlement provisions, though allowing settlement by arbitration, are unclear and rather restrictive (Article 27). The insurance and banking sectors are excluded from the scope of the Law and related legislation is difficult to access. It would be worthwhile to review these provisions in line with the development objectives of Iraq and after consultations with domestic and foreign investors.

Table 1.1. **Summary of MENA-OECD recommendations on the role of the National Investment Commission**

Status	Independence, responsibility and authority, with necessary budgets
Strategy	• Identify the needs of foreign investors and their views of Iraq as an investment location and a country with the capacity to compete for foreign investment. • Produce a coherent investment map for local and foreign investors and a clear, informative investment guide.
Human capital	Develop human resources and skills through adequate education and training programmes and initiatives and with the help and expertise of the international community.
Administration	Remove administrative barriers to further facilitate foreign investment.
Communication	Improve communication with foreign investors to identify their needs.
Services	Aid and provide investors with information on negotiations, the legal and regulatory landscape, visits, financing, choices of location, ownership, recruitment, etc.).
Organisation	Enhance internal structures to improve the NIC's effectiveness.
Co-ordination	Clearly demarcate the NIC's prerogatives and co-ordinate its actions with ministries, governmental agencies, provincial commissions, and private sector representatives.
Institutional	Create a Supreme Investment Council to supervise the activities of the NIC and PICs, muster political support, and ensure investment projects are effectively implemented.
Legal	• Encourage review of the investment law, enact necessary amendments, and adopt implementing regulations. • Adopt complementary laws in areas of interest to foreign investors (companies, competition, labour, stocks and shares, privatisation, banks, trade, consumer protection).

Notes

1. Law No. 13 (2006) available at *www.investpromo.gov.iq/files/investment_lawenglish.pdf*. An amendment to the Law was approved by the Council of Representatives in October 2009. It allows investors to own land for housing projects and clarifies leasing procedures. However, as this publication covers the period 2007-2008, the following analysis is based on the provisions of the Investment Law as approved in 2006.
2. Law No. 13 (2006), Art. 1(b) and Art. 4.
3. Diwan Order No. 134, 7 November 2007.
4. "Iraq: FDI Inflows to Soar", *Business Monitor International*, October 2008.

5. Communiqué by the NIC (*www.investpromo.gov.iq/english*) ; see list of projects in annex.
6. Law No. 13 (2006), Art. 7.
7. According to NIC sources, foreign investors cannot get loans from banks, while Iraqi investors can.
8. Interview with Ali al-Dabbagh, GoI's official spokesman: "Baghdad: 2009 budget will focus on investment and services", *Elaf*, 12 July 2008.
9. Communiqué from the National Investment Commission (NIC): *www.investpromo.gov.iq/english*.
10. The October 2009 Amendment to the Investment Law grants investors the right to own lands for housing purposes.
11. The October 2009 Amendment to the Investment Law clarifies leasing procedures.
12. Investment Law, Chapter 5, Article 17.
13. Making Reforms Succeed: Moving Forward with the MENA Investment Policy Agenda, OECD 2000.
14. Investment Law (2006) Article 9.3.
15. Chapter 2, Article 5.

ANNEX 1.A1

Key Features of the Iraqi Investment Law and Investment Promotion Guidelines

1.1. Key Policy features of Iraq's Investment Law and key projects

Legal provisions for the mandate of the National Investment Commission are contained in Chapter 2 of the Investment Law – "The National Commission for Investment and the Investment Commissions in the Regions and Governorates".

- The National Commission for Investment is responsible for drawing up the national policies for investment and drawing up its plans, regulations and guidelines as well as monitoring the implementation of these guidelines and instructions for investment. It shall specialise in strategic investment projects of a federal nature exclusively (Article 4.1).
- The National Commission for Investment shall draw up an overall national strategic policy for investment identifying the more important of the sectors and shall prepare a map of investment projects in Iraq in the light of the information it receives from the regions and governorates. It shall also prepare lists of investment opportunities in strategic and federal investment projects with initial information about these projects, making it available to those wishing to invest (Article 4.5).
- The regions, and governorates not organised in a region, may form investment commissions in their areas. The latter shall enjoy the powers of granting investment licenses, investment planning, promoting investment and opening branches in their areas within the provisions of this law in consultation with National Commission for Investment to guarantee compliance with legal conditions (Article 5.1).
- The Investment Commissions of the regions and governorates shall co-ordinate their work with the National Commission for Investment, and shall co-ordinate and consult with local governments regarding investment plans and facilities. (Article 5.4).
- The regional and governorate commissions shall draw up their investment plan in a way that does not contradict the federal investment policy and shall prepare lists of the investment opportunities in the areas that are subject thereto, with initial data about these projects, and offer it to those wishing to invest (Article 5.5).
- The Commission shall promote investment by working on the following (Article 9):
  - ❖ Building confidence in the investment environment, identifying investment opportunities, and promoting and stimulating investment in them.

- ❖ Simplifying the procedures for registration and the issuing of investment project licenses, and following up on existing projects and giving them priority in processing by official entities. Answering investor requests and obtaining the required approvals for the investor and the project.
- ❖ Establishing a one-stop shop at the National Commission for Investment and the Regional and Governorate Commissions that includes authorised representatives from the ministries, and members nominated by the Councils of the regions and governorates as the case may be and the concerned authorities. The one-stop shop is to issue licenses and obtain the approvals of other authorities in accordance with the law.
- ❖ Providing advice, information, and data to investors and issuing special manuals in this regard.
- ❖ Setting forth and implementing programs to promote investment in different areas of Iraq in order to attract investors.
- ❖ Facilitating the allocation of the needed lands and renting them out for establishing projects for a sum to be determined by the Commission in co-ordination with the concerned authorities.
- ❖ Establishing secure and free investment areas with the agreement of the Council of Ministers.
- ❖ Encouraging Iraqi investors (residing in Iraq) through providing them with preferential loans and financial facilities in co-ordination with the Ministry of Finance and with the assistance of Banking Institutions, provided that the investor obtaining the loan shall employ a number of unemployed Iraqis proportional with the volume of the loan.
- ❖ Any other tasks related to its work and assigned by the Council of Ministers.

1.2. Key investment projects (2008)

The list below features major construction projects that are underway, planned, or open to bids:

- Grand Basra Port.
- Baghdad International Airport.
- Baghdad-Duhok 600-kilometer highway.
- Gas City in Sulaimaniyyah, Kurdistan, which will require an expected initial investment in basic infrastructure estimated at USD 3 billion and will be designed to host over 20 varieties of world-scale petrochemical and heavy manufacturing plants, as well as hundreds of small and medium-sized enterprises (SMEs).
- Tarin Hills master development project in Erbil, a complex of residential, retail, commercial, hospitality, entertainment, health and sports facilities and amenities. The development will have an initial cost of USD 4.5 billion and will cover 170 million square feet.
- The 48-floor World Trade Tower in Basra.
- The Baghdad Metro, which will have several lines and a capacity of one million passengers in its first phase.
- Marriott Hotel in Baghdad's Green Zone.[1]
- Umm Qasr container project.

- Disneyland City, a multi-million dollar entertainment complex, to be built on a 50-acre lot adjacent to the Green Zone at Zawrah park, Baghdad.
- Medical City in Baghdad, a seven-hospital complex.
- Najaf City, proposed by the Kuwaiti investment company Al-Aqeelah and approved by the Council of Ministers (CoM) with an investment value of USD 38 billion. Najaf has attracted foreign investors interested in tourism opportunities to the area. The project includes the construction of 200 000 residential units, houses, schools, universities, and the development of industry, tourism, banks and financial institutions, higher education and agriculture.
- Kut Industrial City.
- Five-star hotels in Al-Kadhimiyyah and Al-Utiafiyyah in Baghdad, as well as a large mall in Al-Waziriyyah and apartment complexes. The projects are expected to create several hundred jobs and were expected to be completed in 2009.[2]
- Iraqi-German specialised hospital in Baghdad's Karadah al-Sharqiyyah neighbourhood, with a cost of USD 150 million and a construction timeline of nearly two years. The hospital will provide public services for all the capital's inhabitants and will employ both Iraqi and German doctors.[3]
- Housing projects at the Al-Rasheed military camp, and at locations in Baghdad and other governorates.
- Park Kempinski and Rotana five-star hotels in Erbil.[4]

1.3. Strategic Guidelines on Investment Promotion

Strategic Guideline 1:

Establish government policy on foreign direct investment and the vision for its role and contribution to the national economic development framework.

1.1. Establish and widely publicise the broad vision and aims of FDI policy in terms of national economic and social development.

1.2. Introduce and enact legislation, where necessary, on FDI policy, treatment of FDI, new institutions and other policy areas that impact on FDI.

1.3. Ensure consistency of other government policies (*e.g.* legal and administrative procedures, labour regulations) with agreed FDI strategy so that efforts to attract FDI are not undermined or obstructed by conflicting laws and regulations.

1.4. Involve foreign investors in policy dialogue at all stages in the development of new policies.

1.5. Ensure that foreign investment policy has a regional dimension, *i.e.* that appropriate steps are taken to ensure that as many regions as possible benefit from FDI (*e.g.* infrastructure and skills training/development).

1.6. Periodically assess the economic impact of FDI and instigate policy change, where necessary, to improve performance or deal with a changing environment.

Strategic Guideline 2:

Articulate and advocate national policy on FDI among social partners and civil society as well as investors in order to create a better awareness and consensus on the aims of policy.

2.1. Undertake wide communication and publicity on planned FDI policy and expected results as well as on the methodology to monitor and review performance.

2.2. Take a proactive role in communicating with civil society and with domestic and international media in order to explain FDI policy and government support for it.

2.3. Ensure that new FDI projects are properly announced and publicised (this is a key part of the work of an Investment Promotion Agency and requires close partnership between government and IPA to achieve best results).

2.4. Actively and publicly participate in supporting the work of the IPA – this is a key task for government.

2.5. Ensure that local industry or regional partners are fully aware of the opportunities for business links and co-operation with foreign investors.

2.6. Consult with social partners and foreign investor representative groups in reviewing, amending or introducing new FDI policies to improve performance.

2.7. Ensure that the conduct of performance reviews allows for inputs from all relevant groups in society and that such reviews are made available to the wider public.

Strategic Guideline 3:

Establish an Investment Promotion Agency (IPA) and determine its objectives, as well as the legislative and governance structures of the agency.

3.1. Establish an Investment Promotion Agency (IPA) with a clear legal structure and powers to carry out its mandate.

3.2. Ensure that the mandate of the agency is clear, transparent and modifiable only by government decision. To be effective, the agency needs to be empowered and resourced so that it can compete internationally for investment.

3.3. Appoint a senior cabinet economics minister (or the prime minister) to be directly responsible for the activities and performance of the IPA.

3.4. Provide sufficient resources and budget to meet the objectives.

3.5. Decide on the role, authority, responsibilities, appointment procedures, budgeting process and reporting of the IPA supervisory board, chairman and chief executive.

3.6. Appoint the supervisory board, including significant private sector and key stakeholder representation, and the chief executive.

3.7. Appoint an independent chairman as the key communications channel between the supervisory board and the responsible minister.

3.8. Clearly state the responsibilities, powers, budgetary and reporting procedures of the agency, the limits on capital and operating expenditure, and appropriate auditing procedures.

3.9. Set clear targets and measures of outputs and programme performance to meet government objectives and budget allocations.

Strategic Guideline 4:

Inculcate within the IPA a professional management and service culture, result-oriented ethos and innovative marketing approach in order to compete successfully in attracting new investment and to ensure satisfactory continuity of the organisation culture.

4.1. Appoint a high calibre chief executive who has the vision, experience and management skills to build and lead a successful organisation.

4.2. Implement professional recruitment procedures to ensure that all management and staff are appointed based on industry experience, skills and personal qualities.

4.3. Ensure that conditions of employment within the organisation, insofar as possible, match those of industry and thereby facilitate quality recruitment and retention of experienced staff.

4.4. Ensure that staff are provided with continuous training and skills development (*e.g.* business strategies, marketing techniques, sectoral knowledge, presentation skills, client servicing, and project evaluation).

4.5. Follow best corporate and management practices in developing the strategic and operational plans for the IPA.

Strategic Guideline 5:

Define strategic policy options and set out the corporate strategy and marketing plan for the IPA to build competitive strength and achieve selected policy options.

5.1. Identify positive and negative factors that differentiate the country from its regional and global competitors, as well as develop strategic policies and actions to address these factors with investors.

5.2. Create awareness and a positive image of the country in the minds of potential investors. This is an important first step to successful promotion of investment.

5.3. Select priority industrial and service sectors where the country already has or can develop competitive advantage, keeping in mind the potential in new emerging technologies and arising from structural change in industry sectors.

5.4. Undertake research on selected sectors so that strategic issues affecting business and investment are understood and reflected in IPA's dealings with investors.

5.5. Encourage action by the government, where necessary, to enhance competitive advantages for attracting investment (*e.g.* special skills training or provision of specific infrastructure).

5.6. Develop corporate strategies and operating plans to focus on selected options.

Strategic Guideline 6:

Decide on an incentives policy and ensure objective and regular evaluation of its costs and benefits.

6.1. Review incentive policies in competitor countries in order to assess the level of competition and the need for incentives.

6.2. Determine if incentives are necessary and design an appropriate incentives package which is affordable and effective.

6.3. Ensure that all planned incentives are properly evaluated through cost/benefit analyses and that the scope and duration of incentive programmes are well defined.

6.4. Initiate required legislative changes.

6.5. Review incentives policy periodically, monitoring the cost effectiveness of incentives in achieving stated goals and revising incentives policy where necessary.

6.6. Consider appropriate tax agreements with FDI originating countries.

Strategic Guideline 7:

Undertake a comprehensive review of skills available *versus* skills required by investors. Develop and implement policies to address identified gaps and to facilitate new investment and job-creation.

7.1. Identify key skills in industry sectors that are being targeted for FDI and ensure that well constructed training, retraining, skills development and educational programmes are provided to meet the changing needs of both domestic and international investors.

7.2. Seek joint involvement of relevant state organisations with industry players in designing and conducting training in order to ensure relevance and quality practices.

7.3. Set out an information society strategy, which is co-ordinated with FDI policy and promotion, addresses training and skills demands, and attracts investment in modern technology sectors.

7.4. Within the framework of the above strategies, ensure good collaboration between the education sector, training sector and industry in order to provide new job opportunities and meet the needs of investors.

Strategic Guideline 8:

Ensure the provision of essential infrastructure needed by industry – industrial estates, modern factory and office buildings, utilities (electricity, gas, water), effluent treatment, drainage, telecommunications (including access to broadband networks) and different modes of transport.

8.1. Based on the target sectors identified, develop centres of excellence' which will attract investors by making available infrastructure that will give the country or region an advantage when competing internationally for investment.

8.2. Examine potential advantage to be gained from the provision of advanced factories, serviced offices or serviced land (with all utilities in place) for selected investors and encourage private sector suppliers to meet this demand.

8.3. Devise commercial packages with infrastructure providers to ensure the provision of specialist infrastructure (*e.g.* pharmaceutical and chemical industries have specialist needs in the areas of water, environmental treatment and procedures).

8.4. Within the framework of the information society strategy, ensure that a modern telecommunications infrastructure, in particular high-speed broadband access, is provided or planned for.

Strategic Guideline 9:

Identify administrative barriers to FDI and establish a programme with clearly assigned responsibilities and target dates to remove such obstacles to investment.

9.1. Undertake regular reviews of the investment climate in the country, using independent expert advice and surveys of investors' opinions.

9.2. Draw on the experience of other countries in identifying and addressing major issues affecting the investment climate.

9.3. Ensure that regulations and procedures which impact on foreign investors are coherent and consistent.

9.4. Establish a programme with clearly assigned responsibilities and target dates to remove administrative barriers to foreign investment.

9.5. Inform and educate society on the negative impact of barriers to FDI.

9.6. Provide appropriate structures to facilitate access by foreign investors to senior politicians and government officials.

Strategic Guideline 10:

Promote FDI by undertaking a comprehensive and professional marketing programme aimed at new and existing investors and by building the IPA as a credible and competent partner for investors.

10.1. Use professional surveys of investor perception of the country as the basis for an image-building programme.

10.2. Develop an international image-building programme aimed at the foreign investment community and international business media.

10.3. Include, where possible, the existing foreign investor community in promotion activities.

10.4. Use senior political figures and government officials, existing foreign investors, and the overseas expatriate community as "ambassadors".

- Identify and target growing sectors, *i.e.* sectors where the country can offer competitive advantage.

10.5. Within these sectors, identify the key investing companies and the decision-makers within those companies.

10.6. Implement an investment generation campaign aimed at key executives in potential investing companies and based on an appreciation of investors' investment priorities and on the competitive advantages the country can offer in response to those priorities.

10.7. Organise and conduct well planned country visits by potential investors, ensuring the provision of all relevant information and advice necessary to assess the country's attractiveness as an investment location.

Strategic Guideline 11:

Facilitate investment and service investors at all stages of the investment cycle, from start-up through to post-investment and new expansion stages.

11.1. Ensure that IPA staff has the right skills, experience and training to deal with senior foreign investors, and remunerate staff accordingly.

11.2. Prepare and manage visit programmes, paying attention to the details of itineraries as well as content.

11.3. Agree on the itinerary in advance with the investor, addressing all key issues that the investor wants to clarify.

11.4. Ensure early contact with local suppliers (component suppliers, subcontractors, service providers) in order to facilitate the potential investment and use of the local supply network.

11.5. Assemble a development package, negotiate legal agreements, and provide assistance during start-up and a comprehensive service during the early years of operation.

11.6. Maintain contact and work closely with existing investors, as they can have a powerful influence on other potential new investors and are themselves a major source of new investment through expansion, introduction of new products, etc.

Strategic Guideline 12:

Encourage greater integration of foreign businesses into the economy and the establishment of foreign investment in the country.

12.1. Survey foreign investors on what they purchase and are willing to purchase from the local economy in terms of services, materials and technological support.

12.2. Develop specific support programmes aimed at domestic suppliers, training institutions and technology centres capable of becoming internationally competitive suppliers to investors.

12.3. Identify gaps in local firms' management training and technological capacity to support targeted foreign sectors, and support investment to close the gaps.

12.4. Identify and support local manufacturing and service firms capable of developing an internationally competitive position through the development of sub-supplier programmes based on the needs of the foreign investor.

12.5. Support programmes aimed at improving indigenous management, technology and language skills that are provided by management training institutes, universities, etc.

12.6. Support programmes linking foreign investors and the higher education sector in the development of new technologies, associated start-up companies and technology clusters based on shared exploitation of academic, human and capital resources.

12.7. Encourage enterprises to conform to the OECD Guidelines for Multinational Enterprises.

Notes

1. Rosenwald, M.S. (2008), "Marriott Weighs Risk, Opportunity of a Hotel in Baghdad Green Zone", *Washington Post*, 8 May.
2. Lennox, S. (2008), "New 5-Star Hotel for Baghdad", *Newsweek*, 22 July; Abbas, M. (2008), "Iraq says new hotel to be investment milestone", *Reuters*, 19 July.
3. "Putting the cornerstone of Iraqi German hospital in Baghdad", *Iraq Daily Business Updates*, 8 May 2008.
4. It must be noted that most hotels and residential complexes are partially the result of the Investment Law. See Semple, K. (2007) "Kurdish Iraq focuses on investment and building", *International Herald Tribune*, 28 June.

PART I

Chapter 2

International Investment Agreements and the Iraqi Investment Law

Introduction

This chapter reviews the bilateral and multilateral agreements that inform Iraq's investment framework, as well as the growing body of domestic provisions stemming from the 2006 Investment Law, in light of the GoI's stated objective to increase investment in the country.

Iraq has a long history of concluding bilateral and multilateral trade and investment agreements, particularly between 1960 and 1990. Its investment regime prior to 2003, however, was restrictive, especially in relation to non-Arab countries, although it did sign investment treaties with a number of non-Arab countries according benefits similar to those enjoyed by Arab countries.

Since 2003, Iraq's economic policy has been to open its markets and foster a business-friendly environment to attract FDI and facilitate trade. It has reformed laws and regulations governing the formation and registration of companies; foreign investment; import, export and customs valuation; intellectual property; banking and bankruptcy.[1] It has also begun joining or rejoining key international organisations and conventions aimed at bolstering the investment climate. For example, Iraq is now a member of the World Customs Organization (WCO) after allowing its membership to lapse for several years; it started the accession process to become a member of the WTO; and it became member of the Multilateral Investment Guarantee Agency (MIGA)[2] on 6 October 2008 and acceded to the 2004 United Nations Convention against Corruption on 17 March 2008.[3] Iraq also passed a new Investment Law in 2006 which created the NIC. The Law has already been revised[4] and the government is currently in the process of issuing its implementing regulations. Implementing regulations have not been enacted, however, or, if they have, are ambiguous regarding implementation, enforcement and interpretation. In addition, lack of transparency remains a challenge and raises concerns *vis-à-vis* the respect of international commitments and Iraq's future potential WTO accession.

Dispute resolution also remains a major challenge. Iraq has not ratified the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) and the 1965 International Convention on the Settlement of Investment Disputes between states and nationals of other states (the ICSID Convention). Iraq's Investment Law of 2006 does allow disputes to be settled by international arbitration (Article 27.4); however, it is unclear under current Iraqi legislation whether or not a binding arbitration award can actually be enforced – a key consideration for foreign investors. The signature of the New York Convention would remove the ambiguity. Iraq is presently considering joining the New York Convention and ICSID and several informational sessions have been held to enhance the understanding of the arbitration mechanisms and discuss the benefits of ratification of these two treaties.[5]

Iraq's international investment agreements – An overview

According to Iraqi sources, the country is signatory to a number of international investment agreements (IIAs), including 32 bilateral investment-related treaties and nine multilateral agreements further to the Investment Promotion and Protection Agreement promulgated by the Arab League's Council of Arab Economic Unity (see Annex 2.1 for the full list). Several of these agreements contain provisions for promoting and protecting investments that include the treatment of investments and investors (most-favoured-nation (MFN) and national treatment clauses), fair and equitable treatment, repatriation of profits, dispute settlement (State-State and investor-State), protection against expropriation, and compensation of losses.

Iraq's multilateral investment agreements include: Arab Capital Investment, 1 June 1981; Establishment of Arab Monetary Fund, 1 November 1976; Arab Investment Security Corporation, 16 September 1971; Arab Industrial Investment Company, 26 March 1979; and the Arab Industrial Investment, 5 July 1976.

Iraq signed most of its investment-related agreements between the 1960s and the early 1990s. Most of these agreements contain duration and termination clauses. A review of these provisions in the few agreements available reveals that the agreements are automatically renewed unless denounced by one of the contracting parties. With the creation of the new government of Iraq, the crucial question of the succession of the State of Iraq and recognition of previous treaties seems to be unresolved: it is unclear whether the ratified agreements were either automatically renewed or ceased to exist with the collapse of the former government.

Since 2003, the government of Iraq has signed several treaties, and some bilateral negotiations are on-going. A Trade and Investment Framework Agreement (TIFA) with the United States signed in July 2005 aims mainly at promoting investment flows, and does not provide for investor protection provisions. The same applies for the bilateral framework agreement with Turkey signed in July 2008. Iraq also negotiated bilateral investment agreements in 2009, including with France, Germany and Italy. It is also negotiating a framework agreement with the European Union (EU), and talks with Jordan are reportedly ongoing. In addition, several investment contracts (bilateral agreements concerning a specific project and setting rules governing the project itself) have been signed with countries starting to invest in Iraq.

Negotiating international investment agreements

Who negotiates investment agreements

Iraq's new Constitution and Law No. 111 of 1979 governing treaties, which is still in force according to an Iraqi source, stipulate the negotiation and ratification processes of international treaties and the authorities responsible.

Article 80-6 of the Constitution empowers the Council of Ministers (CoM) "to negotiate and sign international agreements and treaties, or designate any person to do so", while Article 60-1 provides that "draft laws shall be presented by the President of the Republic and the Council of Ministers". In addition, under Article 73-2, the President of the Republic has the power "to ratify international treaties and agreements after approval by the Council of Representatives. Such international treaties and agreements are considered ratified 15 days after the date of receipt by the President".

Law No. 111, which is consistent with Article 80-6, empowers various government entities to negotiate treaties. It states that the Minister of Foreign Affairs represents Iraq, does not need authorisation to negotiate treaties, and has the authority to appoint negotiators. The Ministry of Foreign Affairs is therefore the negotiating authority for international treaties and agreements of the GoI, drawing upon the expertise of other ministries.

In practice, senior Iraqi officials have indicated in conversations with the MENA-OECD Initiative that any ministry may negotiate bilateral agreements, including investment agreements. While the NIC helps to set national investment policies, the Investment Law does not grant it exclusive jurisdiction over bilateral agreements or, in fact, explicitly grant it any authority for negotiating investment agreements.

Negotiating procedures

The different negotiating procedures and phases are the following:

- The relevant Ministry negotiates the agreement.
- The draft agreement is sent to other concerned Ministries for comment. For example, if the Ministry of Trade is negotiating a trade and investment agreement, it would send a draft agreement to the NIC and other concerned Ministries (in the case of specific sectors) for comments on the relevant provisions.
- The draft is also sent to the Ministry of Foreign Affairs for comment and to the Consultative Council (*Shura*) for a legal opinion/review.
- Upon concluding the negotiations, the agreement is sent to the Ministry of Foreign Affairs and the Office of the Prime Minister.

Depending on the type of agreement and how comprehensive it is, the Ministry negotiating the agreement or the Prime Minister may sign it. The process is the following:

- The relevant Minister writes to the Prime Minister advising of the agreement.
- The relevant Minister may request that the Prime Minister sign it or delegate the signing authority to the Minister.
- The agreement is then signed as directed by the Prime Minister's response.
- The agreement is then presented by the President for the legislative process and for ratification to the Presidency Council[6] after passing through the Parliament.

Checklist for negotiating international investment agreements

Iraqi government officials are advised to use a checklist when negotiating investment chapters in free trade agreements and bilateral investment treaties. Below is a checklist of issues to carefully take into account. It is advisable to follow it and progressively check off each piece of advice when preparing and conducting negotiations. This list would consist of:

General and procedural issues

- Understand the different kinds of IIAs: BITs, preferred by European states; free trade agreements that combine trade and investment provisions, favoured by the US and Japan; and regional investment and integration agreements.
- Draw up a list of potential strategic partner states in the light of domestic economic priorities and investment promotion strategies.

- Study the content of treaties signed by the negotiating partners and the economic context.
- Draft a model bilateral agreement according to the development objectives of the government involving an inter-ministerial process of co-ordination. This is a lengthy and complex process, but will help the involved ministries and institutions to understand and conduct subsequent negotiations.
- Set up a negotiating team composed of representatives of the relevant institutions.

Substantive issues

Treaties need to be negotiated carefully and attention should be paid to all terms and concepts. Some of these are listed below. A careful parallel reading of the Investment Law and other relevant domestic regulations is also required to ensure consistency between the international commitments being negotiated and the national laws.

Table 2.1. **Substantive provisions to consider when negotiating international investment agreements**

Terms and clauses	Issues and questions raised
Preamble: aims at stating the intentions of the parties and the objectives of the treaty. It can highlight the importance of fostering economic relationship for mutual benefit, but also include additional elements such as technology transfer, environmental protection, public interest, health, safety…	The preamble does not establish legally binding rights and obligations, but is relevant for the interpretation of the treaty.
Definition of investor: denotes the national (natural or legal person) of a country that benefits from the provisions of the treaty.	In the criteria to determine the nationality of the legal entities (place of incorporation, location of registered office) and the question of ownership and control, the issue of double nationality should be carefully addressed.
Definition of investment: denotes the assets covered by treaty provisions. Investment is generally defined in a broad and open-ended manner, covering "every kind of asset" and complemented by an illustrative list of assets.	Should it be an open or closed definition? Should it be mentioned that the assets are acquired or used for economic purposes and that they have the characteristics of an investment? In an illustrative list, attention should be paid to claims to money, debt instruments, intellectual property rights and concessions. Should there be some exclusion?
Scope and application: application in time and exclusions.	Temporal application: Should the agreement apply only to investments made after its entry into force? Should the agreement apply to all existing investments? If so, it may be important to clarify that agreement would not apply to disputes initiated before the entry into force of the agreement or to disputes arising out of events that occurred prior to its entry into force. Sectoral application: Should the agreement apply to investments in all sectors of the economy? Exclusions: should taxation issues be excluded? It could also be mentioned here that the agreement applies to all levels of government.
Admission and establishment: refers to the entry of investments in the territory of the other contracting party. Two basic models are used. Either the investment is admitted in accordance to the laws of the host country (admission clause), or the investor is granted a right of establishment (used by countries like US and Canada for liberalization purposes and in some FTAs with investment chapters).	Should a traditional admission clause apply and allow countries to admit investors according to their evolving domestic priorities? If the establishment model applies, a list of excluded sectors should be annexed (the negative list specifies the sectors closed to investment and the positive only specifies the sectors that are open to investment).

Table 2.1. **Substantive provisions to consider when negotiating international investment agreements** *(cont.)*

Terms and clauses	Issues and questions raised
National treatment (NT) and most-favoured-nation treatment (MFN): Relative standards of treatment: they define the required treatment to be granted to investment by reference to the treatment accorded to other investment. The NT standard requires a Contracting Party to treat an investment from the other Contracting Party no less favourably than it treats an investment of its own nationals. The MFN standard means that a Contracting Party must grant the investors of the other Contracting Party a treatment which is no less favourable than the treatment given to the investors of a third country.	Should the treatment standards be contingent on treatment in "like circumstances"? Should there be exceptions and reservations to the treatment standards? Is it desirable to exempt weak sectors in order to protect them or to reserve the right to formulate certain future policy measures? MFN treatment generated controversy in the wake of the *Mafezzini v. Spain* case, as it allowed the investor to "import" the dispute settlement provisions from another BIT, so-called "treaty shopping" (other cases – *Salini* and *Plama* – stated the opposite). Therefore, could it be desirable to exempt rules on dispute settlement from MFN treatment? Should REIO (regional economic integration organization) exceptions and taxation exceptions be included?
Fair and equitable treatment (FET): absolute standard of treatment, such as full protection and security and minimum standard of treatment according to customary international law.	There is a trend to clarify the scope and content of the FET standard, a point of debate in international investment law. It plays a significant role in recent arbitral practice.
Expropriation clause: The expropriation provision does not *per se* prohibit expropriation of an investor's investment but it defines the conditions and modalities for proceeding to expropriation. Most expropriation clauses cover direct expropriations but also measures tantamount or having an effect equivalent to expropriation (*i.e.* indirect expropriation). Four conditions are usually recognized for a lawful expropriation: • public purpose, • non-discrimination, • due process of law (legality, *i.e.,* in accordance with the procedures of domestic legislation, and right of the affected investor to a prompt review of its case), and • payment of compensation (currency and valuation).	Indirect expropriation is a major issue in investment treaty arbitration. Provisions of the domestic laws should be carefully studied to ensure consistency, in particular the Investment Law and the rules and procedures concerning the payment of the compensation. What emphasis should be put on issues of public interest?
Transfers (of investments, interest, revenues, proceeds from liquidation, etc.).	The transfer provisions included in investment treaties are particularly important for foreign investors, as timely transfer of funds is key to the operation of their investment. However, countries also need to be able to regulate capital flows, especially outflows. Some specific exceptions and balance-of-payments exceptions should be considered in line with International Monetary Fund (IMF) commitments.
Umbrella clause: requires a contracting state to comply with all its investment obligations towards investors from the other contracting country.	Several disputes have emerged in connection with this clause. The question is whether, through the umbrella clause, the investor's contractual claims against the host country could be resolved under the arbitration provisions of the investment treaty, rather than under the dispute resolution provisions of the contract in question. Are such clauses desirable? From the point of view of the investor the answer is certainly yes, but not necessarily from the point of view of the host country.
Compensation for losses: clause ensuring non-discriminatory treatment of foreign investors in situations where their property is damaged as a result of war or civil disturbance (state of national emergency).	The list of emergency situations should be adapted. Should MFN and/or national treatment be granted with respect to compensation?
Dispute settlement: two different clauses (State-State and investor-State).	There are very few disputes between contracting states. The provision relating to investor-State dispute settlement is a central feature in investment treaties and should be carefully drafted. Most investment treaties include relatively general provisions (containing amicable settlement, different arbitration venues available to the investor and final and binding award). However, these provisions evolved in recent treaty practice. They are more detailed, providing greater guidance to the disputing parties with respect to arbitration procedures.
Duration and termination.	It is important to keep track of the duration of the agreements and their renewal mechanisms.
Other provisions: entry and sojourn of foreign key personnel, subrogation, denial of benefits, general exceptions, transparency, environment and labour standards, investment promotion provisions, review/implementation mechanism.	Provisions related to transparency, environmental and labour issues, and investment promotion and implementation are recent treaty practice and should be carefully drafted in accordance with the development objectives and capacities of the negotiating countries.

International agreements with investment-related provisions signed by Iraq

Trade agreements

Iraq is signatory to 98 bilateral agreements with 85 countries and 5 multilateral trade agreements[7] (see Annex 2.1). They are designed to facilitate trade and strengthen economic ties through preferential tariffs. Most offer MFN treatment for trade in goods, although some grant privileges and advantages: *e.g.,* to neighbouring countries to facilitate border trade; to co-members of customs unions, free trade areas, or regional economic co-operation units; to other Arab countries. Some agreements contain measures to safeguard Iraq's national or health security, or special clauses relating to the contracting parties' implementation of their obligations and to the exercise of their rights in accordance with international agreements.

The two most important and comprehensive multilateral trade agreements to which Iraq is party are the Agreement to Facilitate and Develop Trade among Arab States (known as the "Taysir") and the Greater Arab Free Trade Area (GAFTA).

The Taysir agreement

The Taysir, signed in 1981, liberalises trade in selected goods between contracting Arab countries. It specifically exempts certain goods from customs duties, taxes, and non-tariff barriers that may apply to non-Arab contracting parties. These goods are agricultural and animal products, semi-finished manufacturing input goods approved by the Arab Economic Council (AEC), goods produced under joint projects within the framework of the Arab League or Arab organisations working within its scope, and AEC-approved industrial goods.

The Taysir also phases out duties, taxes and restrictions on some other goods from Arab countries according to a step-by-step schedule of reduced rates, set out in AEC-approved lists, and culminating in exemption. Any contracting party may, however, keep or introduce duties and quantitative or administrative restrictions specific to its local industry requirements for a limited period of time.

Under the terms of the Taysir, contracting parties may give additional preference to other Arab countries within the framework of bilateral or multilateral agreements whether or not those countries are signatories to the Taysir. They must, however, give preference to Arab goods in public procurement deals. They may also negotiate and implement, through decisions adopted by the AEC, minimum common customs duties and taxes on products imported from non-Arab countries if such goods are competitive or can be substituted for goods of Arab origin. Goods from non-Taysir contracting parties may be imported, however, if those from contracting parties do not meet local requirements. A contracting party may not re-export goods imported under Taysir terms without the express approval of the initial exporter.

GAFTA

The Greater Arab Free Trade Area came into force on 1 January 2005 under the terms of the GAFTA Agreement of February 1997. The agreement launched an executive programme designed to establish a free trade zone by 2007 through an annual 10% reduction in customs duties and the lowering of trade barriers. At its 69th meeting in Cairo in February 2002, the Arab Economic and Social Council decided to speed things up. It brought the 2007 deadline forward to 2005 with the ultimate aim of full tariff exemption by 2010 for all GAFTA members.

GAFTA boasts 17 members and is managed by the Council of Ministers of member countries and a secretariat under the auspices of the economics department of the Arab League Secretariat.

The key features and practices of GAFTA may be summarised as follows:

- Goods covered by the programme should be treated like national goods.
- Arab goods should be treated in compliance with the programme's rules of origin, whereby at least 40% of the total cost of a product must be domestically originated in order to qualify for zero tariffs.
- Tariff-like provisions should be treated as actual tariffs.
- International standards (safeguards, subsidies, etc.) should be complied with.
- No Arab goods traded within the program should be subject to non-tariff barriers (NTB), although some goods supplied by contracting parties may not be imported by others for religious, health, environmental or national security reasons. A reciprocity principle for unjustified NTBs operates.
- Special treatment is awarded to Arab countries classified as underdeveloped by the UN, plus the Palestinian Authority.

A unique feature of the executive programme that instituted GAFTA was that the private sector helped to monitor its implementation. The Union of Arab Chambers of Commerce was tasked with preparing a half-yearly report on the difficulties encountered by traders in their dealings with the customs administration and regulatory agencies of individual member countries. Designed to enhance GAFTA's transparency, this arrangement recognised that the private sector has a role to play in GAFTA

Trade in services agreements

According to governmental sources, Iraq is signatory to 175 bilateral trade in services agreements with 81 countries and 35 multilateral agreements (see Annex 2.1). They contain general provisions to improve and increase co-operation in services trading. Iraq is also party to 350 sector-specific bilateral agreements covering numerous sectors[8] with many countries.[9]

Prevention of double taxation treaties

Iraq is a signatory to 13 bilateral and multilateral agreements on the prevention of double taxation and fiscal evasion. Double taxation treaties are designed to offset taxes paid in one country against those paid in another country in order to avoid paying taxes twice.

Table 2.2. **Examples of double taxation and tax evasion bilateral agreements**

	Type	Ratified
Czech Republic	Tax exemption	20 March 1978 (no longer in effect)
Egypt	Avoidance of double taxation	2 December 1968
Italy	Avoidance of double taxation	2 July 1978
Jordan	Income tax exemption	22 August 1977
Russian Federation	Tax exemption	22 December 1975 (no longer in effect)
Sudan	Avoidance of double taxation	16 September 2002
Tunisia	Avoidance of double taxation	10 December 2001
Yemen	Avoidance of double taxation	22 July 2002

Iraq's WTO accession

Background

Iraq launched the accession process to the WTO in September 2004, and a Working Party to examine its application was established at the General Council meeting of 13 December 2004. Iraq submitted a Memorandum on the Foreign Trade Regime in September 2005. The Working Party met for a second time in April 2008 to continue the examination of Iraq's foreign trade regime. A third meeting was conducted at the end of 2009.

Following its Memorandum on the trade regime, Iraq is preparing its goods offer and services schedules. In addition, Iraq has drafted bills in the following fields to meet its WTO obligations:

- Protection against unfair trade practices.
- Competitiveness.
- Consumer protection.
- Commercial arbitration.
- Customs and customs tariffs.
- Government purchasing.
- Intellectual property.
- Technical barriers to trade.
- Sanitary and phytosanitary measures.

Additional legal reforms include legislation to reorganise insurance (Legislative Order No. 10) and a law (Law No. 17 of 2005) that repeals legislation preventing courts from hearing tax- and trade-related claims against the government.

Investment policy related obligations

As part of its WTO accession duties, Iraq has committed to principles of transparency, non-discrimination, and national treatment.

Iraq's Investment Law is compliant with the WTO Agreement on Trade Related Investment Measures (TRIMs). It institutes no quantitative TRIMS or any prohibited measures like local content requirements (where investors and companies are required to use or buy domestic products), trade balancing (where imports are restricted or tied to export volumes), or foreign exchange balancing (where a company's imports are tied to the value of its exports in order to sustain net foreign exchange earnings).

A caveat is that the Investment Law's implementing regulations have not been finalised and it cannot be assumed that they will be consistent with the TRIMs Agreement. However, given the legal reforms that Iraq is undertaking, it is very likely that the implementing regulations will meet the requirement of the TRIMS Agreement and WTO agreements in general.

Iraq's Investment Law provides for national treatment, except in certain sectors and in land ownership rights.[10] In terms of sectors, the Investment Law does not apply to banking, insurance and oil and gas. These sectors are covered under separate laws.

Customs and Standards

Iraq is reforming its customs laws and also plans to enact and implement a harmonised tariff code system, consistent and compliant with the WCO. The draft customs

laws are designed to facilitate trade and have enforcement provisions that include protecting intellectual property rights at the border.

Prior to 2003, Iraq had a fairly comprehensive system of standards and technical regulations for industrial and agricultural goods. Since 2003, due in large part to security constraints and the loss of infrastructure, its ability to enforce standards has been curtailed to the point of non-existence.

In further meeting its WTO future obligations, Iraq is undertaking reforms on standards, technical regulations, and conformity assessment. Iraq's two draft laws on technical barriers to trade and on sanitary and phytosanitary measures are reportedly compliant with the relevant WTO agreements. Both laws stipulate the following points:

- The establishment of enquiry points where WTO member countries can obtain information on laws and regulations.
- The adoption of international regulations when necessary.
- Compliance with WTO rules of transparency, which include informing the WTO of changes to policies and laws that may affect trade, allowing WTO members time to respond, and giving their comments due attention.
- The implementation of the principle and agreements of mutual recognition.

Intellectual property

Iraq's draft intellectual property law is also reportedly compliant with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and offers broad protection for intellectual property holders, ranging from trademark to copyright and patent protection that encompasses industrial designs and plant varieties. Iraq is a member of the following conventions relating to intellectual property:

- Paris Convention for the Protection of Industrial Property (1967, ratified by Law No. 212 of 1975);
- World Intellectual Property Organisation (WIPO) Convention (ratified by Law No. 212 of 1975). Iraq became a member of the WIPO in January 1976;
- Arab Agreement for the Protection of Copyrights (ratified by Law No. 41 of 1985);
- Arab Intellectual Property Rights Treaty (Law No. 41 of 1985).

Iraq's Investment Law benchmarked against MENA practices

To restate a point made in the introduction to this chapter, Iraq's investment regime was restrictive prior to April 2003. It allowed only Iraqis or citizens from Arab countries to form companies or act as commercial agents for foreign companies operating in the country; although branch offices of foreign companies could be opened, they were subject to strict bureaucratic import, export, and foreign exchange controls. In 2002, Law No. 62 on Arab investments did provide tax incentives for investments, guarantees against nationalisation and expropriation, repatriation of profits and capital, and free import and export of goods. They were, however, meant only for Arab investors.

Iraq's reform efforts aimed at attracting more FDI and liberalising trade began with the enactment of orders and regulations under the CPA from 2003.[11] Many are still in place and have served as catalysts for the 2006 Investment Law which afforded foreign investors increased national treatment and guarantees, simplified business formalities, and removed some of the burdensome licensing and quantitative restrictions. Iraq also

adopted the General Agreement on Tariffs and Trade (GATT) valuation code. The CPA Orders listed below illustrate the direction in which Iraq is striving to go:

- Order No. 38, which introduced a 5% reconstruction levy on all non-exempted goods entering Iraq.[12]
- Order No. 39, which liberalised foreign investment and repealed all previous laws.[13]
- Order No. 54, which suspended all customs tariffs, duties and import taxes on goods entering Iraq, thereby putting an end to the preferential tariff treatment accorded under many of Iraq's bilateral and multilateral trade and economic agreements. Exporters had been entitled to claim back 85% of duties on their exports. As they incur the non-refundable reconstruction levy they now lose out.
- Order No. 64 (Amendment to Company Law No. 21 of 1997), which liberalised Iraq's corporate law by eliminating restrictive barriers to forming companies. The reform allowed foreign shareholders, provided greater flexibility for private companies with regard to share ownership and Board composition, and allowed mixed companies to become private companies through sales of government shares.
- Order Nos. 80, 81, and 83, which amended Iraq's intellectual property laws, covering trademarks, patents, industrial design, and copyrights, to offer greater protection.
- Order No. 94 (2004), which enabled wholly foreign-owned private sector banks to set up business in Iraq and required that branches and domestic subsidiaries of foreign banks be given national treatment (unless otherwise stated in the Order).

However, the most important move to liberalise investment since 2003 came in 2006 with the promulgation of the Investment Law (see below and also Chapter 1 of this publication).

MENA regional trends

Since 2000, new-generation laws to liberalise investment have swept the MENA region, with countries like Qatar (2000), Yemen (2002), Saudi Arabia (2000), Algeria (2001), and Kuwait (2003) all revising their investment laws. Egypt passed a substantially revised law in 2005, and a new Syrian investment law entered into force in 2007. Tunisia, the United Arab Emirates (UAE), and Oman have followed suit. Jordan's revised investment law is pending parliamentary approval, while emerging international good practice on the matter has prompted other countries to reconsider their investment regimes. Finally, some countries, such as Bahrain, do not regulate FDI through special legislation, but deal with foreign investment regulation issues as part of their commercial law.

Iraq's Investment Law establishes a sound compromise between market liberalisation and the general provisions of international public law whereby states are sovereign in determining the entry and length of presence of foreigners – which includes foreign investors. In the global marketplace, however, countries compete to attract high value-added foreign investment as a key development tool for their economies. Iraq benefits from the fact that the 2006 Investment Law opens up all economic sectors (except banking, insurance and oil, governed by different legislation) to foreign or domestic investors. Given that a majority of Iraqi enterprises are still state-owned, forms of corporatisation, privatisation and public-private partnerships are needed so that the theoretical openness stipulated in the Investment Law can actually happen in the real economy.

Investors look for transparency and predictability, particularly when investing in countries with regulatory traditions different from their own and where there are no, or few, fully modernised institutions and enforcement mechanisms. A state-of-the-art investment law can be one among many other indicators attesting that the investment climate in a given country is transparent and predictable in matters like regulation of entry, investor guarantees, incentive systems, and procedural and legal recourse. Best practice in domestic investment laws, together with binding international investment instruments – *e.g.,* BITs, WTO obligations, investment chapters of free trade agreements (FTAs), and the OECD Declaration on International Investment and Multinational Enterprise – can reassure investors that basic standards of property rights and administrative treatment are in line with international standards. In this respect, the key themes of most investment laws are:

- Entry regulations with negative lists itemising the exceptions to national treatment.
- Screening and approval requirements for foreign investments.
- Guarantees for investors that they will not be expropriated and that they will enjoy national treatment and freedom to transfer funds.
- Regulatory, fiscal, and financial investment incentives.
- Institutional provisions regarding investment promotion agencies (IPAs) and/or high-level investment commissions.

Many new-generation investment laws in MENA countries hold the middle ground between restricted entry and national treatment of investors; unrestricted admission and varying degrees of entry regulation; and investment encouragement through incentive systems and institutional and procedural arrangements for promoting investment.

The investment regimes of selected MENA countries are discussed in more detail in Annex 2.A1.

Benchmarking Iraq's Investment Law

Iraq's Investment Law shares many of the components of the investment laws recently adopted in other countries of the MENA region. On the entry and exit of foreign investors, it establishes a sound compromise between market liberalisation (*i.e.,* competing for high value-added foreign investment as a key development tool) and the general provisions of international public law whereby states are sovereign in determining the entry and length of presence of foreigners – including foreign investors. The law also grants guarantees to investors – for example, against the seizure of their assets or nationalisation of projects and agreeing on a mechanism to resolve investment disputes through arbitration – and offers major incentives in terms of capital repatriation, the right to trade shares and bonds listed on the Iraqi Stock Exchange, and significant exemption from taxes and fees over a renewable period of time. It additionally provides for the introduction of national and regional one-stop shops (OSS) for investors as one way of easing bureaucratic hurdles. With the creation of the NIC and PICs, the Investment Law furthermore provides for solid institutional provisions and screening and approval procedures. The Law conforms to the general trend in MENA countries in using a national treatment approach which extends to foreign and domestic investors alike. Still, other areas and sectors could benefit from further specification of implementation regulations and administrative guidelines. Given that a majority of Iraqi enterprises are still state-owned, forms of corporatisation, privatisation and public-private partnerships are needed so that the theoretical openness stipulated in the Investment Law can actually happen in the real economy.

The following is an overview of the key articles of the Investment Law that are important for international investors' perception of transparency and predictability of the investment climate in Iraq. It should be noted that a prime-ministerial decree on investments subject to NIC jurisdiction (the NIC decree)[14] was issued in March 2009 setting out the main functions and duties of the NIC and outlining its organizational structure. According to NIC officials and the GoI, the decree is to be consolidated with other regulations into one single implementing regulation on investment. Additional amendments have been enacted (on land ownership rights and leasing) or drafted (on PICs) in 2009, but will not be thoroughly analysed here, due to limited access to information on the legislative status and actual implementation.

Scope of application

The scope of application of the Investment Law is determined by:

- The definition of the term "investment"
- A possible de *minimis* rule.

Defining investment is important for determining the scope of Iraq's 2006 Investment Law. As a regulatory tool, the law identifies categories of investment that should benefit from protection and privileges. At the same time, investments which Iraq does not seek to promote under its Investment Law are explicitly excluded.

Broad asset-based definition. Investment laws whose main purpose is to offer investors greater predictability and transparency tend to define investment broadly – capital that crosses borders to acquire control of an enterprise, portfolio investment, etc. This sweeping definition of investment is also referred to as a "broad asset-based approach" and MENA countries' investment laws are often based on it.

Iraq's Investment Law's definitions of investment and capital below are expressed in broad, asset-based terms, which make it consistent with international and regional practice.

Box 2.1. **Investment and capital according to the New Investment Law**

Article 1 states:

"Investment is the use of capital in any economic activity that is beneficial for the country."

Article 21 describes capital as:

Transferred funds to Iraq through banks or other financial Institutions or by any other legal means for the purpose of being invested according to the regulations of the law;

Other non-liquid assets imported or acquired in Iraq using transferred funds to include non-liquid assets related to the project;

Machinery, buildings, transportation tools, furniture, and office supplies needed for the project;

Non-liquid assets to include patents, registered trademarks, technical know-how, and engineering, marketing, and administrative services and what is considered as such;

Profits, returns, reserves resulting from the projects capital invested in the project or if invested in another project covered under the regulation of this law.

Proposal for a *de minimis* rule. The purpose of the Investment Law is to enhance economic development by attracting investors and to foster economic and social development by bringing technical and scientific expertise and developing human resources through the creation of job opportunities for Iraqis and technological transfer. For this purpose, investment incentives are granted if an investor follows the screening and approval procedures laid out by the Law. However, the purpose is not to extend these benefits to Iraq's small businesses. The Law should therefore fix a *de minimis* threshold that bars projects worth less than between USD 5 million and 20 million from the scope of the Investment Law. Article 1 of the NIC Decree specifies that the Law applies to projects whose capital input is at least USD 250,000. This threshold is very low when set against the type of projects contemplated by the GoI. It remains to be seen whether the threshold will be raised when the implementation regulations are issued.

The Jurisdictional Issue of "Strategic Investment". According to Article 1.B of the Investment Law, the NIC specializes in "strategic investments" of a federal nature. The Law does not provide clarification as to what qualifies as strategic investment. Article 7.A states that the NIC's mandate does not encompass projects whose capital is less than the minimum amount determined by the national or regional Councils of Ministers. The Law, however, clearly states in Article 7.B that for a project of a value exceeding USD 250 million, the NIC must obtain the approval of the Council of Ministers before granting the investment license.

The 2006 draft of the implementing regulations (see box below) supplies both a threshold and a definition of strategic investment. A project is considered "strategic" if it invests more than a certain amount, is located in certain geographical areas, or delivers a certain technological or economic input. Job creation could also be a criterion.

Box 2.2. **Strategic Investment According to the 2006 Draft of the Implementing Regulation**

"*a)* An investment over USD 20 million in governorates and over USD 50 million in regions; or

b) An investment which covers more than one governorate/region; or

c) An investment which fills a technological gap in the national investment plan; or

d) An investment which provides specifically needed processes and uses local (not imported) resources but does not discriminate between foreign and domestic producers (for WTO accession purposes); or

e) An export oriented investment project that diversifies Iraq's highly concentrated economy.

The selection of strategic investments must be reviewed and if necessary modified by the Board of Directors of the Commission annually in order to remain current and to avoid conflict with WTO accession requirements."

The NIC Decree of 2009 takes a different tack from the 2006 draft implementing regulation. Although it requires projects to invest *deminimis* amounts of capital, it makes the sector the decisive factor in determining the strategic nature of an investment. Sectors that the NIC Decree designates as strategic range from infrastructure and extraction of

Box 2.3. **What Constitutes a Strategic Investment According to the 2009 NIC Decree**

Infrastructure related projects with capital of not less than USD 50 million or the equivalent in Iraqi dinars;

Projects which are undertaken in a joint manner between more than one region or a governorate not organized in a region;

Projects related to the extraction of natural resources without prejudice to the provisions of Article 29 of the Investment Law;

Projects which are established pursuant to treaties to which Iraq is party;

Industrial, metallurgical, petrochemical, and pharmaceutical projects, and different kinds of tire production projects provided that the capital investment requirements of these projects is no less than USD 50 million or the equivalent in Iraqi dinars;

Projects to develop historical areas;

Transportation projects such as roads, ports, airports, and railways provided that their capital is not less than USD 30 million or the equivalent in Iraqi dinars;

Electricity projects with production capacity not less than 30 mega Watt;

Dams and barrages and all irrigation projects which cover at least 20 thousand denim of irrigated land;

Communications related projects;

Projects with a capital not less than USD 1 Billion or the equivalent of Iraqi dinars, or

Any other project that is considered by the Council of Ministers to be strategic and of a federal nature.

natural resources to metallurgy, petrochemical and pharmaceutical industries, electricity, dams, irrigation, and communication.

The NIC's sector-based approach is judicious, but nevertheless requires considerable clarification for the purposes of transparency. The implementing regulations should therefore set out detailed selection criteria for strategic investments to make project selection a transparent procedure.

Regarding demarcation between the NIC and the PICs, the 2008 MENA-OECD proposal for an implementing regulation makes the following recommendations:

- The NIC should have sole jurisdiction to receive applications and grant or refuse licences for projects which are strategic or relate to matters within the competence of the GoI under Articles 106 and 107 of the Iraqi Constitution. Strategic projects relate to the defence of Iraq; airports or seaports; waterways, railways, or major highways located in more than one province; or having a value above USD 50 million.
- If a project is within the competence of both the federal government and provincial or regional authorities under Article 110 of the Iraqi Constitution, then either the NIC or the competent PIC should deal with the investment projects. They should, however, grant or refuse a licence for the project jointly.
- If a project is within the competence of two or more regions or provinces under Article 111 of the Constitution, the commission responsible for the area hosting the greatest share of the project should receive the application and, jointly with other

investment commissions concerned, grant or refuse the licenses for the investment project.

- In the case of a project that falls within two or more jurisdictions, a jurisdiction which hosts less than 5% of the value of a project or a share of the project valued at less than USD 1 million (or whichever is less) should not be party to the licensing decision.

The Investment Law does not explicitly state how disputes over jurisdiction between the NIC and a PIC are to be resolved. It only refers to disagreement between the NIC and other relevant entities (other than regional/provincial commissions) on the granting of licenses (Article 20.3). The same rules should apply to the relationship between the NIC and PICs: the dispute should be brought before the Prime Minister for settlement.

Regulation of entry under Iraq's Investment Law

Sovereign states regulate the entry of investors through screening and approval procedures that apply either to investment projects regardless of sector or only to sectors considered as sensitive or strategic. The transparency and predictability of a given country's procedures send messages to potential investors about its investment climate.

Very few OECD countries have compulsory screening and approval procedures, while non-OECD members tend to use them more widely. They are usually case-by-case reviews of potential foreign investment projects by a specialised government agency in the host country – often the IPA, a special investment committee, or a ministry. Traditionally, when such a body has authority over screening and approval, it wields wide discretionary powers.

The investment laws in many MENA countries have simplified investment screening and approval procedures. Nevertheless, special FDI screening remains in place in a number of states. In some of them, the motivation is ultimately to control the sources and nature of incoming investment flows. Other countries, including Egypt and Jordan, have a different motive, which is to decide on whether to grant preferential treatment to foreign investors.

Screening foreign investment inflows should, in fact, be restricted to sensitive sectors. If MENA countries wish to keep such procedures, they should consider offering investors rights of judicial review against decisions by the review agency. A further transparency-enhancing measure should be to set out clear guidelines to improve the transparency of the decision-making process and the predictability of its result. Transparency and simplicity would also gain from including and clearly stating all foreign investor screening procedures in general investment regulations.

Positive and Negative Lists

In entry regulations, MENA countries use two standard ways of informing investors which sectors are open to them. Positive lists designate only those sectors in which they may invest,[15] while the negative list approach allows them into all sectors except those where it is explicitly stated otherwise.[16]

The Iraqi Investment Law practices a negative list approach. Article 29 states:

All investment areas are subject to this law except:

- Investment in the areas of oil and gas exploration
- Investments in the banking and insurance sectors.

Good practice in entry regulations

A good practice approach distilled from OECD and MENA countries' investment laws and regulations could be to draw up a negative list of sectors excluded from foreign investment or subject to special screening and approval procedures. Any screening and approval procedures (applied transparently in accordance with clear guidelines) would then serve to assess a project's compliance with the negative list or with clearly defined considerations of national interest. They would also be used to determine whether to grant an investor regulatory incentives and/or to set out performance requirements in line with international standards.

Investors should have a right of appeal against decisions. The duty of the host country to conduct judicial reviews would further contribute to making its procedures equitable and transparent and to enforcing guidelines that limit discretionary powers.

Articles 6-10 of the MENA-OECD proposal for implementing regulations contain clauses relating to the application process, forms and fees, application assessment, and criteria for granting licenses that should be used for fair, logical, transparent and modern screening procedures (see Annex 2.3).

Investor guarantees

Expropriation

Private investors, especially in long-term projects, are prone to the risk that host country governments change domestic legislation and harm their investment. Although large-scale nationalisations of foreign-owned industries mainly happened in the 1970s, expropriation can still occur. Investors may be directly expropriated or affected indirectly by governmental measures that do not specifically target them.

Guarantees against expropriation are explicitly mentioned in most MENA countries' investment laws. Moreover, international investment agreements to which MENA countries are parties provide guarantees against expropriation. These tend to abide by international legal standards. For an expropriation to be lawful, it should be carried out for public purpose, without discrimination, under due process of law and against payment of "prompt, adequate and effective compensation".[17]

The taking of foreign private assets by host governments raises issues for foreign investors. Accordingly, following the standards of international public economic law, expropriation clauses in investment laws are designed to protect foreign investors by providing them with compensation that the host state should grant when interfering with or confiscating their property rights.

The expropriation of foreign investors' property can take the following forms:

- Nationalisation, where a state takes control of private property in a sector of industry, usually as part of its economic policy.
- Direct expropriation, where a government directly takes private property under the terms of a legislative or administrative act.
- Indirect expropriation, where interference has the effect of depriving the owner, in whole or in part, of the use or the "reasonably to be expected benefits" of its property.

Indirect expropriation

The Iraqi Investment Law does not provide for the whole range of expropriation categories described above. It does not, for example, refer to such indirect expropriations as creeping expropriation. In fact, it affords foreign investors only limited protection and no guarantee against indirect expropriation.

There has been worldwide concern over this issue of indirect expropriation, highlighted by international arbitration cases involving foreign investors. International investment instruments,[18] model bilateral investment treaties,[19] most ratified BITs and some MENA investment laws[20] do provide protection against indirect expropriation. Iraq's law does not. Article 12.3 states that it guarantees the investor that the Iraqi state will not "confiscate [a] project or nationalise it wholly or partly except if there is a final court order to that effect". The absence of specific reference to indirect expropriation – and protection against it – could be rectified in an implementing regulation.

Compensation

Under international law standards, no expropriation of any kind may be carried out without fair, immediate, and adequate compensation from public authorities. Compensation is granted on a non-discriminatory basis in an exchangeable currency, and transfer back to the investor's home country is free of charge.

Most MENA countries' investment laws include a provision granting investors the right to prompt and adequate compensation.[21] Again, the Iraqi Investment Law does not. The Iraqi Constitution, however, does – albeit for Iraqis only (Article 23.2 see below). An Investment Law implementing regulation could extend such provisions to foreign investors.

Public interest condition

Expropriation can be justified only in the public interest under international law. The Iraqi Investment Law does not mention this condition explicitly, although the Iraqi Constitution does state the public interest requirement for the expropriation of Iraqi nationals.[22]

Iraq's neighbouring countries have written the public interest requirement into their investment laws. The Qatari Law, for example, states that "foreign investments shall not be subject, either directly or indirectly, to expropriation or any measure with similar effect, unless it is done in the public interest". Syria and Kuwait do likewise.

Free transfer of funds

MENA countries vary as to the amounts of capital they allow foreign investors to freely repatriate. Thirteen[23] report that they place no restrictions, whilst Algeria, Morocco, Syria, and Yemen regulate to varying degrees. There is no publicly available information for the Palestinian Authority.

Article 11.1 of Iraq's Investment Law states: "[The investor] can expatriate the capital it entered into Iraq and its revenues according to the regulations of the law, and the guidelines of the Central Bank of Iraq, in a negotiable currency and only after the investor has settled all its obligations to the Government of Iraq and all other entities". Foreigners also have the right to transfer their salaries and compensations outside Iraq after paying taxes and debts (Article 12.4).

National treatment provisions

MENA countries have been steadily lowering barriers against partly or wholly foreign-owned enterprises setting up and doing business within their borders. They have relaxed restrictions on foreign ownership of enterprises, land and real estate, and on foreigners buying shares in their stock markets. In some MENA countries, foreigners may participate in the privatisation of state-owned enterprises.

In Iraq, Article 10 of the 2006 Investment Law states that "the investor, irrespective of his/her citizenship, shall enjoy all privileges, facilitations and guarantees and shall be subject to the responsibilities stated in the Law". Article 15.3, however, makes the duration of a project's tax exemption (to a maximum of 15 years) conditional to a majority Iraqi ownership, while Article 9.8 seeks to encourage Iraqi investors (residing in Iraq) with loans and financial facilities in coordination with the Ministry of Finance and with the assistance of banking institutions if they employ a number of jobless Iraqis "commensurate with the size of the given loan". Article 22 states that foreign investors may enjoy additional privileges in accordance with international agreements (bilateral or multilateral).

Dispute settlement mechanisms

The availability of dispute settlement mechanisms is vital for attracting foreign investment. Investors need to know how they can settle their potential disputes with the host country, if it will be resolved fairly, speedily, and efficiently and if they can bring their disputes to international arbitration.

The most commonly used mechanisms for settling international investment disputes – ICSID, the UNCITRAL arbitration rules, the International Chamber of Commerce (ICC), the Stockholm Chamber of Commerce – have borrowed extensively from commercial arbitration, even though investor-State disputes often raise public interest issues. Foreign investors tend to prefer more informal, flexible, inexpensive approaches better-suited to the demands of business.

International arbitration

Article 27 of the Iraqi Investment Law is dedicated to dispute settlement. In substance, it gives Iraqi courts jurisdiction over disputes arising under the Investment Law, but also makes reference to arbitration, though in a limited way. It stipulates that Parties may resort to arbitration when stipulated in the investment contract or agreement. In other words, Iraqi courts have wide jurisdiction over disputes arising under the Investment Law and over those which are contract-related, except when foreign investors and the GoI have contractually agreed otherwise.

However, Article 22 stipulates that the foreign investor shall enjoy additional privileges according to international agreements between Iraq and its home country or multilateral agreements Iraq signed. Therefore, if a bilateral investment treaty allows for international arbitration for disputes arising between an investor and the State, the foreign investor should be able to use international arbitration mechanisms even if the investment in dispute is not executed under a contract.

Some MENA investment laws explicitly allow for international arbitration. The Qatar Investment Law stipulates in Article 11 that "[a]greement may be reached on the settlement of any dispute between the foreign investor and others by means of domestic or international arbitration panels". The Jordanian example prioritizes amicable settlement

between the State and private parties, while allowing both to take their case to (international) arbitration should amicable procedures fail.

Enforcement

Iraq's Civil Code and Civil Procedures Code do not include provisions for enforcing foreign arbitration awards.[24] However, awards by arbitral tribunals may be enforced if the country in question is party to a bilateral agreement with Iraq that stipulates that awards are binding.

Iraq is a signatory to the Arab League Convention on Commercial Arbitration (1987) and the Riyadh Convention on Judicial Co-operation (1983). But, unlike most MENA countries, it has not signed the most important legal instrument on the issue, the 1958 UN New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (commonly called the New York Convention).[25] Iraq is also not a member of the International Centre for the Settlement of International Disputes Convention (ICSID).[26]

Iraq is presently considering joining the New York Convention and ICSID, but a greater understanding of the implications of ratifying these two conventions is necessary.

Privileges and incentives

The use of financial and other incentives to attract foreign investors is not a substitute for pursuing policy measures that create a sound investment environment, for domestic and foreign firms alike. Resorting to incentives *per se* is a second best option[27]. They give preference to foreign investors and are by nature discriminatory, and likely to create subsequent market distortions. Nevertheless, they may prove useful in implementing foreign investment policies.

In the Iraqi context, for instance, there has been a strong case for measures that help diversify the economy. Two objectives have been particularly high on the agenda: drawing large amounts of FDI to feed a depressed economy and moving the Iraqi economy away from its dependence on the oil industry. Under those circumstances, investment incentive policies are justified.

The aim of incentives is to maximize the long-term benefits of foreign corporate presence. In this regard, selection of the right tools for promoting investment entails an element of risk. The cost of the measure (budgetary and opportunity costs, deadweight loss, etc.) must be outweighed by the benefits it triggers.

Incentives pertain to one of three categories: regulatory incentives *(e.g.,* easing environmental and labour regulations); financial incentives *(e.g.,* promoting an area through temporary wage and infrastructure subsidies); or fiscal incentives *(e.g.,* reducing direct corporate taxation, incentives for capital formation).[28] Non-OECD countries, which have limited funds available for financial incentives, tend to prefer the fiscal kind – which are also the least risky. Articles 15 and 17 of the Iraqi Investment Law set out fiscal incentives.

A significant point in Article 15 is that it empowers the NIC to grant tax and fee exemptions to projects which have obtained a license. Article 2.3 of the draft implementing regulation links this provision to areas of development determined by the Council of Ministers.

To achieve their purpose, incentives must be combined with a series of policy measures. In 2006, the MENA-OECD Task Force on Investment Incentives drew up a set of

Box 2.4. **Incentive Provisions in Article 15 of the Iraqi Investment Law**

1. Projects awarded an investment license will enjoy a 10-year tax exemption from the date of actual commercial start up of the project according to the nature of the development zone designated by the council of ministers, based on suggestions of the NIC head according to the degree of economic development of the zone and the nature of the project itself.
2. Based on the national interest and on the nature of the project, its geographic location and employment levels, the Council of Ministers can suggest laws to extend or provide additional exemptions or other incentives in addition to those mentioned in Article 15.1 above.
3. The NIC can proportionately increase the number of years of the project's tax exemption to reach a maximum of 15 years total, if the percentage of Iraqi ownership in the project is more than 50 per cent.

recommendations that fed into the proposals below outlining some keys to incentive efficiency. These recommendations could serve as guidelines for the GoI and help to further strengthen its incentives provisions.

Fiscal transparency and policymaking

All tax and non-tax investment incentive policies should be co-ordinated with one another in a coherent policy framework designed to improve the investment environment.

As incentives are just one policy in the GoI's investment promotion arsenal, they should be co-ordinated with others – macro-economic policies in trade, tourism, and industry, for example, and governance reforms.

All investment incentives should be set in an overall strategy jointly developed by ministries whose mandates cover incentives. This will avoid the problem of competing or contradictory policy aims and legal inconsistencies. Iraq should consider ensuring that a budgetary ceiling is set on the amount of incentives that can be granted each year according to agreed criteria that should satisfy the goals of the investment project. In this way, unintended government spending or revenue loss would be prevented.

Investment incentive policies should be transparent in their provision and delivery, and there must be a sustained, constant effort to achieve greater transparency. The specific goals and expected benefits of each incentive scheme should be feasible, clear, and publicly disclosed in order to properly evaluate each scheme. Information about each scheme should be published and posted on relevant governmental websites. It should include comprehensive descriptions of each scheme, procedures and criteria for obtaining incentives, and the estimated cost of each scheme, where relevant information is available to support reliable estimates. Where practical, case studies showing the benefits and costs of specific schemes should be developed and published. Estimates of future costs of incentives and costs incurred by existing incentives should be made in order to inform policymakers and provide them with recommendations, and to support incentive evaluation capacity-building.

Incentives are, to the greatest extent possible, to be rule-based and provided equally and fairly among all investors. In practice, this means that administrative discretion in the

awarding of incentives should be very limited and the criteria for exercising discretion publicly disclosed. Incentives prone to abuse will require more oversight.

Expenditure reporting frameworks and procedures should be developed to publicly report the cost of investment incentives where the requisite information is available. Annual tax and non-tax expenditure reporting of the cost of incentives will help ensure proper management of public funds and reduce the scope for corruption.

Designing the incentives framework

Investment incentives should be designed to maximise their effectiveness, efficiency, and benefits and to minimise their costs. To that end policymakers should:

- Choose the types of incentives most closely linked to the activity which they seek to promote. When incentives are motivated by a need to compensate for weaknesses in the enabling environment, a more efficient outcome can be secured by tackling these shortcomings directly. Both considerations would seem to favour targeted financial incentives over general fiscal ones. However, this needs to be balanced against budgetary constraints.
- Avoid stacking incentives. Offering multiple incentives (*i.e.,* by different ministries) tends to be counterproductive, as it increases not only programme costs but complexity, too, and contributes to compliance and administrative costs. It also leads to unintended patterns of relief and subsidies across different investors and asset types, leading to inefficiencies in resource allocation. Furthermore, offering myriad incentives can create the impression that the country is compensating for a lack of a proper investment-enabling environment.
- Choose incentives that can be adequately managed by programme administrators. When considering alternative incentive mechanisms, an important requirement is a workable set of rules and regulations understandable not just to investors, but also to those responsible for the administration of the incentive. The internal capacity of relevant ministries should be further developed to strengthen tools and techniques to evaluate incentives.
- The GoI should consider eliminating or phasing out "grandfathering"[29] and tax holidays, which are particularly prone to tax-planning abuse and revenue loss. For existing incentives, a transparent approval and monitoring process should be put in place to detect potential abuse, and firms should be required to file annual profit statements. To that end, the notification requirements of Article 14 of the Iraq Investment Law are useful. Existing holidays must also be coupled with strong and transparent anti-abuse rules. Specific basic protection rules include robust transfer pricing rules, thin capitalisation, and controlled foreign corporation rules. Countries are also encouraged to utilise the exchange of information procedures in their double taxation treaties (Article 26 of the OECD Model Tax Convention).

Special zones

Special economic and duty free zones, where used, must be carefully designed. They can be an efficient way to develop an export industry, minimise the costs of doing business

and simplify administrative procedures in selected parts of a country. To ensure that zones achieve their objectives, authorities need to take into account the following considerations:

- Discrimination between companies on the basis of nationality and/or sectors should generally be avoided. Access to zones should be based on objective criteria.
- Adequate policies should be designed to encourage linkages between enterprises located in special economic zones and the rest of the host country. The ultimate goal should be to widen the economic achievements of the zones to the whole economy.
- Performance requirements, while sometimes justified by the presence of incentives and other subsidies, need to be carefully assessed. Performance requirements are often second-best to rethinking the generosity of other schemes.
- Where a specific regulatory environment is created for the zone, care must be taken to ensure that core labour and reporting standards, together with other recognised international standards, are not violated.

Evaluating and monitoring incentives

It is critical to ensure the ability of the administering body to effectively monitor incentives. One frequent complaint is that government agencies responsible for incentives are at a disadvantage *vis-à-vis* better staffed and resourced multinational enterprises. They also often lack the analytical ability to conduct in-depth impact and cost-benefit analysis of the schemes they administer. Sufficient resources must be allocated to administration of the incentives to ensure they are effectively monitored. Special macro-economic models should be established for evaluating the effectiveness of incentives contained in the annual state budget, particularly those related to tax incentives.

The costs and benefits of current and proposed investment incentives should be assessed. Iraq should work towards developing frameworks and capacities to analyse the costs and benefits of existing and proposed incentives. Such cost-benefit assessments would require:

- specifying and, wherever possible, quantifying the hoped-for direct and indirect benefits of incentive schemes;
- documenting the effectiveness of incentives in achieving authorities' stated policy goals (*i.e.* additional investment, jobs, and exports);
- accounting for the estimated direct and indirect costs of the incentive (cash or cash-equivalent outlay, revenue foregone and administrative costs);
- taking into account broader-based efficiency considerations. In particular, even when a scheme is found to be effective, in that its benefits exceed its costs, authorities need to assess whether even better results could be obtained at a similar cost.

All investment incentives should have "sunset clauses".[30] To facilitate monitoring and evaluation of incentives, as well as to curb unintended abuse, investment incentives should be introduced for a fixed period and be renewed only after evaluation and enactment of new legislation. For those incentives particularly susceptible to abuse, such as tax holidays, the fixed period should be no longer than five years, beginning in the year of production.

Policy forum and capacity building

Strengthening capacity to analyse investment incentives should be a priority. In addition to addressing the concerns about administrative ability raised above, the GoI should further consider strengthening its analytical capacities. There is a need to develop – through national and regional programmes and forums – analytical frameworks, databases, and the technical expertise of officials working in the incentive policy area. Specific topics could include:

- empirical and case study analyses of linkages between incentives and investment;
- alternative incentive types and designs;
- databases for incentive analysis and simulation models to estimate the revenue cost of tax incentives;
- expenditure reporting, alternative benchmark choices and reporting practices;
- guidelines for monitoring incentives;
- anti-abuse rules;
- double taxation treaty negotiation;
- exchange of information.

Next steps

Following the first project phase on investment policies (2007-2008), MENA-OECD continues to consult the GoI and stakeholders on implementing regulations. A specific output will include enabling the Investment Law to take effect by working with the GoI, which includes the NIC and provincial authorities, in order to ensure that regulations implementing the Law are clear, transparent, readily accessible, and not unnecessarily burdensome on investors. MENA-OECD will continue working with all stakeholders in Iraq on strengthening the implementing regulations of the Law.

MENA-OECD will use OECD tools and expertise to clarify key concepts of the Investment Law implementing regulations (*i.e.*, transparency in application procedures and jurisdictional issues). This should help to streamline legislative tools to be more conducive to investment.

As mentioned above, Iraq is a signatory to several regional conventions, but has not signed the New York Convention and ICSID. Among the multiple activities planned in the second phase of the Iraq Project, MENA-OECD aims to enhance the GoI's understanding of these conventions, further analyse the Iraqi draft arbitration law and foster exchange of experiences and practices with countries in the region. The NIC will also benefit from capacity-building activities to enhance its investment promotion strategy and implementation and foster capacities to negotiate international investment agreements.

Notes

1. The Coalition Provisional Authority (CPA) issued many laws and regulations that framed these legal and regulatory reforms.
2. Law No. 29 of 2007.
3. Law No. 35 of 2007.
4. An amendment to the Investment Law was approved by the Council of Representatives in October 2009. It allows investors to own lands for housing projects and clarifies leasing procedures.

5. Izdihar, a USAID Growth and Employment Project, provided the GoI with a detailed report on Iraq's status on key international organizations and made recommendations for joining such organizations in December 2005. Iraq's National Development Strategy 2005-2007 notes that effective use of the International Center for Settlement of Disputes (ICSID) is a second pillar in revitalizing Iraq's private sector environment for foreign investors. *Iraq National Development Strategy 2005-2007*, p. 12.
6. The Iraqi Constitution posits that the National Assembly elects a President of State along with two deputies who form the Presidency Council. The Presidency Council appoints the Prime Minister who appoints the Council of Ministers, all of whom must be approved by the Assembly.
7. Most of the information relating to Iraq's pre-2003 bilateral and multilateral agreements was obtained from records made available by the Government of Iraq.
8. Sectors include electricity, tourism, postal services, culture and publications, technical, training and education, telecommunications, transit and transport (air, land and sea transport).
9. Countries include Armenia, Bulgaria, Egypt, Greece, Italy, Iran, Jordan, Lebanon, Russia, Syria, Turkey, United Arab Emirates, United Kingdom and Yemen.
10. An amendment to the Investment Law approved in October 2009 granted foreign investors additional rights in land ownership for housing projects.
11. The CPA enacted about 200 orders, regulations, memoranda and public notices pursuant to its authority under the 1907 Hague Regulations, 1947 Geneva Convention and various UN Resolutions, *www.iraqcoalition.org/regulations*.
12. Section 2, CPA Order No. 38. Exceptions for goods include food, medicines, medical equipment, clothing, books, and goods for humanitarian purposes, while exceptions for people include CPA authorities and international organizations.
13. CPA Order No. 39 was revoked by Investment Law No. 13 (2006).
14. Prime Ministerial Decree No. 2/2009 published in the Iraqi Official Gazette on 2 March, 2009.
15. For example, Libya uses a positive list approach in its Investment Law, Article 8: "Investment shall be allowed in the following fields: Industry, Health, Tourism, Services, Agriculture. Any other field specified by a decision of the General People's Committee upon submission of the Secretary."
16. For example, Saudi Arabia adopts a negative list approach in its Investment Law, Article 2: "Without prejudice to the requirements of regulations and agreements the Authority shall issue a license for a Foreign Capital Investment in any investment activity in the Kingdom, whether permanent or temporary." In Article 3 the Saudi Investment Law states: "The Council shall have the authority to issue a list of activities excluded from Foreign Investment."
17. See OECD publication on expropriation, *www.oecd.org/dataoecd/22/54/33776546.pdf*.
18. The 1992 World Bank Guidelines Section IV (1) on "Expropriation and Unilateral Alterations or Termination of Contracts", state that: "A state may not expropriate or otherwise take in whole or in part a foreign private investment in its territory, or take measures which have similar effects."

    The 1994 Energy Charter Treaty in its Article 13 provides that: "investments of investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation."

    Article 1110 of NAFTA states that: "No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment."
19. See for example the US model Bilateral Investment Treaty, Article 6: "Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization […]."
20. See for example the Libyan Investment Law, Article 23: "The project shall not be nationalized, expropriated compulsorily acquired or confiscated or imposing guardianship conservation or freezing thereof or subjected to procedures having the same effect unless by law or judiciary verdict against a prompt, adequate and fair compensation, provided that such procedures shall be taken indiscriminately. Compensation shall be calculated on the basis of fair market value for the project in taking the procedure. The value of compensation is allowed for transfer in transferable currency within a period of one year at exchange rates prevailing at the time of transfer."

21. See Libyan Law Article 23 above mentioned, the Qatar Law, or the Syrian Investment law whose Article 3 requires: "Immediate and just compensation that is equal to the enterprise current value just before appropriation. Payment should be in a convertible currency for foreign capital. With no violation to the provisions of the Public Funds Collection Law No. 341 of 1956, it shall be impermissible to seize the enterprise but via a judicial ruling."

22. Article 23:

    First: Private property is protected. The owner shall have the right to benefit, exploit and dispose of private property within the limits of the law.

    Second: Expropriation is not permissible except for the purposes of public benefit in return for just compensation, and this shall be regulated by law.

    Third:

    A. Every Iraqi shall have the right to own property anywhere in Iraq. No others may possess immovable assets, except as exempted by law.

    B. Ownership of property for the purposes of demographic change is prohibited.

23. Bahrain, Djibouti, Egypt, Jordan, Kuwait, Lebanon, Oman, Qatar, Saudi Arabia, Tunisia and United Arab Emirates, Iraq and Libya.

24. Saleh Majid, Iraq Arbitration Law, 9 August 2007, *www.mondaq.com/article.asp?articleid=45310*.

25. Algeria, Bahrain, Egypt, Iran, Israel, Jordan, Kuwait, Lebanon, Morocco, Oman, Qatar, Saudi Arabia, Syrian Arab Republic and Tunisia have signed the New York Convention.

26. Algeria, Egypt, Jordan, Kuwait, Lebanon, Morocco, Oman, Syria, Tunisia, UAE, and Yemen have signed the ICSID Convention.

27. OECD, Assessing FDI Incentive Policies: a Checklist, 2003, p 10.

28. OECD, Assessing FDI Incentive Policies: a Checklist, 2003, p 19-20.

29. "Grandfathering" concerns providing tax relief made available in the past to investors that previously qualified and accessed such relief.

30. Sunset clauses are provisions requiring the automatic termination of incentives after a specified number of years.

ANNEX 2.A1

Iraqi International Economic Agreements, Investment Law Provisions, and MENA Comparisons

2.1. International economic agreements of the Republic of Iraq

Iraq's Bilateral Trade and Economic Agreements on Goods

	Date of signature/Ratification
Afghanistan	31 August 1987
Albania	30 August 1959
Algeria	13 September 1982
Australia	12 May 1980
Austria	2 June 1975
Bahrain	16 February 1976
Bangladesh	13 October 1974
	20 July 1981
Brazil	2 August 1971
	8 August 1977
Bulgaria	1 September 1986
	3 February 1973
Cape Verde	25 August 1980
Central African Republic	3 June 1972
Chad	13 November 1978
	16 October 1989
China	10 August 1981
	22 June 1998
Congo	18 September 1974
Cuba	4 May 1974
	12 March 1979
Cyprus	4 January 1982
Czech Republic	9 February 1987
Denmark	17 February 1960
Djibouti	25 February 1980
	1 September 1980
Egypt	14 October 1985
	12 January 1986
Finland	12 November 1961
France	14 October 1967
	19 June 1974
Germany	13 October 1973
	14 January 1984
Greece	24 May 1969
	20 September 1976

	Date of signature/Ratification
Guinea	6 December 1976
	28 April 1980
Guyana	14 April 1980
	25 August 1980
Hungary	22 December 1975
	26 December 1977
India	12 March 1973
	7 May 2001
Indonesia	28 December 1981
	6 May 1996
Iran	19 September 1977
Italy	31 July 1967
	28 November 1974
Japan	31 October 1974
Jordan	14 August 1980
Kenya	21 December 1969
Kuwait	24 July 1978
Lebanon	11 September 2000
Libyan Arab Jamahiriya	29 October 1979
Madagascar	4 February 1980
Malaysia	25 April 1977
Maldives	21 July 1980
Mali	20 May 1965
	14 April 1980
Malta	8 August 1983
	23 October 1989
Mauritania	24 July 1978
	11 February 1980
Morocco	13 October 1980
	28 December 1981
Mozambique	28 January 1980
Myanmar	10 December 2001
Netherlands	6 February 1984
New Zealand	31 May 1982
Niger	15 September 1980
Nigeria	22 August 1977
Norway	17 September 1979
Oman	8 August 1983
Pakistan	19 August 1977
Philippines	11 January 1982
	11 July 1983
Poland	29 September 1975
	10 May 1976
Portugal	26 June 1978
Qatar	21 December 1979
Republic of Korea	18 July 1983
Romania	11 January 1972
	2 August 1982
Russian Federation	16 September 1986
Saudi Arabia	27 February 1984
Senegal	20 July 1981
Singapore	11 January 1982
Slovakia	23 July 2001
Somalia	16 January 1972
	29 July 1974

	Date of signature/Ratification
Spain	8 August 1988
Sri Lanka	7 March 1973
Sudan	14 October 2002
Sweden	14 August 1962
	2 October 1978
Switzerland	9 June 1978
Syrian Arab Republic	16 January 1972
	29 October 2001
Thailand	21 January 1985
The former Yugoslav Republic of Macedonia	10 May 1975
Tunisia	28 May 1990
Turkey	12 April 1976
Uganda	10 November 1975
Ukraine	9 April 2001
	23 April 2001
United Arab Emirates	20 February 1978
United Kingdom of Great Britain and Northern Ireland	19 February 1990
United Republic of Tanzania	4 March 1975
United States of America	8 February 1940
	18 January 1967
Vietnam	1 August 1977
Yemen	17 June 1985
	24 July 1989
Zambia	28 January 1980
Zimbabwe	13 October 1980

Iraq's Multilateral Trade and Economic Agreements

Name of agreement	Date of signature/Ratification
Long-Term Arab Trade Multilateral Agreement	7 January 1980
Arab Joint Fund Agreement of Basic Goods	10 August 1981
Converter of Arab Economic Unity	12 January 1964
Arab Trade Regulation Agreement	13 December 1954
Agreement to Facilitate and Develop Trade Among Arab States (Taysir)	11 January 1982
Greater Arab Free Trade Area (GAFTA)	18 February 1997 (signature)

Multilateral Trade and Economic Agreements in Services

Multilateral agreement	Date of signature/Ratification
Arab Bank for Economic Development	19 February 1975
Arab Gulf Post	3 June 1985
Arab Telecommunication Union	26 April 1982
Arab Civil Aviation	18 February 1965
Commercial ship Trading	12 July 1937
International Monetary Fund	3 August 1959
Increasing Iraqi Participation UN International Development Co-operation	2 October 1977
International Civil Aviation	27 December 1976
	21 February 2000
International Maritime Organization (IMO), (formerly known as the Inter-Governmental Consultative Marine Organization)	11 September 1973

Multilateral agreement	Date of signature/Ratification
Facilitating Marine Transportation	24 July 1978
Marine Communication	14 July 1986
International Agreement for the Safety of Lives in The Seas Signed in Landon	24 July 1978
International Postal	6 May 1959
International Communication Documents	14 July 1986
Commodities Transport	8 March 1969
Passengers and Luggage Transport	16 December 1974
International Real way Transport	14 May 1984
International Tourism Organization	10 February 1975
Electricity Power Transfer	26 March 1935
Auto Passage	26 August 1932
GCC Communication and Postal Co-operation	16 October 1989
GCC Labour Corporation	16 October 1989
GCC Media Corporation	16 October 1989
UN Ships Registration	11 December 1989
Organizing Transit Trade	18 June 1956
Facilitating Transition of Audio-Visual Tools	2 January 1969
The Ratification of Arab Convention to Simplify Transition of Arab Cultural Production	5 February 2001

Iraq's Bilateral Investment Related Agreements

	Date of signature/Ratification
Afghanistan	18 June 1979
Bangladesh	12 May 1980
Cuba	28 December 1981
Guinea	28 April 1980
India	22 March 1982
Iran	17 August 1924
Japan	13 November 1978
Jamaica	19 May 1980
Jordan	4 January 1982
Kuwait	12 September 1977; 20 June 1988
Madagascar	28 January 1980
Mali	18 January 1982
Mauritania	1 September 1980
	1 June 1981
Mozambique	28 January 1980
Nigeria	1 June 1981
Poland	5 December 1969
Republic of Korea	23 October 1978
Romania	15 February 1982; 18 January 1988
Senegal	5 October 1981
Spain	28 June 1971
Sri Lanka	6 September 1976
Syrian Arab Republic	27 April 1974
	23 September 2002
The former Yugoslav Republic of Macedonia	13 October 1980
Tunisia	4 July 1977
Turkey	5 November 1979
Uganda	10 August 1981

	Date of signature/Ratification
United Kingdom of Great Britain and Northern Ireland	30 April 1984 25 February 1985
United Republic of Tanzania	11 February 1980
United States of America	27 October 1964 July 2005 (Trade and Investment Framework Agreement)
Vietnam	31 March 1980
Yemen	6 July 1981; 21 December 1981; 18 January 1982
Zambia	24 August 1981

2.2. Overview of the Iraq Investment Law Provisions

The following table outlines good practices intended to foster a transparent investment environment in MENA and OECD countries. The table outlines key legislative aspects of the investment regime, *e.g.* investor guarantees, positive or negative list approach, approval procedure, rights of access to land. This document presents the key elements of a "new generation" of laws on investment. The OECD documents referred to in this table are accessible through the OECD website *www.oecd.org*.

Item	Description	Good practice MENA/OECD
1. Investor Guarantees	Emerging standards in domestic investment regulations and in international investment agreements[1] refer to the following principles protecting private investors: *a)* Foreign investors should receive pre- and post-establishment national treatment. *b)* Exceptions should be clearly and precisely formulated and periodically reviewed with a view to being phased out. *c)* The treatment of domestic and foreign investments should be fair and equitable[2] and encompass the full protection of property rights, including intellectual property. *d)* High standards of compensation should be provided for direct and indirect expropriation. *e)* Investors should have unrestricted access to effective national and international dispute settlement mechanisms.	
a) National Treatment	In recent decades, barriers to the establishment and operation of partly or wholly foreign-owned enterprises have been steadily lowered in the MENA countries. Restrictions on foreign ownership of enterprises have been relaxed, as have those on foreign ownership of land and real estate and on foreign purchases of shares on local stock markets. In some MENA countries, foreigners may buy into privatised enterprises. The willingness of most MENA countries to commit themselves to protecting foreign investments is demonstrated by the increasing number of bilateral investment treaties signed in recent years as well as protection and guarantee provisions in their investment laws. Nonetheless, certain countries have not yet granted these guarantees to foreign investors in their investment laws.	In Iraq, Article 10 of the Investment Law No. 13 of 2006 states: "The investor, irrespective of his/her citizenship, shall enjoy all privileges, facilitations and guarantees and shall be subject to the responsibilities stated in the law." Article 15 of the Law however stipulates: The National Investment Commission can proportionately increase the number of years for the project's tax exemption to reach a maximum of 15 years total, if the percentage of Iraqi ownership in the project is more than 50%. Article 8.8 also seeks to encourage Iraqi Investors by "providing them with loans and financial facilitations in conjunction with the Ministry of Finance and other financial organizations, provided that the beneficiary Investor shall employ a number of unemployed Iraqis commensurate with the size of the given loan". Article 22 states that foreign investors should enjoy additional privileges in accordance with bilateral and multilateral agreements. See OECD Declaration's National Treatment Instrument[3]

Item	Description	Good practice MENA/OECD
b) Expropriation	The majority of the MENA countries' investment laws include legal guarantees against expropriation. Moreover, international investment agreements concluded by MENA countries (BITs, ICSID subscription) provide for guarantees in the case of expropriation. These agreements tend to preserve the international minimum standard, according to which expropriation is only lawful when it is carried out for a clear public purpose, without discrimination and upon payment of "prompt, adequate and effective compensation".	In Article 12.3 of the Investment Law, Iraqi authorities pledge "not to confiscate the project or nationalize it wholly or partly except if there is a final court order to that effect". Article 4 of the Kuwait-Iraq BIT 1964 states that "neither of the two contracting parties may expropriate the (other party's) investment (…) except in the public interest and in return for a just and immediate compensation". See the OECD publication on expropriation[4]
c) Free Transfer	Generally, MENA countries vary in the degree to which foreign investors may freely repatriate capital. Thirteen of the MENA countries (Bahrain, Djibouti, Egypt, Jordan, Kuwait, Lebanon, Oman, Qatar, Saudi Arabia, Tunisia and United Arab Emirates, Iraq and Libya) report that they allow repatriation of capital without restriction, whilst Algeria, Morocco, Syria and Yemen, operate restrictions of varying depth. No publicly available information with respect to this regulation exists in the Palestinian Authority at the moment.	Article 11 of the Investment Law states that the investor "can repatriate the capital it imported into Iraq and its revenues according to the regulations of the law, and the guidelines of the Central Bank of Iraq, in a negotiable currency and only after the investor has settled all its obligations to Government of Iraq and all other entities". Also: "Employees of the project can transfer their salaries and compensations outside of Iraq according to the law after they settle all obligations towards the Government of Iraq and all other entities" (Art. 12.4).
d) MFN / IIA – most favoured treatment	MFN treatment clauses are found in most international investment agreements. While MFN is a standard of treatment which has been linked by some to the principle of the equality of states, officially an MFN obligation exists only when a treaty clause creates it. In the absence of a treaty obligation (or for that matter, an MFN obligation under national law), nations retain the right to discriminate between foreign nations in their economic affairs. Most investment laws in MENA countries do not contain an MFN clause, but the MENA countries that are members of the WTO are bound to this rule under their WTO commitment. There are nine such countries: Bahrain, Egypt, Kuwait, Mauritania, Morocco, Qatar, Tunisia, Turkey, UAE.	Not mentioned in the Investment Law or in the Kuwait – Iraq BIT.

Item	Description	Good practice MENA/OECD
e) Fair and Equitable Treatment / Dispute Settlement	Private investors, especially in long-term infrastructure projects, are often subject to the risk that future governments of the host country implement changes in the domestic legislation which could negatively affect their investment. Best practices to protect investors from such a risk: *a)* provide fair and equitable standards; *b)* introduce an international arbitration clause in bilateral investment agreements and in investment laws; *c)* introduce a stabilisation clause in project-specific investment agreements. For many MENA countries, the issue of interpretation and disputes between investors and governments falls under international law (see point *[b]* above) as they are members of the International Centre for Settlement of Investment Disputes in the World Bank.	No mention of fair and equitable treatment in the Investment Law. Article 13 only guarantees that no "amendment … shall have any retroactive effect regarding the guarantees, exemptions, and rights recognized" by the law (confirmed by Article 26). Disputes arising between parties subject to the Investment Law shall be subject to Iraqi Law unless Iraqi courts are not competent or do not have jurisdiction. The parties subject to the law may choose their method of resolution of conflict by contract (Article 27.4) If the dispute does not arise from a crime, the parties may agree on the law and the court to be called upon at the time of their dispute (Article 27.2). Unless otherwise stipulated, any dispute arising out of work contracts is subject to Iraqi law. If a dispute results in an interruption of business activity of more than 3 months, the NIC can withdraw the licence or request investors to resolve the dispute within another three months (after which the licence may also be withdrawn if no settlement is reached). Article 2 of the Kuwait-Iraq BIT includes a just and equitable treatment obligation. Article 7 of the Kuwait-Iraq BIT provides for a full arbitration mechanism. In the MENA region, most countries have signed the ICSID Convention for international settlement of investment disputes (Algeria, Egypt, Jordan, Kuwait, Lebanon, Morocco, Oman, Syria, Tunisia, UAE, Yemen). Algeria, Bahrain, Egypt, Iran, Israel, Jordan, Kuwait, Lebanon, Morocco, Oman, Qatar, Saudi Arabia, Syrian Arab Republic and Tunisia, Iran, Qatar have signed the New York Convention on the Recognition and Enforcement of Foreign Arbitral awards. See OECD Publication on fair and equitable treatment standards[5] See OECD publications on dispute settlement[6]
2. Positive List* vs. *Negative List	The majority of MENA countries rely on a positive list approach in that they list the sectors which are open to foreign investment. Certain MENA countries provide a list of FDI restrictions outlined in their investment laws or publicly accessible information sources. A list of remaining restrictions on foreign investment gives investors transparent and easily accessible information. To our knowledge, this transparent approach is currently followed by Bahrain, Jordan, Qatar, Tunisia and Saudi Arabia, or 27% of the 18 Middle Eastern countries participating in the MENA-OECD Investment Programme.	Art 29 states: "All investment areas are subject to (the Law) except Investment in Oil and Gas exploration, and Investment in the banking and insurance sectors."

Item	Description	Good practice MENA/OECD
3. Investment Screening and Approval Procedures	Investment screening and approval procedures have been simplified in many MENA countries' investment laws. However, despite these improvements, special screening procedures for foreign investment remain in place in a number of countries for all or specific sectors. In some countries, the motivation behind special procedures for FDI is to ultimately control the sources and nature of incoming investment flows. Other countries, including Egypt and Jordan, use screening and approval procedures with a different motive: to decide on whether to grant preferential treatment to foreign investors. In general, three scenarios can be detected in the application of FDI screening procedures in the region: in certain countries, all sectors are subject to approval requirements, in others only specific, strategic sectors are subject to such requirements. A third scenario, found in countries such as Jordan, Egypt or Bahrain, is that additional approval procedures are required (as compared with national treatment) when a company wishes to apply for certain incentives under the applicable investment laws. While screening of foreign investment is one of the most widely used techniques for controlling the entry and establishment of foreign investors in host states, it can create unnecessary impediments and should be restricted to sensitive sectors. Often, a specialized investment review agency deals with the screening and approval procedure using a process which tends to be highly discretionary, lacks overall transparency, and denies investors the right to claim effective judicial review. If screening procedures were to remain, MENA countries employing such procedures should consider offering rights of judicial review to investors against decisions by the review agency. A further transparency-enhancing measure would be to issue clear administrative guidelines for the decision-making process so as to increase the predictability of the final decision to the investor. It would be also beneficial both from the perspectives of transparency and simplicity if all investment screening procedures for foreign investors were included in the general investment law or referred to within the body of the latter.	According to Article 19, "the investor will receive the license for investing or starting a project from the [NIC] following a simplified procedure" (Article 19.2). The commission will also deliver "a license and other necessary approvals to benefit from all the advantages and exemptions provided by the commission" (Article 19.1). The NIC can help investors by creating a one-stop shop (OSS) (Article 20.1) or contacting governmental agencies regarding the granting of investment licenses (Article 20.2).

Item	Description	Good practice MENA/OECD
4. Foreign Exchange Regulations	Recent years have seen a substantial liberalization of foreign exchange regimes, and MENA countries have been following the trend. In particular, all the MENA countries except Syria have obtained IMF Article VIII status, indicating that they have removed restrictions on payments and transfers relating to current transactions, including repatriation of profits. Generally, MENA countries vary in the degree to which foreign investors may freely repatriate capital. Thirteen of the MENA countries (amongst them Bahrain, Djibouti, Egypt, Jordan, Kuwait, Lebanon, Oman, Qatar, Saudi Arabia, Tunisia and United Arab Emirates, Iraq and Libya) report that they allow repatriation of capital without restriction, whilst Algeria, Morocco, Syria and Yemen, operate restrictions of varying depth.	Article 11.5. makes "accounts in Iraqi or Foreign currency or both (available) with local or foreign banks inside or outside Iraq" for the purpose of the Licensed project.
5. Access to Land	Ease of acquisition of real estate and land is of major importance for attracting investment, both foreign and domestic. For foreign investors, the process is, however, often more circuitous than for local residents. The number of procedures an investor has to go through in order to acquire real estate varies in each MENA country: for instance, Jordan requires 8 procedures, Algeria 16, while Morocco and the United Arab Emirates require 3. These types of bureaucratic hurdles can ultimately affect the destination of international capital.	Both Iraqi and foreign investors in housing projects are entitled to keep land under the terms agreements with owners of the property, subject to a no-trading clause, and based on guidelines issued by the NIC and approved by the council of ministers. The NIC shall facilitate the allocation of land needed for the housing project, as well as the allocation of housing units after completion (Article 10). For other projects (Article 11), the investor can lease land or benefit from the land in return for investing in it for a period not exceeding 50 years (renewable upon agreement by the NIC). The period during which the investor may benefit is determined by the nature of the project and the benefit for the national economy.
6. Transparency and Access to Information	Most MENA countries have made serious efforts to increase the transparency of their foreign investment regimes. However, for foreign investors in the region it still remains an issue of concern. The transparency of foreign investment regimes varies widely among MENA countries. One reason is the relative lack of information made available to foreign parties by some MENA countries. Indeed, while some countries provided detailed reports in response to a survey on investment restrictions conducted by the IMF, others supplied cursory responses devoid of usable content. Similarly, the range of national government websites providing information of use to foreign investors extends from sophisticated sites containing relevant laws and regulations, details of establishment procedures and other useful content (usually in English or French as well as in Arabic) to sites with virtually no relevant information.	The NIC shall provide "advice, information, and data to investors and issue special manuals" in order to promote Investment. Article 8 of the Implementing Regulation requires the Commission to prepare an Investment Guide describing the process to be followed to obtain all investment licenses. See OECD Framework for Investment Policy Transparency[7]

Item	Description	Good practice MENA/OECD
7. Institutional Setup – Investment Promotion Agencies	Although there is no single model of success when it comes to investment policy and promotion, it has become clear that successful investment promotion requires both an appropriate strategy and sufficient operational means to support it. It is certainly very important that an efficient, transparent institutional framework is set up. In particular, it is essential to set up a responsible organization which must not become another layer of bureaucracy, but a truly efficient facilitator in providing advisory services and fulfilling a pro-investment environment advocacy function. Most countries in the MENA region have created Investment Promotion Agencies (IPAs) with a mandate of: *i)* image building, *ii)* investor servicing and facilitation, *iii)* investment generation and targeting, and *iv)* policy advocacy. The responsibilities and emphasis on the various IPAs vary, depending on the purpose and state of their investment policies and how much promotion is needed in view of the country's fundamental attractiveness and requirements for specific types of investment.	An NIC is set up under Article 4, to define and implement investment strategies and projects of a federal nature exclusively. It shall prepare a national investment policy, list the investment sectors/ opportunities (Article 4.5), and promote investment in the country. Regions, and provinces not part of a region, can create investment commissions having authority in their area to grant investment licences, draw up investment plans, "promote investment and open branches in their area" (Article 5.1). The investment plan shall not contradict the national plan (Article 5.5). Information shall be made available on the investment opportunities and perspectives in commission areas (Article 5.6). The NIC is required to set up one-stop shops where NIC representatives will advise applicants, issue the investment licences and obtain approvals from other governmental agencies (Article 8.3). See MENA-OECD Programme Investment Promotion Guidelines for the MENA region [8]

Item	Description	Good practice MENA/OECD
8. Incentive System	MENA countries use investment incentives to attract FDI. They may grant the right to invest in the whole territory, or only in special economic zones. Direct subsidies or income tax incentives can make the host state more attractive to investors. However, especially when it comes to tax incentives, the effectiveness of the incentive regime should be assessed on a regular basis to make sure that the balance between investor attraction and sustainable tax revenues continues to serve the public interest and that tax regime remains internationally competitive.	According to Chapter 3, an investor will enjoy all the privileges and incentives according to the law (land access, free transfer, non-expropriation, residency in Iraq, employment of non-Iraqi if no Iraqi has the same qualifications and abilities). According to Article 15.1, a project may be exempted by the NIC from "taxes and fees for a period of (10) ten years as of the date of actual commercial start up" in accordance with the areas of development defined by the Council of Ministers at the suggestion of the Commission based on "the degree of economic development of the area and the nature of the investment project itself". The Council of Ministers (Article 15.2) or the NIC (Article 15.3) can extend either the scope or duration of the exemption. If a project is transferred from one area to another (Article 16), it shall be treated like other projects in the development areas it is moving to, provided that the NIC is informed of such move. If it is transferred from one owner to another, the exemptions will hold if the new owner operates the projects as previously agreed (Article 11). Under Article 17.1, assets imported for the purposes of the exempted investment project shall be exempted from fees, provided that they entered Iraq within (3) three years from the date the investment license was granted. Article 17.2 exempts the imported assets required for the expansion, development or modernization of the project from fees if they lead to an increase in the designed capacity, provided they are brought in within three years from the date the NIC allowed the expansion. Article 17.3 exempts spare parts imported for the purposes of the project from fees if the value of these parts does not exceed 20% of the total value of the project. Article 17.4 sets out the conditions whereby projects to build hotels, tourist resorts, hospitals, health institutions, rehabilitation centres and educational and scientific facilities are granted exemptions from additional duties and tax exemptions. See OECD Checklist FDI Incentives[9] See MENA-OECD Investment Programme Recommendations

2.3. MENA-OECD Proposal for Draft Implementing Regulations for Investment Law No. 13 (2006)

Article 1

Definitions

- The definitions in Article 1 of the Investment Law apply to this regulation, subject to Item 2.
- The following definitions also apply to this regulation:

Applicant: an Iraqi individual or entity, or foreign individual or entity, or a combination of any of these that applies for a license under this regulation.

Commission: the NIC or PIC, or two or more of these acting in co-operation as relevant in the context.

Dollar or USD means United States dollar.

Dominant jurisdiction: the jurisdiction referred to in Item 3 of Article 5.

Entity: a corporation, partner, individual or other body with legal status that is Iraqi, foreign, or a combination of both.

Foreign investor: an investor who is not an Iraqi citizen or which is a corporation registered outside Iraq.

Investment Law: the Investment Law No. 13/2006.

Licensed investor: an applicant that has been issued with a license.

Notice: notice in writing (physical or electronic), sent to the address that has been specified by the individual or entity that is to receive the notice.

Project: a legal business investment activity for which a license is applied for under the Investment Law and its regulations.

Strategic project: a project related to:

- the defence of Iraq;
- an airport or seaport;
- a waterway, railway or major highway that is located in more than one province; or
- a project with a cost exceeding USD 50 million.

Value: the gross investment of capital, loans and the value of the supplies, materials and equipment that are to be used in the first three years of a project.

Article 2

Authority

This regulation is issued under the authority of Article 30 of the Investment Law.

Article 3

Purpose

The purpose of this regulation is to implement the Investment Law and carry out its objects, including those stated in Article 2 of the Law, as well as to enable the commissions formed pursuant to the Law to carry out their objectives, including those stated in Article 8 of the Law.

Article 4

Scope

- This regulation covers applications by individuals or entities for investment licences, the assessment and determination of the applications, and the granting of licences to applicants.
- Under Article 29 of the Investment Law, the law and this regulation does not apply to a project principally related to oil and gas exploration, banking or insurance.
- This regulation does not apply to a project with a value less than USD 20 million.

Article 5

Jurisdiction

- The NIC has sole jurisdiction to receive applications for, grant or refuse a licence for a project which
  - *a)* is a strategic project; or
  - *b)* relates to matters within the competence of the government of Iraq under Articles 106 and 107 of the Constitution.
- For a project that is within the competence of both the government of the federal and regional governments under Article 110 of the Constitution, the NIC or PIC involved has the jurisdiction to receive the application. Thereafter, the NIC and PIC involved will jointly consider and grant or refuse a licence for the project. For a project that is within the sole competence of two or more regions or provinces under Article 111 of the Constitution, the commission responsible for the area with the greatest share of the project is the dominant jurisdiction and has the following jurisdiction:
  - *a)* to receive the applicant; and
  - *b)* to jointly with the PICs concerned consider, grant or refuse licences for projects.
- In the case of a project that affects two or more jurisdictions, a jurisdiction
  - *a)* to which less than 5% of the value of the project is allocated; or
  - *b)* concerning a value of a project that is less than USD 1 million,

  whichever is less, shall not participate in the decision to grant or withhold the licence.
- In accordance with Item 3 of Article 20 of the Investment Law, the prime minister shall determine any dispute that arises between the NIC and a PIC concerning jurisdiction over an application.
- *[Note that the Prime minister does not have jurisdiction under 20.3 to resolve disputes between the NIC and PIC, and it is not clear why this was omitted, but it is logical to follow the same idea]*
- In accordance with Article 7(b) of the Investment Law, a decision of the NIC related to a project with a value exceeding USD 250 million must be confirmed by the Council of Ministers.

Article 6

Application process and forms

- To simplify the application process for a licence and to facilitate a "One-stop-shop" (OSS) process, the NIC shall develop standard procedures and documentation to be used for all applications under these regulations, including:
  - *a)* the procedure for submitting applications for a licence under this regulation;
  - *b)* the minimum information that investors must provide with an application;
  - *c)* the forms that must be completed to show the information; and
  - *d)* the form of the contract to be entered into between a commission or several commissions and an investor to whom a licence is granted.
- The NIC shall publish the procedures and forms developed under Item 1, and after publication they shall apply to all applications for licences under the Investment Law and its regulations.

Article 7

Application fees

The NIC shall establish and publish the fees to be paid under the Investment Law and may amend them from time to time.

Article 8

Applications and determination of jurisdiction

- An applicant shall submit the application for a licence for a proposed investment to the commission that has sole or dominant jurisdiction over the proposed project by providing the information, following the procedure and respecting the form established under Article 6.
- The commission that receives the application shall, within 15 days, give the applicant notice whether the application:
  - *a)* will be dealt with solely by the commission that received it;
  - *b)* is subject to consultation with other commissions whose approval is also required. If disputed, this shall be determined under sub-Article 5. The applicant is then informed of the commissions that will be involved;
  - *c)* should be initially made to a different commission;
  - *d)* requires further information submitted by the applicant to enable the commission to determine which commission has jurisdiction to deal with the application;
  - *e)* is rejected because the project does not fall within the parameters of the Investment Law; or
  - *f)* is disqualified from receiving a licence under the Investment Law. The reason for disqualification must be mentioned as well.
- After the issues arising under paragraph 2 are determined, the commission that receives the application shall notify the applicant whether the application:
  - *a)* will be dealt with by a single commission. In this case, the name of that commission must be given;
  - *b)* will be dealt with by two or more commissions. In this case, the dominant commission must be named.
- If the application will be dealt with by two or more commissions, the following applies to the dominant commission, named under paragraph 3.b:
  - *a)* it is the body to which the applicant must address all communication, unless otherwise advised by the dominant commission;
  - *b)* it shall act as a single point of contact for the applicant. In addition, it shall make decisions regarding those applications within its jurisdiction and request and, if appropriate, recommend any permissions or approvals; and
  - *c)* it shall identify any conditions the applicant must fulfil as required by the other commissions, government departments or agencies involved.
- If an application falls under the jurisdiction of two or more commissions, the commission with the greatest interest in the application shall be named the dominant commission.
- If an application is rejected by a dominant commission, it cannot be approved by any other commission unless it is relocated.

Article 9

Procedure for assessing application

The commission, alone or in co-operation with the other commissions that have jurisdiction over the project, shall assess the application, taking into account objective factors that are relevant, including:

- the economic and technical merits of the project;
- the financial strength of the applicant;
- the experience of the applicant in similar projects; and
- the need for the project in Iraq or regions and provinces involved, considering also any similar projects that have been granted a licence under these regulations.

Article 10

Criteria for granting a licence to be fair, logical and transparent

- If the approval of more than one commission is needed for the licence, the commissions involved shall, as directed by the dominant commission, work separately or in conjunction and communication with each other by any means, including teleconferencing, with the objective of making a quick, informed and logical decision.
- The commission assessing an application shall:
  a) decide on the application based on the criteria in this regulation and the Investment Law, as well as on the merits of the project and the application;
  b) not be influenced by personal considerations or benefits for any person.
- In assessing a project, the commission may consider relevant factors, including but not limited to:
  a) the inclusion and capital percentage of Iraqi investors;
  b) any co-operation with other applicants, enterprises or licensed investors, whether by contract or partnership;
  c) whether the project involves the purchase of any Iraqi corporation;
  d) the use and development of natural or other resources in Iraq;
  e) the impact of the project on existing utility supply, water resources, transportation resources and other infrastructure;
  f) the need to import material, staff or technology;
  g) the number and type of foreign staff that will be needed, and for how long;
  h) the projections for employment creation and training for Iraqis as labour, skilled and professional staff;
  i) the nature and source of technology for the project, and who owns this technology;
  j) whether any of the individuals who are applicants or investors have been convicted of a crime in Iraq, or of any offence related to investment in Iraq;
  k) the impact of the project on existing or previously approved projects, balancing the need for competition, the scale of the project and the reasonable opportunity for profit for the applicant and the investors of any previously licensed project that will be affected.
- The commission may assess the project in the presence or absence of the applicant, but must give the applicant notice with details of any facts the commission considers

relevant to the application, if this is information the applicant did not provide himself and is not public and widely known, and give the applicant the opportunity to comment on those facts to the commission.

- The commission may give the applicant notice to provide more information within a reasonable time specified in the notice.
- If the commission decides that it intends to reject an application or state that the applicant is disqualified, the commission shall give the applicant 30 days notice of its intent, providing specific reasons, and during these 30 days, it shall allow the applicant the opportunity to present written and oral arguments to the commission before the final decision is made.

Article 11

Transparency

- All information that the commission considers in assessing an application shall be made available by notice to the applicant before the commission makes a decision.
- An applicant must be given a chance to mitigate or rebut information that is to be considered by the commission.
- The decision of the commission to approve or reject an application must be in writing, given by notice to the applicant and shall include:
  a) the facts and laws on which the decision is based;
  b) the specific reasons for the rejections;
  c) whether an amended application is encouraged;
  d) steps that could be taken in order to make an application more acceptable if submitted in an amended form.
- Every commission must prepare and periodically publish a generalized report of all its decisions, from which all information the applicant has justified as confidential has been removed.

Article 12

Agents

- If an applicant uses an agent that is an Iraqi citizen or entity, the following applies:
  a) compensation to be paid to the agent and the services provided must be disclosed to the commission by the applicant, and a copy of the agency agreement must be filed with the commission;
  b) services provided by the agent must not include obtaining any political access or influence, nor any preference or benefit for the investor;
  c) services must be solely for work and advice to enhance the project and its merits;
  d) the agent may not communicate with the commission without the knowledge of the investor and without providing the investor with a copy of the communication; and
  e) the agent may not communicate with one member of a commission without communicating with all members of the commission at the same time.
- No person who is related by family or business relationship to a member of a commission that has jurisdiction over a project or to the government of Iraq, a region or a province, may directly or indirectly act as an agent for the applicant of the project.

- The NIC may develop and publish rules for the interpretation and application of this Article.

Article 13

Contract with conditions of licence

If the commission or commissions with jurisdiction over the project proposed by the applicants decide to approve the project and grant a licence to the applicant, the commission or commissions shall enter into a contract with the applicant that includes but is not limited to the contract conditions listed in the Appendix.

Article 14

Contract disputes

A dispute arising from a contract with a licensed investor may be referred to binding arbitration.

Article 15

Review of commission decisions

A decision of a commission to grant or refuse a licence may be appealed to a competent court on the following grounds only:

a) that the commission did not have jurisdiction over the application; or

b) that the commission did not follow the process established by the Investment Law or this regulation.

2.4. Appendix to the Draft Implementing Regulation

The contract between one or more commissions and an investor who is to be licensed under the regulations referred to in Article 15 shall specify the details of the project, the responsibilities and benefits of the investor, and the conditions negotiated, which shall include but not be limited to the following:

- A description of the project, its purpose, financial plan, operation and product.
- The stages of construction and the times by which they will be achieved.
- Other responsibilities of the investor.
- The amount and timing of the investment to be made, as well as the sources of the capital and financial structure of the investment.
- The technology that will be used, as well as the sources of this technology.
- The number and type of foreign and Iraqi staff that will be needed, their skills and time-schedule of employment.
- The reasonable efforts that the investor must make to secure local Iraqi labour (*e.g.* advertising *et al*) before using foreign or out-of-province labour.
- Any work that will be carried out to connect with or contribute to utilities, infrastructure and transportation services in Iraq.
- The materials and equipment to be imported into Iraq, and whether these will be consumed or converted in, or removed from Iraq.
- A description of any gas, liquid or solid waste that will be produced by the project and how it will be disposed of.
- The grant of a licence to carry out the project.

- The conditions that apply to the licence and the consequences of breaking these conditions.
- The tax benefits that will be granted to an investor, and for how long.
- The rights of a foreign investor to export the profits of the project after making all payments that are due to:
  a) the government of Iraq, a region or a province;
  b) Iraqi investors in the project; and
  c) any other entity in Iraq.
- The suspension or cancellation of the licence and benefits granted under the contract if the investor breaks specified conditions of said contract.
- The right of the commission to expropriate the assets of the project in Iraq under the following conditions:
  a) the investor breaches specified basic conditions of the contract, or specified stages of the contract are not met by a specified time;
  b) the investor commits a substantial breach of the laws of Iraq and does not remedy the breach within a reasonable timeframe; or
  c) the investor becomes insolvent.
- The right of the commission to assign to the government of Iraq, a region or a province the rights of expropriation.
- The binding arbitration process by which disputes under the contract may be settled; The means of giving notice to the commissions and to the investor, as well as the names and addresses of any relevant persons for information. The right of the investor to assign the benefit of the contract to:
  a) another investor approved by the commission; or
  b) the investor's successor or the entity that owns or controls the investor with the consent of the commission, which is not to be unreasonably withheld.
- The fact that the contract is to be governed by the laws of Iraq.

2.5. The Iraqi investment regime compared to selected MENA countries

IRAQ	
1. All-sector limitations on the entry of FDI including screening and prior approval procedures	
General	*Approval and screening requirements*
Order Number 39 replaced all previous foreign investment laws. On 10 October, 2006 Iraq adopted a new investment law. Under the new legal regime, a foreign investor is in principle entitled to make foreign investments in Iraq on terms no less favourable than those applicable to an Iraqi investor and the amount of foreign participation is not limited. Exceptions are: foreign direct and indirect ownership of the natural resources sector, involving primary extraction and initial processing. Further restrictions can apply to banks and insurance companies.	The new Investment Law of 2006 mentions that investors must obtain the *project establishment license* from the National Commission On Investment. The Commission shall give its decision within 30 days from the date of the completion of the technical and legal requirements and conditions pursuant to the provisions of this law, based on guidelines and standards set forth by the Commission.[10]
2. Limitations on foreign purchase of domestic shares (portfolio investment)	
Information not publicly available.	
3. Restrictions on transfers abroad of the proceeds of the liquidation of a foreign direct investment	
On payments for invisible transactions and current transfers, domestic or foreign companies operating in Iraq requesting the transfer of funds abroad must submit proof of the amount of the contract and the percentage that may be converted into foreign exchange.[11]	

IRAQ
4. Sectoral limitations to establishment of FDI, including reciprocity
Investment in banks and insurance companies shall not be subject to the provisions of the Investment Law 2006.[12]
5. Acquisition of real estate for FDI purposes by foreign investors
Information not publicly available
6. Exception to national treatment of foreign-controlled enterprises
Information not publicly available
7. Performance requirements on foreign direct investors
The investor must directly or indirectly employ a number of Iraqis, who shall make up no less than about 50% of the total employees in the project, unless the Commission determines otherwise for reasons of the technical specialisation required, or the nature of the activity or the geographical location of the project.

JORDAN	
1. All-sector limitations on the entry of FDI including screening and prior approval procedures	
General	*Approval and screening requirements*
In ***Jordan*** there are no general restrictions on foreign ownership of Jordanian companies. A non-Jordanian may not own any of the following projects or businesses in whole or in part: passenger and cargo road transport, including services of taxis, buses and trailers; investigation and security services; and sports clubs, including sports event organisations but excluding fitness and physical health clubs. The Laws JIB Law No. (16) of 1995, JIB Law No. (16) of 1995 and By-Law No. 54 of 2000 contain a list of sectors with restrictions on foreign participation. The Non-Jordanian investor ownership shall not exceed 49% of the capital of any project in the following sectors and activities: *a)* Scheduled and non-scheduled passenger, freight and mail air transport services. *b)* Rental services of aircraft with operator. The Council of Ministers may, upon the recommendation of the Higher Council for Investment Promotion, permit the foreign ownership of or participation in big development projects that are especially important by any non-Jordanian investor in higher percentages than is provided for by this regulation and according to the percentage in the council's decision. N.B. A new draft Investment Law has been developed by the Jordan Investment Board and is in the process of being shared with stakeholders for comments in preparation for eventual submission to Parliament this year.[13]	In principle, the screening of projects is done by Ministries and agencies that deal with the registration and licensing of projects. Projects in specific sectors laid out in the Investment Law enjoy exemptions and incentives. For this purpose the Investment Promotion Committee reviews applications submitted by investors and decides on them within a period of thirty days.[14] Neither is there any formal screening or host government selection process for foreign investment.
2. Limitations on foreign purchase of domestic shares (portfolio investment)	
Jordan reports no restrictions on capital and money market instruments.[15] However, the Amman Stock Exchange (one of the region's largest stock markets, with 42 per cent foreign share ownership) states that companies in the construction contracting, commercial and commercial services and mining sectors are subject to a ceiling of 50 per cent foreign ownership of the paid-up capital.[16] Further, non-resident investments are limited to a maximum of 49% ownership or 50% subscription in shares in the following major sectors: commerce and trade services, construction, contracting, and transportation. The amount of investment in any one project must total at least JD 50 000.	
3. Restrictions on transfers abroad of the proceeds of the liquidation of a foreign direct investment	
There are no controls on liquidation of direct investment.[17]	
4. Sectoral limitations to establishment of FDI, including reciprocity	

JORDAN
In ***Jordan***, a non-Jordanian investor can own no more than 50 per cent of the capital of any project in: brokerage, excluding financial brokerage and intermediary transactions done by banks, financial companies and financial service companies; monetary exchange transactions, excluding those provided by banks and financial companies; and services of commercial agents and brokers and insurance brokers. The amount of investment in any one project must total at least JD 50 000.[18]
In ***Jordan***, non-Jordanian investor ownership shall not exceed (50%) of the capital of any project in the following sectors and activities: purchase of goods and other movable tangibles for purposes of leasing or renting for re-leasing, including machinery and equipment, transport vehicles and other transport equipment, rent a car, aircraft (without operator) and ships, excluding financial leasing services conducted by banks, financial companies and insurance companies. Purchase of goods and other movable tangibles for purposes of selling with profits. Wholesale trade and retailing. Import and export excluding importation up till the Kingdom's border outlets. Distribution of goods and services within the Kingdom including distribution of audiovisual works. Supply services excluding food catering that is not conducted by restaurants, cafes and cafeterias, without prejudice to the provisions of item (12) of paragraph *(b)* of this Article. According to By-Law No. 54 for the year 2000, a non-Jordanian may not own any project or business in whole or in part in quarrying for construction sand, stones and crushed rock and debris used for construction purposes. JIB Law No.(16) of 1995: Non-Jordanian investors are not allowed to participate, wholly or partially in any of the following projects or activities: Passenger and freight road transportation services including taxi, bus and truck services. Quarries for natural sand, dimension stones, aggregates and construction stones used for construction purposes. Security and investigation services. Sports clubs including organization of sports events services, excluding health fitness clubs services. Clearance services, without prejudice to paragraph (D) of Article (3) from this regulation
5. Acquisition of real estate for FDI purposes by foreign investors
Non-Arab foreign nationals are permitted to own or lease property in ***Jordan***, provided that their home country does not discriminate against Jordanians and the property is developed within five years from the date of approval. The Cabinet is the authority on licensing foreign ownership of land and property. Agricultural land is not included in the provisions of this law. However, a foreign company that invests in the agricultural sector in Jordan automatically obtains national treatment with respect to ownership of agricultural land, once registered as a Jordanian company.[19] In general, purchase of land is allowed only if reciprocal agreements exist and Cabinet approval is obtained.[20]
6. Exception to national treatment of foreign-controlled enterprises
In ***Jordan***, foreign investors can bid for government-commissioned research and development programmes that are slated for international or mixed bidders. Otherwise, they have to find a Jordanian partner. This qualification will be dropped once Jordan accedes to the WTO's Government Procurement Agreement (GPA), for which it is currently preparing an entities offer.[21]
7. Performance requirements on foreign direct investors
In its bilateral investment treaty with the United States, Jordan is prohibited from imposing performance requirements as a condition for the establishment, acquisition, expansion, management, conduct or operation of an investment covered by the treaty (*i.e.* by a US entity). The list of prohibited performance requirements is exhaustive and covers domestic content requirements and domestic purchase preferences, the balancing of imports or sales in relation to exports or foreign exchange earnings, requirements to export products or services, technology transfer requirements, and requirements relating to the conduct of research and development in Jordan.[22]

EGYPT

1. All-sector limitations on the entry of FDI including screening and prior approval procedures

General	*Approval and screening requirements*
Within the scope of Law 8 of 1997 and Law 3 of 1998, the two key laws governing investment in Egypt, foreign investors may own up to 100 per cent of businesses categorized in a positive list guaranteeing automatic approval (see Sectoral Limitations, below). Law 8 of 1997 is designed to allocate investment to targeted economic sectors and promote decentralization of industry from the Nile Valley Area. Private and state-owned exporting companies were required to sell at least 75% of their foreign currency earnings to state-owned banks. There are no general controls on inward direct investment in ***Egypt***, but non-bank companies of foreign exchange dealers must be owned entirely by Egyptians.[23] The Investment Guarantees and Incentives Law (Law 8), passed in May 1997, allows investment through joint-ventures, limited liability companies, and partnerships, and governs "inland investments", essentially domestic investment projects, and investment in free zones, which are treated as outside the domestic economy for taxation, customs, and trade purposes.[24] Law 94 of 2005 amended the Investment Incentives Law and made companies incorporated under the Investment Incentives Law subject to the relatively simpler incorporation provisions of the Companies Law 3 of 1998.[25] The Income Tax Law enacted in June 2005 eliminated some of the incentives in the Investment Incentive Law, namely all corporate tax exemptions and tax holidays that the latter law had authorized for newly established companies. The WTO noted in its 1999 trade policy review that FDI had been liberalized since its previous report and, with a few exceptions, granted national treatment. The list of sectors where foreign investment was actively discouraged was reduced in 1994 to the Sinai, military equipment and tobacco and replaced in 1998 by a positive list of sectors where investment is encouraged through the Law of Investment Guarantees and Incentives. As of 2 January, 2005, Egypt accepted the obligations of Articles VIII, Sections 2, 3, and 4 of the IMF's articles of Agreement.[26] In July 2007, Egypt became the 40th country to adhere to the OECD Declaration on International Investment and Multinational enterprises. This Declaration is a way for governments to commit to improving their investment climates, ensuring equal treatment for foreign and domestic investors and encouraging the positive contribution that multinational companies can bring to economic and social progress.[27] Egypt has been very active in concluding bilateral investment agreements; by February 2007 it had concluded treaties with 110 countries.[28]	Under Egypt's law No. 8 on investment incentives and guarantees, passed in 1997, the General Authority For Investment and Free Zones (GAFI) automatically approves any application for projects within 16 sectors listed in the law. Investors can chose to proceed with their project through GAFI if they wish to benefit from its one-stop-function and the incentives laid out in law No. 8. There is, however, no obligation to do so. Nevertheless, GAFI oversees 69 activities, and the investor deals with 71 entities under the responsibility of 22 ministries.[29]

2. Limitations on foreign purchase of domestic shares (portfolio investment)

Trading in securities denominated in foreign currencies must be settled in foreign currencies. The foreign exchange market may be used for transferring proceeds associated with the sale of both Egyptian securities and foreign securities. Further, shareholdings by residents or non-residents in any bank in Egypt that exceed 10 % of the bank's capital require approval from the CBE Board of Directors.[30]

3. Restrictions on transfers abroad of the proceeds of the liquidation of a foreign direct investment

No controls are applied on liquidation of direct investment.[31] There are no restrictions on repatriation of funds by companies, or rules requiring foreign companies to hold foreign currency accounts.[32]

4. Sectoral limitations to establishment of FDI, including reciprocity

EGYPT
The reforms initiated in 2004 have significantly opened up both the infrastructure and the financial sectors to private investors, both domestic and foreign. With respect to infrastructure, the focus has been on transportation and telecommunications since 1998. Recent transportation initiatives have included new legislation in June 2006 allowing private sector investment in the railway sector for the first time, a memorandum of understanding involving a consortium of international firms for USD 30 billion of investment in highway, railroad and seaport projects, and plans underway to more than double the capacity of Cairo International Airport through the construction of a new third terminal, however foreign investment in air transport is only allowed up to 49% in companies involved in regular international and domestic flights. With respect of maritime transport: foreign investment is only allowed in the form of joint-venture companies in which foreign equity does not exceed 49 % and for supporting services foreign equity should not exceed 75%.[33] With respect to telecommunications, the reform process started in 1998 with the establishment of the government-owned operator, Telecom Egypt. The new telecommunications Law No. 10 was passed in 2003. The government is in the early stages of licensing operators for international gateways and for the provision of international services in Egypt.[34] With respect to construction sector, foreign investment is only allowed in the form of joint-venture companies in which foreign equity shall not exceed 49%. In addition, foreign participation in electrical wiring and other building completion and finishing work is restricted to projects valued at over USD10 million (Law 104 of 1992). Reform of the financial sector has been another priority sector for the government. The reforms in this sector have been managed by the Banking Unit within the Central Bank of Egypt since the new banking law passed in 2003. The reforms have combined efforts to bring about consolidation in the banking sector with significant privatisation. The financial sector is now approximately divided 50-50 between private and public ownership and approximately 70-30 domestic *versus* foreign ownership.[35] There are no limitations on foreign ownership. Every natural or legal person owning more than 5% of the issued capital of a bank must notify the Central Bank. No natural or legal person is allowed to own more than 10% of the issued capital of any bank, except with the approval of the CBE's Board of Directors. The Insurance Law allows up to 100% foreign ownership of Egyptian insurance companies. It also allows foreign companies to establish representative offices to advertise and promote life and non-life insurance activities. However, they may not sell their services through representative offices. There are no restrictions on foreign nationals being on the board of directors of insurance companies. All investment in the insurance subsector is subject to an economic needs test.[36] Commercial agents and importers for resale in ***Egypt*** must be Egyptian nationals.[37]Qualifying investments in Law No. 8 of 1997 in Egypt which must be approved to benefit from incentives include: tourism (hotels, motels, tourist villages and transport); maritime transport; refrigerated transport of agricultural products and processed food; air transport and related services; housing; real estate development; hospitals and medical centres that offer 10 per cent of their services free of charge; water pumping stations; computer software production; and projects financed by the Social Fund for Development.
5. Acquisition of real estate for FDI purposes by foreign investors
In ***Egypt***, non-Egyptians may not sell property within five years of taking possession. Foreign individual or corporate ownership of agricultural land (defined as traditional agricultural land in the Nile valley, delta and oases) is explicitly prohibited by Law 15 of 1963.[38] Prime Ministerial Decree No. 548 for 2005 removes restrictions on foreign property ownership in a number of tourist and new urban areas, namely the Red Sea, Hurghada, Sidi Abdel-Rahman and Ras-Hekma in Matrouh Governorate. Foreign individuals are still, however, limited to ownership of a maximum of two residences in Egypt. Companies/citizens of Arab countries have customarily received national treatment in this area.[39]
6. Exception to national treatment of foreign-controlled enterprises
Egypt passed a Tenders Law in 1998 which introduced greater transparency in the process of public procurement, although the law does allow price preferences for Egyptian suppliers.[40] Tenders Law No. 89 of 1998 amended the Tenders and Bidding Law No. 9 of 1983 governing foreign companies' bids on public tenders. It requires the government to consider both price and best value and to issue an explanation for a bid's refusal. An Egyptian domestic contractor is accorded priority if its bid does not exceed the lowest foreign bid by more than 15%.[41] The WTO has noted that although the Tenders Law is an improvement on previous legislation, it continues to provide considerable discretion to government departments to limit procurement to selected suppliers.[42] But the law was amended in mid-2006, requiring contracting government entities to acknowledge price fluctuations in the first year of the contract or increases or decreases in cost, and to compensate contractors where necessary.[43]
7. Performance requirements on foreign direct investors
In ***Egypt,*** Investment Incentives and Guarantees Law No. 8 of 1997 specifies that assembly industries must meet a minimum local content requirement of 45 per cent to benefit from customs tariff reductions on imported industrial inputs. The Labour Law of 1981 requires that foreign workers (not counting managers) must account for no more than 10 % of the workforce and 20 % of the payroll. Foreign employees are further limited to 25% of administrative and professional employees and 30 % of wages paid to these categories of workers.[44]

Notes

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PART I

Chapter 3

Fighting Corruption in Iraq: Sources and Challenges

Introduction

The GoI has become increasingly aware of the risks posed by corruption to its country's development and investment programme. "Corruption" as a term covers a multitude of sins, but is frequently defined as the "abuse of public or private office for private gain". It distorts economic decision-making and saps economic activity, diminishing the quantity and quality of domestic and foreign investments and aid projects, while businesses that disregard good governance are unduly rewarded with dominance. This, in turn, curbs growth and undermines the credibility of governmental institutions in public opinion. Corruption is particularly critical in countries rich in resources and torn by major military conflicts since the 1990s. They are prone to instability and weak rule of law,[1] and opportunities to divert revenue from resources on a grand scale are plentiful, while punitive measures are almost non-existent.[2] As many Iraqis observe, corruption also exacerbates sectarian conflict, hampers the re-establishment of functioning public institutions operating under the rule of law, and deters the development of a business-friendly climate. Multiple rounds of information exchange between the GoI, Iraqi business actors, and MENA-OECD have confirmed the existence of widespread corruption in Iraq and its inherent link to the country's slow economic recovery. Strikingly, the Transparency International Corruption Perceptions Index published in 2008 ranks Iraq 178 out of 180 countries.

Accordingly, the GoI has moved corruption up the political agenda and, in January 2008, launched its first national initiative to fight it. Since then, its efforts have been widely supported by the international community.

From its inception, the MENA-OECD Initiative for Investment has supported moves to develop networks of anti-corruption experts and encouraged MENA countries to upgrade their anti-corruption legislation and institutions. In January 2008, MENA-OECD organised the *Workshop on Fighting Corruption and Enhancing Transparency in Public Procurement* in Amman, Jordan. It brought representatives from various GoI agencies and institutions together with Iraqi business representatives to discuss corruption and transparency in public procurement.

In this and subsequent associated exchanges, the participants identified corruption as one of the greatest challenges for governance in Iraq. They also stressed its sheer scope and its systemic incidence in the public sector. Bribes are reportedly commonplace at all levels of interaction, particularly among senior government officials. Both domestic and foreign businesses give bribes, with transactions frequently carried out by intermediaries or agents who provide the services to the parties involved in the offence. Some Iraqi business actors even claim that those who abstain from corruption and bribery are not considered serious business partners. The misallocation of funds is particularly prevalent in public procurement (see Chapter 4), while sectors like the oil industry are also extensively exposed to corruption.

As an outcome of the meeting, MENA-OECD was tasked to review the main sources of corruption in Iraq, the legislative framework regulating public integrity, and the fight

against corruption. Iraqi officials underlined that a report on the findings would help the GoI better identify and fight the causes of corruption and take effective action to enhance Iraq's economic and investment climate.

At the High-Level Meeting on Economic and Governance Policy Reforms in Iraq, held jointly by the MENA-OECD Programme and the UNDP on July 8-10 2008, Iraqi participants – government officials, parliamentarians and business representatives – confirmed the OECD Secretariat's analysis of the main causes of corruption in Iraq and agreed that the existing institutional and legal anti-corruption framework required revision. The enforcement of anti-corruption provisions remains a key challenge and is dependent on the progress achieved in security, law enforcement, and the protection of anti-corruption personnel. In this respect, MENA-OECD emphasised key instruments for enhancing integrity in both the public and private sectors, and Iraqi officials approved several policy recommendations contained in the GoI/MENA-OECD/UNDP Paris Agreement (see Annex 3.A1).

This chapter builds on the preliminary observations MENA-OECD has drawn from its exchanges with representatives of Iraq's public and private sector communities. It addresses the issue of corruption in Iraq from three angles:

- It provides an overview of the sources of corruption in Iraq. Understanding them may assist the GoI in its national anti-corruption strategy and help to determine a range of additional measures that could be taken as part of the effort to ensure efficient government and market functions.
- It outlines the existing legal and institutional framework for fighting corruption.
- It discusses the inadequacies of the framework and suggests action and amendments towards an effective, dissuasive anti-corruption strategy. Criminal corruption offences, in particular, require amendments to be in line with international anti-corruption standards, while awareness of the framework needs to be substantially raised, particularly among public officials and business representatives. In addition, the fight against corruption calls for strengthened human and financial resources, and the different anti-corruption bodies must co-ordinate their work coherently.

Sources of corruption in Iraq

Corruption riddles the civil service and taints business transactions according to Iraqi government and business representatives. In meetings and interviews with MENA-OECD, and in their answers to the MENA-OECD *Questionnaire on Integrity and Fighting Corruption in Iraq* (see Annex 3.A1), they identify numerous sources of corruption.

One such source is the weakness of Iraq's institutions combined with its wealth of oil resources. High world oil prices and improved extraction have increased both government revenues and exposure to corruption and misuse. Ineffective government control, stemming from conflicts of interest between different ministries prone to outside influence, amplifies the threat of corrupt practices. The many projects conducted by the donor community are also vulnerable to corruption in the absence of transparency, adequate planning of aid delivery, and oversight mechanisms – to mention only a few elements crucial to ensuring effective resource allocation.

Partial state building and security threats

The persistent vulnerability of Iraq's institutions is not conducive to fighting corruption. The collapse of government and the widespread insecurity that followed the

fall of Baghdad in April 2003 have spawned a multitude of unlawful practices in both public and private sectors. Cases of mismanagement by the CPA have also been cited.[3] They include its financial, administrative, and managerial failure to guarantee an accountable, transparent use of Iraq's domestic funds.

Many sources document instances of serious corruption within Iraqi ministries. Below are some examples which gave a taste of the difficulties that the GoI faces. They have been picked at random, make no claim to be exhaustive, and certainly warrant a more detailed examination.

The Iraqi Ministry of Oil has been a focal point of probes as part of a tougher anti-corruption policy. Investigators have found that oil production, transportation, storage, shipment, and export accounts are materially understated and records of production misstated – malpractice that facilitates organised crime and other criminal activities related to smuggling and the illegal distribution of Iraq's oil revenues.

Additional concerns regard the integrity of the Ministry of Trade, particularly in its administration of the Public Distribution System (PDS). In 2005, a World Bank report noted that the PDS was dysfunctional and that it was hard to know whether prices charged were appropriate, contracts fulfilled, quantities of goods effectively available and actually needed, and whether duplicate payments were made. The overall view was that the system is highly vulnerable to waste, theft and corruption. Responses to the MENA-OECD questionnaire reveal acute frustration regarding the management of the ministry, which controls some of the most visible commodities in Iraq, operates the USD 5.3 billion PDS and oversees key imports (cars, grain, seeds, and construction materials).[4]

Corruption in the Ministry of Health has affected the ability of public officials to deliver critical medical services. Instances of medical supplies diverted and sold outside the ministry for profit, especially to armed militias, have been reported. Several sources have mentioned financial transactions from sidetracked medicines involving the radical Shia militia known as the Mahdi Army.

The Ministry of Interior has also been identified as particularly problematic. Both it and the national police forces it manages are seen as infiltrated by militias and consequently unable to provide adequate levels of readiness, capability, and effectiveness – all essential for internal and border security. Contrary to its mission, the ministry has allegedly been involved in "security situations", with some of its personnel reportedly involved in kidnapping, bribery and extortion.

Continued insecurity and violence are inherent in the inefficiency of Iraqi public institutions and the lack of co-ordination among them. The disbanding of the Iraqi army[5] led from the outset to an acute security vacuum which, in turn, provided opportunities for many informal groups (insurgents, militias) to use violence for their own gain. Taking advantage of the general collapse of governance prior to 2007, these groups engaged in illegal activities such as arms trading and smuggling, where corruption plays a central role.

Oil resources

Iraq – a country with among the largest energy reserves in the world – is almost entirely dependent on oil and gas revenues to support state expenditure. The size and use of oil revenues was a jealously guarded secret during Iraq's decades of authoritarian rule. The oil sector was nationalised in 1972 and initially managed by the state-owned Iraqi National Oil Company before the Ministry of Oil itself took control. The resulting wealth

significantly contributed to the country's overall economic development and modernisation during the 1970s. Yet oil also exerted highly disruptive effects by becoming a major incentive for bribery and corruption.

Corruption grew following the first Gulf War and the imposition of international sanctions on Iraq from 1995 to 2003. In a context of limited access to international goods and services, Iraqi oil revenues were subject to extensive abuse and smuggling, and informal trade prospered. As of 2003, all revenues from oil export sales, oil products, and natural gas were deposited in the Development Fund for Iraq (DFI), established by the United Nations Security Council[6] and initially placed under CPA administration. It appears that the fund has not always been managed in best interests of development,[7] as highlighted by several audits that recorded mismanagement, poor record-keeping, and ineffective monitoring of contracts.[8]

Greater public accountability is key to ensuring that all Iraqi citizens benefit from their country's wealth in natural resources. In this respect, it is vital to raise standards of accountability for decision-makers controlling extractive resources and revenues. They can be held to account, however, only with adequate, precise information about the resources extracted, the revenues generated, and the destination of related spending.

Box 3.1. **United Nations "Oil-For-Food" Programme**

Iraq's Deputy Prime Minister Barham Ahmad Saleh underlined at a meeting in January 2008 dedicated to the fight against corruption[1] that, in his view, the international community held a significant share of the blame for Iraq's widespread corruption.

He argued that the phenomenon resulted essentially from the sanctions imposed by the United Nations against the Ba'thist regime. It was thus a legacy of the United Nations Oil-For-Food Programme (OFFP), originally designed to help Iraq meet its international obligations and ensure an equitable distribution of imports to its people.[2] In June 2008, the GoI filed a civil lawsuit in a US federal court in Manhattan against 94 companies alleged to have defrauded Iraqis under the OFFP. It is seeking compensation of USD 10 billion.[3]

It should be recalled here that the Independent Inquiry Committee (IIC) into the OFFP[4] noted in its final report of October 2005 that the sanction-relief programme had been easy to manipulate. The report stated that the OFFP was marred by the complex way in which it operated with regard to the Iraqi regime, rendering it vulnerable to corruption. The report further documented a vast network of illicit surcharges connected to oil contracts for the benefit of about 140 companies, as well as payment of over USD 1 billion in kickbacks in the form of fees for after-sales services and in-land transportation. The report also emphasised that, during the OFFP, the Iraqi regime had derived the greatest portion of its illicit revenues (approximately USD 10 billion) from illegal oil smuggling outside the OFFP.

1. Agence France-Presse, Baghdad, 3 January 2008.
2. The Oil-for-Food Programme, established by UNSCR Resolution 986 (1995), ran from December 1996 until November 2003. It permitted states, notwithstanding previous resolutions that had prohibited such activities, to import oil and oil products originating from Iraq, and allowed the Iraqi regime to purchase humanitarian goods with the revenues from oil sales. Pursuant to Resolution 986, an escrow account was established and managed for the purpose of receiving proceeds from the sale of Iraqi oil and disbursing funds for Iraq's purchase of food, infrastructure, medicine and humanitarian goods.
3. "L'Irak saisit la justice sur le Plan pétrole contre nourriture", *L'Express*, 1 July 2008.
4. The IIC was created in April 2004, and the UN Secretary-General, Kofi Annan, appointed an independent and high-level inquiry to investigate and report on the management of the OFFP, considering allegations of fraud and corruption on the part of ýUnited Nations officials, personnel and agents, as well as United Nations or Iraqi regime contractors under the programme.

Rise in oil revenues

Between 2003 and 2008, world oil prices rose by more than 200% – from nearly USD 27 per barrel of crude in March 2003 to over USD 100 a barrel in the summer of 2008. It was against this backdrop that Iraq increased its oil production capacity and exports in 2007-8. As a result, oil revenues soared and the country boasted a massive budget surplus.

Higher oil output and revenues have played a key role in providing Iraq with the resources it needs for its reconstruction and economic recovery. However, corruption risks are high in a setting hampered by an absence of adequate mechanisms for allocating and distributing resources to meet Iraqis' needs. Nor is there an effective oversight system for tracking and reviewing the quality and effectiveness of expenditures. To address these concerns, the GoI plans to tighten its financial and administrative control over oil revenues and the use of the DFI by different ministries.

Oil smuggling

International experts have singled out Iraq as being especially highly exposed to oil smuggling and related activities, which cost it nearly USD 7 billion between 2005 and 2008.[9] Oil is reported to be a primary commodity on the black market and central to the corruption, terror, and criminality that continue to plague the country.

In a report on transparency in 2006, the Iraqi Oil Ministry's Inspector General noted:

"[T]he huge profits generated by smuggling have attracted highly placed social, religious and political personalities and involved the latter in a cycle of corruption. In addition, a great number of smugglers have bought the protection of these notables through financial assistance and bribes."

The report also emphasised the dangerous consequences of smuggling for the political system.[10] In testimony before the US Senate Appropriations Committee in March 2008, the Inspector General for Iraq stated that "insurgent groups [are] funded by graft derived from oil smuggling or embezzlement".

The profits at stake in oil smuggling draw mafia networks, new criminal gangs, and insurgents. The lack of security has significantly increased opportunities for them to enter the illegal oil trade by bribing government officials. Basra, a city with a key role under Saddam Hussein, is reported to be a natural smuggling outlet.

International support and business

The flow of funds from the United States and other governments into Iraq's reconstruction effort has been considerable. However, oversight procedures have often been inadequate. Media sources cite lack of planning and poor oversight as a major problem, with some claiming that USD 23 billion of funds intended for reconstruction may have been lost, stolen or improperly accounted for between 2003 and June 2008.[11]

What is more, there are allegations that corruption risks may have spread within the donor countries. The United States is one example. The US Department of Justice National Procurement Fraud Task Force 2008 Progress Report[12] confirms that there have been domestic prosecutions for procurement fraud offences related to the war in Iraq and reconstruction contracts there. The United States has also prosecuted individuals with ties to the US for an offence involving Iraqi officials under the Foreign Corrupt Practices Act.[13]

GoI officials have told MENA-OECD how difficult it is to operate a business in Iraq. Very few international companies are engaged in business operations there, not only because of insecurity but also because of corruption. Yet attracting foreign trade and investment is one of Iraq's major reconstruction challenges. First, though, business practices must incorporate integrity, particularly as international awareness of corruption heightens. Governments worldwide have introduced legislation to make integrity part of business, and companies have come under increased public scrutiny in their home countries. High-profile law suits have prompted them to balance the gains from corruption against loss of reputation and to seek business opportunities while abiding by domestic and foreign laws.

Box 3.2. **Far-reaching regional and international anti-corruption standards**

Globalisation and competitive challenges have prompted the widespread adoption and implementation of new rules and regulations governing international business transactions. A number of legally binding and non-binding instruments have been developed at regional and international levels to improve trade and investment, promote integrity, and fight corruption.

The international legal framework which regulates bribery and corruption notably includes:

- the Inter-American Convention Against Corruption (1996);
- the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997);
- European Union Instruments on Corruption (1997);
- Council of Europe Criminal and Civil Law Conventions on Corruption (1997-1999);
- the African Union Convention on Preventing and Combating Corruption (2003);
- United Nations Convention Against Corruption (2003).

The various instruments differ in scope and function. Some apply to geographical regions and focus on a variety of practices. Several, but not all, target both domestic and international corruption. Others are designed to fight public corruption and others still to root out corrupt practices in the private sector.

The ***Convention on Combating Bribery of Foreign Public Officials in International Business Transactions***, adopted within the framework of the OECD, seeks to limit unfair competition in international business transactions. Parties to the convention commit to combating the bribery by their nationals (individuals and companies) of foreign public officials. Thirty-eight countries have ratified this convention: 30 OECD members and 8 non-member countries, *i.e.* Argentina, Brazil, Bulgaria, Chile, Estonia, Israel, Slovenia, and South Africa. The rigorous monitoring mechanism developed and implemented by the OECD Working Group on Bribery ensures that all parties implement and enforce the convention. Since it came into force, parties have outlawed the bribery of foreign public officials and an increasing number of lawsuits have resulted from the new regulatory environment. The convention is an open instrument and its parties hope that other countries, particularly the emerging economies, will join this initiative.

Exposed actors and activities

In meetings with MENA-OECD and in their answers to its questionnaire, Iraqi officials have stressed that while corruption affects Iraqi society at large, some players indulge in it

more than others, and some sectors are more prone to it than others. The consensus is that political leaders are embroiled in corruption at national and local levels, as are civil servants, the police, and tax and customs officials. One explanation for this government and public sector corruption is that some ministries have become party fiefdoms, diverting government resources to build political constituencies.

The awarding of public contracts and licenses is highly prone to corrupt practices, which throws an interesting light on the findings of the *OECD Benchmark Report on Improving Transparency in Government Procurement Procedures in Iraq*. The granting of import and export permits is open to corruption, while another fertile ground is access to public utilities (*e.g.,* telephone, electricity, and water systems), to the PDS (where illegal trade in foodstuffs frequently takes place), and to storage in warehouses and transportation.

Exposure to corrupt and illegal practices is also extremely high in the private sector. Both domestic and foreign companies are concerned about how corrupt business conduct is in Iraq. According to some testimonies, people who abstain from corruption are simply excluded from business transactions. Several respondents to the questionnaire also pointed out that foreign business players dealt directly with high-level officials, which may be because language barriers prevent them from making direct contact with government office staff.

Many international business operators actually work through agents, consultants, and contractors who speak Arabic. In an environment where it is difficult to engage straightforwardly in business, intermediaries have flourished and are key "facilitators" in bribery. International studies and bribery prosecutions have demonstrated that businesses call upon individuals to act on their behalf particularly for international business transactions in the more opaque economies. The regulation of intermediary activities is an important point, and one that could well be written into new commercial laws.

The fight against corruption in Iraq

From 2007, the International Compact for Iraq triggered greater awareness of and attention to corruption in Iraq. The GoI also decided to address the matter at a highly visible policy level. Iraq has a significant number of anti-corruption provisions in its penal code and is equipped with institutions tasked with preventing and fighting corruption. The GoI delegates the administration and enforcement of good governance to individuals and services in each ministry.

Nonetheless, as indicated by the former Head of the Commission on Public Integrity (CPI), Radhi Hamza al-Radhi, corruption-related prosecutions remain extremely low. According to Iraqi representatives engaged in the MENA-OECD Iraq Project, anti-corruption provisions and institutions are: 1) little known, 2) lacking coherence in their design, which makes enforcement difficult; and 3) insufficiently endowed in human and financial resources to respond to corruption risks in Iraqi society. Finally, due to security threats, anti-corruption provisions are hardly implemented.

According to the findings of MENA-OECD, there are aspects of the anti-corruption regulations that could provide a foundation for developing and implementing further tools. The priority, though, is to review the existing framework with the aim of making it more coherent and effective.

The legal and institutional framework

Legal and institutional provisions framing Iraq's fight against corruption preceded the US presence to some extent, but were in large part introduced by the CPA. Since then, Iraqi authorities have engaged in the process of amending the prevailing framework.

Anti-corruption provisions

Criminal offences in the Penal Code. Historically, Iraq developed a relatively sophisticated legal system. According to statements from Iraqi nationals, corruption in the 1960s and 1970s was punished. It was only in the second half of the 1980s and throughout the 1990s that corrupt practices became prevalent. After April 2003, the CPA reinstated the 1969 Iraqi Penal Code (IPC),[14] with fundamental amendments. In particular, corruption was established as a criminal offence, while bribery and embezzlement, along with other criminal acts such as breach of trust and fraud, were defined as "dishonourable offences"[15] and punishable under several articles by a term of imprisonment, fines, or confiscation.[16]

Both active and passive bribery of public officials and agents are criminalised (Chapter 6), although bribery of foreign public officials is not a criminal offence under the IPC.

Active bribery concerns:

- "Any public official or agent who seeks or receives for himself or for another a gift, benefit, privilege or promise thereof to carry out or refrain from carrying out an act that does not fall within the duties of his office" (Chapter 6, §308).
- "Any person who gives, offers or promises a public official or agent anything stipulated [above] is considered to be offering a bribe. Any person who mediates for a person who offers or accepts a bribe in order to offer, seek, accept, receive or promise such bribe, is considered to be an intermediary. The person who offers a bribe, as well as the intermediary, is punishable" (Chapter 6, §310).

Passive bribery is also criminalised as follows:

- "Any public official or agent who seeks or accepts for himself or for another a gift, benefit, honour or promise thereof to carry out any duty of his employment or to refrain from doing so or to contravene such duty is punishable" (Chapter 6, §307-1).
- A passive offence is committed when an official or agent accepts a bribe (Chapter 6, §313), and third beneficiaries are punishable (Chapter 6, §312).

Embezzlement, misappropriation, and diversion of property by public representatives are also covered. Those punishable are:

- "Any public official or agent who embezzles or conceals funds, goods, documents establishing legal rights, or other things that come into his possession" (Chapter 6, §315).
- "Any public official or agent who exploits his position in order to obtain funds, goods or documents establishing legal rights, or other things to which he is not entitled, and which belong to the State or to an establishment or organization in which the State has a financial interest" (Chapter 6, §316).

With regard to these offences, the IPC defines the notion of public official very broadly: "A public official is any official, employee or worker who is entrusted with a public task in the service of the government or its official or semi-official agencies or agencies belonging to it or placed under its control" (Chapter 2, Article 19-2).

Related anti-corruption provisions

The CPA and GoI (following the formal transfer of sovereignty in June 2004) adopted several complementary legal provisions, which also aim to provide Iraq with the broadest possible legal system to combat corruption.

In this regard, legal provisions for the protection of whistleblowers are contained in CPA Order No. 59.[17] It states that Iraqi citizens should be able to hold the government accountable by exposing corruption and wrongdoing without fear of repercussion or retribution. Order No. 59 recognises the need to restore trust and confidence in the honesty and integrity of public representatives and, accordingly, seeks to promote the active enforcement of anti-corruption provisions by encouraging eyewitnesses to call out illegal activity and denounce corrupt practices.

No government employee or contractor can be discharged, demoted, transferred, threatened, intimidated, discriminated against, harassed or undergo reprisal for reporting violation of laws, rules, or and regulations – *e.g.,* mismanagement, waste of funds, abuse of authority, corruption cases. Nor can any adverse action can be taken against an individual who chooses to co-operate with an investigation or provides information to anti-corruption bodies. Persons and organisations violating these provisions are liable to criminal sanctions in accordance with applicable laws (IPC, §329).

Key documents completing these provisions and confirming those set forth previously by the US-led coalition are the Law on Money Laundering and Regulation No. 1 of 2008 on the Implementation of Government Contracts.[18] The law that makes money laundering, and the funding of crime and terrorism, a criminal offence is contained in Section 2 of CPA Order No. 93.[19]

Article 3 of Order No. 93 states that whoever knowingly conducts or attempts to conduct a financial transaction that involves the proceeds of some form of unlawful activity, or whoever knowingly transports, transmits, or transfers funds that represent the proceeds of some form of unlawful activity is punishable. To fight money laundering practices, the Central Bank of Iraq (CBI) is empowered to investigate financial institutions over which it has oversight. Its role is set out in CPA Order No. 56 of 2004.[20]

Finally, Iraq's Commercial Law of 1970, as amended by the CPA,[21] addresses – albeit indirectly – the need for safeguards against corruption in business transactions. Its provisions are intended to organise commercial activities in Iraq in a way that avoids corrupt practices. It requires commercial agents to be licensed, specially registered, and vetted. It also requires governmental units to deal directly with principals rather than commercial agents.

Anti-corruption institutions

The CPA tasked three principal bodies with law enforcement and the fight against corruption: 1) the Commission on Public Integrity (CPI), 2) Inspector Generals' Offices (IGOs), and 3) the Board of Supreme Audit (BSA). In addition, a Joint Anti-Corruption Council (JACC) was established in 2007 within the Prime Minister's Office to enhance the executive co-ordination of anti-corruption efforts. At the legislative level, a Parliamentary Committee on Integrity has been put in place.

Iraqi officials who attended the MENA-OECD High-Level Meeting in July 2008 explained that draft laws would be submitted to the Iraqi Parliament in order to strengthen the anti-corruption framework. The CPI would notably be renamed the "Commission on

Integrity" (COI), and its powers and duties revised to ensure further harmonisation with IGOs and the BSA. Officials also shared with the OECD Secretariat the different points of Iraq's national campaign to combat corruption (see Annex 3.A1), which offer a preliminary overview of the GoI's strategy. However, no further information was received on related developments, the author(s) of the laws, methods for dealing with anti-corruption agencies and their activities, or progress on the submission of these laws to Parliament for ratification.

The Commission on Public Integrity. As a separate, independent, multi-functional agency, the CPI is the cornerstone of Iraq's anti-corruption institutional framework. It was established in 2004 by CPA Order No. 55,[22] and is headed by a ministerially appointed commissioner who answers to parliament. Six departments, each supervised by a director, carry out the following missions: 1) investigations, 2) legal affairs, 3) prevention, 4) education and public relations, 5) relations with NGOs, and 6) administration. The CPI's main mission is to promote the rule of law in Iraq by conducting preventive and investigative anti-corruption actions.

The CPI's preventive functions include: the promulgation and implementation of financial disclosure systems (Section 4, §6), the promulgation of a code of conduct for Iraqi public officials (Section 4, §7), the preparation of draft legislation for submission to parliament (Section 4, §8), and public education and awareness-raising programmes (Section 4, §9).

The commission also has broad investigative and law-enforcement functions. Section 4, §1 states that it is the body in charge of investigating cases of corruption or public wrongdoing, and of presenting the evidence to the investigating judge. In order to carry out its mission, the CPI is mandated to draw up procedures for hearing allegations of corruption, including anonymous ones (Section 4, §3).

The CPI's mandate is broad, and includes reaching out to Iraq's civil society, non-governmental organizations (NGOs) and the independent media. These actors are considered important partners in the effort to eradicate corruption at all levels of government.

Precise, reliable information is not available on the CPI's achievements. Iraqi observers have reported the CPI has not been able to do all the preventive work it was designed to perform and that *de facto* limitations prevent it from fulfilling its investigative functions.

The Inspectors General's Offices. Inspector General's Offices (IGOs) were established in 2004 by CPA Order No. 57.[23] They formalised the coalition's belief that a body of qualified professionals was needed to improve efficiency and integrity in Iraqi ministries. Inspectors General (IGs) are, under the terms of the order, independent offices placed in each ministry. The IGs are independent (Section 1), selected for their integrity and leadership skills (Section 2), and protected from undue influence (Section 3).

In fighting governmental corruption, IGs have several preventive missions aimed at enhancing the performance and accountability of Iraqi ministries. They are also vested with investigative powers.

Their preventive functions include: 1) conducting activities to prevent corruption and offenses such as fraud, waste, abuse and other illegal acts; 2) reviewing legislation, rules, regulations, policies, procedures and transactions, and recommending actions to improve

or rectify any existing deficiencies; 3) engaging in training and education initiatives, especially for ministry civil servants, to help build the capacity to identify corruption and all forms of waste and abuse.

CPA Order No. 57 focuses specifically on the auditing function of IGs. They are: 1) to audit all records and activities of the ministries in order to ensure their integrity, transparency and efficiency; 2) to review ministerial systems and measure performance; and 3) to receive, assess, and process complaints of fraud, waste, abuse of authority, and mismanagement likely to affect ministries.

It is also the duty of IGs to conduct administrative investigations. Their powers are set out in Section 6 of the order. The IGs shall have: 1) unrestricted access to offices, areas, employees, records, information data, reports, contracts and other material; 2) authority to hear testimonies relevant to any inquiry or investigation underway; 3) reasonable access to the head of governmental entities (ministries, departments, agencies), when necessary, for purposes related to their work; 4) authority to require employees of the ministry to report to the IGs any information regarding fraud, waste, abuse, corruption and other illegal acts. Section 7 of the order stipulates that, during the course of audits and investigations, records produced should be kept secret and their public disclosure forbidden, as should the identity of informants unless they give their consent.

On completing their investigations into cases of alleged corruption, IGs should: 1) report to the relevant ministers any significant problems, abuses, or deficiencies related to ministerial operations, and to the CPI cases requiring civil, criminal and administrative action (Section 3); 2) address recommendations to relevant ministers or other appropriate bodies (Section 9); 3) upon request, prepare and issue reports, which should conform to generally accepted professional standards and are likely to be made available to the public (Sections 5, 10 and 11).

The Board of Supreme Audit. Iraq's BSA was established in 1927 by Law No. 17 as an office for auditing general accounts and has since evolved through successive stages. From 1968 to 1980, within the framework of broad economic development plans in Iraq, it grew more specialised. The aim was to make it a government auditing authority of which the efficiency would be on a par with the increase in state prerogatives. Under Saddam Hussein, the board's organisational structure was minimal, principally because of its incompatibility with the state's authoritarian rule.

Serving as a supreme audit institution, its competencies are defined by Law No. 6, promulgated in 1990 and amended by CPA Order No. 77 of 2004.[24] This law defines the BSA as an independent public institution, empowered to enhance the efficiency, effectiveness, and credibility of the GoI.

Pursuant to Law No. 6 of 1990, the BSA is headed by a president and two vice-presidents. They must be selected without regard to their political affiliation on the basis of their integrity and experience in accounting, financial auditing and management (Order No. 77). The board is also composed of a Council of Financial Audit, headed by the President of the Board, as well as an Office of the Board President and an Office for Technical and Administrative Affairs. At the operational level, the board is divided into a Central Audit Department, containing sectoral sub-departments, and a Governorates Audit Department comprising six geographical divisions.

Law No. 6 gives the BSA a number of responsibilities in the fight against corruption. Preventive duties include audits and performance reviews. These are carried out in compliance with the government's preventive financial control systems in order to detect evidence of corruption, fraud, waste, abuse and inefficiency in matters related to the receipt, disbursement, and use of public money (Article 2.5). The BSA's investigative duties concern the efficient disbursement and use of public funds. It conducts investigations at the specific request of parliament (Article 2.6).

The BSA also has a reporting function in cases of allegations or evidence of corruption, fraud, waste, abuse or inefficiency in the disbursement and use of public funds. It submits its reports to the IGs of the ministries concerned or directly to the CPI (Article 2.7).

The BSA is responsible for preparing and publishing an annual plan describing and commenting on: 1) anticipated audits and performance evaluations; 2) areas of co-operation with the CPI and IGOs from ministries; and 3) any other matter deemed necessary by the board to achieve transparent, accountable, and efficient governance. As an example of co-ordination between anti-corruption agencies, the CPA's annual plan must include a statement of audits, evaluations, and all related work carried out at the formal request of the CPI or government. It is unclear whether an annual plan has actually been drawn up, although it would obviously be a valuable tool in the fight against corruption in Iraq.

The Joint Anti-Corruption Council. Established in May 2007, the JACC is designed to complete and supervise Iraq's general anti-corruption capacities. Its existence is the culmination of negotiations between independent commissions and the prime minister's office and constitutes an affirmation of the independence of the courts and the equal status of agencies charged with fighting corruption. The JACC comprises the Council of Ministers' secretary, a representative of the country's Higher Juridical Council, a senior member of the IGO, the president of the BSA, and the commissioner of the CPI. It has the duty of co-ordinating anti-corruption work and formulating a national anti-corruption strategy.

Independent and non-partisan, the JACC is a forum where stakeholders can confront corruption and harmonise their efforts. For the JACC to effectively galvanise civil society, it should hold symposiums and joint conferences to strengthen Iraq's institutional anti-corruption framework and create a broad national front to deter corruption. Along the same lines, it also draws up standards to evaluate the performance of governmental units.

With the support of the Council of Ministers, it follows up the recommendations it makes to different anti-corruption bodies and enhances the implementation of ongoing efforts. The GoI announced that a legal framework would be further developed to facilitate and co-ordinate the JACC's work and functions with the activities of other anti-corruption agencies.

The Parliamentary Committee on Public Integrity. In 2006 Iraq's National Assembly formed a Parliamentary Committee on Public Integrity. MENA-OECD has scant information on its activities and, as suggested by several respondents to the MENA-OECD questionnaire, its role should be further clarified.

Priorities on the GoI's 2008 Policy Agenda

Increasing international concern about corruption's negative impact on Iraqi reconstruction, and heightened domestic awareness of the problem, have prompted the GoI to meaningful action.[25] In addition to its national campaign specifically targeting corruption, the GoI signed the United Nations Convention against Corruption (UNCAC) on 17 March 2008 and, on 29 May 2008, endorsed the Paris Declaration on Aid Effectiveness (PDAE) at the International Compact[26] Review Conference in Stockholm. The GoI has also stepped up consultation at the international level as part of its effort to produce a comprehensive roadmap of its anti-corruption objectives.

A National Anti-Corruption Campaign

In January 2008, high-level Iraqi representatives engaged in a debate on administrative and financial corruption and the most effective ways of containing its effects on Iraq's stability. Prime Minister Nouri al-Maliki launched an 18-point anti-corruption drive – also referred to as the National Campaign for Fighting Corruption – which confirmed the GoI's commitment and enabled anti-corruption measures to be implemented in 2008-9 (see Annex 3.A1).

The GoI's national anti-corruption campaign is its acknowledgment of the need to improve Iraq's overall anti-corruption framework, adopt regulations, and harmonise the functions and responsibilities of anti-corruption agencies.[27]

The campaign advocates a substantial review of the laws on whistleblowers (Point 3), money laundering (Point 9), and public service[28] (Point 12). It also calls for a law to fight corruption in the civil service (Point 14), as well as other provisions to increase the efficiency of existing anti-corruption institutions – CPI, IGs, BSA, and JACC (Point 11).

Another key priority is to improve procedures and co-ordination mechanisms between anti-corruption agencies. Point 1 of the campaign is a call for the use of audits, inspectors, and stakeholder reports. Further standards must also be set for inspectors general to assess the performance of all governmental units within ministries (Point 2). The inspectors general should have sufficient support, budgets, and personnel (Point 4), and procurement instructions should be reviewed to make the national economic reconstruction effort more efficient (Point 6). The plan specifically addresses the need to engage Iraq's civil society, NGOs, and the private sector in combating corruption (Point 17).

Complying with international standards

In parallel to its domestic commitments, the GoI also made significant progress towards convergence with the international community in 2008. It endorsed key anti-corruption standards and demonstrated its understanding that international co-operation is indispensable to fighting domestic corruption and enhancing integrity, which will make Iraq's business climate more attractive. The GoI's progress also draws on the general understanding developed within the framework of the International Compact with Iraq that good governance and a solid anti-corruption framework are essential to economic and democratic development.

The Baghdad Declaration on Combating Corruption. Another milestone in the GoI's anti-corruption commitment was the Baghdad Declaration on Combating Corruption in March 2008, coinciding with the United Nations Initiative on Good Governance and Anti-

Corruption in Iraq. In attendance were representatives from the country's main anti-corruption agencies (CPI, JACC, BSA, IGs). They acknowledged that corruption and bribery remained the most critical challenge to a stable and democratic environment, to reconstruction, and to good management of public resources. Difficulties encountered in fighting corruption, they said, continued to be considerable.

Reinforcing a number of points in its national campaign against corruption, the GoI agreed to: 1) review the existing legal and institutional framework and capacities, co-ordinate anti-corruption bodies more effectively, and devise a plan of action to bring about improvements; 2) take preventive action by reviewing and amending existing laws and regulations, ensuring compliance with the relevant codes of conduct, establishing effective accounting and auditing standards, and supporting education aimed at promoting ethical conduct, transparency and accountability in the society; 3) review administrative procedures and institutional roles and responsibilities; and 4) evaluate existing legal and institutional performance to determine where corrective action is necessary.

To round off its anti-corruption commitment, the GoI has engaged in defining a strategy with a special focus on prevention, the criminalisation of certain offences, law enforcement, international co-operation and asset recovery. It is also establishing a credible, functional complaints system to report corruption and support sustainable capacity building.

The Paris Declaration on Aid Effectiveness. The Paris Declaration on Aid Effectiveness (PDAE), which Iraq endorsed in May 2008 as part of the International Compact,[29] was initiated by the OECD. It seeks to reform the international aid structure, define methods and tools to make aid more effective, and increase its impact on development. The PDAE recommends principles and promotes accountability between donors and recipient countries. It encourages mutual commitment through a model that increases transparency in the use of resources – and this is particularly critical in challenging conflict situations such as those in Iraq.[30]

Since 2003, the GoI has been a major recipient of international aid. The deteriorating security situation has considerably constrained the management and effectiveness of allocated aid, with very few donors and partners present on location. Moreover, the large number of donors channelling aid makes the system even more complex.

Iraq's endorsement of the PDAE is a key step towards a framework for setting economic recovery priorities and mechanisms and implementing appropriate policies. It commits the GoI to assessing and improving its performance, transparency, and accountability to international donors. The GoI has also agreed to intensify its efforts to generate an enabling environment for public and private investment. However, it can achieve none of these improvements without building institutions and establishing structures capable of delivering effective governance, public security, and equitable access to basic social services.

International co-operation

Since 2007 Iraq has been working more closely with the international community. Declarations by Prime Minister Nouri al-Maliki confirm that it is also seeking to intensify its foreign trade relations. It has joined a number of international policy dialogues such as the MENA-OECD Iraq Project in a move that asserts its desire to share and benefit from international experiences and best practice in a number of policy areas – in particular, the

importance of pooling international forces in the fight against corruption. As emphasised earlier in the chapter, corruption is not a purely domestic problem. It frequently has international links and ramifications. Being a party to the UN Convention against Corruption and entering into agreements and participating in international events on integrity and anti-corruption should help the GoI determine and implement policy measures compatible with international standards and practices.

In doing so, the project builds on the decade-long OECD experience in the battle against bribery and corruption through a range of anti-corruption and integrity instruments and tools.

Conclusions and recommendations

This third and final section considers some critical obstacles impeding the fight against corruption and explores ways of overcoming them.

Establishing the rule of law

Enhancing the anti-corruption legal and institutional framework

In meetings with MENA-OECD and in response to its questionnaire, Iraqi officials were near unanimous in their belief that the Iraqi Penal Code should be enlarged and better applied. They also felt that the GoI should reconsider legislation governing civil servants since a number of laws have failed to keep pace with the transformations sweeping Iraq. Their inadequacies are exploited by individuals and organisations and breed considerable administrative and financial corruption.

The independence and capacity of anti-corruption agencies established since 2003 must be further reinforced. Article 136(b)[31] of the Law on Criminal Procedures allows government ministers to prevent the arrest and prosecution of ministerial officials accused of corruption, while the prime minister can halt investigations against any government minister. The article seriously affects the independence of anti-corruption bodies and their protection from political pressure. Article 136(b) needs to be closely cross-referenced with Article 19(2) of the Iraqi Penal Code, which defines bribery offences in relation to public officials.

It emerged from the MENA-OECD questionnaire that Iraq's anti-corruption bodies are unable to carry through their mandates. There is a plain need to clearly establish the jurisdictions of Iraq's anti-corruption agencies, especially in relation to the courts. It is, for example, unclear whether and how the CPI reports the results of its investigations to local courts, and whether the courts must prosecute. The MENA-OECD Iraq Project should examine in greater depth the need to establish the mandates and co-ordinate the responsibilities of anti-corruption agencies and courts.

Evidence indicates that co-ordination mechanisms do not ensure adequate linkage between the country's anti-corruption agencies. The JACC certainly helps bring different institutions together and provides additional oversight. Their duties and powers, however, are not always complementary: they sometimes overlap, which renders investigation and prosecution particularly difficult. MENA-OECD believes it is essential to assess the ways in which anti-corruption agencies work together, share information, and process alleged corruption cases effectively.

In principle, IGs report alleged misconduct by a minister or subordinates to the CPI; however, while each ministry should, in theory, nominate an IG, not all have done so.

Furthermore, IGs are hired and financed by the minister who also decides on the resources at their disposal. In such conditions IGs clearly lack independence to do their jobs and report corruption to the CPI.

The BSA is supposed to co-operate with other anti-corruption bodies, working with the CPI to improve rules, practices, and standards applicable to managing, accounting and auditing public funds. It refers allegations or evidence of corruption, fraud, waste, abuse, or inefficiency in the disbursement and use of public funds to the IG of the ministry concerned, or directly to the CPI. If a disagreement occurs between the BSA and a ministry or other government entity, the board may refer the matter directly to the CPI for further investigation or enforcement of the relevant laws and regulations. This system is in great need of review.

MENA-OECD is very concerned that the legislation framing the missions of Iraq's anti-corruption agencies is so complicated that it leads to inaction and duplication. The terms of co-operation between the IGs, the BSA and the CPI must be clearly defined in order to clarify their relations and propose enhanced communication channels.

Inter-agency dialogue is vital in the fight against corruption in Iraq. Law enforcement and the detection, investigation, and prosecution of corruption rely on agencies co-operating and sharing information, particularly financial inspection and law enforcement bodies. It is an aspect of anti-corruption that MENA-OECD should examine in detail in a follow-up report.

Strengthening the independence of the judiciary

Political will and social attitudes toward corruption influence the effectiveness of anti-corruption law enforcement. An effective anti-corruption apparatus builds on an independent judiciary that is free from political influence and pressure. Any case serious enough to warrant formal judgement in a court of law should be handled by a competent, independent, impartial authority.

Since the investiture of Iraq's judicial system in 2006, Prime Minister Al-Maliki has stressed the need to make it more independent and effective by increasing its powers and making it the sole authority for punishing crime and corruption. This is a laudable decision. It is also a formidably difficult task requiring significant political will and scrutiny from internal and external observers.

Most challenging will be how to consolidate efforts to protect the judicial system from political and social pressures, and enshrine the independence and impartiality of judges. Constitutional provisions and formal arrangements separating the judiciary from other branches of government are how most states guarantee the independence of their judiciary. Iraq's judicial authorities must have the same constitutional and financial independence. Iraqi representatives suggested to MENA-OECD that part of the solution could be to require that judicial office holders have no political affiliation.

The GoI should also ensure that judges are adequately trained and remunerated so that economic necessity does not force them to hold a second job. Poor training and pay makes them ineffective and vulnerable, increasing the likelihood they will fall prey to corruption.

Protecting Justice and anti-corruption personnel

Public and private sector respondents to the MENA-OECD questionnaire did not identify the judiciary as involved in corruption. They did, however, say that judges in Iraq encounter numerous obstacles in the exercise of their functions. In some cases, the lives and family of those charged with investigating and prosecuting corruption are threatened. The Iraqi Penal Code singles out the obstruction of justice by corruption (§253-254) and the use of violence against judges as criminal offences (§229, 230, 233, 234, 235 and 253). Despite these provisions, judges working on corruption and terrorism cases continue to be killed.

Radhi Hamza al Radhi, former commissioner of the CPI, underlined at his hearing at the United States House Committee on Oversight and Government Reform that violence, intimidation and personal attacks were the main difficulties faced by those involved in the fight against corruption. He reported that since the CPI came into being, "thirty-one employees had been assassinated, as well as at least an additional twelve family members", that "in a number of cases, CPI staff and their relatives had been kidnapped or detained and tortured prior to being killed", and that "corrupt persons were reported to have attacked their accusers and their families with guns".

IGs, too, have also been subjected to repeated intimidation and threats and have found themselves unable to reveal the truth about the illegal activities of some powerful individuals. The reluctance or incapacity of the judiciary to prosecute important corruption cases has confined them to minor cases. Iraq's court system remains weak and is easy prey to intimidation and pressure. Without adequate security and protection for anti-corruption personnel, the fight against corruption in Iraq cannot be effective.

Roles and responsibility of Iraqi courts

Anti-corruption efforts hinge on a competent, well-equipped, and responsible court system. Despite some progress, the Iraqi system remains weak. Courts are often unable to fulfil their role, anti-corruption agencies bring few cases to court, and favouritism and selective appreciation (as well as corruption) mean that the judiciary does not always prosecute.

Iraqi courts of law must become responsible and accountable. Amendments to legislation must clarify which courts are charged with enforcing which anti-corruption rule or provision. Iraq's anti-corruption bodies must report more instances of corruption, while judges must fully analyse the facts of the cases transmitted by investigating magistrates if prosecution is to be more efficient. In addition, court proceedings should be accelerated and their decisions made public to ensure they are enforced.

Within the civil service, internal inspection and investigation units could play a valuable role. They should have the power to enforce administrative laws and, in the event of breaches, apply sanctions. The practice in Iraq remains that of referring all suspected cases of civil service corruption to the CPI, which is then supposed to investigate and bring them to court.

Promoting effectiveness and integrity

Adequate resources for law enforcement agencies

Anti-corruption agencies lack adequate human and material resources. Although legally empowered to investigate, they have to contend with security issues and violence in

some public institutions and ministries, which complicate effective prosecution. They enjoy little support from the government or from within ministries. Inspectors general have often complained that fighting corruption is a solitary task, sidelined from any overall governmental anti-corruption strategy.

Anti-corruption institutions need adequate resources – sufficient numbers of responsible officials to enforce anti-corruption measures and sufficient funds. Staff should also be well-educated and regularly trained in the detrimental effects of corruption and the best ways to counteract them. The benefits of programmes to inform and educate employees in corruption-prone government departments and sectors are proven. They bring improvements to the law, strengthen watchdog mechanisms, and lead to specialised training for officials.

Further examination of the corruption risks in ministries like the trade, customs, oil, health, and interior ministries would help the GoI understand where to focus special efforts and determine the best means of fostering integrity and fighting corruption.

Awareness raising and training in detection and investigation of corruption

Although Iraqis working in government and the private sector testify that corruption exists, they seem less familiar with its sources and detrimental effects on the domestic economy and international relations. Nor do they seem to know much about anti-corruption standards and practices. The GoI should consider running targeted, practical, awareness-raising campaigns that would benefit public officials, the business community, and the public at large. They could focus on how corruption harms and robs ordinary people, on practical ways to address the problem, and on the benefits of resisting corruption.

A public information campaign could run advertisements in the print and broadcasting media, set up a dedicated, multilingual website, or publish a regular newsletter. Educational programmes that take in schools and universities would further enhance awareness and increase understanding.

Special training courses tailored to the needs of civil servants, the judiciary, senior officials, etc., would provide guidance about the signs and sources of corruption, as well as effective counter-measures (rules, modern management methods, crisis management). Furthermore, training the staff of the BSA and other anti-corruption bodies should become part of the GoI's national anti-corruption campaign. MENA-OECD has already assisted Iraqi representatives in acquiring better instruments to fight corruption through workshops and meetings in 2008 and recommends follow-up.

Public integrity

Many measures for tackling corruption are neither stand-alone nor specific to certain kinds or havens of corruption. They are part of wider public administration and regulatory reforms that aim at increasing transparency and accountability within public institutions. Prevention of corruption covers a very broad range of measures to strengthen public service integrity.

A first step could be for countries to introduce codes of ethics, further complemented by ethics specific to government bodies. Once a code has been drafted, it is key to disseminate it effectively, then build on it through high-quality, on-the-job ethics training for public officials.

An additional, and effective, way of driving home the integrity message is to spell out anti-corruption principles and enforce non-compliance sanctions. The CPI has developed a code of conduct for ministries and government offices that officials and employees are bound to comply with (see 3.3.1.2.) as a condition of employment. MENA-OECD recommends reviewing the code and its application to clarify and strengthen the standards of ethical conduct to which the GoI employees must adhere.

Additional measures to reinforce public service integrity should be introduced. They include tools to prevent and manage conflicts of private and public interest among government employees. There should be special emphasis on developing practical guides and training in the implementation of regulations – and on strengthening the institutional mechanisms that will support this implementation.[32]

Compulsory public disclosure of assets for public officials could also contribute to countering illicit profit making, if their declarations are properly verified and regularly updated. Checks could be carried out by a specially assigned public office or organisation with powers of public scrutiny. It is critical to ensure the access of law-enforcement bodies to disclosure documents when they investigate corruption-related offences by public representatives.

Encouraging human resource management policies, like merit-based and competitive recruitment, may also help to strengthen integrity.

Whistleblowing

Reporting suspected misconduct by public officials can either be required by law and/or facilitated by rules. Whistleblowing – the act of raising concerns about misconduct within an organization – is a crucial element of good governance, transparency, and accountability.

In 2008, the GoI approved a new law on the protection of whistleblowers to complete the range of institutions and procedures already in place to enable whistleblowing in Iraq. They include inspectors general in ministries, complaint procedures, help desks, and telephone lines.

Yet whistleblowing seems almost non-existent. In the context of insecurity and violence, most civil servants do not dare denounce corruption in government agencies and administrations. Those Iraqis who have done so are exposed to intimidation, threats, and reprisals. The GoI must reinforce whistleblowing through additional measures and by actually implementing existing instruments – and they must give whistleblowers proper protection against reprisals.

Business, civil society and the media

Business integrity is essential in fighting and preventing corruption. Adequate policies and procedures are an important element of a comprehensive business integrity and anti-corruption strategy. Drawing on the answers to its questionnaire, MENA-OECD recommends that the GoI adopt a workable, coherent business integrity action plan.

Companies should be able to take preventive anti-corruption action. Respondents to the MENA-OECD questionnaire thought it would be highly beneficial for businesses to familiarise themselves with anti-corruption tools. Companies can fight corruption individually or through joint action either on a sector-wide or cross-industry basis, locally,

regionally, or globally. They should share experience, learn from their peers and, in partnership with other stakeholders, work to level the playing field.

Civil society has a key role to play in fighting corruption, too. The MENA-OECD questionnaire confirms that Iraqi civil society continues to regularly denounce and voice concern about corruption. However, it has insufficient legal knowledge and no access to official data, which limits its scope for action. The print press and electronic media can be powerful allies in the fight against corruption. In numerous countries, the press has contributed to a better understanding of the dangers and costs of corruption, put pressure on ruling elites to mend their ways, and supported anti-corruption action by both the public bodies and civil society.

An open, active, free press can help blow the whistle on corruption. Journalist and media professionals in Iraq should benefit from modern, democratic laws providing them with necessary legal rights that are further strengthened and protected by an independent judiciary and the rule of law.

Media workers should also be encouraged to draw up a professional code of conduct and to comply with the law on defamation in order to ensure that journalists treat corruption issues impartially.

Adequate controls

Oil resources

Proper control of oil resources and related expenses is a constant concern of the GoI. A metering system is one way of curtailing oil smuggling. Iraq is installing, repairing, and/or regulating oil-flow meters at its oil production and distribution facilities as part of the Ministry of Oil's three-year plan. Reportedly, meters should be put in place at all facilities in the near future. Installation is, however, only a first step. Regular maintenance and servicing will be needed to guarantee conformity with international metering standards.

In a report published in 2006, the Inspector General of the Iraqi Oil Ministry identified additional measures to contain smuggling. One measure was an agency for combating smuggling that would collaborate with Iraq's oil, defence and interior ministries. As of October 2008, this agency has not been established, and the government has plans to transfer the oversight of oil revenues to an independent Iraqi body, the Committee of Financial Experts (COFE).

Established by the Council of Ministers to succeed the International Advisory Management Body (IAMB), the COFE is preparing to assume the role played by the DFI. Its members are the president of the BSA and two independent experts chosen by and reporting to the Council of Ministers.

MENA-OECD strongly advises that the GoI establish and maintain integrity and accountability in operating, trading, and administering oil and related revenues. It is imperative that future regulations be clear and well-defined, and that an effective monitoring system be established if new sources of corruption are to be avoided.

Public procurement

In order to fight corruption in the particularly vulnerable area of public procurement, the regulatory framework needs to cover the entire procurement cycle – from design and definition of needs to the final phase of delivery and contract payment. Establishing a clear,

straightforward regulatory framework that fully meets the needs of public procurement is a first step.

Public Procurement Law No. 87 of 2004 issued by the CPA is the last procurement law enacted in Iraq. Further regulations and instructions were approved and published in 2007 and 2008, and a practical guide drafted on the basis of the 2004 law to ensure proper implementation. A new procurement bill, which draws on international standards and good practices, is in preparation.

Standardisation, transparency, and accountability through greater scrutiny and a public procurement process that is scheduled in advance and where all involved have clearly defined responsibilities will reduce room for bad and discretionary practice. Regulations must be clear and understandable by all. Top-heavy or constantly changing regulations may generate corruption through deliberate or unwitting disregard or misinterpretation. They should be applied to all procuring entities and to the majority of goods and services purchased by ministries, non-ministerial agencies, provinces and regions. Government contracting entities should avoid working with companies and individuals that have a record of corruption and bribery.

The *OECD Benchmark Report on Improving Transparency in Government Procurement Procedures in Iraq* (2008) details Iraqi public procurement provisions and their implementation, as well as providing a number of policy recommendations for improvement.

Domestic budget allocation and management

Adopting and publishing a national public budget has been an important step forward for Iraq, where budgets had traditionally not been disclosed. In fact, it was long considered a crime to report budgets. As of May 2003, a prime objective for the CPA was a government that would provide the money for ministries' operating expenses. To do so, it used the existing national budget system of mandatory monthly ministerial and government spending plans that identified amounts for salaries, operating expenses, and capital expenditures. The system also required monthly submissions of trial balances with details about the previous month's allocation of funds.

As Iraq continues to face significant challenges, budget practices are key to establishing transparency and public accountability. Mismanagement, waste, abuse, and corrupt practices still take place and especially affect ministry budgets. The GoI and ministries must develop meaningful, transparent, accountable budgets that correspond to international best practices. It is important to ensure full reporting from public accounts and clearly explain the strategic goals and specific programmes within each ministry.

In order to foster public debate and build consensus, MENA-OECD suggests the following measures to improve the transparency and effectiveness of domestic budgets:

- Ensure the DFI is used transparently and clarify how it must contribute to the national budget.
- Adopt a national strategy explaining budget priorities, objectives, revenues and expenditures. Each ministry should draft a detailed plan on its activities and expenditures, and how these meet the objectives set out in the overall budget strategy.
- Clarify the role of the Committee of Financial Experts.

- Provide more data on state-owned enterprises, their incomes, and their assets in order to minimise opportunities for corruption and improve transparency.
- Publish reports on the actual implementation of budgets, assessing whether expenditures are realistic and well-targeted, and whether future budgeting proposals are appropriate.
- Estimate revenues and expenditures in budgets consistent with a medium-term framework and plans for Iraq's reconstruction.
- Establish procedures for budget auditing and better guidelines to guarantee that audit reports are publicly disclosed and conducted in a timely fashion.
- Involve civil society more closely in the budget process to build consensus on the use of national resources.
- Define fiscal discipline in the use of budget resources to gain the confidence of international donors and the investment community.

Customs and borders trading

Customs administration has many important functions: it implements a country's foreign trade policy and is responsible for managing customs rates, quantitative limitations, and rules on the origin of goods and anti-dumping measures. It normally prevents the trafficking of illegal goods such as weapons or narcotic drugs, and the import of goods restricted by international treaties and standards. It also provides an additional source of liquidity by collecting income from import and export taxes. In Iraq, corruption in customs administration has been a very serious matter. It has spread since 2003, most notably through smuggling. A wide and consistent range of anti-corruption measures will have to be developed and implemented to put an end to corruption in customs administration.

Tax administration

A functioning tax system is essential to weighing the costs and benefits of transition, promoting sustainable growth, and achieving stable power-sharing between different levels of government. GoI representatives questioned by MENA-OECD state that the country's tax administration is very weak and that, although rates are low, hardly any taxes are collected.

In functioning systems, tax inspectors are able to detect corruption. In transition economies, however, they are more prone to taking advantage of their position and collecting bribes. Because there is no real history of paying taxes in Iraq, Iraqi tax inspectors necessarily do not engage in corrupt practice to any great extent. However, as the tax system develops, the GoI should ensure that inspectors are aware of corruption and contribute effectively to fighting it.

The OECD has developed a series of good practices from tax administration in its 30 member countries, which it has made available to the Iraqi government. It has also produced a review of tax policy options, which will help Iraq compare notes with MENA countries. Building on its understanding of MENA taxation systems, MENA-OECD recommends several measures.

To begin with, the GoI should develop a tax administration system based on international best practice. It should also build its capacity to predict the revenue effects of

tax policy changes. Special consideration should be given to tax policies that encourage new businesses and investment (through incentives), generate growth and employment, and minimise compliance costs through simplified regimes.

Oil taxation requires efficient resource and revenue management and good governance with accountability and transparency. In Iraq, taxation of oil rent and other oil products should be an additional source of revenue. On this point, MENA-OECD believes the GoI could learn from the successful experience of Norway.

International support and funding

The Paris Declaration on Aid Effectiveness, which the GoI endorsed in May 2008, provides instruments for the oversight of international funds. The declaration compels the GoI to respect the principles of aid effectiveness and become more accountable to international donors by using funds more transparently. The PDAE also obliges international partners to respect both Iraq's needs and reporting requirements.

However, challenges remain regarding the appropriate use of international funds by the GoI. MENA-OECD recommends that it put into practice the PDAE framework. It should offer guarantees of transparency and accountability, for which it might need further assistance from the international community.

Notes

1. African countries on which research has been conducted notably include Angola, Congo Brazzaville and Nigeria.
2. The allocation and spending of large sums of development aid from the donor community are difficult to track in countries with weak or non-existent oversight and review mechanisms. Furthermore, the police, investigating magistrates, prosecutors and the judiciary are weak and ill-equipped to defend integrity. Finally, media and civil society stakeholders are not in a position to support anti-corruption efforts.
3. See the findings of audit reports conducted by the International Advisory and Monitoring Board.
4. "Iraqi Trade Officials Ousted in Corruption Sweep", *New York Times*, 23 September 2008.
5. Order No. 1, "De-Baathification of Iraqi Society", CPA, 16 May 2003; Order No. 2, "Dissolution of Entities", CPA, 23 May 2003. The decision by US administrator Paul Bremer to dismantle the army had highly disruptive effects on Iraq's security situation.
6. The DFI was created by the UN Security Council Resolution 1483, and its operation extended under UNSCR 1468 until the end of 2008. The CPA managed the fund after Saddam Hussein's overthrow until 28 June 2004; and was then monitored by the International Advisory and Monitoring Board for Iraq (IAMB). Iraq's Ministry of Finance then took formal control in order to allocate funds to other ministries in line with the national budget.
7. On mismanagement of the DFI, see William Fisher, "Report Finds 'Appalling Level of Fraud and Greed'", *Global Policy Forum*, 29 June 2005.
8. See the different audits by the CPA Inspector General, International Advisory and Monitoring Board.
9. "Iraq makes progress on economic front", *IMF Survey Magazine*, Vol. 37, No. 3, March 2008.
10. "Smuggling Crude Oil and Oil Products", *Second Transparency Report*, Iraq Oil Ministry's Inspector General, 2006.
11. "BBC uncovers lost Iraq billions", *BBC News*, 17 June 2008.
12. See National Procurement Fraud Task Force, *Progress Report*, December 2008 under *www.usdoj.gov/criminal/npftf/resource/Dec08progress_report.pdf*.
13. Other domestic or foreign cases may be identified should new or additional evidence become available. The December 2008 Progress Report by the US National Procurement Fraud Task Force

(page 13) underlines the difficulties associated with investigations and prosecutions of procurement fraud cases involving the war in Iraq. They are complex and resource-intensive, involving the investigation of extraterritorial and domestic conduct, requiring the coordinated efforts of military and civilian law enforcement authorities, and coordination with foreign law enforcement officials. Moreover, these investigations are extremely difficult to conduct because of the need to provide adequate security to prosecutors and investigators who are working abroad to put together these cases. Additionally, the difficulty of locating and collecting evidence and interviewing witnesses in an active combat zone cannot be overstated. Among other things, covert investigative techniques, which are often crucial to the success of these investigations, are very difficult to undertake in a combat zone.

14. Order No. 7, "Penal Code", CPA, 9 June 2003. Before the adoption of the IPC in 1969, Iraq was administered for decades by the "Baghdad Penal Code" (*Qânûn al-'Uqûbât al-Baghdâdî*), a provisional law established in 1919 by the British, and redrafted several times by Iraq's successive regimes. See Richard Coughlin, "In Iraq, a Justice System Worth Saving", *New York Times*, 26 July 2003.
15. Iraq Penal Code, Chapter 3, 1, §21-1.
16. Iraq Penal Code, Articles 307-314; Order No. 55, Appendix A, 6.
17. Order No. 59, "Protection and Fair Incentives for Government Whistleblowers", CPA, 1 June 2004.
18. "Implementing Regulations for Governmental Contracts" (2007). See *OECD Benchmark Report on Improving Transparency in Government Procurement Procedures in Iraq*.
19. Order No. 93, "Anti-Money Laundering Act", CPA, 2 June 2004. It is noteworthy that the 1969 Penal Code also contains provisions likely to be used as a legal basis to punish certain forms of money laundering. Article 460 sanctions "any person who knowingly obtains, conceals or makes use of any goods acquired as a result of a felony, or disposes of such goods in any way".
20. Order No. 56, "Central Bank Law", CPA, 1 March 2004.
21. Order No. 54, "Trade Liberalization Policy", CPA, 24 February 2004.
22. Order No. 55, "The Commission on Public Integrity", CPA, 27 January 2004.
23. Order No. 57, "Iraqi Inspectors General", CPA, 5 February 2004.
24. Order No. 77, "Board of Supreme Audit", CPA, 18 April 2004.
25. Accordingly, 2008 was labelled "Anti-corruption Year in Iraq" by the GoI.
26. The International Compact is an initiative of the GoI announced in 2006, and designed to foster a new partnership with the international community. Jointly chaired with the United Nations, it aims to provide Iraq with assistance to achieve its national strategy over the next five years, and requires the GoI to establish benchmarks for normalizing security, stabilizing the political environment, and revitalizing the economy.
27. Since then, the GoI has drafted new laws intended to better reflect the UNCAC requirements and clarify the mandate of each anti-corruption agency.
28. Law No. 24 on Public Service (1960).
29. The PDAE was presented and discussed with the Iraqi delegation in the framework of the MENA-OECD Iraq Project meeting in early March 2008.
30. "Adapt and apply to differing country situations", Paris Declaration on Aid Effectiveness, 2 March 2005.
31. Article 136(b) of the Law on Criminal Procedures, which had been repealed by the CPA, was reinstated following the formal transfer of sovereignty to new Iraqi authorities in June 2004.
32. The *OECD Recommendation on Guidelines for Managing Conflict of Interest in the Public Service* provides useful tools for the development and implementation of an effective conflict of interest policy.

ANNEX 3.A1

Campaigning Against Corruption, the Paris Agreement, and Chapter Methodology

3.1. Iraq's National Campaign against Corruption (2008)

- Point 1: Setting new and opportune mechanisms to increase audits and inspection reports by stakeholders;
- Point 2: Setting standards designed to evaluate the performance of all units within ministries;
- Point 3: Drafting a new proposed law on whistleblowers;
- Point 4: Supporting Inspector General Offices (IGOs) and providing them with sufficient budgets and personnel;
- Point 5: Reviewing procurement instructions;
- Point 6: Executing the UN Convention against Corruption, which the GoI has committed to;
- Point 7: Implementing the principle of transparency within ministries, institutions and agencies, and setting up a system of disclosure for necessary material and information;
- Point 8: Defining a roadmap for the training of personnel within anti-corruption agencies;
- Point 9: Reviewing existing laws related to money laundering through a roadmap to establish control mechanisms of such activities;
- Point 10: Setting new, effective and quick processes for full control and implementation in cases of administrative corruption;
- Point 11: Accelerating the implementation of new laws for the Commission on Public Integrity and the Board of Supreme Audit and Inspector General Offices;
- Point 12: Reviewing the Law on Public Service No. 24 (1960);
- Point 13: Enhancing leadership skills through training of Iraqi representatives;
- Point 14: Drafting a new national law specific to the fight against administrative corruption;
- Point 15: Simplifying all transactions within Iraqi ministries;
- Point 16: Achieving the governmental electronic project;
- Point 17: Working with civil society and NGOs;
- Point 18: Pursuing economic and administrative reforms.

3.2. GoI/MENA-OECD/UNDP Paris Agreement

Participants at the MENA-OECD High-Level Meeting on Economic and Governance Policy Reforms, held on 8-10 July 2008 within the framework of the International Compact with Iraq (ICI) and Iraq's National Development Strategy (2007-2010), placed particular emphasis on anti-corruption efforts.

The Iraqi delegation committed to support the GoI in strengthening the regulatory and institutional framework designed to enhance and maintain accountability, transparency and integrity in the public and private sectors through the following actions:

- Institutional and policy development, enhancing the capacities of the principal anti-corruption institutions of Iraq and their co-ordination at federal, regional and local levels, in particular of the Commission of Integrity, the Board of Supreme Audit, the Inspectors General, the Joint Anti-Corruption Council and the Parliamentary Integrity Committee.
- Effective prevention through improved public administration and management, including public financial management and development of the civil service.
- Improving implementation through support of capacity building with practical tools and training programs and by enabling officials and institutions in designing and implementing integrity and anti-corruption measures.
- Re-establishing a culture of integrity in society at large with public-private coalitions and partnerships against corruption, general public awareness and long-term education strategies to communicate public integrity as a shared responsibility.
- Preventing conflict of interest, strengthening standards and implementation mechanisms, in particular financial disclosures, to support the identification of conflict of interest and also support detection of illicit enrichment.
- Inspection, monitoring, detection and oversight by strengthening the specialised functions of the BSA, IGOs and the Parliamentary Integrity Committee.
- Consistency of anti-corruption laws: ensuring anti-corruption laws in Iraq are consistent, meet international standards and are well known both by public officials and by the society at large.
- Enforcement of laws and regulations, including authorities of the COI, to carry out the COI's independent investigatory functions, to strengthen the law enforcement capacities of investigative judges regarding fraud and corruption, and to protect witnesses and other persons bringing corrupt activities to the attention of the authorities and the public.
- Enhance the system of public procurement by implementing effective rules and mechanisms to promote competitive bidding, increasing transparency, ensuring integrity of the system at all levels of government, providing adequate training to public procurement officers, and encouraging integrity commitments by enterprises participating in the bidding process.
- International assistance for corruption and related crimes, by building a functional system, operational capacities as well as channels and mechanisms for international cooperation in areas such as money laundering and asset recovery.

- Inter-agency co-ordination and co-operation to ensure consistency at the policy and operational levels in the design and implementation of integrity and anti-corruption measures.
- International co-operation, to increase the knowledge of international good practices, enhance Iraq's participation in relevant international and regional forums, and support Iraq in fully complying with the requirements of the United Nations Convention against Corruption.

3.3. Methodology and questionnaire on corruption

Scope and methodology of Chapter 3

This chapter builds on the research led by MENA-OECD in 2008 into the main sources of corruption in Iraq, the country's legal and institutional anti-corruption framework and remaining challenges. It is complemented by the findings collected during meetings organised by MENA-OECD, questionnaires addressed to public- and business-sector representatives in Iraq, as well as interviews conducted with Iraqi delegates from national anti-corruption institutions.

Between January and July 2008, workshops and meetings addressed, amongst other topics, anti-corruption policies in Iraq. On these occasions, public officials and representatives from the private sector openly shared their insights and knowledge on the present corruption trends and challenges faced by Iraq. In order to fully involve the Iraqi authorities, it was decided by MENA-OECD to seek additional information and data by way of questionnaires.

In June 2008, a questionnaire was sent in English and Arabic to several Iraqi ministries and actors from the business sector. To get a better understanding of corruption in Iraq, it was divided into three distinct parts. A first part – on the current general context – raised the corruption issue in general terms and asked the question: Why, and to what extent, do Iraq's public and private actors engage in corrupt practices, and which areas/positions are the most affected?

A second part relates to the legal and institutional framework and is designed to assess the level of awareness among the respondents regarding anti-corruption provisions and agencies. A third part – a look ahead – seeks to identify current concerns about corruption in Iraq and potential actions to address the problem in the short and longer term.

The questionnaire addressed to the GoI was circulated via the prime minister's office to the ministries of health, trade, industry, oil and electricity, as well as to anti-corruption bodies, *i.e.* the Commission on Public Integrity, Board of Supreme Audit, and Inspectors General. As for the version addressed to representatives of Iraq's business sector, it was transmitted via the International Chamber of Commerce Headquarters in Paris to Iraqi representatives who themselves further dispatched the questionnaire to the local business sector.

The OECD Secretariat received over a dozen responses: officials from several key ministries replied, as well as ten representatives from the Iraqi private sector. It is worth noting that while most general questions were answered, more specific anti-corruption-related questions were often left blank.

The preliminary findings of this chapter were presented and validated during the MENA-OECD High-Level Meeting on Economic and Governance Policy Reforms in Iraq.

*Questionnaire on integrity and fighting corruption in Iraq**

General context

1. In your country, do you consider corruption a problem? Please explain why?
2. Would you consider that people in Iraq engage in corrupt practices for many purposes or are corrupt practices particularly frequent in transactions involving public funds?
3. What areas do you see as most affected by corrupt practices: basic public services, government procurement, private sector domestic business transactions, private sector international business transactions, other? Please elaborate with specifics on the area most affected by corrupt practices.
4. Do you perceive corrupt practices as a problem, which affects certain or all of the following positions:
   a) Political leaders (national or local-level);
   b) Customs officials;
   c) Civil servants;
   d) Licensing and other regulatory officials;
   e) Police;
   f) Judges and other judicial system officials;
   g) Tax officials;
   h) Others (please mention what public positions – not a person's name).
5. How frequent would you estimate that individuals or firms make extra payments in connection to:
   a) Public utilities (phone, electricity, etc.) ;
   b) Import and export permits;
   c) Awarding of public contracts;
   d) Obtaining of licenses;
   e) Public distribution system (*e.g.* wheat, rice);
   f) Other – please explain.

   Please classify your answers to these options on a range of five with 1 meaning "it never occurs" and 5 "it is a very common practice".
6. Do you think governmental civil servants "demand" special payments or favours for their services or are they being offered extra payments to handle transactions in a more efficient manner?
7. Would you consider that foreign and domestic businesses engage in corrupt practices similarly or differently? Please specify which and why.
8. Are there risks associated with engaging or not engaging in corrupt practices? Please explain your point of view.

* This questionnaire is the version as sent to Iraqi government representatives. It has been revised and amended relative to the version sent to business sector representatives.

Legal and institutional framework

9. Are you aware of government measures and actions to fight corrupt practices? Please mention the measures and actions adopted over the last two years. Are you aware of the Government's motivations and expectations regarding the "National Campaign for Fighting Administrative Corruption" announced in January 2008?
10. Please mention the responsibilities and tasks of your institution/organization to build integrity and fight corruption in the public service? Please specify the mandate and staff resources.
11. Are you aware of legal provisions that regulate corrupt practices? If so, please mention past and current legislations?
12. Is the legal framework clear and well defined and do you consider that the legislation can effectively be enforced? Should additional laws and regulations be adopted and introduced and if so which ones? Please explain your point of view.
13. Do you know if a corruption accusation has been raised against a person in your ministry/organization? Has that person been referred to jurisdiction? Has a final verdict been issued in the case?
14. Do you know if a corruption accusation has been raised against a person (natural or legal) that has been giving bribes? Do you know whether such acts are criminal? If so, has that person been investigated and prosecuted and has a final verdict been issued?
15. Are you aware of any procedures for public servants to report misconduct? Do employees use these procedures? If people are reluctant to report corruption cases, is this due to:

    a) Fear from corrupted persons? From his party and supporters?

    b) No use as no action will be taken.

    c) Do not know how and to whom I should report.

    d) Others (please specify).

    Are protections in place to protect those who report from possible negative consequences and what are those protections?
16. How do you evaluate the role of the "General Inspection" bureau at your ministry/organization? What are your suggestions to enhance and improve its performance?
17. Are you aware of any actions by businesses or civil society NGOs to limit extra payments to civil servants? Please mention the actions taken or planned.
18. Are you aware of actions taken by international organizations to fight corruption? Do you believe that these actions can and should support the Government of Iraq in its efforts to enhance integrity? If so, why and which measures would you recommend?

Looking ahead

19. What are the emerging concerns relating to corruption? What are, in your opinion, the key actions to address the sources of corruption in the short and medium term and who are /should be the key players? Please explain your point of view.
20. Please mention whether we can contact you for any follow-up to this questionnaire.

PART I

Chapter 4

Improving Transparency in Government Procurement Procedures

Background

The request made by the Iraqi authorities

Public procurement is a particularly corruption-prone government activity. Governments around the globe have grown increasingly alert to the risks of corruption and to the need for greater transparency and accountability in public procurement given its tremendous importance, both economic (10-15% of gross domestic product)[1] and strategic (procuring the goods and providing the services that administrations need).

Representatives from the GoI expressed their concerns over corruption in procurement at an OECD Workshop on Enhancing Transparency in Public Procurement Procedures, held in Amman, Jordan, on 24 January 2008. Discussions led to the Iraqi officials requesting that the OECD examine Iraqi public procurement regulations and procedures and provide policy recommendations for improvement. They also asked the OECD to identify good international practices in order to help them fight corruption and promote integrity in public procurement.[2]

This chapter seeks to respond to those requests, in three parts:

- an overview of Iraqi procurement regulations;
- a critical appraisal of the 2008 Regulation that uses the OECD Principles as a framework;
- proposals for action.

Specific suggestions, prompted by critiques of certain provisions in the 2008 Regulation, are highlighted in frames, while standalone boxes show examples of practices in different countries.

All references to Iraqi procurement regulations relate to the English translations of the 2007 Procurement Regulations, the 2007 Contracting Guide and the 2008 Regulation received from the Iraqi national authorities.

How information was gathered

Information was gathered first from Iraqi ministries, particularly the Ministry of Planning and Development Co-operation, the Council of Ministers, and various international organisations working in Iraq. Additional documents were added from preliminary research by the OECD Secretariat.

The OECD Secretariat interviewed Iraqi representatives to understand what they expected from the chapter. On the basis of their replies, the OECD drafted a questionnaire as a data collection tool. It was entitled the "Survey on Current Public Procurement Legislation in Iraq" and was translated into Arabic in order to reach a wide cross-section of Iraqi experts.

With the agreement of GoI officials, the OECD Secretariat developed four specifically tailored versions of the survey which it sent out to the following stakeholder groups:

- ministries and regional authorities;

- members of the JACC;
- members of the Iraqi Parliament;
- private sector representatives.

The OECD Secretariat received 40 responses to the survey which yielded unique, first-hand insights into the implementation of public procurement legislation in Iraq and a broad spectrum of Iraqi opinions.

It then drafted a "Discussion Paper – Improving Transparency in Government Procurement Procedures in Iraq" to present the preliminary findings of the OECD procurement survey. The paper was distributed prior to the Paris Workshop on Enhancing Transparency in Public Procurement on 8-10 July 2008 and used as a key background document to support discussions.

Iraqi replies to the survey questionnaire were benchmarked against procurement procedures recommended by international organisations – particularly the World Bank, the International Monetary Fund and the European Union – and were reviewed in light of international legal instruments and good practices, including:

- The Government Procurement Agreement (GPA) of the WTO.
- The Model Law of the United Nations Commission on International Trade Law (UNCITRAL).
- Main policy instruments drawn up by the OECD, in particular the OECD Recommendations for Enhancing Integrity in Public Procurement, which builds on good international practices and the OECD Principles for Enhancing Integrity in Public Procurement (referred to as the "OECD Principles").
- European Commission Directives.

Historical overview of Iraqi public procurement and its actors

The 2004 Law on Public Contracts

The CPA Order No. 87 of 2004 – known as the "Law on Public Contracts" – is the most recently passed procurement law in Iraq. Approved as part of the CPA's efforts to rebuild public governance frameworks and capacities in Iraq, it created the Office of Government Public Contract Policy (OGPCP), within the Ministry of Planning and Development Co-operation (MoPDC). The purpose of the OGPCP was to ensure implementation of the 2004 law. It was vested with the following responsibilities:

- Co-ordinate government public contract policy for all ministries and public entities.
- Establish an independent administrative tribunal to handle procurement complaints and disputes.
- Provide expertise and recommendations for improving regulations and instructions as they relate to government procurement.
- Develop and adopt standard government public contract provisions.
- Train government public contracting personnel.

The 2004 public contract law lays down the principles of government procurement in general and of open competition and negotiated procedures in particular. It describes the contracting authority and the standard public contract provisions and contract specifications. It also sets out financial requirements, the dispute resolution system, and the principles of procurement integrity and conflict of interest.

Fast-changing procurement regulations

A number of fast-changing regulations and instructions have been issued to support implementation of the 2004 public contract law.

In 2007 the Implementing Regulations for Governmental Contracts (known as the "2007 Procurement Regulation") were issued under the authority of the OGPCP and with the help of the Procurement Assistance Centre (PAC). The PAC also published the *Iraq Quick Start Contracting Guide* (or *Contracting Guide* for short) in 2007. Aimed at Iraqi public procurement practitioners, its aim was to better disseminate and explain the procurement provisions set out in the 2007 procurement implementing regulations.

In 2008, new procurement instructions were issued. They contained nothing new, but were more explanatory and detailed than the 2007 regulations. In the same year, the OGPCP issued Regulation No. 1 on the implementation of government contracts (referred to hereafter as the "2008 Regulation"),[3] which replaced the 2007 Procurement Regulation. By the end of 2008, the MoPDC had prepared another draft public procurement law and submitted it to the government for approval.

Iraqi procurement regulations have changed rapidly and not always transparently. The coexistence of rules, instructions, and regulations and blurred divisions of competence in procurement procedures and oversight result in confusion and limited efficiency in the daily work of Iraqi public procurement officials. In addition, responses to the OECD public procurement survey questionnaire show that different ministries follow different procurement rules.

Institutionally, the MoPDC is in charge of issuing and implementing government procurement regulations. In order to increase awareness and to disseminate and enforce public procurement regulations more efficiently in a quickly changing legal framework, responsibility for supervision of the overall contracting process could be transferred from ministry level to a higher authority, such as the Council of Ministers (CoM).

Assessing the 2008 procurement implementing regulation

For an objective assessment of the 2008 Regulation, the OECD Principles for Enhancing Integrity in Public Procurement are a valuable yardstick. This internationally recognised framework contains ten key recommendations for reinforcing integrity and public trust in how public funds are managed (see Annex 4.A1). They come under four headings:

- Transparency.
- Good management.
- The prevention of misconduct, and compliance and monitoring.
- Accountability and control.

Transparency for fair and equitable treatment

OECD Principle 1: "Provide an adequate degree of transparency in the entire procurement cycle in order to promote fair and equitable treatment for potential suppliers."

An important aspect of transparency in public procurement is the overarching obligation to treat potential suppliers as equitably as possible throughout the procurement procedure – from needs assessment to contract management and execution. Adequate transparency is a pre-condition for fair, open, well-understood procurement.

General comments on the 2008 regulation

The scope of the 2008 regulation

Because the 2008 Regulation provides numerous guarantees of transparency throughout the procurement process, its provisions partially meet the above-mentioned transparency requirements. They also span the procurement cycle from the preparation of tenders to bid evaluation, the award procedure, and payment. They do not, however, apply to projects and public contracts financed by international and regional organisations (Article 2.2), for which special agreements or protocols are drawn up. In other words, there are no coherent, systematic rules for such contracts, whatever their value. Paradoxically, the procurement rules applied by international organisations are often similar to the Iraqi regulation. Yet they continue to apply their own procurement rules instead of the national Iraqi system, which raises a number of problems:

- There is inequality between domestic actors and international actors not subject to the same rules.
- Different control mechanisms are applied under national and international procurement rules *(e.g.,* large amounts of international funds may not be registered in the Iraqi national federal budget and may therefore escape the Iraqi parliamentary oversight).
- Article 2.2 may open the door to possible corruption and, at the very least, to suspicions of corruption.

Length and style of the 2008 Regulation

The 2008 Regulation, which covers the procurement cycle from the preparation of tenders to payment of the contract, is neither too complex nor too long. Compared, for instance, to EU directives, it is short.

Nevertheless, the mechanisms in place could be described more simply and precisely. Further suggestions for easing procedures will be detailed throughout this chapter.

The 2008 Regulation is better written than its 2007 predecessor. It is better structured and sets clear objectives right from the beginning of the document, while its style is clear, concise, and user-friendly. However, it gives the impression of having been drafted more for international transactions than for small- and middle-value national procurement contracts.

Coexistence of regulations

Another important general point is that different procurement procedures coexist with the 2008 Regulation. As replies to the survey questionnaire show, these multiple procedures are a non-negligible risk factor, as they fail to ensure the security of public buyers. Some private sector representatives, in response to the questionnaire, stated that, in the same entity, certain civil servants were still using former procurement procedures (*e.g.* from the CPA period) while others applied the 2007 Procurement Regulations.

The coexistence of several sets of Iraqi procurement regulations was already a major concern of the 2006 World Bank Report.[4] Yet since it was published, two new procurement regulations have been issued. Responses from ministries to the OECD survey questionnaire

in 2008 confirm that procurement procedures are a mixture of regulations and instructions that include:

- The CPA Order No. 87 on Public Contracts of May 2004.
- The 2007 Implementing Regulations for Governmental Contracts.
- The 2008 Governmental Contracts Implementing Regulation No. 1 (the "2008 Regulation").

To compound matters, awareness of the 2008 Regulation appears to be very limited. This can be partially explained by the fact that the *Iraqi Official Gazette* published the 2008 Regulation only in May 2008.

However, procurement regulations also change fast and frequently in developed countries, as the case of France illustrates.

Box 4.1. **Case study of a country with fast changing procurement regulations – France**

In France, three new public procurement codes were adopted in the years 2004-8. Public purchasers had real difficulties following the quick change of regulations that at times significantly differed from those they had used previously and which had been in force for nearly 20 years. This situation has resulted in an increased number of appeals and disputes often lost by the government because public purchasers had not always been informed of the latest laws and were using procedures that did not comply with the new regulations. The work of public contract fraud and corruption investigators was also complicated because they had to investigate cases in accordance with the law in force at the time they were signed.

Preparing invitations to tender

The 2008 Regulation requires all government contracting entities in ministries, non-ministerial agencies, provinces and regions ("government contracting entities") to carry out comprehensive technical and economic feasibility studies before starting procurement procedures (Article 3.1[a]). The Ministry of Planning and Development Co-operation must first approve the technical and economic feasibility study – an impractical requirement, according to Iraqi delegates in conversations with the OECD, as communication among ministries and governmental entities is limited in the Iraqi administration.

Article 3.1(c) of the 2008 Regulation also emphasises that the authorities need to make sure that they have earmarked adequate funds for a project before initiating a tender. All the provisions in Article 3.1 are designed, if properly implemented, to maximise guarantees for public buyers and contractors.

Although the 2008 Regulation does not stipulate so, verifying that public purchasing projects meet a real, proven need of the contracting entity is of the utmost importance to avoid waste of public funds. For reasons of objectivity, a body that is separate from the contracting entity should assess and verify the need.

As part of the procedure for preparing a tender, the 2008 Regulation requires government contracting entities to estimate the cost of every project. It does not, however, specify methods or formulae for estimating cost, nor who is responsible for doing it. Estimated cost plays a significant role in procurement:

It helps to rule out bids that exceed 15% of a project's estimated cost (Article 5.4). The 2008 Regulation improves significantly on the 2007 regulation in that bids significantly lower than the cost estimated by the contracting entity are no longer automatically ruled out. International good practice shows that there can be good reasons for such low prices, *e.g.,* new technical solutions or a company's start-up status.[5]

It can be grounds for cancelling a procurement procedure and reissuing a call for tender (Article 5.5[b] and [c]). In such cases, bids may exceed estimated cost by a 30% margin subject to special approval from the Central Contracting Committee (CCC)[6] of the General Secretariat of the Council of Ministers.

It is a factor in decisions to cancel or postpone a project and use the earmarked funds for other purposes and projects (Article 5.6[f]).

According to the public procurement survey questionnaire, price seems to be the decisive cost evaluation criterion, even though the estimated project costs are not disclosed in tender notices. Iraqi representatives at the 8-10 July 2008 meeting in Paris felt that it would be useful if the estimated costs could be published in tender notices – except in cases of some commodities.[7]

In most countries, the estimated cost of a project is kept secret, and publishing it is tantamount to a criminal offence. Other countries, such as Greece, publish a project's estimated cost in procurement notices. The Greek authorities believe that doing so limits opportunities for collusion between companies.

Publishing procurement notices

Procurement notice/Media publication

Publishing procurement notices is an essential precondition for fair and open competition. The media chosen can be the print press, specialised journals, and freely accessible web portals. It is mandatory to publish all public procurement contract notices.

As recommended, for example by the European Commission and the World Bank, mandatory publishing can also apply to projects that a contracting authority only considers launching in the coming year or period. Even if such a practice were not mandatory, it would be advantageous both for the purchaser – who could shorten deadlines for the receipt of tenders after the contract has been advertised – and suppliers, who could better plan their production schedule.

In Iraq, the 2008 procurement implementing regulations – like the 2007 regulations before it – do not contain specific measures requiring government contracting bodies to publish procurement plans for the year ahead. In the absence of prior information, potential suppliers have to submit tenders on an *ad hoc* basis as and when they are issued, and to meet deadlines which, in many cases, leave them insufficient time to prepare tenders. The lack of prior notification is part of the more general problem of planning, and can partly be justified by the Iraqi context.

Transparency in government procurement procedures in Iraq could be enhanced by institutionalising prior notices that give suppliers advance information about procurement opportunities coming up over a predetermined period.

Different public procurement contracts are advertised in different ways (Article 3.3[a] and [b]). For instance, some ministries use the Internet, while others use bulletin boards and newspapers. Iraqi embassies also advertise international procurement contracts on

their websites. Contractors with local agents in Iraq have the clear advantage of receiving timely information when tenders are published in the national media. On the other hand, foreign companies gain from e-tenders and from Iraqi embassy notices. Private sector replies to the procurement survey questionnaire highlight the importance of informal relations – such as acquaintances inside ministries – for being better informed about procurement opportunities.

A new provision in the 2008 Regulation is the requirement that the winning bidder is the one "responsible for bearing the costs of publishing and advertising the tender" (Article 3.3). One risk is that tenderers increase their prices to offset advertising costs, which may lead to an overall increase in prices. Moreover, the contracting authority calculates and communicates its advertising cost unilaterally without giving the winning supplier a chance to verify that the amount is correct. It is for such reasons that contracting authorities in most countries bear their own advertising costs.

A controversial provision of the 2008 Regulation is contained in Article 5.2.l. It allows the state contracting body to "cancel the tender, paying no compensation to the bidders, with the exception of the tender's documentation purchasing price only". It would be important to request the contracting authority to justify its reasons for unilaterally cancelling a project.

Advertising timelines

Experience shows that the deadlines for responding to calls for tender should leave suppliers sufficient time to prepare their bids. This is vital to increasing both the number and competitiveness of tendering companies. International organisations usually set deadlines based on the minimum advertising timelines for open and restricted procedures and the kind of service or product requested. Contracting authorities may lengthen them in accordance with the complexity of a project.

In Iraq, depending on the "importance of the contract", advertising timelines range from 15 to 60 days for procurement and consultancy services, and from 21 to 60 days for public works (Article 5.1[c]). To put these deadlines in context, the minimum period in the EU is 52 days for the open tender procedure and 37 days for tenders submitted under the restricted procedure. They may be reduced in the event of an emergency.

Iraqi advertising deadlines might need to be reviewed for several reasons:

- Procurement advertising timelines may be arbitrary, as the instructions and criteria for setting minimum and maximum deadlines are worded imprecisely in the 2008 Regulation.
- Except for commodity-related contracts, the minimum advertising timelines are too short compared to international practice. The 2008 Regulation even shortened the minimum deadline for public works procurements from 28 to 21 days.
- Advertising timelines do not for allow for the nature of stakeholder consultation and advertising procedures. They consequently fail to offer guarantees of transparency. Minimum deadlines are particularly important as, according to the private sector responses to the survey questionnaire, tight advertising periods do not always allow enough time to prepare all the documentation that needs to be submitted with the bid – *e.g.,* catalogues and technical details for complex procurement; bank guarantees, including performance bonds and bid bonds – nor to provide samples in a timely manner.

A new provision of the 2008 Regulation specifies that the countdown for the receipt of tenders starts from the date on which a procurement project was last advertised. This may cause problems, as potential contractors may not always have access to the media where the latest contract was advertised. This provision may open the door to arbitrary decisions on the part of the contracting authority and schemes to postpone the implementation of certain projects.

In order to help potential bidders keep up to date with procurement advertisements and notices, contracting authorities may consider developing and updating a central registry that indicates the dates and media on which procurement opportunities are advertised.

Information in procurement notices

Contrary to the 2007 Procurement Regulations, the 2008 Regulation clearly differentiates between information to be included and published in the advertising notice and information to be included in the tender documentation (Articles 5.1 and 2). Information published in a procurement notice is freely available and includes the nature and description of a project, its advertising timeline and tender closing date, the tender's purchasing price and the website reference for further information. However, all public procurement tender documentation in Iraq also has a so-called "non-refundable purchasing price". Access to the information included in the tender documentation (tenders' starting date and place, the date of a special conference to answer contractors' inquiries, etc.) is limited to those who pay this purchasing price.

Although the 2008 regulation specifically describes the information that should appear in advertising notices and documentation, a sample of Iraqi notices and documentation showed a lack of harmonisation in the information itemised in notices. Ministries with more capacity and/or experience in tendering (such as the Ministry of Trade, the Ministry of Industry and Minerals, and the Ministry of Electricity) publish tender notices that contain a wider range of information compared to less well equipped government contracting bodies.

According to private sector responses to the survey questionnaire, the lack of clear, unambiguous descriptions of procurement projects might be intentional – the aim being to favour specific contractors. Poor tender description data may thus contribute to discriminatory treatment and non-objective, even corrupt, practices.

Procurement notices do not indicate against which criteria an offer is judged to be the "most economically advantageous" – as confirmed by private sector representative respondents to the survey questionnaire. This differs from the practice in European countries, for example, where courts cancel tenders whose evaluation criteria is not published in advance. The Iraqi 2008 Regulation specifies only that the price of each tender should be calculated on a uniform basis (Article 7.7). This inevitably causes firms to question the impartiality of the decision maker. The lack of pre-defined evaluation criteria hampers contractors' preparation in submitting their bids and may also lead to subjectivity, favouritism, and the unequal treatment of tenderers.

In this regard, it would be useful to apply to Iraqi procurement regulations the recommendations made by the European Commission in 1994 or UNCAC in 2003.

Internationally speaking, the information published in procurement notices varies from country to country. Some is compulsory and stipulated by law, while information that

may not be obligatory may be required by court rulings. In France, for example, the courts continually add new items to the obligatory information published in tenders in order to prevent cancellations due to incomplete procurement notices.[8]

Tender reception and evaluation

Reception of tenders and bid opening committees

The 2008 Regulation pays significant attention to meeting the stringent conditions regarding the reception and filing of contractors' bids (Article 6.5). These measures could prevent a certain amount of fraud, *e.g.*, informing a bidder of another's offers or substituting price quotations. A new provision in the 2008 Regulation prohibits the disclosure of information related to tenders already received prior to the submittal deadline in order to maintain the confidentiality of the procedures (Article 6.5[a]).

The 2008 regulation accepts electronic bids – another improvement on the 2007 regulations. A related challenge is to secure the data received over the Internet.

Bid opening committees in ministries and non-ministerial government entities – both at national, regional and provincial levels – are made up of experts headed by senior civil servants like directors or chief engineers (Article 6). The 2008 Regulation sets out the committee's tasks very clearly in order to ensure formal, uniform reception, registration and filing of bids. Questions remain as to who nominates the president of a committee and its members, as provisions are vague in this respect.

Bid Evaluation and analysis committee

The bid evaluation procedure is entrusted to a technical committee, also composed of specialised civil servants (Article 7). The bid evaluation and analysis committee has an advisory role only. It submits its final report on evaluation processes and recommendations concerning procurement contract awards to the head of the contracting body that makes the final decision (Article 7.19). This is an important change: under the 2007 regulations, reports were submitted to the minister concerned (Article 7.19).

The obligation set out in the 2007 Procurement Regulations to renew the members of the bid evaluation and analysis committee at least every six months has been removed from the 2008 Regulation. As with the bid opening committee, there is no reference to who appoints the president and members of the bid evaluation and analysis committee. Nevertheless, appointment criteria should be competency and technical expertise. It is also important to ensure the right of members of the bid evaluation and analysis committee to make independent decisions based on objective assessments during the entire evaluation and analysis process.

In Iraq, public servants seem reluctant to take part in such committees. This reluctance stems from their having to know and obey such a large number of "internal regulations and instructions coming from higher authorities",[9] and from the fact that they may subsequently be questioned and inspected. Survey responses from ministries confirm that institutions such as the Council of Ministers, the Inspectors General, the State Commission of Taxes, the State Commission of Customs, the Ministry of Planning and Development Co-operation, or the Ministry of Finance can issue regulations and instructions.

The same idea was formulated by a private sector representative in these terms: "Iraqi officials frequently fail to act for fear of violating new rules and procedures which they

either don't understand or are scared of. In many cases this fear leads to reluctance to exercise practical judgement."

The reluctance of civil servants could be overcome either by keeping them more effectively informed of the numerous instructions and regulations or by involving officials from agencies like the IGOs, the BSA, and the CPI in the bid opening, evaluation and analysis processes.

Bid evaluation and analysis process

The responsibilities of the bid evaluation committee are very specifically set out in the 2008 Regulation (Article 7). While specific details do guarantee that the committee treats all bidding companies equally – especially as regards the strict application of conditions for accepting or rejecting submitted offers – they do not guarantee that all candidates are assessed against the same yardsticks.

The bid evaluation process is kept secret (Article 7.3), which is the rule in most countries. However, secrecy requires an independent court system with ease of access to the whole decision-making process to verify transparency throughout evaluation.

Tender notices do not include either bid evaluation criteria or the indicative prices. The 2008 Regulation stipulates only that tender documentation should include information on "the applied method for measuring the evaluation ratios for the awarding purposes" (Article 5.2[p]). Although this is a real improvement over the 2007 Procurement Regulations, the obligation to publish clear, detailed bid evaluation criteria in the tender notice is still missing from the 2008 provisions. It is important to note that EU member countries consider the failure to publish clear evaluation criteria in the procurement notice – and, in fact, during the entire evaluation process –an offence. They consider that it constitutes a proof of favouritism and sanction it in line with national criminal law.

The 2008 Regulation clearly prohibits any negotiation on prices with the bidders (Article 7.15). However, it does authorise bidders to complete or correct any data in their bids, except those related to price (Article 7.16). The ability to add or update details and documents that have simply been forgotten in the submission process is an often used good practice in many countries, including those in the MENA region *(e.g.,* Morocco). However, missing documents and the inclusion of non-specific data could also, as mentioned above, be the consequence of ambiguous tender description.

A new provision in the 2008 Regulation provides the contracting authorities with guarantees before they sign a contract with the winning bidder (Article 7.20). These guarantees are that:

- The head of the contracting entity may not sign contracts over specific thresholds without the approval of the CCC.
- Awards are valid from the date of notification.
- Legal action will be taken if the company awarded the tender refuses to sign the contract.

When a contracting body has decided to which supplier to award a procurement contract, it should inform all bidders. Article 7.20(b) of the 2008 Regulation gives bidders 14 days to appeal an award decision.

With regard to procurement budget thresholds, Iraqi public procurement officials agreed – during a workshop conducted under the aegis of the PAC – that those stipulated in

the 2007 Procurement Regulations were an obstacle to efficient public procurements in Iraq.[10] A report from the US Government Accountability Office in 2008 complemented this observation. It pointed out when the award decision for contracts above a certain ministerial threshold is made by the High Contracting Committee, a dozen signatures are required for the approval, which significantly slows the process.[11] (See also § 3.3.)

In response to these concerns, the 2008 Regulation raises the existing thresholds, affording a wider margin to ministerial and contracting entities for deciding how to use public funds. For key spending ministries, the threshold was raised to USD 50 million from 20 million in 2007, and for "other" ministries to USD 30 million from 10 million in 2007. The respective threshold applied to provincial contracting authorities was raised to USD 10 million from 5 million in 2007.[12]

Rejecting bids

Unlike the 2007 Procurement Regulations, the 2008 Regulation does not automatically eliminate submitted offers which are 25% less than the estimated cost of a contract.

The new regulation could be improved by adding a specific article on "abnormally low offers". This could specify that candidates should not be eliminated on the sole basis of having submitted a very low estimate, if the candidate were not given the opportunity to explain the price. The example in Footnote 88 shows that sometimes companies have reasons for proposing very low prices. Moreover, such a provision could reduce the risk that a contracting authority is accused of favouritism after eliminating low price offers without explanation.

Article 7.10(b) of the 2008 Regulation requires "the inefficient" contractor, vendor or consultant to be excluded from bidding in light of "the Government's previous experience with the contractor in executing previous contracts". This highly sensitive provision needs to be spelt out more explicitly since it applies equally to firms which:

- Failed to perform satisfactorily in previous contracts – though there is no reference to objective reasons for the public buyer's dissatisfaction.
- Have just been created and, as such, could enjoy special treatment.
- Have never been awarded government contracts by which to be judged.

Applied injudiciously, this provision may encourage corruption or the awarding of contracts to the same firms each time, which greatly restricts competition and is tantamount to favouritism.

Private sector respondents to the questionnaire indicated that in a certain number of cases inefficient subcontractors cannot be eliminated. This is the case when a procurement contract is awarded to an international company that operates in Iraq only through its subcontractors (who are not mentioned in the submitted tender offer). Contracting authorities may not exclude such companies because these companies are not required to mention subcontractors in their bid.

Execution of contracts

Experience shows that in many countries fraud occurs during the execution of a contract and is often facilitated by the absence of effective oversight and inspection. Opportunities are extremely numerous and need constant surveillance by reliable, honest professionals.

Preparing contracts

Article 8 indicates contracts should contain comprehensive information (including the name and address of both parties authorised to sign the contract and the document of authorisation). It also specifies that draft contracts should be included in the tender conditions and in invitations to tender. Among the different conditions that should be complied with, one is essential – the one that prohibits transferring the whole contract to another contractor or subcontractor (Article 8.4).

Standard Bidding Documents (SBDs) have been drawn up to harmonise the procedure for preparing contracts. Four types of SBDs, prepared by the Procurement Assistance Centre and approved by the Ministry of Planning and Development Co-operation, can be used for supplies, public works, consultancy, and service contracts.

Contract amendments

The 2008 Regulation prohibits amendments to contracts (such as new quantities or additional work) and prices once the contract has been awarded (Article 15). It lists possible exceptions, *e.g.,* where an amendment eliminates usefulness, results in savings, or where alterations "do not cause a basic change" in the contracted service or public work. These exceptions provide a certain flexibility, although it is important to run checks to avoid abuses of contract amendments.

The 2008 Regulation introduces a strict control and authorisation system in cases where amendments are needed to change the duration of contract execution times. It is well-known that amendments are a particularly vulnerable point of contract execution. However, they sometimes have to be authorised due to unforeseeable circumstances that arise during the execution of the contract. Rather than banning them, regulations should make them subject to extremely strict, pre-defined conditions.

Price adjustments during contract execution

The 2008 Regulation does not provide for price adjustments during the execution of a contract. However, the prices of raw materials or supplies may rise and fall. These specific circumstances might be taken into consideration. When the duration of a contract exceeds three months, for example, companies could be able to update their prices to reflect market fluctuations. If factors specifically used to calculate the contractor's bid change (*e.g.,* for external reasons, such as an increase in the price of steel or gas on the national or international markets), then its submitted price could be revised. Such modifications, made according to official indicators, may increase or reduce the price indicated in the contract.

In many countries, specific formulas exist to update and revise prices according to indicators regularly published and updated by the government. The existence and exact use of such formulas could be indicated in the procurement regulation, and, if specific procurement contracts require special formulas and indicators, they would need to be indicated in the tender documentation.

Such specific provisions lessen the risks of lower quality and quantity that automatically occur when a contract price is fixed without any possibility of revising or updating it.

Deadlines

The 2008 Regulation imposes heavy fines for the failure to respect deadlines (Article 16.2) and provides a formula to calculate them. It is not clear, however, who applies sanctions or who checks that they have indeed been applied.

Responses from both private and public sector representatives to the survey questionnaire confirm that long delays and postponements often occur in awarding and executing contracts in Iraq. While ministry responses mainly highlight the challenges of rapid bid evaluation and analysis and complain about contractors executing contracts slowly, the private sector criticises delays in signing and notifying contracts and in payment procedures. One critical point emphasised by private sector players relates to delays in issuing certificates of final acceptance by the public purchasing body. Their responses to the survey questionnaire show that, in numerous instances, the approval was delayed or not forthcoming even though suppliers had fulfilled their contractual obligation. Eliminating the uncertainty of payment would ultimately lead to better prices for Iraqi procurement.

The Iraqi situation – fragile institutions, violence, sectarian strife, and the high outflow of skilled labour – accounts for long, frequent delays throughout the procurement process.[13] There are other factors, too, however:

- Abusive postponement of closing dates for tender. Because an advertising timeline "starts from the date on which a contract was last advertised" (Article 5.1[c]), nothing prevents constant repeat advertising of the same contract.
- Long authorisation processes requiring numerous signatures.
- Economic committees which meet irregularly[14] *(e.g.,* to discuss high-value contract decisions).
- The failure of operational-level public officials to take responsibility for fear of taking decisions without explicit written instruction from senior management.
- Reluctance of delegated public servants to inspect and approve required supplies manufactured and delivered by the contractors.
- The myriad regulations, instructions and rules that need to be understood and applied.

Monitoring the execution of contracts

The legal consequences of contractors breaching their contractual obligations were not explicitly mentioned in the 2007 Procurement Regulations. The 2008 Regulation develops and clearly explains them under Article 17. It states that there are fines for overshooting contract deadlines, but no similar penalties appear to exist for failure to deliver what is stipulated in the contract specifications. The 2008 Regulation fails to indicate which body ensures that the product or service delivered is in conformity with the specifications of the tender.

Payment is made after the delivery of goods, works or services have been certified. The 2008 Regulation does not clearly indicate the person responsible for signing the document certifying that delivery has been made in conformity with specifications. Similarly, clear indications are missing and would be required for *a)* appointing the person in charge of monitoring and evaluating the work in progress, and *b)* defining how monitoring can be organized to ensure timely delivery of the quality specified.

Although the 2008 Regulation does not go into detail about monitoring the execution of procurement contracts, the experience of other countries reveals that procurement

regulations generally refer to other regulations and laws which set out monitoring and inspection procedures.

Subcontracting

Subcontracting emerged as a real problem from meetings with Iraqi delegates and their responses to the survey questionnaire. One major difficulty encountered by the contracting authorities is that, for different reasons, the company awarded the tender may not itself execute the contract, but subcontract it to an Iraqi or a foreign company. In this case, the contracting authority is generally obliged to accept the subcontractor even if it is considered a non-performing company. Although it is prohibited under the 2008 Regulation to subcontract whole contracts to another contractor or subcontractor, parts of a contract may be transferred. The regulation does not, however, specify which parts of a contract may be subcontracted, so contractors are technically at leisure to farm out 99% of the original contract – after receiving the approval of the contracting authority. Nor does the regulation specify whether subcontractors should be identified before or after a contract is signed. In order to improve the efficiency and responsibility of the contractors, subcontracting limitations – for example, 50% of the original contract – could be introduced. Similar limitations exist in other countries.

Furthermore, prospective subcontractors could be regularly declared prior to the bid evaluation so that the bid evaluation and analysis committee may reject bids where previous contracting experience has shown subcontractors to be inefficient or non-performing. After approving the subcontractors, contracting authorities may agree to pay them directly when the subcontract accounts for more than, say, 5% of the total original contract. This practice, which most other countries apply, would give subcontractors official guarantees of payment. The practice in countries like France and the United Kingdom is for the contracting authority to pay the subcontractor directly. Subcontractors can thus rest assured they will be paid after executing their part of a contract.

Additional problems may arise when subcontractors themselves subcontract work. The result may be a chain of subcontractors trying to deliver the original project for ever lower prices. The quality of the work or services delivered can only suffer. It is important to eliminate this practice, as was highlighted in the OECD survey questionnaire.

Blacklisting

A new provision in the 2008 Regulation blacklists contractors who violate their contractual obligations (Article 18). Blacklisting, however, is a drastic measure that should be used with caution. Accordingly, Article 18 describes monitoring action that should be undertaken before blacklisting either Iraqi or foreign companies. As the practice of blacklisting was only recently introduced, there is little information on how it is applied.

Nevertheless, in order to limit the discretionary power of the contracting entity and any abuse of power, companies should have the right to defend themselves. Any decision to blacklist could therefore be proposed by the contracting authority, but decided by an administrative court after reviewing the arguments advanced by both parties.

Non-competitive tendering methods

OECD Principle 2: "Maximise transparency and precautionary measures to enhance integrity in particular in exceptions to competitive bidding."

The right procurement procedure is crucial to ensuring effective competition. Although open and competitive bidding enhances transparency in public procurement, the choice of procedure is governed primarily by the value and nature of the contract. In practice, suppliers are invited to tender either by an open or restricted procedure. Other tendering arrangements may also used for very low-value contracts or if open or restricted procedures fail. The European Union, the World Bank and the United Nations insist on the systematic use of open tendering procedures, which they deem to offer the best guarantees of transparency and competitiveness.

The 2008 procurement implementing regulation partially applies two international recommendations – transparency and competitiveness. It provides six different tendering procedures for public procurement, which include open and competitive tendering, a newly introduced procedure called the "two-phase tender", and three non-competitive approaches. The regulation's provisions enhance integrity in the three non-competitive tendering procedures and rule out negotiated procedures.

Promoting transparency and preventing corruption in government procurement procedures require the ability to make an informed choice among the most adequate non-competitive method. But the 2008 Regulation offers scant criteria for selecting tendering procedures. The easy option is therefore to use limited bidding and direct contracting procedures like direct invitation and single source. These non-competitive procedures, according to UNCAC and the World Bank, should be used solely in exceptional situations, *e.g.,* the absence of bids submitted in response to a tender, the existence of special and sole property rights, and emergency situations. The Iraqi authorities do not regard non-competitive methods as being for use in exceptional circumstances only. International instruments, such as the procurement procedures of the GPA, the World Bank, and the International Monetary Fund, as well as European directives on public works, supplies and services contracts, could offer benchmarks for changing the Iraqi approach by identifying conditions for the use of the various procedures. Adjustments to local conditions are of course important, bearing in mind that non-competitive tender methods concern only a limited number of contracts (which may nevertheless involve large amounts of taxpayers' money).

The public tender

International organisations advocate the open, or public, tendering procedure as the base option for any competitive call for tender. The Council of Europe's appraisal of procurement in Turkey illustrates this point. In its 2007 Annual Report it called on Turkey to cease its "non-transparent, discriminatory [public procurement] procedures". In other words, Turkey should always use the open procedure, except in exceptional circumstances.

Article 4.1 of the 2008 Regulation limits the use of public tenders solely to calls for tender worth more than IQD 50 million.[15] Open tendering is thus not theoretically the rule in all procurement contracts. In practice, however, according to respondents to the survey questionnaire, it is the most widely used, save for highly sophisticated technical procurements – as recommended by European Directives and Article 9.1 of UNCAC.

The limited tender

The use of restricted tendering (Article 4.2) is also limited to contracts worth more than IQD 50 million. The number of candidates selected and invited to bid should be no fewer than six – a number that seems very high from a European perspective for a procedure that is, in principle, reserved for highly specialised suppliers. It would be

difficult, for example, to find six independent firms specialising in highway construction in France, Germany, or the United Kingdom. In Iraq, too, contracting bodies are likely to have trouble finding six public works contractors specialised in the renovation of highways or refineries. A contract might well have to be re-advertised, with a contractor eventually being found only through direct invitation five or six months later.

The two-phase tender

Introduced by the 2008 Regulation, the two-phase tender is different from restricted procedures in that it is applicable to contracts with intricate technical specifications for goods, works, or services that are not available at the start of the project.

The two-phase tendering procedure applies to contracts of any value and is similar to the procedure in use in European countries for public infrastructure design and construction projects. It should be used only sparingly, nevertheless, in line with its purpose.

Direct invitation tendering

Direct invitation (Article 4.4) is a limited bidding procedure where there is no open advertising. It applies to all contracts regardless of their value and can be used as an alternative to open and restricted tendering procedures. However, it does not seem to offer sufficient guarantees of integrity in the procurement process for three main reasons:

No less than five suppliers are selected and invited to submit tenders. Yet the 2008 Regulation does not specify the criteria for selecting the five suppliers.

Article 4.4(a) set outs three scenarios for direct invitation. One is for contracts "of a special characteristic". This wording is prone to a wide range of abuses and should be reformulated to plainly state its meaning.

The 2008 Regulation indicates that the use of the direct invitation procedure has to be approved where appropriate. However, it yields no detail on who approves the use of direct invitation method.

Once the direct invitation method has been decided upon, however, bid documentation is provided free of charge to the invited bidders (Article 4.4[b]). Moreover, they are exempted from bid bond requirements (Article 4.4[c]). Both provisions are designed to accelerate the procurement process.

Single source procedure

Article 4.5 sets out the conditions for implementing the single source procedure. The description of the procedure is more detailed compared to the provision in the 2007 Procurement Regulations. The single source procedure applies to contracts awarded to a company which holds a monopoly on the supply of specific goods or work, or which provides a specific type of consultancy or maintenance service.

Use of the single source method requires proper authorisation from the CCC of the General Secretariat of the Council of Ministers. It has 14 days in which to make its decision. Like direct invitation, single source tendering does not require candidate suppliers to submit bid bonds, which accelerates the process and is based on the assumption that the company, thanks to its market position, will be willing and has the capacity to execute the contract.

A loophole in the description is that the 2008 Regulation fails to specify what constitutes a company that holds a monopoly or exclusive rights.

In order to prevent the single source method from being diverted from its original purpose more detailed provisions are needed. They should spell out exactly what constitutes a company with a monopoly or exclusive rights. It is equally important to monitor and ensure that the single source procedure does not tempt contracting authorities to use their discretionary powers and favour particular contractors.

Purchasing Committee Procedure

The 2008 Regulation states that the purchasing committee procedure applies to domestic or international contracts worth less than IQD 50 million or "any value determined in the current budget" (Article 4.6). No further indications guide procurement officials in deciding under what circumstances to use the purchasing committee procedure, as this is the only article that deals specifically with it.

The 2007 *Iraq Quick Start Contracting Guide* (the *Contracting Guide*) does contain some details on the purchasing committee procedure, but the 2008 Regulation does not. The guide explains, for example, that no advertising is required, any more than bid opening or bid evaluation committees need to be established. It also stipulates financial thresholds. In this respect, respondents to the survey questionnaire specify that the authorisations required by projects with values of less than IQD 50 million (and elaborated upon in Article 3 of the Federal Iraqi Budget Regulation of 2008) are:

- Up to IQD 100 000 (USD 86): direct purchase without any authorisation.
- From IQD 100 000 to IQD 3 000 000 (from USD 87 to USD 2 576): a purchase committee may make the purchasing decision (no bids are required).
- From IQD 3 000 000 to IQD 50 million (from USD 2 577 to USD 42 800): the purchase committee chooses the best offer among a minimum of three.

Nevertheless, it would be necessary that the 2008 Regulation supplies more information on the composition, role, activity, resources, and powers of the purchasing committees. Cross-references to the Federal Iraqi Budget Regulation of 2008 might also be considered.

Specific or additional checks

The 2008 Regulation does not set out any specific, or additional, monitoring for non-competitive procedures, such as direct invitation and single source. They may be contained in other laws or regulations to which the 2008 Regulation should refer.

One additional monitoring agency could be the High Contracts Committee. Although responses to the survey questionnaire confirm the importance of the committee in the procurement process, the regulation does not mention its composition, role or responsibilities. Moreover, problems arise from the fact that the committee often changes the dates of its meetings and sometimes even changes the terms of previously negotiated contracts.

Clear reference to the composition, organisation, role, and competencies of the High Contracts Committee would be required to be included in the procurement regulations. They could also refer to the monitoring activities of the purchasing committees and how they operate.

Good management – Proper use of public funds

Principle 3: "Ensure that public funds are used in public procurement according to the purposes intended."

Provisions exist in all countries to ensure that public funds are earmarked for public use and spent in the public interest. In many cases these provisions are implemented by public auditing and inspection bodies. In addition, local or regional assemblies scrutinise expenditure plans before approving any major investment projects that shape a country's strategic development.

Preparing procurement

The 2008 Regulation stipulates and describes in detail how a procurement transaction and associated spend should be properly prepared and planned. This is clearly one of the strongest parts of the regulation by international standards. It provides that:

- procurement shall be based on public funds that are available at the time;
- the total amount of the contract shall be deposited in a bank in the form of an irrevocable letter of credit for international procurement contracts;
- senior servants and specialists shall be personally involved throughout the whole process, and especially when the contractors' bids are opened and examined.

Article 3.1(c) sets out comprehensive measures for ensuring that a contract is awarded to meet a need which has been identified and evaluated and for which the required funding is actually available.

Another strong point is the requirement to open, in an authorised Iraqi government bank, an irrevocable letter of credit for a sum equal to the estimated total cost of the project (Article 9). Besides the fact that the letter guarantees, in theory, the availability of funds for the procurement contract, it also provides the contractor with guarantee of payment.

These innovative provisions, applicable only to international procurement contracts, are often lacking from procurement regulations in other countries.

However, there is no mention of the rules to apply when the contracting entity concludes a contract with a national company without requiring a letter of credit, but – as set out in Article 16.1(a) – accepts certified cheques, bank guarantees, or loan bonds.

Managing the bidding process

To ensure the involvement of top officials throughout the bidding process, senior civil servants should be appointed to monitor key phases of the contract award procedure, *i.e.*, the provision of funding (irrevocable letter of credit), opening of sealed bids, and evaluation of tenders.

The monitoring arrangements stipulated in the 2008 Regulation are administrative rules related to the financing of the public contract. However, the regulation does not specify the use of monitoring mechanisms for procurement, particularly independent committees that would verify the appropriateness and good management of the procurement process from the definition of needs to the bidding and bid evaluation phase and the execution of contract.

It would also be useful to clarify the role of the BSA, the IGs (Article 12), or any other government bodies in reviewing and controlling procurement procedures.

As mentioned in UNCAC Article 10, it is necessary "to enhance transparency in the public administration, including with regard to its organisation, functioning and decision-making processes". One way to implement this recommendation is to clearly specify the composition, role and responsibilities of the different committees or entities as they relate to the public procurement process.

Simplifying administrative procedures and cutting red tape

Most of the representatives from ministries and the BSA who attended the procurement workshop organised by the PAC agreed that red tape is a real obstacle to effective public procurement in Iraq and that it slows down the procurement process.[16]

The 2008 US Government Accountability Office Report mentions the inappropriateness of the process for high-value contracts, where, in certain cases, several ministerial or equivalent level signatures are required for the approval of tender contracts.[17]

The contractor's red tape burden

The difficulties stemming from the burden of paperwork and procedures that weigh on bidders is clearly stated in responses to the survey questionnaire. Private sector representatives mention that one problem is the obligation to supply all the necessary references for each tender procedure. The result of this requirement is the multiplication of files and demands for validating certificates issued by different governmental entities.

Administrative loads and procedures may be lightened by:

- Validating references for a given period *(e.g.,* one year) instead of for a single tender.
- Re-organising procedures to make it possible for companies to obtain all the necessary documents at a single counter. This is already the practice in several developing countries, such as Senegal, and more recently, Algeria. The rationale is to encourage local companies to tender bids for public procurement contracts.

Devolving ministers' responsibilities to ease their workloads

Although red tape undoubtedly hinders the efficiency of public procurement in Iraq, the 2008 Regulation does seek to speed up procurement by simplifying administrative procedures. One important change is the introduction of devolved responsibility as a way of reducing the constant need for a minister's personal approval:

- In the 2007 Procurement Regulations, the decision to re-advertise a tender required ministerial approval. Under Article 6(a) of the 2008 Regulation, the head of the contracting authority may make that decision.
- Similarly, the head of the contracting authority may now approve the bid evaluation committee's work (Article 7).
- The role of the minister in resolving contractors' appeals and complaints has also been changed. According to the 2007 Procurement Regulations, the minister was the only person to whom the committee – formed to review complaints – had to submit its recommendation for final approval. Article 10.1(b) of the 2008 Regulation allows committee recommendations to be submitted to the head of the contracting entity (while the final decision remains under the minister's competency).

As a minister sometimes has to deal with the overwhelming details of specific procurement transactions, devolving some of his or her responsibilities helps to make procurement faster and decisions more public-oriented. However, it is fundamental to put in place clear devolvement rules as well as appropriate monitoring mechanisms in order to ensure an effective process.

Box 4.2. **One-stop shops in Senegal**

In Senegal, a contractor can obtain all authorisations and administrative certificates in a timely manner from a single office at the Ministry of Finance. This "one-stop shop" is made even more efficient by the Ministry of Finance website, which lists all the documents needed to secure authorisations and certificates.

Financial procedures linked to procurement

Requiring financial guarantees like bid bonds (a bank deposit) from bidding companies is common practice in most countries. The aim is to ensure that the tendering contractor is genuinely committed to delivering the goods or services in keeping with the terms of the contract. Unsuccessful bidders are refunded once the contract has been awarded and signed.

The deterrent effect of bid bonds

The requirement to submit bid bonds is clearly defined in the 2008 Regulation under "Legal Insurance" in Article 16. However, responses to the questionnaire show that the deadlines contractors are set for submitting their bids are rarely long enough to secure the requisite financial clearance from the banks.

One reason is that the value of the bid bond is 1% of the offer. A tendering company has to calculate its price, and then seek a bid bond equal to 1% of the calculated price. Due to often limited advertising timelines, there are generally only one or two days left in which to obtain the bid bond – insufficient for the bank to carry out verification procedures. The result could be bribery, or the risk of bribery, with a bank issuing bid bonds without checking companies' guarantees in return for illegal payments.

If the estimated cost of a project were published in the tender notice and bidders could calculate the bid bond from that estimated cost, they would have more time to apply for and obtain guarantees from the banks. An added advantage would be that guarantees would cover an officially estimated price – even if a company's offer did turn out to be cheaper.

For all bid bonds issued, an expiry date should be stated so that unsuccessful bidders' financial resources are not unnecessarily withheld from them. However, Article 7.17 of the 2008 Regulation stipulates that the "bid bond of the three first bidders nominated for the award is not to be released". The thinking behind the article is that if the winning bidder fails to perform to specifications then the runner-up or – should the runner-up pull out – the third nominee will execute the contract.

This practice not only deters bidders, it can also cause liquidity problems for contractors awarded contracts as second- or third-best bidders in several parallel procurement projects. If contractors are small and medium-sized enterprises (SMEs), they

may even find themselves temporarily insolvent. In addition, responses to the survey questionnaire show that significant delays in refunding unsuccessful contractors' bid bonds stem from the fact that the 2008 Regulation does not specify deadlines and terms of reimbursement. Provisions such as Article 17 and responses to the survey questionnaire reveal that winning bidders in Iraq frequently refuse or fail to execute contracts.

To prevent bid bond requirements landing companies in dire straits there are some good practices which may be emulated.

One solution is to require deposits from bidding contractors only for contracts above a certain threshold so as not to rule smaller companies out of the running.

Another solution might be for banks to guarantee contractors for a given period of time rather than for a given contract. Moreover, where foreign firms are concerned, it might be possible to use guarantees from banking institutions in their home country which Iraqi banks could then register simply and rapidly. Finally, calculating the bid bond as a percentage of the published indicative price of the tender may facilitate the obtainment of these guarantees.

Iraqi banks have an important role to play – not least because they refund guarantees to non-successful candidates. A universal requirement that would greatly ease guarantee-related procedures and cash-flow problems for contractors, while reassuring buyers, would be for the same bank to issue bid and performance bonds on the one hand and letters of credit on the other. Such a requirement would prevent mismatches between performance bonds and payment mechanisms.

Box 4.3. **Tender Guarantee Refunds in the EU and Macedonia**

Many countries do specify the terms of bid bond refunds in their procurement-related legislation and regulations. In EU countries, deposits are automatically reimbursed to non-successful bidders 15 days after a contract has been awarded. Winning bidders are paid for the products and services they deliver no later than 45 days after the contracting authority's reception of the bill. These rules offer real financial security and ease the difficulties caused by depositing bid bonds as part of different tenders, because the refund of one bid bond enables contractors to use it for another tender without having to request an additional bank loan.

The former Yugoslav Republic of Macedonia adopted a law on public procurement in December 2007. It stipulates that tender guarantees shall be returned to unsuccessful bidders within a set period of time and to winning bidders on signature of the public procurement contract and submittal of the performance guarantee if required (Article 47.7 and 47.8 of the Macedonian Procurement Law).

Reasons for the non-execution of contracts in Iraq

According to the US Government Accountability Office, the reason committed procurement contracts are not executed stems from the capacity and security challenges facing Iraq.[18] However, things may be more complicated than that.

Huge amounts of earmarked public money lie dormant in ministry budgets. These liabilities are mostly outstanding letters of credit – in other words, unfulfilled public contracts. The situation is compounded by the fact that some companies are repeatedly

awarded public contracts even when they have failed to previously execute awards. Large contracts may be awarded to small, unknown companies with little capacity, which highlights the risk of subjective selection and favouritism.

In cases where procurement projects are not executed, it is important to modify the selection criteria and to impose heavy penalties *(e.g.,* blacklisting for a pre-defined period) on companies that submit offers without any real intention or capacity to execute contracts should they win them. The recommendations of bid evaluation and analysis committees and the final decisions of heads of contracting authorities must be supported by vetting non-performing companies to verify that selection was not influenced by non-objective evaluation factors and that mismanagement, fraud, or corruption have not taken place.

According to the 2008 Regulation, the performance bond guarantee, required from the winner to ensure smooth execution of the contract, is determined at a rate of 5% of a contractor's price, a proportion in line with practices in the public works sector.

Nevertheless, it is important that the regulation specifies that the winning contractor's bid bond will be reimbursed when it submits its performance bond. Furthermore, the bid bond could be considered as contributing (20%) to the performance bond and should be refunded accordingly.

While the 2008 Regulation requires the performance bond guarantee for all contracts (Article 16.1[d]), it is also important to recognise that different types of contracts call for different types of financial guarantees. Accordingly, supply contracts may require fewer guarantees, while contracts for large, complex projects would probably call for several types of financial guarantees *(e.g.,* advance payment bonds or hold-backs that are not released until satisfactory completion of the contract, performance bonds). Iraq's procurement regulations should consider providing that flexibility.

A new element in the 2008 Regulation is the exemption of the public sector and state-owned companies from bid and performance bonds for a period of three years starting from the date the regulation takes effect (Article 16.1[e]). This three-year limit needs to be justified.

As far as terms of payment are concerned, the 2008 Regulation's Article 19 is much more explicit than previous regulations. The system adopted is similar to those in use in other countries, although Iraqi payment control measures are less developed (except for supplies coming from foreign countries).

Box 4.4. **How Algeria eased the bid bond burden on small companies**

In Algeria, local companies felt that they were automatically excluded from tenders because they had to execute bid bonds for every tender, especially those published at the national level for all contractors across the country. Only large Algerian and foreign companies had sufficient financial resources. On 23 July 2008, the Algerian government decided that financial deposit guarantees would henceforth be required only for contracts above the threshold of 250 million Algerian dinars.*

* DZD 250 million equals USD 3 600 000 as of 14 December. In comparison, IQD 50 million represents USD 42 800.

Source: Liberté, 26 July 2008.

Good management – High professional standards

OECD Principle 4: "Ensure that procurement officials meet high professional standards of knowledge, skills and integrity."

International standards stipulate that management by qualified public officials is a prerequisite for good, effective procurement. To ensure such professionalism, procurement personnel would benefit from a constantly updated common body of knowledge, skills, and ethical standards.

The 2008 Regulation does not explicitly address the professionalism of public officials involved in awarding, monitoring and executing contracts, because it is not typically the object of a law on government procurement. However, it is very important to have competent and properly trained officials in place to reduce the corruption risks associated with awarding and executing contracts.[19] In order to control such risks, the 2008 Regulation lists specific ethical principles to which public contract officials should adhere.

Article 5.2(q) requires tender documentation to contain a statement "clarifying that government and public sector employees are not allowed to participate in tenders, either directly or indirectly". This requirement evidences a positive approach to managing conflicts of interest, but could be elaborated upon.

Article 13 also stipulates that information must not be disclosed to persons who are not involved in the contracting process. Doing so may lead to criminal prosecution.

The Contracting Guide sets out instruction for drafting mandatory reports during the procurement process. Civil servants are ethically obliged to obey these instructions.

Such provisions are particularly modern and innovative when set against procurement rules in many other countries. However, private sector respondents to the survey questionnaire feel that public procurement officials are not sufficiently qualified to deal with their assignments, lacking the expertise to correctly evaluate the logistical and technical elements of procurement contracts and short on basic English-language skills. Public procurement officials also acknowledged that procurement and managerial staff were under-qualified and unsuitable for their positions.[20]

The PAC contributes to the proper implementation of Iraqi procurement regulations by organising training courses for public procurement officials. Their regular procurement workshops give officials from governorates and Iraqi ministries grounding in the critical provisions of the 2008 Regulation. The training material the PAC has used includes OECD documents, such as the one drafted for, and presented at, the 8-10 July 2008 meeting in Paris.[21]

Courses are not always fully effective, however, because officials who attend are not necessarily those for whom they are designed. Another reason is the high staff turnover in ministries and non-ministerial agencies in the provinces and regions, as well as the sheer size of public sector administrative services in Iraq.

To ease the skills acquisition burden, one possible solution might be to develop training for trainers under the aegis of institutions that currently train public procurement officials.

Prevention of misconduct – Risks to integrity

Principle 5: "Put mechanisms in place to prevent risks to integrity in public procurement."

Awareness of Corruption Risks

The 2008 Regulation contains a number of important points related to awareness of the risks of corruption. Two have been referred to above: the ban in Article 13 on the disclosure of information and Article 5.2(q), which prohibits government and public sector employees from participating in procurement tenders directly or indirectly. Although the use of the word "indirectly" warrants clarification, the latter provision is particularly important. It offsets the fact that the requirement to disclose any private interest has been deleted from the 2008 Regulation.

Awareness of corruption is implicit in the 2008 Regulation insofar as their provisions stipulate that authorisation must be sought throughout the procurement process. Similarly, awareness of corruption underlies a provision on bid evaluation. Article 5.2(p) requires bid documentation to include "evaluation ratios" which, even if they fall short of actual evaluation criteria, are a step in the right direction of limiting the use of arbitrary criteria (which can lead to accusations of favouritism in the procurement award process).

Nevertheless, the 2008 Regulation offers nothing for actually improving awareness of the risk of corruption in the design and implementation of the procurement process. Nor does it contain any significant innovations for strengthening mechanisms that prevent risks of corruption in public procurement. To temper this critique, it could be argued that the purpose of a public procurement law is not to combat corruption. Indeed, compliance with transparent procedures open to the maximum number of bidders is generally the best means of forestalling fraud and corruption.

Monitoring and authorisation procedures are in place at several levels to ensure the technical feasibility of projects, scrutinise specifications before tender notices are published, check that land and funds are available for projects, examine tendering firms' references and guarantee deposits, and verify that offers comply with specifications. An added measure is that the value of a contract determines the seniority of the official who signs it. As for disputes, they are judged in the first instance by the competent minister or governor (Article 10) and on appeal by a specialised administrative court.

All these provisions make it possible to say that precautions have been taken to build structural resistance to corruption. There are, however, further measures that could be taken to limit and even substantially reduce the risks of corruption.

Rotation of public officials

Qualified officials should be rotated, particularly when they are members of the bid evaluation committees. In the 2007 Procurement Regulations, specific provisions stipulated that the bid evaluation committee should be renewed at least every six months. This provision is no longer included in the 2008 Regulation.

Rotating qualified public officials safeguards their integrity in positions exposed to risks of corruption and bribery. Procedures which call for brief tenures and short rotation periods may lead, however, to loss of organisational experience and knowledge. In practice, a term of office in a committee may not exceed one or two years.

Use of new technologies in procurement

E-procurement may also be a promising instrument for standardising processes; storing information on public procurement tenders and processes in a stable, readily accessible format; avoiding direct contact between officials and bidders; and fostering transparency and accountability in the procurement process, thereby diminishing the risks of corruption and collusion between companies. The use of new technologies, in a wider context, can also contribute to reducing red tape as it involves rationalising processes.

National Internet portals are used for publishing some procurement tender opportunities, as the survey questionnaire revealed. As the 2008 Regulation – which allows e-tenders for the first time – has only recently been approved, the e-readiness of contractors intending to do business with the Iraqi government cannot be taken for granted. E-bidding also raises the wider questions of securing information and data in Iraq.

Undercutting any concrete proposals for e-government in general, and e-procurement in particular, are the regular power supply failures that Iraq endures.

Anti-corruption agencies

For the fight against corruption to be effective, there must be action on three levels: prevention, education, and prosecution. Special agencies do this work in several countries. The oldest anti-corruption agency was created in Hong Kong. Others have followed suit, with some investigating and prosecuting corruption, and only a few *(e.g.,* in Albania, France, Slovenia) focusing on prevention.

Agencies act to prevent corruption in public procurement by:

- Auditing organisations and structures, processes, and people to identify risks in the procurement process and in the roles, responsibilities, and behaviour of public officials.
- Mapping weak points in public procurement control.
- Providing tools for reducing identified risks.

Anti-corruption agencies also use their knowledge of corruption mechanisms to help law enforcement agencies investigate corruption offences and unearth evidence.

Box 4.5. **Agencies fighting corruption in public procurement in Latvia and France**

In Latvia, unsuccessful bidders can file their complaints directly with the Procurement Monitoring Bureau – the Latvian public procurement agency. If the latter does not answer favourably, the case is passed to the Corruption Prevention and Combating Bureau (KNAB) to investigate. This arrangement makes it possible to respond very quickly to company complaints, start investigations, and detect fraud and corruption before a contract is signed.

In France, the Central Service of Prevention of Corruption trains police officers and gendarmes working in public procurement investigations. Training is designed to build capacity and help investigators root out fraud in the public procurement process

Iraq's anti-corruption body is the Commission on Integrity, put in place to reduce risks of corruption and build the integrity of Iraqi civil servants and elected officials. Its mandate for combating corruption involves oversight, scrutiny, and inspection.

With regard to public procurement, the Commission on Integrity employs specialised officers who investigate irregularities following complaints about the public procurement process. If fraud is uncovered, the Commission transfers the case to the investigative branch of the judiciary.

The integrity and honesty of public procurement officials are fundamental to ensuring the best use of public funds, delivery of goods and services, and reduction of corruption.

Bearing in mind that the risks of corruption may be linked to processes, management, or people, action to promote integrity in the public sector in general and in public procurement in particular may include:

- Mapping risks throughout the whole public procurement process (from needs assessment to final payment).
- Helping authorities to put in place effective control procedures.
- Helping authorities to put in place efficient management procedures.
- Developing transparent and efficient decision-making processes together with the public bodies concerned.
- Helping investigators to detect fraud and corruption cases more easily.
- Advising authorities on how to inform and educate the wider public so that they contribute to the non-tolerance of corruption.

Prevention of misconduct – High standards of integrity

OECD Principle 6: "Encourage close co-operation between government and the private sector to maintain high standards of integrity, particularly in contract management".

Communication and co-operation between contracting parties

Fostering an open dialogue with private sector suppliers contributes to correcting imbalances in access to information about the public procurement process. Co-operation is crucial as international and local enterprises are the direct business partners of governments who need them to provide supplies, services, consultancy, and public works.

Co-operation starts from the outset of the procurement process, with the "rules of the game" being set out. Drafting public procurement regulations involves wide-ranging collaboration between public sector officials and professionals from the private sector in many countries. The quality of the collaboration determines the quality of the legislation, as well as the ease with which it can be implemented. Yet because it is there in the background before any laws are passed, it does not generally get a mention in final public procurement acts. Iraqi regulations are no exception. Nevertheless, dialogue must continue throughout the procurement cycle and translate into practice, *e.g.*, prompt responses from purchasing bodies to contractors' questions for clarification before submitting bids.

The 2008 Regulation requires that tender notices indicate the contracting entity's website and e-mail address for further inquiries (Article 5.1[h]). This provision constitutes a real improvement over the 2007 Procurement Regulations. The 2008 Regulation also allows contractors to complete or correct their tender documentation after they have submitted their bids (Article 7.16), so as to avoid exclusion due to administrative inadvertence.

Furthermore, Article 5.2(g) stipulates that the tender documentation must set a date for a conference at which all contractors' enquiries may be answered at least seven days before the tender's closing date. In practice, fixing such a conference date might prove difficult, as the tender closing date is not set in advance, but determined according to the date on which the tender notice was last advertised.

Challenging award decisions and dispute settlement

Exchange of information should not stop with the awarding of a contract. One element that builds contractors' trust in the overall procurement process is the ready availability of dispute resolution mechanisms.

In the Maghreb countries and in Morocco in particular, all bidders are entitled to ask for clarification regarding a procurement project before submitting their tender. When the purchasing ministry or government body receives such a request, it is required to disclose its reply to all the other bidders in order to ensure fair access to information. EU countries follow the same practice and bidders are advised to make their requests solely in writing so that replies can be forwarded to all the firms that request details on a procurement project. However, requests for clarification addressed to a contracting authority in the last week before the bid deadline are not examined. This is to prevent repeated extensions of the consultation period due to constant requests for further information.

In contrast, the Iraqi regulation does not say whether it is possible for firms to request further details on a project during the consultation period. It provides only for a conference to answer a bidder's questions. Allowing firms to ask specific questions in writing would avoid subsequent problems and misunderstandings. The answers to the written inquiries should be sent to all contractors who have purchased the tender documentation.

It is also often difficult for a company to appeal against the decision of a contracting entity. What worries many companies is that they may be blacklisted if they file a complaint.

Box 4.6. **How Morocco protects companies from reprisals for challenging decisions**

In Morocco, there is a system in place for lodging appeals and complaints regarding procurement decisions. Yet companies who were unhappy with contracting authority decisions were hesitant about challenging them because they feared the possible consequences, principally being ruled out of future public contracts. In order to keep the plaintiff companies anonymous and overcome their reluctance to challenge decisions, the General Federation of Moroccan Businesses (GFMB) devised a solution. It decided to represent plaintiff companies in appeal and dispute procedures so that their identities would not be disclosed.

Dialogue between a contracting authority and suppliers is, of course, facilitated if they have longstanding ties. But although close relations can enhance the efficiency of business transactions, they may also foster bribery and corruption.

Responses to the survey questionnaire show that private sector contractors have several suggestions for improving procurement procedures. They want improved

communication and information-sharing about the procurement process from contracting authorities and specifically ask for:

- Clear, standard procedures for the public procurement process and related financial arrangements and guarantees to be communicated to them.
- Information on evaluation criteria and estimated project costs to be shared with them.
- Prompt responses to their requests for procurement contracts prior to submitting the bids. Responses to these requests should be forwarded to all other contractors to ensure equal treatment.
- A standardised way of informing all bidders – the winner and unsuccessful bidders alike – of the final award decision. Survey questionnaire respondents say that replies to requests for an explanation from unsuccessful companies remain too formal.
- A functioning, effective post-bid appeal system that would restore the confidence of contractors in the whole procurement process.

Prevention of misconduct – Policing misconduct

OECD Principle 7: "Provide specific mechanisms to monitor public procurement as well as to detect misconduct and apply sanctions accordingly."

Policing the public procurement process for irregularities and possible corruption should be supported by accessible procedures for reporting and sanctioning any breaches of the rules.

It is important to stress that the 2008 Regulation is not intended to list measures for rooting out and fighting corruption and bribery. Integrity measures – *e.g.,* codes of conduct, financial disclosure, mechanisms for scrutiny – should be the subject of additional specific laws or regulations, as is the case in other countries. It would, however, be useful if there were an explicit reference to such regulatory provisions in the 2008 Regulations.

A positive and very important provision is the strict requirement to archive tender documents. Article 6.5 stringently stipulates all the information that must be recorded and filed before tender evaluation. The aim is to keep track of past procurements and provide a sound base for investigating misconduct or mismanagement through procurement scrutiny mechanisms.

The 2008 Regulation could also provide similar provisions for filing documents even after the procurement contract has been executed. It may also set out sanctions and penalties for failing to archive documents related to a tender or for archiving them only partially.

It is recommended to make other provisions for fighting corruption and applying sanctions in separate laws or regulation, as is the case in other countries. Reference to such legal or regulatory measures would help clarify the responsibilities of the different institutions waging the fight against corruption, particularly in public procurement in particular.

Box 4.7. **UNCAC recommendations for fighting corruption in public procurement**

The best known and most recent piece of legislation that specifically addresses corruption is UNCAC. With regard to public procurement, Article 9 of UNCAC stresses the need to:

- publicly distribute information;
- establish the conditions of participation to the tenders in advance;
- establish objective and predetermined criteria to use for the selection of suppliers;
- establish an effective system of recourse;
- establish measures to regulate matters regarding personnel involvement in procurement, such as declaration of interests, selection of personnel, and training requirements.

Accountability and control – Responsibility

OECD Principle 8: "Establish a clear chain of responsibility together with effective control mechanisms."

Archiving documentation

The requirement to file bids and documentation is extremely precise in Article 6.5 of the 2008 Regulation. If properly implemented, it may enable any malfunction to be traced throughout the tendering process. The *Contracting Guide* even stipulates file formats and presentation. This point is essential not only for monitoring the decision-making process, but also for ensuring transparency if documents are made available to supervisory institutions and civil society representatives.

There is little data on effective implementation of this provision or on how these files are kept in practice. The *Contracting Guide* provides detailed guidance for archiving documents. But, as the 2008 Regulation has replaced the 2007 Procurement Regulations to which the Contracting Guide refers, its practical use is unclear.

Chain of responsibilities

In order to guarantee the legal security of the public procurement contract award process, it is essential to define a clear chain of responsibility and to put in place effective control mechanisms. The 2008 Regulation defines levels of responsibility, both for contract approval and for the amendment of contractual terms and conditions. Provisions clearly specify important accountability mechanisms, in particular by defining the:

- Role of the bid opening committee.
- Role of the bid evaluation and analysis committee.
- Role of the minister and governors in the process.
- Content of the reports.
- Content of the archived files.

Under Article 3.1(c) of the 2008 Regulation, the "specialised authorities" should, before issuing a public contract, confirm the availability of allocated funds needed to finance the

contract and indicate how the project is classified within the project plan. It remains unclear, however, who the "specialised authorities" are.

In most countries, major structural investments are debated and approved by parliament, which usually adds a special item to the general state budget to cover the funding of such investment. Regional or local assemblies vote on funding for smaller investment projects. Based on responses to the survey questionnaire, these parliamentary procedures are not an Iraqi practice.

Technical and economic feasibility reports on a project are subject to pre-approval by the Ministry of Planning and Development Co-operation (Article 3.1[a]). As this provision is new in the 2008 Regulation, it is not certain how the pre-approval procedure is enforced.

For a public reconstruction contract, the contracting entity should settle all legal and financial issues regarding the location of work (Article 3.1[e], [f] and [g]) before announcing the tender and subject to pre-approval by the Ministry of Planning and Development Co-operation (Article 3.1[a]). Again, it is not certain how this provision can be enforced.

The 2008 Regulation does not give guidance on who is responsible for choosing procurement tendering procedures. It simply states that the contracting entity should select one of the six existing procedures (Article 4).

The head of the contracting entity, or any person he or she authorises, decides and gives his or her approval for re-competing the contract (Article 5.6[a]) and informs the Minister of Planning and Development Co-operation. This minister's role remains important in the procurement process, but less so than in the 2007 Procurement Regulations.

The role and make-up of the bid opening and the bid evaluation and analysis committees are described in great detail in Articles 6.1 to 6.4 and Article 7 of the 2008 Regulation. These provisions are among strong points of the 2008 Regulation, particularly in view of the fact that they are rarely provided in the procurement legislation of other countries.

Provisions in the 2008 Regulation discuss the verification and monitoring of initial stages only in the procurement procedure. There is nothing on procedures for checking that delivered goods and services comply with contract specifications – a major source of possible corruption. This shortcoming must be corrected. The regulation needs to set out in greater detail the obligation to have the contract award process audited by external auditors.

Procurement oversight institutions

In international practice, public procurement control – independent of the government contracting entity – is the job of ministry-wide inspectors (like Iraq's IGs) and general accounts auditors (like the BSA). The audits that they carry out cover pre-bidding, bidding, and post-bidding. They are vital to ensuring that implementation practices are in line with the requirements of the legal and regulatory frameworks.

Financial audits help investigate and detect fraud and corruption in public procurement. In general, external control institutions provide yearly reports and recommendations for systemic or procedural improvement. External controls could complement each other and be carefully co-ordinated to avoid gaps or loopholes and maximise findings.

In Iraq, a legal framework exists that defines the mandate and responsibilities of the IGs and the BSA (see "Anti-Corruption Institutions" in Chapter 3 for a detailed discussion of IGs and the BSA). This legal framework dates back to the CPA era. Accordingly, in each ministry, an IG carries out financial and performance audits that take in complaints of fraud, waste, abuse of authority, and mismanagement. IGs publish reports on their findings.

The BSA, created as an independent external oversight institution, audits public accounts and verifies the sound application of financial laws, regulations, and instructions. It also serves as a "public guardian" by identifying fraud, waste, and abuse and by promoting anti-corruption awareness and integrity within the GoI. CPA Order No. 77 of 2004 requires the BSA to work in conjunction with the CPI and the IGs of different ministries "to ensure that the Iraqi government remains honest, transparent and accountable to the people of Iraq".

Improving public procurement control

Bilateral discussions with Iraqi public officials and their responses to the survey questionnaire point to a need to improve some aspects of the public control system, particularly in public procurement.

First, very little information is available on the actual powers and resources of IGs, the BSA, and the CPI as they relate to procurement control. There is also scant information about publication of their annual reports, or their purpose, use, and impact.

Second, while the legislation clearly delineates their tasks and responsibilities, how these translate into public procurement control practice is more problematic. Responses to the survey questionnaire confirm that rather than co-ordinated work in accordance with well-defined divisions of competence, there are overlaps in the responsibilities of IGs, the BSA, and the CPI and loopholes remain in the control system.

It is important to redefine the terms of reference for co-operation between the IGs, the BSA, and the CPI. They must co-ordinate their work efficiently to achieve results in the fight against corruption in general, and in the field of public procurement control in particular, with the ultimate aim of reinforcing the credibility of the GoI.

Third, as mentioned above, there is a concern about the existence and accessibility of written documents – the basis for the monitoring work of public auditors and inspectors in Iraq. Bilateral discussions with Iraqi public officials confirm that even if these documents are available, it is difficult to find them: they are stored in separate offices and buildings, and the databases that catalogue them are incomplete. Furthermore, with no legal framework empowering the public at large to freely access them, the principle of transparency ceases to be operative.

Accountability and control – Dispute settlement

OECD Principle 9: "Handle complaints from potential suppliers in a fair and timely manner."

The fair settlement of claims within a reasonable period of time is a requirement specified in the instructions of all international organisations. The EU's Remedies Directive is specifically designed to provide suppliers with guarantees and to require governments to introduce effective mechanisms for challenging award decisions.

Articles 10 and 11 of the 2008 Regulation specify the complaint and appeals procedures available to unselected contractors, prior to contracting and after signing contracts. The provision for post-contracting dispute settlement offers procedures such as conciliation, arbitration, and specialised court hearings. Most importantly, they are extremely rapid, compared to similar systems in place in other countries. The specialised administrative court, at the Ministry of Planning and Development Co-operation, delivers its decisions within 120 days from the date on which court dues are paid (Article 10.4).

The central committee in every contracting body should review written complaints and protests. Then, within fifteen days, it should submit its recommendation to the head of the contracting entity or to the minister who must come to a decision within just seven days.

Contractors have seven days to appeal an award as of the day on which the contract was awarded. Although the 2007 Procurement Regulations – even if this is not necessarily their purpose – do not specify whether such an appeal will defer the awarding and execution of a contract, the 2008 Regulation stipulates that the contracting parties "have to wait before signing the contracts until the issue is solved by the competent minister" (Article 10.1[c]).

Under the 2008 Regulation, a contracting entity's central committee is the jurisdiction of first instance to which contractors can take their case. They must wait for the ministerial decision before they can before an administrative court. However, it is not stipulated whether an appeal should be lodged with one jurisdiction before the other, or whether it is possible or mandatory to lodge an appeal with both institutions simultaneously.

The role of the head of the contracting authority in the protest and appeals system is ambiguous, as he or she is simultaneously "judge of" and "party to" disputes between the purchasing body and bidders. He or she has the final say on the awarding of the contract (Article 7), after considering the recommendations of the central committee, while ministers rules on the acceptance or rejection of appeals and protests. Plaintiffs may then go to court.

In order to ensure that plaintiffs are treated impartially, it would be necessary to allow them to take their cases straight to the administrative court and, at the same time, to the contracting authority's central committee.

However, the risks of improper conduct do not end with the final ruling. If an administrative court finds against the contracting authority, it may abuse its power by taking reprisal action like informally blacklisting the plaintiff company.

Accountability and control – Empowering civil society

OECD Principle 10: "Empower civil society organisations, the media and the wider public to scrutinise public procurement."

Under international standards, governments should enable stakeholders and the wider public to scrutinise public procurement through the disclosure of information. Oversight bodies also play an important role in enhancing scrutiny.

The 2008 Regulation does not specify what means of monitoring contract awards should be made available to the general public and the parties involved. There is nothing

Box 4.8. **Armenia submits public procurement to public scrutiny**

In Armenia, civil society is part of a working group developing a five-year national anti-corruption strategy and action, which includes devising specific measures on integrity in public procurement. Although final approval of the proposed measures remains in the hands of the Armenian government, civil society has been given the chance to express its opinion on this issue.

on how to inform interested stakeholders about the procurement process or specific procurement transactions.

Most countries and regions have systems of public involvement in programmed expenditure. A report is drafted to justify a project and proposed spend before being submitted to the scrutiny of a local council or regional or national parliament. Whether the report is approved or rejected, opposition political parties and ordinary citizens have the opportunity to assess whether the project meets real needs and, if not, to mount a challenge through dedicated channels.

In Iraq there is no such requirement for public debate and scrutiny. Information is available only from procurement notices and publicly announced contract awards – which means some, not all, contracts. According to responses to the survey questionnaire, even contractors who are personally involved in a procurement deal face this lack of information. As was mentioned above, the 2008 Regulation does not specify how potential contractors may seek further information on a specific tender apart from attending the "special conference to answer inquiries" (Article 5.2[g]). As for unsuccessful bidders, they learn "indirectly" that they have not been awarded the contract – *i.e.,* by not being notified that they have.

There is a need for further legislation governing corruption, bribery, and fraud that sets out how public procurement processes may be scrutinised. From the perspective of public scrutiny and transparency, Iraq could follow the example of European countries and publish the details of all contracts awarded, irrespective of procedure. Until then, the "offices of public procurement in all ministries" and IGs are responsible for monitoring the application of public procurement procedures (Article 12).

Proposals for action

To conclude this exploration of public procurement in Iraq, the following set of proposals for action offer pointers on policy options which decision makers might consider as they seek to improve Iraqi procurement regulations and implement them on the ground. The previous sections of this chapter appraised aspects of the 2008 Regulation and Iraqi public procurement practice, making critiques and recommendations (highlighted in framed text) as they went along. Some of these are echoed in the proposals below, which single out the areas and types of action that can help public procurement play its vital role in attracting private investment as part of the country's reconstruction effort.

It is important to emphasise that these proposals do not seek to prescribe an outside system of rules and procedures. Although they may have a positive impact in one country, they may be ill-suited to the local situation and practices in another.

Proposal 1: Make procurement procedures more open and competitive to increase efficiency

Choosing the right tender procedure

Tender procedures which are non-competitive or restrict numbers of bidders may foster fraud, favouritism and corruption, and reduce efficiency. It is recommended that the Iraqi authorities will be sparing in their use of procedures such as "direct negotiation" or "single source" in order to reduce the risk of corruption and police public procurement more effectively.

The GoI should consider explicitly making open (or public) tenders the default procedure and require their use wherever possible. To that end, however, it needs detailed guidance on how to choose the best tender procedure, taking into account the nature of the supply, service, consultancy, or public work to be purchased and the capacities of local and international market players.

Balance transparency with efficiency and shorter procedures

Transparency can lengthen the procurement process. Balancing it with efficiency and timely decision making is a delicate matter: in Iraq procurement processes can be so long that contracts are abandoned or run over time.

An independent audit could be run to ascertain the constraints that implementation of the 2008 Regulation imposes on the contracting parties. It would identify ways of streamlining the process in line with efficiency, transparency, and the GoI's efforts to prevent corruption by:

- Seeking out the administrative procedures that can be simplified and the red tape that can be cut.
- Determining how responsibility can be devolved in order to ease the workload of top procurement officials. Devolving decision-making powers the clear delineation of responsibilities in the procurement process and strict monitoring mechanisms to check compliance.

Proposal 2: Set clear rules for the evaluation of bids

Make evaluation criteria public

The failure to publish the criteria for evaluating procurement bids heightens the risk of bias, favouritism, and even corruption. In Iraq, the 2008 Regulation does not require tender evaluation criteria to be published.

The GoI may consider publishing evaluation criteria in tender notices to help contractors prepare their bids. All bids should then be assessed against the published criteria.

Publishing and applying evaluation criteria will reduce the risk of favouritism and foster trust among contractors and the wider public in the objectivity of bid selection in Iraq.

Consider abnormally low offers

Bids that are abnormally below a contract's financial threshold should not be automatically excluded, as they may not necessarily stem from a company's incapacity or

scheme to undercut competition. They may be due, for example, to new developments in technology, or a contractor starting up business.

The 2008 Regulation makes no provision for abnormally low bids. It is recommended to call upon bidders to explain their prices, then include or exclude them in bid selection.

Clear procedures for handling very low bids could help make procurement more cost-effective and would forestall disputes arising from the exclusion of competent contractors simply because their bids were low.

Proposal 3: Make contract execution more transparent

Control subcontracting

When subcontractors fulfil their obligations in a transparent, co-ordinated manner, the execution of procurement contracts is generally timely.

In Iraq, subcontracting is a common practice and the 2008 Regulation allows it. But subcontractors are not always declared and contracting authorities may know little about their track record, capacity, etc. The result of such opacity can be substandard work, or worse.

To ensure that a contract unfolds transparently and is efficiently executed to the specified standard, the subcontracting provisions of the 2008 Regulation may be strengthened. Several practices could be considered:

- The percentage of an original awarded contract that may be subcontracted could be capped at, for example, 30%, in line with international practice.
- Contracting bodies could require winning bidders to supply detailed information about their subcontractors.
- Contracting bodies could pay approved subcontractors directly. This would prevent any dispute arising from any failure to pay on the part of the main contractor, who would still be responsible for execution of the contract.

Improve the access of local SMEs to procurement contracts

SMEs are important actors in national economies. They are familiar with their economic environments and employ local people.

To meet the demand from SMEs to be allowed into public procurement and to play a greater part in rebuilding and strengthening the economy, several solutions could be considered:

- Specific measures to help SMEs obtain required bank guarantees.
- Allow SMEs to form partnerships and submit joint bids.
- Give their bids preferential treatment.

Proposal 4: Ensure effective financial guarantees and their timely reimbursement

Ease bid bond requirements

When a contractor submits a bid it is required to furnish financial guarantees – bid bonds – of its binding commitment to fulfil its contractual obligations.

In Iraq, contractors often face difficulties in obtaining the necessary guarantees in time to tender their bids.

Instead of requiring a bond for each bid, the GoI could consider requiring a guarantee that is issued by a bank for a given period of time. A contractor may use such a guarantee for any tender under a fixed amount for the set duration.

Conversely, bid bonds could be made mandatory above certain financial thresholds.

Reimburse bid bonds

In OECD countries, bid bonds are automatically refunded to non-successful bidders once a contract has been awarded.

The 2008 Regulation provides no deadlines or conditions for refunding bid bonds. Problems inevitably arise, with sometimes critical consequences for contractors.

The regulation needs to be strengthened with a provision stipulating the conditions for releasing and automatically refunding contractors' guarantees.

Proposal 5: Enhance civil servants' professionalism

Efficient procurement, which delivers value for public money, requires a highly professional body of procurement officials. Professionalism includes keen awareness and good knowledge of rules and regulations, as well as the managerial and technical skills to implement them.

There is concern that officials lack awareness of the latest procurement rules and regulations in Iraq.

It is recommended that the GoI systematically give procurement officials training to keep them up to date with fast-changing legislation and develop their ability to apply procurement provisions on a daily basis.

Because of the sheer size of the Iraqi civil service there are not enough trainers. Training programmes for trainers could be put in place and run by the organisations already training public procurement officials.

One advantage of centralised training schemes would be to improve understanding of the risks of fraud and corruption in public procurement. To frame these risks, specific provisions on ethical conduct and integrity in public procurement could be added to the 2008 Regulation.

Another highly desirable move would be for the GoI to embed the procurement process in overall context of the Iraqi public service and promote transparent, merit-based human resource management practices in hiring and promoting procurement officials.

Proposal 6: Ensure co-ordinated control mechanisms

Institute control mechanisms across the entire procurement cycle

Control mechanisms are critical to preventing the waste of public money and any irregularities that may occur during the procurement process. Control is particularly important for ensuring that the contract is executed in conformity with the original tender specifications.

Iraq has numerous *a posteriori* controls in place, governed by a legal framework that defines the mandates of the IGs, theBSA, and the CPI. But it is not clear how these bodies interact.

There is no provision for *a priori* procurement control that operates independently of the contracting entity in Iraqi procurement regulations. Nor is there any provision for policing the execution of contracts.

In order to ensure properly co-ordinated *a priori* and *a posteriori* public procurement control arrangements, the GoI could:

- Clearly delineate the responsibilities and tasks of public procurement oversight and audit bodies.
- Put in place specialised *a priori* auditing units to handle specific tasks like reviewing bidding documentation and approving the tendering procedures.
- Add provisions for policing the execution phase to the 2008 Regulation, even though policing the execution of contracts is the task of the competent ministries, the GoI may wish to refer to these controls in the 2008 Regulation.

It is important that public procurement control agencies are independent of the government and enjoy adequate budgetary and human resources. They need to be allowed to apply the law – including procurement and anti-corruption laws – to all parties in an equitable manner. Supported by proportional sanctions that are actually enforced, they will improve Iraqi public procurement.

Reinforcing accountability

At operational level, clearly defined rules and responsibilities are necessary for an efficiently managed procurement process and a clearly delineated accountability chain.

Public officials are reluctant to take responsibility for making decisions without written instructions from senior management. This may be because the responsibilities of public officials are ill-defined or not defined.

To accelerate the procurement process, improve accountability, and even overcome Iraqi officials' widely shared reluctance to sign public procurement documents, the GoI could consider adding to the 2008 Regulation a provision that sets out who is responsible for key decisions in the procurement process, and particularly for:

- Choosing the tendering procedure.
- Certifying that a procurement contract meets a real, identified public need.
- Selecting the president and other members of the bid opening and the evaluation and analysis committees.
- Verifying the conformity of delivered goods and services with what has been contracted.

Proposal 7: Ensure rapid dispute resolution

For contracting parties and the public at large, an efficient dispute resolution system is a guarantee of the integrity and equality of the contract award process.

In Iraq, a legal framework that provides pre- and post-award settlement mechanisms governs the dispute resolution system. The efficiency of the pre-award mechanisms is due largely to the rapidity with which they deal with submitted complaints and objections.

Post-award settlement mechanisms seem primarily intended for foreign companies. It is recommended that the GoI clarify to what extent post-award dispute resolution mechanisms should apply to national companies.

In order to ensure that procurement complaints are resolved within the strict deadlines set by the 2008 Regulation, the GoI could consider appointing a body in charge of resolving procurement disputes and clearly defining its composition.

The next step would be to ensure the system has the proper resources for effective, timely operation.

It is equally important to raise awareness of dispute settlement arrangements among contractors, as they reportedly have limited knowledge of them.

Proposal 8: Develop specific tools to fight corruption in procurement

The main challenge facing procurement regulations is that they should be implemented properly and consistently. The efforts made by the OGPCP to that end need to be further developed and widened. The experience of other countries shows that complementary practical instruments and performance tools are useful in promoting implementation.

Fighting corruption in public procurement is part of the wider landscape of governments' efforts to fight corruption, not only in Iraq, but in countries all over the globe. It springs from the worldwide recognition that, as a strategic governmental activity where considerable sums of public money are at stake, public procurement is particularly exposed to corruption.

The first measure governments could take is to develop and enforce anti-corruption laws. They may also put in place special judicial and administrative bodies supported by special economic investigation agencies in order to detect and sanction misconduct.

The GoI could focus its efforts on three main areas:

The Prevention of corruption and violations of integrity

Preventing corruption is as important as prosecuting offenders. It involves:

- Taking measures to reduce opportunities for fraud and corruption opportunities and offering incentives for the future;
- Controlling the discretionary powers of decision makers;
- Eliminating the risks linked to the absence of control mechanisms, to inefficient processes, and to the inappropriate management of procedures and resources.

Effective sanctions

Sanctions must effectively be applied when the law is broken, which requires general acceptance of the rule of law, an independent judiciary, and efficient investigators. Institutions must be stable and properly empowered to apply laws and regulations equitably to all, irrespective of position or status.

Raising awareness and educating the population

Educating the public about the impact of corruption in order to render it unacceptable involves a change of mindset and culture that can be achieved only in the long term.

Support from the population in fighting corruption presupposes access to relevant information – through the public education system, impartial government channels, and an independent media.

People should be made aware of the costs of corruption when projects are not executed and of how corruption in the public procurement process harms economic development.

One particularly critical factor is political will at the highest echelons of power. Without it there can be no educational campaigns, no measures to improve awareness of corruption, and quite simply no integrity or transparency in public procurement.

Notes

1. Reliable, timely data related to Iraqi spending through public procurement is difficult to find. The US Government Accountability Office identified wide discrepancies between international and Iraqi statistics on Iraqi budgetary spending. For further details, see Iraq Reconstruction: Better Data Needed to Assess Iraq's Budget Execution, US Government Accountability Office, Report to Congressional Committees, January 2008.
2. For a detailed account of the background to the drafting of Chapter 4 and of the information gathered, refer to the Annex to Chapter 4.
3. The annex to Chapter 4 contains the full text of the 2008 Regulation and an article-by-article analysis with recommendations for improvement.
4. For further details, please see World Bank (2006), *Rebuilding Iraq: Economic Reform and Transition*, February.
5. In the 1990s, the French Ministry of Public Works had a project for more than 100 kilometres of national road reconstruction. It kept its price estimation secret. Following an open tender process, one offer was only 50% of the ministry's evaluation. The offer was not eliminated automatically, but the bidding company was asked to justify its price. The company had won another contract which was to be launched two months later. The company, based 800 kilometres away, decided not to transfer its employees and construction materials for such a short period, but to remain in the region. The result was a very attractive price for the ministry, and the company did a very good job.
6. The CCC is a sub-committee of the High Economic Committee, responsible for making strategic decisions related to high-value procurement contracts that exceed the contracting entities' scope of authority.
7. Here and throughout the Benchmark Report the expression "commodities" is used to denote standardised, homogenous products that are generally purchased in large quantities by an administration. Commodities have well-developed markets characterised by high price volatility. Such commodities are, for example, grain products.
8. Les Echos, "Public Procurement Review", 24 July 2008.
9. Quotation from a high-spending ministry's response to the OECD survey questionnaire.
10. For details, see Procurement Assistance Center, "Procurement Workshop for Iraqi Ministries, 8-13 December 2007", Ministry of Planning and Development Cooperation, Iraq, 2007.
11. US Government Accountability Office "Iraq Reconstruction: Better Data Needed to Assess Iraq's Budget Execution", Report to Congressional Committees, January 2008.
12. Data received from the Procurement Assistance Centre, 2008.
13. US Government Accountability Office (2008), "Iraq Reconstruction: Better Data Needed to Assess Iraq's Budget Execution", Report to Congressional Committees, January.
14. For details, please see Procurement Assistance Center (2007), "Procurement Workshop for Iraqi Ministries, 8-13 December 2007", Ministry of Planning and Development Cooperation, Iraq.
15. IQD 50 million represents USD 42 800 (equivalent to EUR 32 000) (December 2008).
16. For details, please see Procurement Assistance Center (2007), "Procurement Workshop for Iraqi Ministries, 8-13 December 2007", Ministry of Planning and Development Cooperation, Iraq.
17. US Government Accountability Office (2008), "Iraq Reconstruction: Better Data Needed to Assess Iraq's Budget Execution", Report to Congressional Committees, January.
18. US Government Accountability Office, "Iraq Reconstruction: Better Data Needed to Assess Iraq's Budget Execution", Report to Congressional Committees, January 2008, p. 10.
19. In Cameroon, for example, on 21 and 22 July 2008, high-level officials in charge of the execution of public investments declared that administrative and bureaucratic red tape was the reason for the insufficient financial execution rate of the investments (4%). The insufficiently qualified

employees in charge of following up contracts were bracketed with red tape. *Source: Le Messager*, 28 July 2008.

20. For details, see Procurement Assistance Center, "Procurement Workshop for Iraqi Ministries, 8-13 December 2007", Ministry of Planning and Development Cooperation, Iraq.

21. "Improving Transparency in Government Procurement Procedures in Iraq", discussion paper prepared for supporting discussions and exchange of views in Workshop 2, Session 1 on Enhancing Transparency in Public Procurement, 8-10 July 2008, Paris, France.

ANNEX 4.A1

OECD Recommendations, the Iraqi Regulation, and the OECD Procurement Legislation Survey

4.1. OECD Recommendations on Enhancing Integrity in Public Procurement

The *Principles for Enhancing Integrity in Public Procurement* were approved in October 2008 by Council in the form of *OECD Recommendation*. The Recommendation demonstrates the political commitment of OECD countries to tackle risks of waste, fraud and corruption in the whole procurement cycle, from needs assessment to contract management and payment. The Recommendation is a key instrument for policy dialogue between OECD countries, and with non-member countries. In 2011 OECD countries will report on progress made in implementing the Recommendation.

The Principles provide policy guidance for governments to enhance integrity throughout the entire public procurement cycle, from needs assessment to contract management. The Principles and Checklist are based on applying a good governance approach, that is, transparency, and good management, prevention of misconduct, accountability and control to enhance integrity in public procurement. The overall aim is to enhance integrity efforts so that they are fully part of an efficient and effective management of public resources.

A. Transparency

Principle 1. Provide an adequate degree of transparency in the entire procurement cycle in order to promote fair and equitable treatment for potential suppliers.

Principle 2. Maximise transparency in competitive tendering and take precautionary measures to enhance integrity, in particular for exceptions to competitive tendering.

B. Good management

Principle 3. Ensure that public funds are used in public procurement according to the purposes intended.

Principle 4. Ensure that procurement officials meet high professional standards of knowledge, skills and integrity.

C. Prevention of misconduct, compliance and monitoring

Principle 5. Put mechanisms in place to prevent risks to integrity in public procurement.

Principle 6. Encourage close co-operation between government and the private sector to maintain high standards of integrity, particularly in contract management.

Principle 7. Provide specific mechanisms to monitor public procurement as well as to detect misconduct and apply sanctions accordingly.

D. Accountability and control

Principle 8. Establish a clear chain of responsibility together with effective control mechanisms.

Principle 9. Handle complaints from potential suppliers in a fair and timely manner.

Principle 10. Empower civil society organisations, media and the wider public to scrutinise public procurement

Furthermore, a checklist was developed to provide practical guidance for procurement officials on how to implement this framework at each stage of the procurement cycle. Public procurement is divided into three main phases:

- The phase upstream of the call for tender, which includes the assessment of needs, planning and budgeting, drafting of specifications and choice of procedure.
- Tendering and contract award.
- The downstream phase, notably contract performance, purchases order and payment.

The checklist is designed to be used in conjunction with good practices identified in governments across the world.[1]

An extensive consultation was carried out in 2008 on the Checklist and Principles. The consultation with representatives from OECD bodies working on related issues helped reflect the multi-disciplinary approach of the OECD. Furthermore, the consultation of representatives from government from non-member economies, private sector, civil society, bilateral donor agencies and international organisations – such as the United Nations, the World Trade Organisation or the European Union – confirmed that the Principles are in line with international legal instruments on public procurement and anti-corruption. The Principles provide policy guidance for governments and can be placed in the appropriate international legislative context.

4.2. Iraqi Regulation No. 1 of 2008 on Government Contracts Implementation

Accordance to paragraph (1) of Section (14) of Coalition Provisional Authority (Dissolved) Order number (87) of 2004:

We hereby promulgate the following:

Regulation No. 1 of 2008
Of
Governmental Contracts Implementation

Article 1

This regulation is issued to 1) clarify the general principles in implementing the governmental contracts (by state agencies and public sector) in the fields of procurement of public works, goods and other services, and consultancy contracts with Iraqi and non-Iraqi entities; 2) to regulate implementation methodologies; 3) designate authorized parties for opening and analysing bids and awarding contracts; and 4) initiate an appeal to the Administrative Tribunal. The aforementioned objectives take into consideration that all procedures should be conducted in manner of transparency, competition, and integrity.

Article 2

First

The provisions of this regulation apply to the contracts that are concluded by the government contractual entities (the State agencies and the public sector) represented by

the ministries, entities not related to a Ministry, provinces not related to a region, and the Regions. These concluded contracts mentioned above are with Iraqi and Non-Iraqi entities to execute state public works or consultancy contracts or providing good or services related to the said projects.

Second

The provisions of this regulation shall not apply to the projects and the public works of the government Contracts financed by International or Regional Organizations, executed according to agreements or special protocols with Iraqi parties. On the other hand, it is possible to take into consideration the given regulation if it is not included in the text of these agreements or protocols, and is consistent with the rules and regulations adopted by these organisations.

Article 3

First

All government contracting entities in ministries, non-ministerial agencies, provinces, and Regions should meet the following requirements prior to the preparation of the tender documents:

a) The Technical and Economic feasibility reports pre-approved by the Ministry of Planning and Development Co-operation (MoPDC) according to Regulation No. (1) of 1984 issued by the dissolved Council of Planning. When negotiating an additional project to be inserted in the investment project plan, the feasibility reports mentioned above must have the attached Project Petition Form (follow-up form for Investment projects implementation) and should take the specialty of the rehabilitation projects into consideration.

b) The Cost Estimates Study for the project or the contract should be a part of the feasibility study as a measure to analyze the bids and award the contracts, taking into consideration the confidentiality of the task.

c) Availability of national federal budget allocation to implement the contract, or confirmed by the specialized authorities for the requests of the contractual parties' needs. Any special project classification within the projects plan should be indicated in the bid documentations.

d) Verify that all terms, specifications, bills of quantities, drawings and others necessary for the implementation are to be accurate and completed to avoid any changes or additions in the contract during the implementation, taking the following into consideration:

1. Financial authorities authorized to make decisions on this subject in accordance with the federal budget law and its regulations.
2. Clauses concerning the implementation of the projects on the basis of a complete project (turn-key), mentioned in the investment projects regulation according to the federal budget law.
3. The prohibition of any increase in the quantities and the costs of the procurement contracts and consultancy services, for any given cost, during the contract's implementation period, observing the given authorities in the federal budget law and regulations.

4. the special controls and procedures issued by the Ministry of Planning and Development Cooperation to consider the contractors' requests for compensation due to the increase in prices.

e) To have approvals from the competent entities regarding the location and use of the land, and allocation required for the project or the work when executing public works contracts.

f) To eliminate any existing legal and physical issues, including any land acquisition procedures, at the work site during the implementation of the public works contracts.

g) To have the work site completely prepared for the commencement of the work or at least in part in accordance to the approved time schedule.

h) To fulfil any other procedures required due to the nature of the work or the contract.

Second

The value for a set of the bidding documents for the general and the limited tenders, including the two-phase tenders, is based on a relative pricing according to its importance and cost of preparation, to promote serious participation therein. A bidder who has already participated in a restated tender is required to include the receipt of its first participation in his renewed bid. In case the purchasing prices of the restated tender documents are revised, the bidder therefore bears the difference between the two prices, and must submit both first and second receipts in his bid.

Third

a) The advertisement is to be published in at least three daily national newspapers that are widely distributed, considering one of which to be the newspaper for advertisement that is issued by the Ministry of Finance; in case the last said newspaper is out of print for any given reason, the advertisement will therefore be published in another widely spread newspaper. The awardee is responsible to bear the costs of publishing and advertising to the last advertisement of the tender with the exception of the requests for the import of medicine and food products, observing the provisions in Article 5-1-c of the this regulation.

b) The advertisement for national public tenders is to be published in the respective website and the announcement board of the contracting entity; international public tenders advertisement shall also be published at the commercial attachés office at the Iraqi embassies outside Iraq and the United Nations' Business Development Website (DGMARKET).

Article 4

The contracting entities shall adopt one of the following methods when implementing the different types of budget projects or public contracts:

First

The public tender: The head of the contracting entity shall designate the public tender as either national or international, taking into consideration the nature and cost of the contract. The implementation of this category is conducted through a public invitation to all who meet the requirements of the participation and are willing to take part in the implementation of the different contracts having a value no less than 50 million Iraqi dinars (IQD 50 000 000), or any other value that is limited by the concerned parties taking

into consideration that the procedures should be based on open public access and competition, fairness, and transparency.

Second

The limited tender: is carried out through a general invitation from the contracting entity addressed to all who meet the requirements of the participation and are willing to participate in the implementation of the different contracts having values that are no less than (IQD 50 000 000), 50 million Iraqi dinars or any other value that is limited by the concerned entity. The said tender is to be made by two phases as follows:

a) Phase one: consists of submitting the special technical and financial qualification documents of the bidders in accordance with the applicable laws, for evaluation by a specialized committee at the contracting entities and select the qualified bidders to participate in phase two.

b) Phase two: is carried out through conducting a direct invitation according to the legal conditions for participation, which will be at no additional cost, and is to be addressed to the pre-qualified bidders to participate in the tender and submit their technical and financial documents. The said invitation must be sent to no less than six (6) bidders.

Third

The two-phase tender:

a) The head of the contracting entity or any person he authorizes is entitled to apply the method of submitting the bid in two phases in the contract to obtain the best way to achieve his contracting needs. The said method is applicable for contracts with intricate technical specifications; or for goods, works, and services contracts whereby the details of the technical specifications for the products or the works are not available at the beginning of the project.

b) Submitting of the bids in two phases may be preceded by procedures for pre-qualifications that are referred to in Item (2) of this Article. The following must be considered for the purpose of implementing this method:

1. Phase one: To invite the bidders to submit their technical bids based on the preliminary design and the description of the activities. The head of the contracting entity has the right, if necessary, to revise the cost estimate.
2. Phase two: To invite the pre-qualified bidders whose technical bids were approved on basis of the standards of qualifications in phase one, to submit their financial bids based on the tenders' revised documents as per the applicable conditions by the contracting entity.

Fourth – Direct invitation:

a) To have a direct invitation issued by the contracting entities and addressed to no less than five (5) contractors and/or companies and/or consistent institutions with technical and financial capabilities for the implementation of various public contracts, and in case of any of the following justified reasons:

1. If the contract is of a special characteristic/or requiring secrecy in all the contracting and implementing procedures in the interest of national security reasons.
2. If the objective is to achieve speed and efficiency in implementation especially in cases of emergency, natural disasters, supplying of medicaments, and life-saving necessities.

3. The lack of interest from the bidders to participate in the re-issued stated public tenders for a second time.

b) To provide the bid documentation free of charge to the suppliers, contractors, and consultants.

c) To exempt the bidders who obtain direct invitation from the bid bond requirement.

d) To take into consideration the financial authorities for the purposes of awarding and contracting when applying this method.

Fifth

The single source method (a sole source): This method is to be conducted through the issuance of an invitation free of charge from the contracting entities and addressed to one bidder, concerning contracts with monopolised characteristics for goods, implementation of works, consultancy services, or manufacturing, which are deemed necessary and justified, taking into consideration the following procedures:

a) The special contracting entities at the ministries and governmental non-ministerial agencies, provinces, and regions shall inform the Central Contracting Committee (CCC) at the General Secretariat of the Council of Ministers when implementing the contract in the said method, demonstrating justifications for this choice.

b) To consider the financial Authorities of the contracting entities for the implementation of the public contracts. The approval from the CCC should be obtained on the recommendations of the committees responsible for analyzing the bids for contracts that are beyond the head of contracting authority's approval authority.

c) The CCC shall have implicitly approved the request if it has not taken a decision on the contracting entities' request within a given time of 14 working days starting from the date of registering the request at the said committee. After this time, contracting entities are to proceed with the award process and its implementation.

d) Invited parties are to be exempted from submitting the bid bond, using this method.

Sixth

The purchasing committees. This method is applied to provide the governmental offices with goods and services of a value that is less than 50 million Iraqi dinars (IQD 50 million) or any other value determined in the current budget taking into consideration the controls that are issued by the directorate of the public contracts at the Ministry of Planning and Development Co-operation in co-ordination with the competent entities related to the subject.

Article 5

First

The following should be considered for the advertising of the public contract tenders:-

a) The tender's name (title), number, address and the classification listed in the budget.

b) A brief and clear description of the project or the contract to be implemented, demonstrating the required products and services.

c) The time duration for the tender or the direct invitation's advertising to be decided as follows :

1. Time duration of (15 – 60) days for procurement and consultancy services contracts, to be determined according to the importance of the contract, starting with the date of

the last advertisement; contracts for supplying wheat, rice and medicine are exempted as per the assessment of the concerned minister.

2. Time duration of (21 – 60) days for public works contracts to be determined as per the importance of the contract starting with the date of the last advertisement.

d) Indication of the date and the place for the submission of the bids and the tender's required time validity in addition to the date and the place for selling the tender's documents.

e) Indication of the required bid bond amount to be obtained from the bidders.

f) Indication of the tender's closing date.

g) Indication of the tender's non-refundable purchase price.

h) Indication of the contracting entity's website with the email address of the administrative section responsible of its respective tenders.

Second

The contracting entities shall include the following in the instruction to bidders within the tender's documentations for (public works, goods and consultancy services):

a) The main terms of the contract to be concluded and the payment methods for fees or amounts that will be agreed upon later such as the percentage or the deducted amount or the compensated expenditures and other acknowledged methods, in accordance with the respective provisions listed in the federal budget law.

b) A statement revealing that the ownership of the designs, drawings and specifications prepared by the party who obtained direct invitation upon the conclusion of the contract, revert to the employer as per the consent of the contracting entity's head and except for some particular cases. The said entities have to avoid publishing any information related to the nature of the contract before obtaining the respective authorization from the competent entity.

c) A request addressed to the bidders to include, if available, similar projects in their bids, which should be approved by the related contracting parties.

d) An indication of the time and the place for the opening of the tenders in public.

e) A request addressed to the concerned entities to clarify its technical qualifications and the full-time and part-time specialists who will be working in the entity during the implementation of the various contracting or the consultation contracts.

f) A request addressed to the concerned parties to submit the required work plan.

g) A notice determining the date for a special conference to answer the inquiries of the participants in the tender, scheduled to take place at least seven (7) days before the tender's closing date, with the exception of tenders for supplying foodstuffs.

h) A statement indicating the required contractor's classification and level for the Iraqis; in addition, general works contracts require the bidder's certificate of establishment and the work practice license from the bidder's legally authorized bureaus.

i) A request to determine the cost for supply contracts with respect to the place of delivery (CIP, CFR, CIF, and FOB) and others (INCOTERMS).

j) A statement determining the method for calculating the demurrages as per the conditions of the contract (freight demurrage, delivery demurrage).

k) A statement clarifying that the contracting entity is not obliged to accept the lowest bid.

l) A statement clarifying that the government contracting entity may cancel the tender paying no compensation to the bidders with the exception of the tender's documentation purchasing price only.

m) Any other instruction, document, or data that the bidders may need to provide.

n) A statement requesting to write down the bid's prices in ink or in print, in digital numbers and in writing.

o) A statement clarifying that the bidders have no right to write off any of the terms given in the tender's documentation, or introduce changes of any kind therein.

p) A statement clarifying that the bid documentation is to be inclusive of the applied method for measuring the evaluation ratios for the awarding purposes when analyzing the bids.

q) A statement clarifying that the government and public sector employees are not allowed to participate in tenders either directly or indirectly.

r) A request addressed to the bidders to indicate in their bids their website and the email address, in addition to the name and address of the person responsible to follow the inquiries concerning the bid.

Third

The contracting entity may extend the tender's advertisement duration in cases of extreme necessity and only once, taking the following into consideration:

a) It must obtain the consent of the head of the contracting entity or any person he authorizes with due consideration as to the financial Authorities for contracting purposes.

b) It must issue and publish in the same advertisement newspapers a respective appendix, and send copies to all tender participants time before the closing date due for the bid's submission.

Fourth

The head of the contracting entity or any person he authorizes may accept bids not to exceed 15 % of the estimated cost for contracting purposes, provided that there is availability of the required financial allocations in the general federal budget and it is within the total cost of the project; the Ministry of Planning and Development Co-operation must also be informed of the said action.

Fifth

The re-announcement of the tenders are concluded in one of the following cases:

a) If no bids are submitted within the tender advertisement time, or in case there is the submission of one bid which was financially and technically acceptable during this time, then it will therefore be approved and proceedings are to follow for analyzing and awarding the bids.

b) If the amount of the best offer submitted by the bidders exceeds the determined percentage in Item (4) of this Article when analysing the estimated cost for contracting purposes to implement the projects or the works listed in the budget.

c) The head of the contracting entity or any person he authorizes may accept and analyze the bid if it exceeds the estimated cost for implementing purposes by no more than (30%) thirty percent, provided that there is availability of the necessary financial allocations within the total project's cost; and once it addresses the CCC by presenting

respective justifications for the purpose of obtaining the approval to award. The said committee has to take a proper decision whereas the award is considered, within a period of time equivalent to 14 days starting from the date of registering the request in the contracting entity. The award is considered approved in case the authorities stated in paragraph (4) of this Article do not respond after the time period mentioned above.

Sixth

The following procedures must be followed for re-announcement:

a) The head of the contracting entity or any person he authorizes must approve, and inform the Ministry of Planning and Development Cooperation of the said action, determining the time duration of the announcement in accordance with Article (5) – First, item c, of the this regulation.

b) The bidders who participated in the previous tender must be informed of the said action.

c) Adopt the previous serial number for the re-announced tender, giving respective indication in the new advertisement if occurring at the same year; inform the concerned entities about the re-announcement.

d) Inform the concerned entities about the re-announcement.

e) Investigate the reasons for not participating when the tender was first advertised and take the necessary procedures to correct them in this respect.

f) Adopt the sole source method in case of re-announcement, taking the following into consideration:

1. Must have the bid cost amount within the estimated cost, considering paragraph (Fourth) and item (c) of clause (Fifth) of the this Article for contracting purposes, concerning the project's required financial allocations.
2. Must have the bid made in accordance to the technical specifications and the required conditions in the tender advertisement.
3. Must notify the Ministry of Planning and Development Co-operation whenever the amount of the best bid obtained at the second advertisement is higher than the cost estimates stipulated in paragraph (4) and item (c) of paragraph (Fifth) of Article – 5 – and must observe one of the following to implement the project or the required work:
   - postpone the project's implementation until the coming year;
   - make use of the allocated amount for the implementation of other projects if postponement takes place; or
   - increase the estimated cost for contracting purposes within the project's financial allocations in the plan.
4. Must consider a third (last) re-announcement or take the necessary procedures to change the contract implementation method with respect to the adopted methodologies. The head of the contracting entity may conclude the afore-mentioned in case no acceptable bid is submitted in the second advertisement.

Seventh

The aforementioned clauses stipulated in paragraphs (1), (2), (3), (4), (5) and (6) of the this Article are applicable to civil engineering (construction), mechanical and electrical works, in addition to goods and consultancy services contracts.

Article 6 – Establishing the bid opening committees and their tasks:

First

One or more central bid-opening committees are to be established in every ministry or non-ministerial government entity. The said committee is to be comprised of experts and specialists headed by an employee in a position no lower than Director or Chief Engineer, along with members representing the Financing and Law Directorates, a specialized technical employee, and a secretary have a job title that is no less than Observer.

Second

Establishing an opening-bid committee at the ministerial and non-ministerial entities is allowable, provided that the said committee is formed in accordance with the statement in paragraph (1) of this Article.

Third

A central committee is to be established at every contracting entity in the region and at the provinces, and shall be headed by the head of the contracting entity or any person he authorizes, along with members specialized in law, financing and technology, representatives of the beneficiary party and the provincial council, with a secretary having a title that is no less than Observer who is responsible to open the bids that are announced in the region or the province that is non-related to a region.

Fourth

Opening-bid Committees may be established at the regional or provincial entities. Each of the said committees is to be established according to the specified committee in paragraph (3) of this Article.

Fifth

The following procedures are to be observed by the secretary of the bid opening committee while performing his tasks:

a) Insert the bids in a special box that is kept with the concerned entity and issue a receipt in two copies, one of which is to hand over to the bidder or any authorized person while keeping the other with the concerned entity, and to writing down the following information in a special dossier:

1. The tender name and number as shown in its documentation.
2. The bidders' names or their official agents' names, with fully documented address inside or outside Iraq.
3. The name of the officially authorized bid holder with his signature and address.
4. The bid's submission time and date.
5. The attached bid documentation (if available).
6. It is allowable to send the bids by express or registered mail; they must arrive to the competent entity prior to the bid closing date and must be recorded by the Secretary as soon as delivered;
7. It is prohibited to reveal any information, such as names and addresses of the bidders or their agents, to unauthorized entities during the announcement period in order to maintain the secrecy of the procedures.

b) The head of the bid opening committee has to observe the presence of the committee members. If some of them did not attend the meeting, the head of the contracting entity should assign other employees having similar specializations to replace them.

c) For the purpose of proceeding with the public opening of the bids and in presence of the bidders or their agents willing to attend, the bid opening committee directly holds a meeting once the tender closing time is over, or at the beginning of the following working day after taking the approval of the head of the contracting entity or any person he authorizes and as deemed necessary. The meeting is to be held in a previously assigned place whereby the tender's special dossier will be closed and the following will be annotated in the committee's minutes of meeting:

1. Verification of the stamps and seals on the bid's envelopes.
2. The bids with no bid bonds, as required in the tender documents.
3. The bids based on a deducted amount or a percentage of reduction, among the remaining bids that are submitted for the same tender.
4. The alternative (revised) bids substituting previous financial and technical bidder information, and rejecting their previous bids that are relevant to the same tender if submitted during the tender's advertisement valid period, and returning them to the submitters.
5. The number of pages comprised in each bid.
6. Encircling marks on every scratching, erasing, addition or corrections that are shown in the priced bills of quantities, with signatures of the committee's head and members.
7. Adding a horizontal line next to any non priced item in the priced bills of quantities, with signatures of the committee's head and members.
8. Verifying the bidder's signature on the tender submission form and on every page of the priced bills of quantities and any attached annexes.

d) The committee must clearly record in the meeting notes any comments or reservations stated in the bid and appended documents to give clear indication of samples, mock-ups and drawings that are submitted with the bid, writing down their general description and any relevant distinctive characteristics.

e) The committee must stamp all pages of the bid with the committee's stamp and to have members' signatures on all pages of the bid priced bills of quantities.

f) The committee must clearly indicate any missing information or data needed in the bid according to the bidding instructions within the tender documentation, including the tender document purchasing receipt.

g) According to aforementioned instructions , the committee's head has to undertake the following actions after opening the bids:

1. He must declare the bidders' prices, technical specifications and implementation periods, writing these on the advertisement board and as fixed in the said bids, emphasizing that these are subject to auditing and evaluation.
2. He must prepare and sign the meeting minutes jointly with the committee members, the bidders or their attending agents, annotating any relevant notes corresponding to the committee's work.

h) Bids and their attachments shall be forwarded to the Verification and Analysis Committee with a special memorandum informing the contracting entity with the said action.

Article 7 – Establishing bid evaluation and analysis committees and their tasks

One or more evaluation and analysis committees are to be established at every contracting entity to review the bid's legal, technical, and financial terms. The committee is to be headed by a specialized and expert employee having a rank not less than Director or Chief Engineer, along with a number of specialized technicians, including one legal and financial official, and the committee's secretary. The said committee is to fulfil its tasks according to the schedule determined in the establishing decree and may seek assistance from specialized entities with expertise of to the nature of the tender. The recommendations of the committee are subject to the approval of the head of the contracting entity or any person he authorizes as per the applied contractual financing rights. The committee has to consider the following procedures:

First

It must reject the bids with no bid bonds, as required in the tender's documentation.

Second

It must reject the bids based on a deducted amount or a percentage of reduction from any other bids submitted to the tender, and to refuse any reservation or reduced in pricing post tender's closing date.

Third

It must analyze the bids in confidentiality and issue a final report addressed to the authorized entity for the award. These procedures are to take place within the period determined by the head of the contracting entity within the period of the bids' validity.

Fourth

It is prohibited to send the bids outside Iraq for analysis, the consultants outside Iraq have therefore to send their representatives to Iraq for the purpose of proceeding with the required analysis unless the nature of the work necessitates require otherwise; In that case, it is required the approval of the concerned minister or head of the non-ministerial contracting entities is required, or the CCC and as per the applied rights in this respect, provided keeping the original copy in the contracting entity.

Fifth

It must accept the reductions in percentages or in deducted amounts if given in the original bid, when proceeding with the analysis and the evaluation.

Sixth

It must eliminate the reserved amounts given in the priced bills of quantities submitted with the bid that are not required in the tender documents, for comparison and analysis objectives.

Seventh

It must consider all bids' prices on unified basis, as per given statement in the instructions to bidders within the tender's documents.

Eighth

It must consider the written price in words if inconsistent with the price written in numbers. As such, to consider the unit price if inconsistent with the total price of a given item.

Ninth

It must consider the total price of the bid inclusive of the price of any item or items that is not priced in the bid, as per the given quantities for the said items.

Tenth

It must apply the following procedures and controls for the purpose of naming the best bid:

a) Reject the non-compliant bid with the required technical specifications even if was the lowest in price.

b) Reject the inefficient contractor based on the Government's previous experience with the contractor in executing previous contracts. These principles also apply to vendors and consultants.

c) Consider the financial capability through submitting the previous year's financial statement audited by a legal accountant, if required in the tender documents.

d) Consider the amount of contractor, vendor or consultant's, annual financial obligations;

e) Consider the capacity to conform to the given dates for both delivery and execution.

f) Consider a satisfactory record of previous projects achievements.

g) Consider the availability of the technical capacities and skills for the implementation of the contract (engineering and technical cadre with specialized equipments).

h) Consider obtaining confirmation regarding the execution of similar projects, issued from the government contracting entity.

Eleventh

It must determine and assess the weighing percentages for the financial and technical proposal in accordance with given texts in the bidding instructions to compare the technical and financial specification, in order to select the highest scoring bids in the financial and technical evaluations, which should be considered for awarding objectives.

Twelfth

It must annotate in the final report, the details of any disagreement in opinion occurring among the members of the bid evaluation committee subject to be resolved by the head of the contracting entity.

Thirteen

It must prepare a table with a list of all bids obtained, giving full relevant details and list the missing documents (if any), proceeding with the comparison and evaluation of the legal, technical and financial terms, after the completion of the analyzing procedure.

Fourteen

It must include, in the final meeting minutes a special field showing the recommendation of the bid evaluation and analysis committee, stating the name of the selected bidder for award and his identification, as per a respective appended table, showing the bid price, currency, period of implementation or supplying in days, the basis applied by the said committee, and stating that the bid's price lies within the acceptable

limits of the estimated cost. The said meeting minutes are to be stamped and dated after being signed by both the head of the committee and its members.

Fifteenth

It is prohibited to negotiate the prices with the bidders except the single source method.

Sixteenth

It is authorized to complete the required technical data submitted by the bidders and correct the mistakes, if any, but it is prohibited to add or complete any data affecting the presented prices.

Seventeenth

It is authorized for the contracting entity to release the bid bond as per request of the bidder who, prior to the end of bidding, is not expected to be awarded the contract, and after raising the committee's recommendations, and post-approval of the head of the contracting entity. However, in all cases, the bid bond of the three first bidders nominated for the award is not to be released.

Eighteenth

The concerned entity should check the validity of the basic data within the documents, given in the tender prior to the award, including the Bank Guarantee letter for the bid bond.

Nineteenth

The bid evaluation committee should submit its recommendations concerning the nomination and the award to the head of the contracting entity to decide the awarding, in accordance with his contracting rights.

Twentieth

a) It must observe the financial authorities on contract awarding; when the contracting decision exceeds the threshold of the head of the contracting entity, he therefore has to address the CCC to obtain the approvals for award. If the CCC does not reply within a period of 14 days starting with the date of referring the issue to it, then the request is implicitly considered to be approved.

b) The award decision is considered valid starting from the date of notifying the awardee to sign the contract, which must be signed within 14 days from the said date, it must also be approved by the head of the contracting entity, and all other bidders must be notified.

c) If the winning awardee refrains from signing the contract within the given time in item (b) in this Article, then a warning letter must be addressed to him to sign the contract within 15 days. In case of refusing to sign, the contracting entity has therefore to apply the legal procedures stated in paragraph (1) of Article 16 of this regulation.

Article 8 – Preparing a contract

First

The draft contracts are prepared by the contracting entities at the ministries, non-ministerial entities, regions, and, in co-ordination with the financial, technical directorates and the beneficiary entity. The contracts are to include the given items in the tender's conditions or the invitation with any additional conditions that both parties agree upon

assuring the quality of the execution according to contract samples issued by the OGPCP/ MoPDC.

Second

The draft public contract should include a text for collecting the government debts according to law No. 65/1977 (Collecting government debts).

Third

The draft contract should include the names and addresses of both parties who authorized to sign the contract and the document of authorization as per the applied procedures, providing that it should be valid at the time of contracting and issued prior to the date of signing the contract by a period of time not to exceed three (3) months.

Fourth

The contractor may award parts of the contract to subcontractors after taking the approval of the contracting entity. The main contractor remains responsible on the execution of the contract. It is prohibited to transfer the whole contract to another contractor or subcontractor.

Fifth

Ministerial, non-ministerial, regional, and provincial contracting entities should inform MoPDC, Ministry of Work and Public Affairs, the Central Bank of Iraq, Central Agency for Statistics Companies' registration office and the General Authority for taxes with the contractor's name, address and nationality, in addition to the contract price and period as soon as the contract is signed.

Sixth

If the contract stipulates paying an advanced payment to the contractor after signing the contract, then the contracting entity has to request the contractors to submit a Bank Guarantee issued from an authorized bank in Iraq taking into consideration the effective procedures as per the law of the general federal budget.

Seventh

a) The contract is to be written in Arabic, Kurdish and English languages, if possible.

b) The tender documents should list the prevailing language in case of interpretation disputes.

Article 9 – Letters of credit

The following procedures are to be considered when opening letters of credit to cover the international procurement contracts (importing goods, execution projects and purchasing of services) when contracting with Arab and foreign companies:

First

The competent ministry (or non-ministerial entity, region, or province) has to undertake the necessary procedures for opening a (irrevocable and unconfirmed) letter of credit after issuing the award, official signing of the contract, and obtaining the performance bond.

Second

The opening of the letter of credit should be in accordance with the international standards and practices and issued by an authorized governmental bank in Iraq as per the bank special forms (a request form and a contract form for the opening of a letter of credit).

These forms are to be inclusive of the financial conditions for the import process in addition to other conditions conforming to the contractual terms between both contracting parties (the seller and buyer).

Third

The procedures for opening of letters of credit consist of the following:

a) Specify the name of the beneficiary for opening the letter of credit (the seller) with his full address.

b) Specify the required goods, stating the purchasing contract's number and date.

c) Specify the required credit amount in numbers and in writing.

d) Refer to the type of commercial sale as per the international commercial terms (INCOTERMS) such as (FOB/CIF/CFR/CIP) or others as per the conditions of the contract.

e) Indicate the means of shipping (land, sea, air or others) and the final destination.

f) Specify if partial shipment is accepted resulting as such to accept the delivery of the goods in a number of shipments, or in one shipment only, taking into consideration that the payments are in balance with the acquired shipments.

g) Specify if more than one means of transportation (Transhipment) is acceptable or not.

h) Indicate the period and the validity of the letter of credit, as per the contract conditions.

i) Specify the delivery time according to the contract.

j) In case there is an existing need to extend the period of the letter of credit, the equal extension of the bank guaranties validity time or the warranties must also be considered accordingly.

k) Modifications and variations on the irrevocable letter of credit are prohibited without the consent of both contracting parties.

l) It is prohibited to terminate the irrevocable and unconfirmed letter of credit unless getting a written approval of the opener (buyer) and the consent of the beneficiary (seller) or a request from the corresponding bank according to the seller's request and the written consent of the buyer.

m) In case of an advanced payment (certain ratio of the letter of credit amount), it is required to obtain a bank guarantee in the same currency as the L/C on condition to be made through an authorized bank in Iraq.

n) If the seller insists on opening an irrevocable and confirmed letter of credit, then he is responsible for paying the confirmation charges.

o) The following applies to the buyer and seller:

1. The buyer (opener of the L/C)) pay the charges due for the procedures of opening the letter of credit inside Iraq.
2. The seller (beneficiary) pays the charges and profits due to the charges of opening the letter of credit outside Iraq.

p) It is preferable that all bank charges (inside and outside Iraq) are on beneficiary's (seller) account; The insurance should cover all the risks, and is to be stated in the credit statement whether the insurance was actually covered by the seller or the purchaser provided that it covers the value of the goods based on (CIP or CIF).

q) The payment conditions and the method applied to release them must be indicated in accordance with the conditions stipulated in the contract between both parties (the

buyer and the seller). The payment method should be clear as well the type of the necessary documents to be submitted by the seller to get the said payments.

Fourth

The required documents for the letters of credit, their certification as well as to determine their circulation must be done in accordance with the applied international practices and conventions (600 Ucp).

Fifth

An import license must be submitted for the goods or the equipment required a license of importation, according to the law.

Sixth

The competent ministry, non-ministerial entity, region or province shall monitor the shipping and the delivery of goods and get the seller's receipts on the details of the shipments, taking the following into consideration:

a) It must finalize the procedures for the customs clearance of the delivered goods and equipment and facilitate the delivery to the warehouses.

b) It must finalize the procedures for loading and clearance, as soon as possible and within the determined allowances; to avoid paying extra charges caused by late receiving of the goods delivered to the airport or to customs.

c) It must finalize the procedures of ship unloading, as soon as possible and within the determined allowances, to avoid paying demurrages due to the delay of unloading the cargo.

Seventh

The governmental contracting entity must prepare the necessary tools and equipments at the warehouses to finalize, with no delay, the procedures of unloading and delivery of the arrived goods, taking into consideration to record the condition of the received goods for the purpose of assuring the insurance rights.

Eighth

It must follow up the finalization of the procedures by performing a technical test of the delivered goods and issuing a test and acceptance certificate, dated on the same date of delivery, according to the determined period in the contract.

Ninth

Defects, losses and damages:

a) In case of receiving a delivery showing defects or non conformity to the required technical specifications, the test and approval committee established by the contracting entity, has to issue a certificate of specification mismatch and respectively inform the seller, without delay, for the purpose of replacing the said items.

b) In case of missing items or items with total or partial damage, the test and approval committee has to issue a mismatch report for the said items and to inform the seller with the details of the missing or damaged items for the purpose of compensation when the sale is based on (CIF or CIP) since the insurance is covered by the seller.

c) In case the insurance is covered by the buyer and there is damage or missing items in the arrived delivery, a mismatch report is therefore to be issued and it must inform the National Insurance Company for the purpose of assuring the compensation.

Tenth

All regulations issued by the Council of Ministers for the opening of the letters of credit and the methodology of its implementation must be adopted.

Eleventh – Other instructions:

a) The conditions determined by the buyer, addressed to the opener bank, should be clear, precise and transparent.

b) It is prohibited to open a transferable L/C, except the transfer to the manufacturing entities specified in the contract.

c) It is prohibited to give the seller any advance payment unless receiving an On Demand Bank Guarantee equal to this payment and in the same currency. On Demand means that the amount could be withdrawn without notice or judicial order.

d) It is not preferable to accept, Loaded on Deck, method of sale.

e) The opener Bank should follow up the receipt of special bank notifications for the purpose of being acquainted with the movement of the credits, the expenditures and the respective financial settlements.

f) The contracting entity should monitor its account, in foreign currency, so that the fund should be sufficient to cover the amount of the L/C for the implementation of a certain purchasing contract. It is prohibited to have any contractual obligation with the seller before checking the availability of sufficient funding in foreign currency to cover the contract.

g) L/Cs should be opened to cover the foreign purchasing contracts such as equipment, tools, goods or services. The conditions of the L/C should be according to the Uniform Customs and Practice of Documentary Credit.

h) A certain percentage of the L/C amount should be kept to cover the installation, the operation or the maintenance for equipment, tools or goods. It must be included in the conditions for payment of the L/C.

i) In case both contracting parties decide to proceed with modifications on the said contract, the bank holding the open letter of credit will be notified to make any necessary adjustments.

Article 10 – The dispute resolution mechanism prior to contracting

First

Pre-contracting disputes will be solved as follows:

a) A central committee is to be established at every ministry, non-ministerial entity, region, and province to review the contractual complaints and objections; the committee will be connected to the competent minister or the governor or who will be authorized by them; the said committee should consist of experts, specialists, and the committee's secretary with title no less than observer.

b) The committee is responsible for reviewing the written complaints and objections submitted by the bidders or their official agents who had as such made no request to withdraw the bid bonds as referred to in paragraph Seventeen of Article 7 of the given instructions; and should be addressed to the competent contracting entity within seven (7) work days starting from the date of issuing the letter of notification and awarding. A respective recommendation is to be submitted to the competent minister or the head of the non-ministerial entity, region, or province, within a period of fifteen (15) days from

the date of registering the complaint at the contracting; the said minister or governor has to decide on the recommendation within seven (7) days; not giving a decision is considered to be a refusal to the objection after termination of the given time.

c) Contracting parties in ministries and non-ministerial entities, regions, and provinces have to wait before singing the contracts, until the issue is solved by the competent minister or the governor taking within the determined time limitations; the legal periods for reviewing complaint as per the law given in paragraph (B) , item (First) from the said Article must be observed in addition to a condition that the complainer should submit an official commitment to pay the value of the resulting damages caused by the delay in signing the contract due to deliberate or non-justified reasons for the benefit of contracting entity.

Second

a) A specialised administrative court for reviewing the objections submitted by the bidders is to be established at the Ministry of Planning and Development Co-operation. The court is to be chaired by a judge nominated by the Supreme Judicial Council, with the membership of a representative from the Ministry of Planning and Development Co-operation with a title of no less than Director General and one representative with expertise and specialization from Iraqi Contractors Union and the Union of Chambers of Commerce.

b) The court is to have a secretary with a title no less than Observer.

Third

Bidders may object at the administrative court stated above to the referral decisions issued by the ministries, non-ministerial entities, regions, and provinces during a period of seven (7) work days starting from the date of the decision undertaken by the competent entity, which the bidder is complaining about.

Fourth

The court should issue its decision concerning the complaint within a period not exceeding one hundred and twenty (120) days starting from the date of paying the legal court dues.

Fifth

The court's decision are considered decisive if no appeal is filed at the competent Court of Appeal within thirty (30) days starting the following day after the date of the notification of the decision.

Sixth

The court performs its due tasks as per to order number (87) for the year 2004 which issued by the Coalition Provisional Authority (dissolved), the court will be guided by Civil procedural Code number (83) for the year 1969 for all matters not included in the regulations or the controls issued by the directorate of public contracts at Ministry of Planning and Development Co-operation.

Seventh

The directorate of public contracts at the Ministry of Planning and Development Co-operation is bound by the decisions issued by the court in co-ordination with the competent entities.

Article 11 – Dispute resolution mechanism after signing the contract

First

All disputes occurring after signing the contract will be solved through one of the following methods:

a) Conciliation: to be concluded through the establishment of a joint committee between both disputing parties represented by the contracting entity (the party with whom the contract was concluded, *i.e.* contractors, suppliers, or consultants) to study the matter and come to an agreement to treat the said disputes accordingly as per to the valid laws and regulations concerning the matter of the dispute.

b) Arbitration: to be concluded by both disputing parties choosing expert and specialized arbitrators in the matter of the dispute to represent them and a third arbitrator chosen by the earlier two to lead the arbitration committee . In case the choice making for a third arbitrator is unachievable, an authorized court is therefore responsible to nominate the third arbitrator. Thereafter, the arbitration committee studies the matter of the dispute in all its details and issues a final decision to resolve the dispute. The losing party bears the expenses of the arbitration and is bound by the committee's decision after the respective approval by the authorized court according to the law.

c) Transfer the dispute to specialized courts for the purpose of obtaining their verdict in accordance with applicable laws to solve the said disputes.

d) The contracting entity may chose international arbitration to solve the disputes only if it is included in the contract terms and when one of the contracting parties is foreign, considering the mechanism of the approved procedures in the contract, and selecting one accredited international organizations for arbitration to solve the said dispute.

Second

Both contracting parties are committed to choose the best method to solve the disputes arising from implementation of the contract through one of the aforementioned methods in item (First) of this Article and as per the approved conditions of the contract.

Article 12 – Function of public contracts formation

The Function of public contracts formation founded at every ministry, non-ministerial entity, region, and province is determined as per section (2/2/a) of the Coalition Provisional Authority's order number (87) for the year 2004; this Order is followed up by the implementing procedures from the public contracting offices in co-ordination with the office of the inspector general and the concerned provincial councils; and in accordance with applied mechanisms at the of the Government Public Contracts Directorate at Ministry of Planning and Development Co-operation.

Article 13 – Adherence to laws and regulations:

Contracting parties, government directorates, public sector employees and other authorized persons participating in the contracting process are not allowed to disclose any information that is not permitted in the bids to any party having no relation with the contract.

Article 14 – Contract duration and extension

Contracting parties are to abide by the following when extending the duration of contracts:

First

The contractor has to implement the clauses of the contract during the contract period to be calculated starting from the date of commencement or the date of the signing of the contract or any other date stipulated within the conditions of the contract, taking the following into consideration when extending the contract time duration:

a) In case of increasing or changing the work related to various contract terms; or changing the required quantities or the quality to be supplied, thus affecting the execution of the approved curriculum, which would disable the fulfilment of the curriculum within the agreed time as per the original contract.

b) If the delay in implementing the contract is due to reasons or procedures related with the contracting or legally authorized entity, or any reason concerned with other contractors employed by the contracting entity (the employer).

c) If after concluding the contract, exceptional circumstances arose that were unexpected and unavoidable and beyond the responsibility of the contractors, thus causing delay in the completion of the required works or the supply of the required goods as per the contract terms.

Second

The contractor must submit a written request addressed to the contracting entity or any authorized person, within fifteen (15) days of the supply contracts and thirty (30) days for the construction and consultancy contracts, starting from the date of the origin of the cause requiring a request for extension; the contractor must give full and precise details concerning any request for time extension. The contracting entity has to review the request and decide within thirty (30) days for all types of contracts starting from the date of receiving the request. No requests are accepted after issuance of the initial delivery certificate stated in the contract conditions.

Article 15 – Work alterations and additional works

First

Introducing alterations in the contracted works, or adding works, or new quantities are not allowed, except in cases of prime necessity taking into consideration to restrict the alterations as much as possible, if one of the following cases occurs:

a) If avoiding the alterations or additions results in delaying the work or causes damages to the technical or economical aspects.

b) If avoiding the alterations or the additions results in eliminating the usefulness of the contracted work or supplies.

c) If the alterations or the additions result in savings in the project cost or the work.

d) If the alterations or the changes do not cause a basic change in the service or the determined productive capacity for the project or the work.

e) If the alterations cause a reduction in the contract time provided not to cause deterioration with respect to the technical specifications of the work or the project.

Second

All correspondence related to alterations and additional work invoices are considered to be urgent correspondence with prime importance when compared to others; the contracting entity has to decide accordingly within the given times stated in Item (2) Article 14 of this regulation.

Third

Any alteration or additional work should not start until after obtaining a written order (a change order) issued by the authorized entity at the contracting entities and as specified in accordance with the contracting conditions. The said order is to include a brief description of the work, its specifications, quantities, values and the additional time (if existent) necessary to add to the contract time. In case it is not necessary to add a time extension, then it is to be clearly stated in the order.

Fourth

The contracting entities must specify the required alterations or additions to implement on the contract at an early stage, so that it does not to affect the progress of the work as per the approved curriculum.

Fifth

Cost evaluation for alterations and additional works is carried out as per the contracting conditions. In case of adding new items with no similar or corresponding reference in the contract, the prevailing market prices are therefore considered as a base for the cost evaluation of the said items with additional profits and administrative costs.

Sixth

The amount of the alterations and additional works should not exceed the competent minister or the governor's given authorities, in accordance with the regulations for the implementation of the federal general budget.

Article 16 – Insurance, penalty delay fees, and administrative expenses

First – Legal insurance:

a) Bid bonds are not acceptable unless in the form of letters of credit, certified checks, bank guarantees, or loan bonds issued by the Iraqi Government.

b) Bidders are to submit the bid bonds to guarantee serious participation in the tenders for all types of construction and supply contracts, with one per cent (1%) of the bid amount. The bid bonds are to be issued by an accredited bank in Iraq as per a bulletin published by the Iraqi Central Bank concerning Banks' financial efficiency.

c) Bid bonds are confiscated from the awardee if he abstains to sign the contract after being duly informed about the award. All other legal procedures stated in this regulation are to be taken against him.

d) The performance bond guarantee for all contracts is determined at a rate of (5%) five per cent of the contract amount, and is to be issued by an accredited bank in Iraq. The bid bond is not to be released only until due issuance of the final acceptance certificate and discharge of the final accounts. Releasing partial amounts of the total performance bond amount is allowable after final receipt of the said parts and the respective issuance of the final acceptance certificate, thus confirming that the said parts are qualified to be used.

e) The public sector and the government's public companies are exempted from submitting the performance bond and bid bonds stated in this Article, for a period of three (3) years starting from the date which this regulation takes effect. The Ministry of Planning and Development Co-operation is authorized to review the said exemption after due termination of the given period of time and in co-ordination with the Council of Ministers/Economic Affairs. Committee.

Second – penalty delay fees:

The maximum limit for the penalty delay fees determined by the contracting entity is specified not to exceed the rate of ten (10%) per cent of the contract's amount. The implementing entity has to confirm the aforementioned ratio in the conditions of contract, the tender documents and the instructions addressed to the bidders. The contracting entity has, before reaching this limit and after accretion of the delay period to twenty-five (25%) per cent of (the contract period of time plus any additional granted time allowances), to take the necessary procedures to guarantee the expediting of the contract implementation, inclusive of establishing an accelerating committee formed by experts with a representative of the contracting party to pay out for the remaining works or to withdraw the work in accordance with the contract conditions taking into consideration to apply the following equation to calculate the demurrage:

$$\frac{\text{Contract value}}{\text{Contract period}} \times (10\%) = \text{the charges for one day}$$

Third

The penalty delay fees should be reduced in accordance with the determined percentage of execution for the contracting obligations, as per the contracts execution plan, provided that the executed work or the supplied services or goods are ready to be used in accordance with the contract conditions.

Fourth

The contracting entity should, due to justified reason, impose or stop the demurrage upon withdrawal of the work from the contractor.

Fifth – Administrative charges:

The administrative charges are determined when the contracting entity executes, on its own, through any other person, rather than the contractor, any of the contractor's obligations. It should not exceed twenty (20 %) per cent of the actual contract value for the execution of the said obligation. The contracting entity should specify the aforementioned charges within the tender's documents and the contract conditions.

Article 17 – Legal consequences from contractors' violation of their contractual obligations:

First

Legal consequences resulting from violations prior to the signing of the contract:

In case the awarded contractor refrains from signing the contract, after official warning to sign the contract within fifteen (15) days from the date of notice, the following procedures are undertaken:

a) Confiscate the bid bond of the abstained bidder.

b) Award the bid to the second nominee whereas the abstained bidder shall pay the difference between the two bid prices for the execution of the contract.

c) In case both first and second nominees abstain from signing the contract and/or submit the performance bond, the contracting entity should award the bid to the third nominee whereas the first and second abstained bidders pay the difference in values, as joint liability, and according to the ratio of their proposals, seizing as well the bid bonds for both.

d) The procedures stated in items (a), (b) and (c) of this Article are applied on abstained bidders in case the abstinence takes place during the validity period of their bids.

Second – Legal consequences resulting from violations post contract signature:

a) Confiscate the performance bond.

b) Execute the contract on behalf of the contractor through an accelerating committee with representative of the default contractor. In case of contractor refusal, a court order shall be issued from an authorized court to execute the work on the contractor's behalf, after confiscating all the contractor's equipments and materials, for the purpose of settling the accounts, plus adding the demurrage and the administrative charges amount of twenty per cent (20%). After a settlement of the final accounts, if the contractor is a debtor, he gets nothing, and if he is creditor, he must get compensation.

c) It is allowable for the contracting entity to award the remaining work to other contractors if the main contractor has defaulted; the defaulting contractor should pay the difference between his price and the new contractor price, plus the contracting entity shall confiscate the performance bond and follow other required procedures.

Article 18 – Prohibition of contracting

Contracting entities at ministries, non-ministerial entities, regions, and provinces should black-list the contractors violating their contractual obligations, taking the following into consideration:

First

Must undertake the procedures for black-listing Iraqi contractors as per the methodology stated in the regulation for the classification and registration of Iraqi contractors issued by the Ministry of Planning and Development Co-operation number (1) for the year 2005.

Second

Must undertake the procedures of listing non Iraqi contractors, Iraqi and non Iraqi vendors and Iraqi and non Iraqi consultants, as per the methodology stated in the respective issued controls.

Article 19 – Operational or initial payment and progress payments for the work

First

Initial payment should be granted to construction, supply and consultancy contractors according to Federal Budget Law, taking into consideration the submission of the respective special bonds prior to their approval.

Second

Progress payment should be paid to the contractor in a period not less than thirty (30) days as per progress of the work, according to the regulations of the general conditions of contracts and the contracting conditions stated in the tender documentations.

Article 20 – Ministries, non-ministerial entities, regions and provinces are to observe the following

First

The public construction contracts should include provisions to apply the conditions of civil engineering works and the conditions for mechanical, electrical and chemical engineering works issued by the Ministry of Planning and Development Co-operation, and must consider the aforementioned regulations as an integral part of the contract. It should be applied for all matters not stated in the contract.

Second

All effective relevant public contracts laws, the Instructions of OGPCP/MoPDC and the Instructions of the higher authorities should also be applied.

Article 21

First

Ministries and non-ministerial entities should oblige the contracting entity therein to co-ordinate their contracting plans with OGPCP/MoPDC, and send the required data for the purposes of the follow up and technical supervision of its work when commencing to execute its contractual activities.

Second

Ministries and non-ministerial entities should comply with the investment budget regulation issued by the Ministry of Planning and Development Co-operation and any regulations issued by the Ministry of Finance relevant to financial authorities related to the procurement of state agencies as well as the authorities granted to the concerned entities when implementing the projects listed in the budget.

Article 22 – OGPCP/MoPDC undertakes the following:

First

To practice the authorities granted as per the law of public contracts, CPA order No. 87/ 2004.

Second

To issue controls to organize the contractual relations between the state agencies and the contractors and on the consequences related to violations of contractors' contractual obligations.

Third

To issue and revise the general conditions for contracts and the conditions for the supply of goods and services.

Fourth

To evaluate the tasks and the procedures of the committees for opening and analyzing bids at the state agencies and to revise the aforementioned as necessary.

Fifth

To provide answers to the state agencies and other entities who conclude contracts on issues that are related with their tasks.

Sixth

To train and improve the capacities of the employees working at the contracting entities in Ministries, non-ministerial entities, regions and the provinces.

Seventh

To technically supervise the work of the newly introduced procurement agencies at Ministries, non-ministerial entities, regions and the provinces.

Article 23

It is allowable to award contracts to state companies within the Ministry of Industry and Minerals for manufacturing equipments and goods for the operation and production of other ministries in case of availability of capacities at the said companies.

Article 24

The general contracts are subject to the Iraqi laws and the jurisdiction of Iraq courts as per the adopted methodologies.

Article 25

The governmental contracts Regulation no.1/2007 is abolished.

Article 26

This regulation should be effective starting from the date of the publishing in the official gazette.

Ali Ghaleb Baban

Minister of Planning and Development Co-operation

Article-by-article analysis of the 2008 Regulation

To facilitate the work of the Iraqi authorities as they seek to make public procurement procedures more transparent, fair, and competitive, this section analyses article by article the 2008 Regulation. An additional aim is to identify changes and improvements which will help bring the 2008 Regulation into line with the recommendations of international organisations.

A critique of each article is followed by suggestions as to how it could be improved. Some comments will refer to the differences with the former 2007 Procurement Regulations.

Article 1

Appraisal

Because the 2008 Regulation has no introductory section, Article 1 could, in a sense, be considered its preamble. Accordingly, it sets out the objectives of the 2008 Regulation – *i.e.* clarifying the general principles, regulating the implementation methodologies, designating authorised parties for opening and analysing bids and initiating an appeal to the Administrative Tribunal. Nevertheless, it lacks introductory elements, definitions, and references. Furthermore, there is no overview of other legislation which, though not directly related to public procurement, impinges upon public procurement procedure, *e.g.* public procurement control rules, anti-corruption legislation, and the general organisation of state services. Such an overview would be useful in the light of the way procurement regulations overlap other regulations and laws like (as this chapter points out repeatedly).

Recommendations

Since Article 1 also serves as an introduction to the 2008 Regulation it should contain additional definitions and references. It should, for example:

- Explain the system of "contractor classification".
- Take inventory of all the laws and regulations that impinge upon the procurement procedure.
- List the laws, rules, and regulations to which the 2008 Regulation refers.
- Provide definitions of all the players in public procurement and of all procedures and processes, institutions and techniques needed to fully interpret the regulation.

European Directives offer good examples of preambles. They could serve as models.

Article 2

Appraisal

Article 2 describes the regulation's scope of application, *i.e.* contracts between all Iraqi government and public sector entities and contracting partners from Iraq or elsewhere.

It does not appear to apply to local or regional authorities when they are non-governmental entities. If this is the case, the regulation is fundamentally different from nearly all legislation regulating public procurement in other countries. The inference is that local authorities define their own rules. This would certainly complicate the work of contractors since they would have to check which rules govern contracting bodies every time they prepare a bid.

Recommendation

Extend the regulation's scope to all local authorities – regardless of whether they are governmental bodies or not.

Appraisal

Article 2.2 specifies that the provisions of the 2008 Regulation do not apply to contracts and projects financed by international or regional organisations. They are governed by rules agreed on a case-by-case basis (agreements or special protocols). In other words, they are "tied"[2] contracts which the United Nations and the World Trade Organization have been trying to eliminate for several years due to risks of bribery, favouritism, and kickbacks.

Recommendation

Ensure that all public contracts in Iraq are governed by the same rules, irrespective of the bodies (Iraqi Government, foreign governments or organisations) financing them.

Article 3

Appraisal

Article 3 comprehensively sets out the procedures to be followed before publishing a procurement notice and issuing invitations for tender, including pricing the bidding documents and preparing the tender advertisement. Such a detailed pre–procurement approach – seldom observed in the legislation of other countries – is very positive and has a considerable influence on smooth public procurement contracts.

However, there is no requirement for written justification that the procurement meets an identified need of the contracting authority.

Recommendation

Verify, even in the separate reports of high-value contracts, that the purchased product or service meets a clearly identified, justified need on the part of the contracting authority.

Appraisal

Article 3 contains no reference to the possibility of price adjustments so as to allow for fluctuations in the price of commodities like steel or gas during execution of contracts.

Recommendation

Incorporate measures to factor price adjustments that occur during the execution of a contract into its cost. Measures may include updating prices for long-term contracts, and revising them in the event of major fluctuation in the cost of raw materials.

Tender documentation should contain precise descriptions of the price adjustment formula and the references of the indicators used

Appraisal

Article 3.2 specifies that all tender documentation has a non-refundable purchasing calculated according to the size of a contract and the costs of pre-procurement preparation. Setting a documentation price is designed to promote genuine engagement on the part of bidders.

Appraisal

Article 3.3 relates to publicly advertising procurement notices. Priority is given to publishing them in the written press, although the websites of ministries, Iraqi embassies, and the United Nations Development Programme (UNDP) may also be used.

This provision requires selected contractors to foot the costs of publishing and advertising, a practice that is not in line with international good practice and appears difficult to implement. Contractors factor the advertising cost into their bids, which raises the cost and reduces the efficiency of a contract. Ultimately, it is not in the interest of contracting bodies that bidders pay for advertising.

Suggestion

Government contracting entities should bear the costs of publishing tenders, as do most other countries worldwide.

Appraisal

Article 3 contains no obligation to publish procurement notices and awards for contracts over a certain threshold (*e.g.* IQD 50 million).

Suggestion

For reasons of transparency Article 3 should require that **all** procurement notices and awards over a fixed threshold. The contract award notice could be published independently of the award procedure – even, for example, for non-competitive procedures without public advertising like single source and direct negotiation procedures.

Article 4

Appraisal

Article 4 describes the different types of public procurement tender procedures. It does so more explicitly than the 2007 Procurement Regulations, particularly direct

negotiation and single source procedures. Terminology is different from that in use in the United Nations Convention against Corruption and in other international instruments regulating public procurement. For instance, Article 4 speaks of "public tender" instead of "open tender", and "limited tender" instead of "restricted tender". This might simply be a question of the terms used when the 2008 Regulation was translated from Arabic into English.

International organisations recommend that the open tender procedure should be the rule and non-competitive tenders the exception. Iraqi procurement regulations require open tenders only for contracts worth more than IQD 50 million.

Recommendation

Ensure that competitive open and restricted tender procedures are the norm and that the same rules apply to all contracts. Non-competitive procedures should be used only in exceptional circumstances or in very small contracts (*e.g.* less than IQD 50 million).

Appraisal

Article 4.2(b) requires contracting bodies to invite at least six candidates to tender.

Recommendation

In view of the local situation, however, the Article will probably reduce that number. It is practically unthinkable that as many as six contractors could tender bids for the construction of a refinery, for example.

Appraisal

The 2008 Regulation introduces a new procedure – the two-phase tender. The main difference between it and the restricted procedure is that it is "applicable for contracts with intricate technical specifications or for goods, works and services whereby the details of the technical specifications for the products of the works are not available at the beginning of the project". This method, which applies to contracts of more or less than IQD 50 million, is similar to the procedure that EU countries use for the design and construction of public infrastructure and amenities.

Recommendation

The use of the two-phase procedure should remain exceptional.

Article 5

Appraisal

Article 5 clearly describes the information to be included in procurement notices and instructions to bidders. It also describes when and how advertising timelines should be extended and contracts re-advertised.

An important change from the 2007 Procurement Regulations is that the information on the time and place for the public opening of tenders is published in the tender documentation and no longer in the procurement notice. Another difference is that the 2008 Regulation allows contracting entities to accept bids under the published indicative price. The limit of 15% less the indicative price may even be stretched to 30% in the event of re-advertising (Article 5.5[c]).

Article 5.1(c) sets advertising timelines that are vague and lend themselves to different interpretations. Even if lengths of time depend on the size of the contract, minimum periods are too short for contracts exceeding IQD 50 million.

Article 5 indicates that "the tender's advertisement duration [may be extended] in case of extreme necessity" (3). In other countries, "extreme necessity" generally justifies reducing not increasing the length of the advertisement period.

Recommendation

Set minimum-length advertising timelines according to the type of procedure or, if necessary, the nature of the contract (works, supply, services, consultancy, etc.). For procedures like restricted tenders, set time limits on each phase.

Make advertising timelines expandable to allow for the size of a contract or pre-procurement preparations and reducible in the event of re-advertisement.

Clarify or change the term "extreme necessity" (which internationally is used to justify shorter not longer advertising timelines).

Appraisal

Paragraph 2(p) refers to "evaluation ratios" for the analysis of bids. Yet bidders have no prior knowledge either of these ratios or of bid assessment criteria, which prompts suspicion of corruption or favouritism in awards.

Recommendations

To increase transparency publish the ratios and criteria used for evaluating bids in procurement notice in line with provisions in procurement legislation like European Directives or World Bank regulations.

Article 6

Appraisal

Article 6 describes, clearly and understandably, the establishment of bid opening committees and their tasks.

One point – 5(b) – needs clarifications. It is the criteria for designating the head of the bid opening committee and those used by the head to designate the committee members.

Recommendation

Clearly indicate the rules and criteria for appointing of the head and the members of the bid opening committee.

Article 7

Appraisal

Article 7 clearly describes the bid evaluation and analysis committees and their tasks.

Recommendation

Specify standardised criteria for use by committees throughout bid evaluation and analysis. No other criteria should be used.

Define objective criteria for the rejection of "inefficient contractors" and state them clearly in advance to forestall any suspicions of favouritism.

Take special measures for contractors that have no experience of the Iraqi Government to prevent them from being systematically excluded from public procurement contracts.

Appraisal

Paragraph 20(a) refers to the threshold above which the head of contracting entity has to secure the approval of the Central Contracting Committee (CCC) for approval of a public contract.

Recommendation

Instead of stating that there are thresholds over which the CCC's approval must be sought, indicate in Iraqi dinars what those thresholds are for the different contracting entities, such as ministries and provincial authorities.

Article 8

Appraisal

Article 8 explains how procurement contracts should be prepared. There was no such provision in the 2007 Procurement Regulations.

Recommendations

Explain the provision covering government more clearly.

Article 9

Appraisal

Article 9 describes the arrangements for opening letters of credit as a guarantee of a bidder's undertaking to deliver a service or product to specification. Letters of credit are used in conformity with practices in other countries.

However, nothing is said about ways in which bidders can present in national procurement contracts which do not require letters of credit.

Recommendation

Add an Article that sets outs out comprehensive arrangements for procurements that do not require letters of credit.

Article 10

Appraisal

Article 10 clearly sets out mechanisms for settling disputes that arise prior to the execution of a contract.

It does not allow plaintiff contractors to take their case directly to the administrative court. The central committee in the contracting body must first review the complaint, then refer its findings to the head of the contracting entity or minister. If the minister rejects the appeal, then the appeal procedure within the contracting branch of government concerned is exhausted. The plaintiff may now appeal to the administrative court. In practice, however, contractors usually go no further for fear of reprisals.

Recommendations

To protect bidders against unfair decisions, allow plaintiff contractors to have their complaints reviewed by an independent jurisdiction, in parallel with the appeals procedure in place.

In the event of high numbers of unjustified complaints, require plaintiffs to pay costs to offset losses due to delays in signing contracts. The appeals and complaint system is still only in its infancy, so such could not be considered until 2013-3.

Article 11

Appraisal

Article 11 set outs arrangements for settling disputes with foreign companies. Arrangements include conciliation, arbitration and specialised court hearings.

Recommendation

Explicitly provide national companies with dispute settlement arrangements like conciliation, arbitration, and specialised court hearings.

Article 12

Appraisal

Article 12 sets out co-operation between contracting authorities, Inspector General Offices and Government Public Contracts Directorate at the Ministry of Planning and Development Co-operation.

Recommendation

Strengthen co-operation in order to ensure that contracting authorities, Inspector General Offices and Government Public Contracts Directorate at the Ministry of Planning and Development Co-operation share information and co-operate effectively.

Article 13

Appraisal

Article 13 prohibits public officials involved in a procurement contract from disclosing any procurement-related information to a third party. This is a change of stance from the 2007 Regulations, which required officials to disclose their financial interests by filling in a form.

Recommendation

To reinforce anti-corruption provisions, reintroduce the obligation for all contracting officers to file a financial disclosure statement to prevent any conflict of interest with their duties. One solution: require officials to regularly complete an "assets declaration" in order to prevent or spot any illicit enrichment from their public activity.

Article 14

Article 14 indicates the procedure that should be followed for extending the duration of contracts and lists the cases where such extensions are possible. The Article also specifies that the contractor should submit a written request to the contracting entity, explaining the reason for the contract extension.

Article 15

Appraisal

Article 15 sets out the circumstances in which contracts may be altered and augmented. A contractor may not undertake any changes or additional work until the contracting entity has issued a written order to that effect. The contracting entity evaluates the cost of alterations and additional work and should communicate the cost as early as possible. While the provisions of Article 15 explain the budgetary constraints for additional work, they do not address situations where alterations result in a project saving money.

Recommendations

Introduce a detailed provision that the altered contract to be quality controlled. The aim is to prevent any risks to the quality of work – regardless of the reason and even if is to make savings – once the contract has entered its execution phase.

Article 16

Appraisal

Article 16 sets out costs that contractors must bear. They include insurance, fees administrative expenses, and fines for failure to respect deadlines.

The Article also set outs the amount and uses of bid and performance bonds and explains fines are calc0ulated. It does not, however, explain how the bidders who do not win a contract are reimbursed.

Suggestion

Refund bid bonds immediately that winning bidder signs the contract.

Article 17

Appraisal

Article 17 describes the legal consequences stemming from contractors' violation of their contractual obligations. Two main categories of consequences are explained; those resulting from violations prior to the signing of the contract – such as confiscation of bid bonds – and those appearing in the post-contract signature, in particular the confiscation of performance bonds.

The contractor may also be required to pay the difference between its price and price submitted by the contractor who carries out the project successfully.

Implementing these provisions remains a real challenge, especially as they require the defaulting contractor to pay compensation – even in emergency circumstances like bankruptcy.

Article 18

Article 18 refers to the procedures, described in other regulations, for blacklisting Iraqi and non-Iraqi contractors. As the practice of blacklisting is recent, there is little information on how it should be applied and how it works.

Article 19

Article 19 describes the initial and progress payments for the procurement works by referring to the Federal Budget Law. The Article specifies that the progress payment should be paid to the contractor in line with the progress of work.

Article 20

Article 20 makes observations related to public construction contracts.

Article 21

Article 21 emphasises the importance of contracting entities co-ordinating their plans with the Office of Government Public Contract Policy (OGPCP) at the Ministry of Planning and Development Co-operation (MoPDC).

Articles 22 to 26

These provisions set out the undertakings of the OGPCP, the entity that issued the 2008 Regulation. It explains that the 2008 Regulation is based on CPA Order No. 87 of 2004, that it repeals the 2007 Procurement Regulations, and that it became effective from date of publication in the official gazette.

4.3. Survey on current public procurement legislation in Iraq to be completed by ministries and regional authorities

Dear Expert,

The OECD (Organisation for Economic Co-operation and Development) is contacting you in your capacity as an expert and would be pleased if you could assist in sharing your views and expertise in the area of public procurement regulations in Iraq.

The request is motivated by the fact that the OECD wishes to support the Government of Iraq in its undertaking to enhance economic and social development. The OECD is a unique forum where the governments of 30 countries come together to address the economic, social and governance challenges of globalisation. The Organisation provides a setting where governments can compare policy experiences, seek answers to common problems, identify good practice and work to co-ordinate domestic and international policies. (For further information on the OECD please consult our webpage at *www.oecd.org*.

In order to improve transparency in public procurement provisions, the OECD proposes to analyse the Iraqi public procurement regulation in place in light of international good practice. As part of the OECD work-method, it is important to have a better understanding of the current situation and perspectives. To be able to have an informed opinion, we would be pleased if you could participate in this questionnaire and answer the questions below. Additional pages are provided for your answers.

Thank you in advance for your very much appreciated contributions.

A. General questions

General context

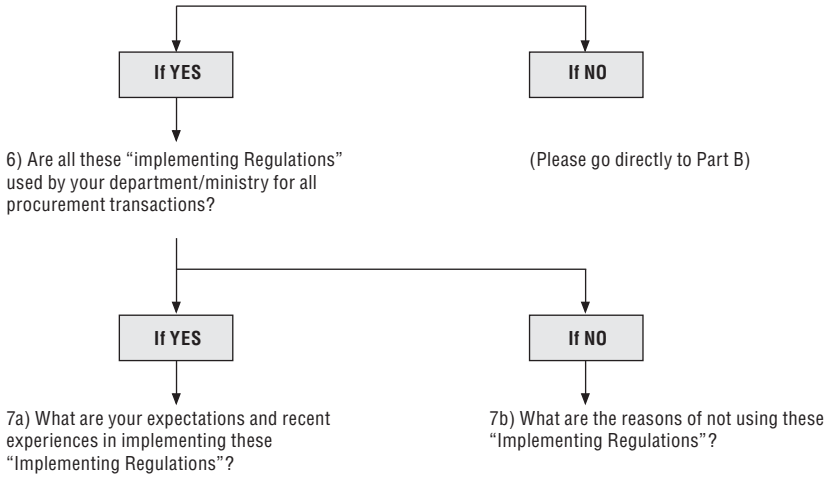
1. Please describe the responsibility that your department plays in the overall procurement process for your ministry?
2. Please describe *your* role in the overall procurement process for your ministry?

Legal sources of public procurement

3. What are the current and past legislations / instructions / guides that your department follows in procurement processes for your ministry?
4. What other regulations / instructions / guides used by your ministry are you aware of in the procurement process? Do those regulations address all the needs of your ministry for guidance in the overall procurement process?
5. Are you aware of Procurement Law No. 1 of 2007, entitled "Implementing Regulations for Governmental Contracts"?
6. Are all these "Implementing Regulations" used by your department/ministry for all procurement transactions?

7. *a)* What are your expectations and recent experiences in implementing these "Implementing Regulations"?

   b) What are the reasons for not implementing these "Implementation Regulations"?



B. Questions related to the procurement legislations/instructions/guides applied in your organisation

Scope of the application

8. Are the procurement legislations/instructions/guides that you use applied:
   - to state-owned enterprises? If not, why?
   - to international-funded contracts? If not, why?

Tender methods

9. What type of tender contracts does your department/ministry use? *E.g.* single source, direct invitation, open tender, etc.
10. What is the proportion of direct invitation and single source tenders that your department uses compared to all tender contracts offered by your ministry?
11. Under what conditions and circumstances are exceptions from open and competitive tendering allowed?

Advertising periods and methods

12. What are the lengths of the advertising periods in use? Are they different depending on the value and/or the nature (supplies/services/public works) of the contract?
13. What methods for advertisement does your department/ministry use in the procurement process? News papers (which ones), radio, television, websites, etc.

Evaluation criteria

14. Do you solely use the lowest price criteria for the selection of the best tender candidate? If not, what other evaluation criteria help guide the decisions of the officials awarding procurement contracts? How, by whom and when are these tender evaluation criteria defined? Are they indicated in the tender notice?

Indicative price

15. Does your department/ministry develop a cost estimate for each tender before it is published? If yes, how is the cost estimate calculated? Which department in your

ministry prepares the cost estimate? How much flexibility does your department/ministry have to deviate from the cost estimate?

Capacity of companies

16. When examining the offers submitted, do you start with the evaluation of the "capacity" of the company or with its submitted price? Does it happen that certain candidates are eliminated from the procurement process because of lack of "capacity" or previous poor experiences? How do you obtain this specific information?

17. For the purpose of assessing the technical capability of domestic tender candidates, does your department/ministry always rely on the company-classification system designed by the chambers of commerce and/or by the Ministry of Planning? Does your department/ministry think the chambers of commerce/Ministry of Planning's company classification systems are fair and accurate representations of domestic tender candidates? Are you aware of other company-classification systems used by the government? If so, please specify which institutions/ministry elaborated it, and how it is used.

Results of the tenders

18. Do you publish the results of the tenders? What is the information published (name of the winner, price, the reason other candidates were disqualified or failed, etc.)? Where these information are published (*e.g.* in newspapers (which ones), radio, television, websites, etc.)?

Complaint system

19. What are the mechanisms in place for challenging decisions related to the procurement procedure? How does the system operate? Do you have any statistics about complaint cases submitted/settled?

Capacity and professionalism

20. How does your department ensure that the overall procurement process is managed by qualified individuals especially for the definition of the needs and for the opening and evaluation committees?

Challenges of implementation

21. What do you consider as main challenges of the implementation of the applied procurement legislations/instructions/guides put forth in the Implementing Regulations for Governmental Contracts (Procurement Law) No. 1 of 2007?

Integrity measures

22. What rules and measures are in place to promote integrity and prevent corruption in public procurement? In particular, do you have, in particular:

- Codes of conduct?
- Rules for managing conflict-of-interest?
- Assets/income declaration for procurement officials?
- Procedures to report misconduct in the workplace?
- Other measures? If yes, please specify.

Notes

1. OECD (2007), *Integrity in Public Procurement: Good practice from A to Z*, OECD, Paris, *www.oecd.org/gov/ethics/procurement*.

2. When a donor country provides its foreign aid for goods, services or public works under the condition that the projects financed by this aid should be implemented by enterprises from the donor country, this is called "tied-aid". Under this type of contract, it often happens that the beneficiary enterprise gives back a certain amount to the donor (notably for the funding of political parties) in the form of a "kickback". This is why "tied-aid" is not promoted by international organisations; they clearly prefer aid funds to be "untied", *i.e.* available for the recipient country to use without any conditions attached.

PART II

Practical Tools for Public Officials

PART II

Chapter 5

Promoting Integrity and Preventing Corruption in the Public Service

Introduction

Expectations of citizens, businesses and civil society drive governments to ensure appropriate standards of integrity among public officials. Enhancing integrity and preventing corruption is a key consideration in their day to day work as they seek to maintain trust in government and public decision making.

This chapter presents a set of draft tools to promote integrity and prevent corruption in the public service. They emerged from discussions with representatives of the GoI during Workshop 2 on Procurement and Anti-corruption Policies, held in Paris on 8-10 July 2008. The tools are designed to provide essential practical solutions for public officials and organisations who want to better understand measures for enhancing integrity and how to put them into practice. They include:

- Key principles and provisions for code of conduct.
- A gifts checklist.
- A checklist for identifying conflict of interest risk areas.
- Training materials with case studies.

The tools are developed on the basis of acknowledged good practices. Managers and policy makers develop, adapt, and apply them as suitable in their own administrative context. Their focus is principally on the actions of individuals, who can either compromise or reinforce the integrity of public institutions. When the focus is on systems, users are encouraged to consider specific tools as part of an "integrity framework" that strengthens reliable government and public management to maintain public confidence in the integrity of public institutions.

Some tools may be used for more than one purpose, supporting both individual and systemic integrity.

Tool No. 1 – Code of conduct: Key principles and provisions

Purpose

This tool outlines a set of key principles and provisions designed to guide public officials towards a best practice code of conduct. The principles can support – after being adapted or redrafted as appropriate to suit local laws, policies, and practices – the design of codes of conduct and integrity guides in line with international instruments, including:

- The United Nations Convention Against Corruption and its Legislative Guide for Implementation (*www.unodc.org/unodc/en/treaties/CAC/index.html*).
- The International Code of Conduct for Public Officials of the United Nations (*www.un.org/documents/ga/res/51/a51r059.htm*).
- The Model Code of Conduct for Public Officials of the Council of Europe (*www.coe.int/t/dg1/greco/documents/Rec(2000)10_EN.pdf*).

- The Seven Principles of Public Life of the Committee on Standards of Public Life (*www.public-standards.gov.uk/about_us/the_seven_principles_of_life.aspx*).

Scope

The code of conduct tool is for use by "public officials", a generic term that encompasses civil servants, public servants, and elected officials.

Principles

Serving the public interest

Public officials are expected to maintain and strengthen the public's trust and confidence in public institutions and decision making by demonstrating the highest standards of professional competence, efficiency and effectiveness, upholding the constitution and the law, and seeking to advance the public good at all times.

Lawfulness

Public officials are expected to use powers and resources for the public good, in accordance with the law, lawful instructions, and government policy.

Integrity

Public officials are expected to make decisions and act without consideration for their private interests. Public service being a public trust, the improper use of a public service position for private advantage is regarded as a serious breach of professional integrity.

Honesty

Public officials have a duty to disclose any private interests relating to their public duties and to take steps to resolve any conflicts of interest in order to protect the public interest.

Impartiality and fairness

Public officials should make official decisions and take action in an impartial, fair, and equitable manner, without being affected by bias or personal prejudice, taking into account only the merits of the matter in hand, and respecting the rights of affected citizens.

Transparency

Public officials are expected to be as open as possible about all the decisions and actions that they take. They should give reasons for their decisions and restrict information only when the wider public interest clearly demands it.

Accountability

Public officials are accountable for their decisions and actions. They need to justify their actions publicly, or to a relevant authority, when appropriate.

Legitimacy

Public officials are required to administer the laws and government policy and to exercise legitimate administrative authority under delegation. Power and authority should be exercised impartially and without fear or favour and for its proper public purpose as

determined by the Parliament or the official's organisation as appropriate in the circumstances.

Responsiveness

As employees of the elected government, public officials are required to serve the legitimate interests and needs of the government, public organisations, other public officials, and citizens in a timely manner with appropriate care, respect and courtesy.

Efficiency and effectiveness

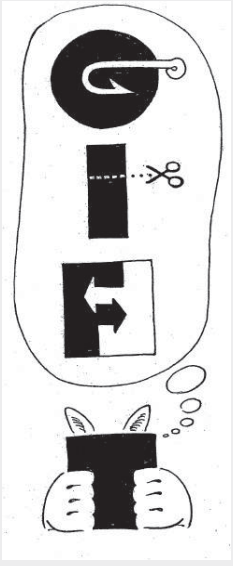
Public officials are required to obtain best value in expenditure of public funds and efficient use of assets deployed in public management, and to avoid waste in the use of resources in public programmes and official activities.

Tool No. 2 – Gifts checklist

Codes of conduct should provide clear standards on what gifts can be accepted by public officials, under what conditions, and what is prohibited.

The following checklist provides a practical tool for public officials to reduce potential confusion by asking four simple questions. Each question reminds officials of the application of a principle, rather than a set of complex administrative definitions, criteria or processes. The four questions are arranged under a mnemonic – gift – to make this test easy to remember.

Table 5.1. **Gifts checklist**

	***G*enuine**	Is this gift **genuine**, in appreciation for something I have done in my role as a public official, and not requested or encouraged by me?
	***I*ndependent**	If I accept this gift, would a reasonable person have any doubt that I could be **independent** in doing my job in the future, especially if the person responsible for this gift is involved or affected by a decision I might make?
	***F*ree**	If I accept this gift, would I feel **free** of any obligation to do something in return for the person responsible for the gift, or for his/her family, friends or associates?
	***T*ransparent**	Am I prepared to declare this gift and its source, **transparently** to my organisation and its clients, my professional colleagues, and the media and the public generally?

Tool No. 3 – Checklist for identifying conflict of interest risk areas

Purpose

The following checklist is designed to help managers identify areas of their responsibility where the organisation is at risk due to conflicts of interest.

For most questions, an effective administrative procedure is necessary for:

- Identifying and preventing conflict of interest situations.
- Resolving and managing conflict of interest situations effectively.

Using the checklist

In each case a "yes" answer is desirable. If the answer is yes, users should ask themselves:

"What is the relevant administrative procedure and is it effective?"

In case of a "no" answer, users should go on to ask themselves:

"Why is there no relevant administrative procedure, and what could be done to establish an effective process?"

Checklist for identifying conflict of interest risk areas

Additional and ancillary employment

- Has the organisation defined a policy and related administrative procedure for approval of additional and ancillary employment?
- Has all the staff been made aware of the existence of the policy and procedure?
- Does the policy identify potential conflict of interest arising from the proposed ancillary employment as an issue for managers to assess when considering applications for approval?
- Is there a formal authorisation procedure under which staff may apply in advance for approval to engage in additional employment while retaining their official position?
- Is the policy applied consistently and responsibly, so as not to discourage staff from applying for approval?
- Are approvals reviewed from time to time to ensure that they are still appropriate?

Inside information

Has the organisation defined a policy and administrative procedure for ensuring that inside information, especially information which is obtained in confidence from other officials or private citizens in the course of official duties, is kept secure and is not misused by staff of the organisation? Particularly sensitive information includes:

- Commercially sensitive business information.
- Taxation and regulatory information.
- Confidential information related to national security.
- Government economic policy and financial management information.
- Personally sensitive information.
- Law enforcement and prosecution information.

Has all staff been made aware of the existence of the policy and procedure?

Are all managers made aware of their various responsibilities to enforce the policy?

Contracts

Does the organisation ensure that any staff member or employed official who is or may be involved in the preparation, negotiation, management, or enforcement of a contract involving the organisation has notified the organisation of any private interest relevant to the contract?

Does the organisation prohibit staff from participating in the preparation, negotiation, management or enforcement of a contract if they have a relevant interest, or require that they dispose or otherwise manage the relevant interest before fulfilling such a function?

Does the organisation have the power to cancel or modify a contract for its benefit if it is proved that the contracting process was significantly compromised by a conflict of interest or corrupt conduct on the part of either an official or a contractor?

Where a contract has been identified as compromised by a conflict of interest involving an official or former official of the organisation, does the organisation retrospectively assess other significant decisions made by the official in his/her official capacity to ensure that they were not also similarly compromised?

Official decision making

Does the organisation ensure that any staff member or employed official who makes official decisions of a significant kind involving the organisation, its resources, strategies, staff, functions, administrative or statutory responsibilities, *(e.g.,* a decision concerning a draft law, expenditure, purchase, budgetary allocation, implementation of a law or policy, granting or refusing a licence or permission to a citizen, appointment to a position, recruitment, promotion, discipline, performance assessment, etc.) has notified the organisation of any private interest relevant to a decision which could constitute a conflict of interest on the part of the person making the decision?

Does the organisation prohibit staff from participating in the preparation, negotiation, management, or enforcement of an official decision if they have a relevant interest, or require that they dispose or otherwise manage the relevant interest before participating in such a decision?

Does the organisation have the power, either by law or by other means, to review and modify or cancel an official decision if it is proved that the decision-making process was significantly compromised by a conflict of interest or corrupt conduct on the part of a member of its staff or an official?

Policy advising

Does the organisation ensure that any staff member or employed official who provides advice to the government or to other public officials on any official matter concerning any kind of policy measure, strategy, law, expenditure, purchase, the implementation of a policy or law, contract, privatisation, budget measure, appointment to a position, or administrative strategy, etc., has notified the organisation of any private interest relevant to that advice which could constitute a conflict of interest on the part of the person providing the advice?

Does the organisation prohibit staff from participating in the preparation, negotiation, or advocacy of official policy advice if they have a relevant interest, or require that they dispose or otherwise manage the relevant interest before participating in preparing or giving such policy advice?

Does the organisation have the ability and processes to review and withdraw official policy advice if it is proved that the advice-giving process was significantly compromised by a conflict of interest or corrupt conduct on the part of a member of its staff/an official?

Gifts and other forms of benefit

Does the organisation's current policy deal with conflicts of interest arising from both traditional and new forms of gifts or benefits?

Does the organisation have an established administrative process for controlling gifts, for example by defining acceptable and unacceptable gifts, for accepting specified types of gifts on behalf of the organisation, for disposing or returning unacceptable gifts, for advising recipients on how to decline gifts, and for declaring significant gifts offered to or received by officials?

Personal, family and community expectations and opportunities

Does the organisation recognise the potential for conflict of interest to arise from expectations placed on individual public officials by their immediate family, or by their community, including religious or ethnic communities, especially in a multicultural context?

Does the organisation recognise the potential for conflict of interest to arise from the employment or business activities of other members of an employed official's immediate family?

Concurrent outside appointments

Does the organisation define the circumstances under which a public official may undertake a concurrent appointment on the board or controlling body of an *outside* organisation or body, especially where the body is or may be involved in a contractual, regulatory, partnership or sponsorship arrangement with their employing organisation? For example:

- A community group or an NGO.
- A professional or political organisation.
- Another government organisation or body.
- A government-owned corporation or a commercial public organisation.

Does the organisation, and/or a law, define specific conditions under which a public official may engage concurrently in the activities of an *outside* organisation including a privatised body, while still employed by the organisation?

Business or NGO activity after leaving public office

Does the organisation and/or a law define specific conditions under which a former public official may and may not become employed by, or engage in the activities of, an *outside* organisation?

Does the organisation actively maintain procedures which identify potential conflicts of interest where a public official who is about to leave public employment is negotiating a future appointment, employment, or other relevant activity with an *outside* body?

Where an official has left the organisation for employment in a non-government body or activity, does the organisation retrospectively assess the decisions made by the official

in his/her official capacity to ensure that those decisions were not compromised by undeclared conflicts of interest?

Tool No. 4. Training materials

Aims

This tool provides a set of short case studies that assist public officials in developing practical skills for recognising and solving integrity issues in daily practice.

The case studies could be incorporated – after adaptation or redrafting as appropriate – in training programmes and used to develop:

- Understanding of integrity issues.
- Skills for applying public service principles and standards through sound decisions-making.

Using case studies in training courses

Officials should take not less than 10 minutes to read and discuss each case study if superficial answers are to be avoided.

Background

Integrity is a fundamental value for serving the public interest. The term "integrity" comes from a Latin word originally meaning "whole", "undamaged" and "undivided".

Integrity in the public service means the proper use of powers, funds, resources and assets for the official purposes for which they are intended to be used.

In this sense, the opposite of "integrity" is "corruption" and "abuse" of official power and position.

Case Study 1

You discover that a close friend at work has been stealing small amounts of cash and altering official financial records to disguise the thefts, as well as taking office supplies from your ministry in the past year.

You also learned that this friend has been selling the stolen supplies at a market in the next town.

In the ministry, no one suspects that anything is wrong because the ministry's accounting systems have been falsified. Your friend has a sick spouse and a young family to support, and the salary as a civil servant is too low for the family to live on comfortably.

Case Study 2

Your ministry contracts for a large supply of printed material every month. The four printing firms that have always done all of the ministry's printing work in the past are well-respected for the quality and cost-effectiveness of their work.

Your father has just purchased a local printing business. Your job as contracts officer is to process all tenders for small to medium printing contracts.

You have access to the details of the other companies' tenders for printing contracts, and your father has asked you if you can tell him the size of their bids so that he can submit quotes at a lower rate. Your ministry has just launched a major programme to cut costs.

You know that the ministry could save many thousands of dollars on printing costs over the year if you do as suggested by your father.

Case Study 3

You overhear in the washroom a conversation between two staff members from another section in your organisation, in which one employee claims, laughing, how she recently got her supervisor to give her a promotion. The employee claims that she had told her supervisor that she would not report him for taking bribes from citizens, for which he would otherwise have been investigated for various criminal offences.

As a senior official, you know that bribe-taking by officials is a serious criminal offence. Your ministry has recently introduced a strict policy to reduce bribe-taking by employees, which includes requiring its supervisors to set an example to other staff. You are also aware that the supervisor concerned is very popular among the staff and senior management of the organisation.

Case Study 4

Senior officials of a government agency occasionally attend lunches or dinners with a wide range of business people from property developers, consultancies, manufacturing firms, and construction companies, as well as local newspaper and television professionals. This has been part and parcel of senior officials' activities in this agency, and there is no fee or money involved. The activity has never been seen as a problem for the agency.

On one recent occasion, three officials attended what was reported in the next day's newspaper as a "lavish" lunch hosted by a prominent local construction company. This occurred a week before the agency decided finally on awarding a major construction contract. It was reported that the company that had hosted the lunch won the contract.

PART II

Chapter 6

Mapping Risks in Public Procurement

Introduction

Corruption affects public procurement in developed and developing countries alike. To fight it, however, any good practitioner must first study and understand it. This chapter explores the techniques used to misappropriate funds and seeks to draw up as comprehensive an inventory as possible of the types of fraud and corruption that have tainted public procurement. The aim is to make stakeholders (public procurement practitioners, elected officials, businesses, investigators, magistrates, etc.) aware of the risks of fraud and corruption.

The examples chosen to illustrate corruption are from European Union member states and span many years. This is no accident: fraud can strike even at the heart of countries with longstanding, abundant legislation, where officials whose integrity is beyond reproach constantly monitor and check.

Despite the controls in place, a number of government contracts give rise to errors, anomalies, fraud, misuse of public funds, and corruption. Most errors and anomalies can be explained by a lack of awareness on the part of the people involved – purchasing agents, accountants, auditors, etc. This can be put right through training. However, misappropriation – for instance in the form of Fraud and corruption remain difficult to correct because they result from a deliberate desire to circumvent the rules for the purpose of illicit gain without leaving any trace.

This chapter focuses primarily on:

- Methods used, at each stage of the procurement cycle, to make a fraudulent transaction look legitimate to observers or auditors.
- Techniques for misappropriating funds initially earmarked for a transaction; how the funds are used (whether there is personal gain or not); and the networks that make corrupt practices possible.

In describing these mechanisms, it is useful to distinguish between the risks of fraud and corruption

- In the needs assessment phase.
- In the planning phase.
- In the selection procedure.
- During the execution of a contract.

Risks of corruption in the needs assessment phase

Even before a contract is signed, there are many different ways to misappropriate public funds. The amounts involved are often smaller than after a contract has been awarded, but they are easier to conceal. The number of payments can also be increased, since misappropriation can take place at each stage of the contract planning process.

Whatever the purpose of a scoping study, the mechanism for illegally diverting public funds remains the same. Procedures may differ, however, depending on the usefulness of the proposed study. If the purpose is to verify a hypothesis, choose an option, or ensure that a decision is adopted, a competent consultancy must conduct the study with the utmost seriousness. If, however, the study serves no real purpose – *e.g.*, when no hypotheses, options, or decisions are at stake – it can be contracted out to any firm, which will provide a document justifying the study without having to expend much time or thought. In some cases it will provide nothing at all, simply collecting the agreed amount of money. The studies produced can thus range from the high quality to the "empty".

Clearly it is easier to detect misappropriation when studies are useless or of poor quality, or quite simply not delivered at all. But the quality of a study and the amount of money diverted are not always correlated: very good studies may conceal major misappropriation, while poor ones may have been conducted honestly. Above all, it is necessary to ascertain how much is at stake and tailor controls to the amount of money involved.

Minor studies

Minor studies are those whose cost falls below national regulatory thresholds. Officials are generally free to deal with whomever they choose, practically without justification, since in most cases a simple voucher or purchase order is all that is needed to commit the expenditure. An invoice will trigger payment, provided that the amount and the description match the order. Conventional checks would be unlikely to detect any fraud.

There are a few ways in which decision makers can divert money for themselves, their associates, or their relatives, or for a group with which they have connections. But they need the help of a consultancy, and the money must leave the local authority or public body through legitimate channels before it can be diverted to the chosen recipient. Typically, "legitimate" channels are:

- "Friendly" consultancies. The decision maker can contact a friendly consultancy or organisation to ask it to perform the work. This is a procedure that has been used extensively by certain political parties to collect funds. There is no problem of competition and the chosen firm can overbill for a fee far in excess of the work performed – *i.e.* the normal cost of producing the study plus the amount the decision maker wants to pocket.
- A firm belonging to the decision maker or to his or her family.

Duplicated studies

The decision maker can have the same study conducted by more than one party, either simultaneously or not. If they are to submit their studies simultaneously, firms may get together and fix their prices to increase their profit margin. They divide up contracts amongst themselves and, in some instances, call upon colleagues or competitors to outsource part of the study. This benefits each party, including the decision maker, who will receive the amount of money requested from a consultancy that did not take part in the selection process. If the decision maker allows them to submit their work on different dates, the firms which submitted their proposals last may take advantage of the work done by the first consultancies. In the best-case scenario, the first – competent – firm prepares a

study from which the others copy extensively, so making substantial profits. In any event, these abnormally large margins find their way back to the decision maker, or designated beneficiaries, via a slush fund and false invoices.

> To prepare for a major public event, a contracting body needed to calculate electricity requirements. A contract for an initial study was awarded to a highly specialised consultancy through a standard tender process. When the report was delivered, the decision maker, claiming a need to verify the findings, hired two other consulting firms to conduct the same study for a price equivalent to the amount paid to the first firm. At the same time, he provided them with the findings of that first study. The other two companies copied the report already prepared, confirmed the findings, and sent their invoices to the decision maker. The invoices were highly overpriced for the work involved, and the decision maker recovered most of the money via a transfer to his bank account in a tax haven.

Studies never delivered

A decision maker may order studies that will be paid for in instalments, which can theoretically amount to as much as 80% of the total contract prior to delivery, although most commonly the initial payment is half the total cost. It will then no longer be possible to obtain a copy of the commissioned study, either because the consultancy fails and vanishes, or, if the firm has not shut down after collecting its down payments, because the decision maker simply does not ask for it, claiming it has "become unnecessary".

In neither case are down payments lost for the people involved in the fraudulent practice of setting up a slush fund for kickbacks to the decision maker. The reason is that (false) invoices enable the firm receiving the payments to show that they correspond to services that have in fact been performed, but from which it derived no benefit.

Circumventing tender procedures

To be sure of working with a firm that suits their purpose, decision makers generally choose the "most economically advantageous" tender, taking care to list a number of subjective elements[1] as additional selection criteria, such as the individual competence of study managers, the firm's reputation, past achievements in the region and so forth. Having taken these precautions, decision makers can decide to award the contract for a study to the firm they deem most "competent" and likeliest to respond to their requirements.

If, because of intense competition, the stipulated price for the study is not high enough to generate the hoped-for margin, decision makers will often allow themselves to be "convinced" by the chosen consultancy to expand the study beyond its initial terms in order to highlight, for example, the implications of the proposed project. This triggers a spiral of contract amendments by the decision maker or his designated representatives, the prices of which are set arbitrarily. Such amendments make it possible to increase the additional profit, which is then redistributed to the decision maker and his or her partners.

Altering the outcome of the selection process

Sometimes a procurement official may also issue conventional calls for tender and choose the lowest bidder, who will then have a number of different ways of paying back the official.

If the successful bidding company has not been forewarned about the commission it is expected to pay, then it is the victim of genuine extortion by the decision maker, who has officially accepted the tender but will allow work to begin work only after an illegal commission has been paid. The tenderer then pays up to avoid losing the right to tender on future contracts. To be able to make this unplanned payment, it either: *a)* obtains an amendment to generate the amount needed via false invoices; *b)* trims its margin but creates additional fictitious expenses (false invoices) to avoid being taxed on a profit that was never made; or *c)* is forced to employ undeclared workers or, more frequently, to use an undeclared subcontractor.

If the successful bidder has been forewarned, it will already have factored the "commission" into its bid. There is no distortion of competition because all tenderers have been treated equally. The commission can be paid to the decision maker via the classic procedure of false invoices, generally channelled through another "friendly" consultancy firm specialising in such practices. The decision maker imposes this consultant on the contractor as a subcontractor prior to signing the contract. The subcontractor gets handsomely paid by overbilling useless work that requires no particular technical expertise (in many cases just re-arranging study findings), but generates the money ultimately destined for the crooked procurement official.

Studies above national thresholds

If the cost of a study exceeds the national threshold, the decision maker must issue a call for tenders or resort to the negotiated procedure. Notification of the contract must be published in the Official Journal of the European Union.

In many cases, decision makers use the schemes described in the previous two sections to award contracts to the most accommodating consultancies. In other cases, they make sure (by underestimating bids) that a call for tender is unsuccessful, in which case they can then use the direct negotiation procedure with a variety of consultancies so as, ultimately, to select the "best" candidate, *i.e.*, the one known to be most amenable to corrupt practices. It should be noted that this procedure is also used extensively in connection with nationwide calls for tender.

Risks of corruption in the planning phase

Before the contract award process gets underway, and in order to complement preliminary studies, decision makers must call upon their own staff or specialised bodies to perform a number of other services. Here, the aim is to establish the precise cost of the project that has theoretically been given the go-ahead. This requires sound analysis of tenders, as well as the preparation of the administrative and technical documentation needed for launching a call for tenders that meets all needs and regulations. As laudable as these objectives are, however, they can be diverted from their true purpose by dishonest public officials or businesses.

Estimating project costs

To decide whether a proposed project is feasible in principle, decision makers need only the rough estimates provided by preliminary studies. They then have to fine-tune the estimate to be able to justify the proposed option when they present it to their superiors. But they may skew it in order to reap personal, financial, or moral gain by overvaluing or undervaluing the proposed option.

Overvalued estimates

An estimate may be overvalued if the project concerned is of clear benefit to various stakeholders. The decision maker may take advantage of the situation, for example, by turning the construction of essential infrastructure into more prestigious facilities that will enhance his reputation.

More practically, the decision maker may exhibit skills as a "good manager" – the cost having been grossly overestimated to begin with – by successfully completing the project within budget. Moreover, there can be no suspicion that he or she has subsequently enjoyed any "favours" from the firms awarded the contract (although the overestimation makes such favours perfectly feasible), since the actual price ends up being very close to the estimate.

> A city council decided to rebuild the city hall, which was outdated, too small and no longer met public access requirements. The estimated cost of refurbishing the existing building would be higher than the cost of building a new one, according to the city's technical departments. Therefore land was chosen for a new downtown location. However, it involved removing several thousand square metres of land from a public garden. Thus, the mayor was able to boast of a remarkable achievement: building a new city hall perfectly integrated with its surroundings, while keeping within the initial budget. He gained a reputation as a good mayor and a good manager.
>
> The truth was discovered a few years later by some of his opponents. Apart from the refurbishment, the initial cost had also included the purchase of land adjacent to the old city hall for building the planned extensions. Since this land was not vacant, it was necessary to factor in the cost of demolishing the existing structure. In the end, although these expenditures were never made, their costs were included in the budget for the new building. Moreover, a simple calculation using available prices showed that the construction costs amounted to more than double the usual amounts. And finally, a short time after the project was completed, the mayor acquired a splendid country house, and his re-election campaign the following year featured the use of especially glossy publications.

Undervalued estimates

In most cases, officials undervalue estimates to win the approval of bodies or organisations for which they act and to which they report (*e.g.,* city councils). They do so by maximising expected benefits while minimising the cost of the investment. This increases the risk of having to ask for additional funds during project execution, thus exposing the official's judgement to criticism. He or she nevertheless believes that once the project is underway such budget increases will not be called into question, as long as there was initial agreement on the principle of carrying the project out. These increases, which take

In the initial estimate for the construction of an underground car park, the cost of lighting was "forgotten". This was rectified later by adding nearly 20% to the value of the contract. But the omission, by keeping the initial costs low, helped to get the go-ahead for a project that was being challenged by the municipal opposition. It also helped in selecting the most accommodating contractor.

the form of amendments to the initial contract, also enable officials to receive "commissions" from the firms to which contracts have been awarded.

Immediate misappropriation during document preparation

Defining project specifics

After submitting the precise estimate of a project's cost, the main input procurement officials expect from an outside consultancy is to set out the specifics of the proposed project and preparing documents for the selection process: specifications, technical clauses, administrative clauses, etc.

Since these documents are vital, one simple technique for misappropriating sums of money is for the decision maker to have them prepared in-house, by his or her own staff, while at the same time commissioning identical work from an outside service provider. The outside firm needs only to copy the documents prepared by the decision maker's technical staff, affix its own logo, and collect the fee stipulated in its contract. Without expending much effort, the outside firm submits a report that corresponds precisely to what the decision maker wants. Substantially overpaid, it is in a position (through false invoicing, for example) to pay into a slush fund through which money is channelled back to the decision maker.

A variation on this technique, and one which avoids any involvement of the decision maker's technical staff, is to outsource project preparation for which there exist standard documents (recent public works, licensed models, standard models, etc.), which enables contractors to do their work easily and provide all the necessary regulatory guarantees.

Making project particulars and tenders understandable

Technical studies, even if done well, can be difficult to understand and even more difficult to explain to laypersons like city councillors. It is thus perfectly reasonable to hire an organisation to make the findings understandable. However, it is not always necessary to commission a private company for this purpose, since the decision maker's technical staff and the office handling the project study are usually quite capable of explaining complex documents and making their work understandable. Hiring a private company is in fact sometimes a way of camouflaging commissions paid to the decision maker or his friends, as discussed in the previous section on minor studies.

"Ordinary" commissions

Lastly, irrespective of the chosen service provider and the quality of the services rendered, decision makers can always arrange to be paid commissions through overbilling, as long as the potential providers have been informed of his intention and the amount of his needs before taking part in a regular call for tenders. Thus all tenderers will have

factored the cost of the commission into their proposals and there is no discrimination since all of them have been informed.

Arranging for misappropriation in the future

Not all misappropriation is necessarily immediate. There are far more subtle techniques, such as arranging for the future diversions of funds when preparing project specifications. These can be organised in a virtually scientific manner to avoid any risk of detection over the whole lifetime of a contract (see section on the risks of corruption during the execution of contracts).

Affiliated entities

The first opportunity for this type of misappropriation arises when a decision maker commissions a service provider to prepare some or all of the tender documents. If the service provider is affiliated with a group that includes another subsidiary likely to submit a tender for the same project, it might be tempted to favour companies in its own group by providing them with exclusive information, or by inserting specifications that companies in its group alone would be able to meet. This situation is not unusual. Cross-shareholdings, takeovers, and mergers have mushroomed in recent years to a point where decision makers and their staff often do not know which group of companies might stand to benefit from information and specifications. This is because each company within a group generally retains its own identity and a certain degree of independence.

> A local government needed to install a new computer system. The work was awarded to a specialised company which recommended the use of specific products, materials, and software. All of these proposals involved supplies for which one firm held exclusive rights. On investigation, it turned out that the firm was another subsidiary of the group to which the specialised company belonged.

Two scenarios are possible when there is dependency or collusion between the company drawing up tender specifications and other firms planning to compete for the contract. If decision makers have not been informed of these ties and fail to take the precaution of checking whether any exist, they are being manipulated (even if they were contemplating being paid "commissions" when the contract was awarded).

If they have in fact been informed of the connection between the service provider and one or more tenderers and they attempt to capitalise on it by asking for a "commission", then collusion is very difficult to prove. It can be uncovered only if it is revealed by an unsuccessful tenderer, or if an external auditing body looks into any ties between the firm compiling the specifications and the company whose offer, being especially well-matched to the decision maker's requirements, was successful and thus won the contract.

Another technique is to persuade decision makers or their staff to specify services that only particular companies can provide because of their exclusive rights to a material, product, or manufacturing process. The use of the phrase "product N or equivalent" is designed to reduce the number of cases in which a particular supplier or manufacturer is given the upper hand. Nonetheless, it is still not uncommon for specifications to name a certain service, giving one particular firm an edge over all others.

Specifications for computer equipment should not state "Windows operating system", since this would automatically eliminate a number of competitors, including those that use the Linux system or the system developed by Apple.

Non-standard specifications

Apart from particular specifications that certain firms alone can meet, specifications sometimes stipulate values far in excess of prevailing standards. Obviously, there could be many reasons for this. However, one should ask whether these specifications will in fact be used in the implementation of the project.

Specifications for reinforcing concrete in a particular project called for steel bars with a diameter of 12 mm, justified on the grounds that the height of the proposed building might be increased. When the work was carried out, inspectors were informed that the building could not be made any higher. They therefore checked the building's safety against conventional standards, which required only 10 mm-diameter bars. Nevertheless, the company billed for 12 mm bars. On this item alone, the savings amounted to 44% of the price of the steel bars.

This scheme would be impossible without collusion from the decision maker's representative who certifies the work that is carried out. The scheme allows the holder of the contract to generate sums of money, part of which can be used to "compensate" dishonest inspectors. The balance can either be recovered in full by the company without the decision-maker being informed or shared with the decision maker if the latter has approved the scheme.

Another approach is for a company, acting together with the decision maker, to submit a tender that does not adhere to standard specifications and, as a result, is lower than those of the other competitors. This proposal generally enables the firm to get the contract and to pay a "commission" to the decision maker without trimming its margin.

Lastly, there is also the possibility that there may be a technician on the decision maker's staff operating for his or her own benefit. Knowing that they enjoy their employer's trust, technicians are in a good position to impose exorbitant specifications in order to ensure that certain companies factor them in – or do not factor them in – when they submit their tenders. The technicians then check and certify whether or not the specifications have been adhered to. If the same technicians are at work throughout an entire procurement process, they have the opportunity to engineer significant misappropriation for their own benefit, needing only the collusion of the firm's local manager, while decision makers remain in the dark.

"Errors"

Another misappropriation technique involves making "errors" in quantities or quality specifications. Any estimate will contain a provision of about 5 to 10% of the total amount of a contract to allow for any on-site incidents. For example, a road-building project may encounter an error in the volume of rock fill to be destroyed. Equally, its hardness may be

misjudged or, despite extensive geological studies, the full extent of certain pockets of clay that have to be removed before the road can be built may be underestimated.

But in some cases these "unforeseen" events may not be unexpected at all. Instead, they may have been deliberately concealed, or omitted from the documentation distributed to potential tenderers. This is one of the most effective means of misappropriating substantial amounts of money. While information that is known to be incomplete or erroneous is planted into specifications, the correct information is provided to a favoured enterprise.

When a corrupt official or technician informs one of the bidding firms about the actual quantities or quality specifications, the following scenarios are possible:

- The informed firm neglects to incorporate an especially costly requirement into its estimate and wins the contract thanks to an offer that is lower than its competitors, yet which still leaves it with a wide profit margin. This type of favouritism is sometimes used to bolster the chances of local firms that are well acquainted with the territory, at the expense of outside firms that based their offers on the specifications alone.
- The firm submits a proposal with an attractive total price in order to win the contract and, in its price list, indicates high unit prices for a quantity of work that it knows has been underestimated. When the quantities stipulated in the specifications have been reached but the contract has not yet been completed, it will request to continue the job until the desired result is achieved. There will be no further tenders. The additional work is performed by the contract holder and paid at the unit price stipulated in the initial price list submitted by the company. Its profit margin is more than adequately restored, which leaves room for substantial kickbacks.

For such schemes to work there must be collusion between the official preparing the specifications and the firm that is favoured to secure the future contract.

Along the planned route of a new roadway through a mountainous limestone area, there are caves, filled to varying extents with clay, that need to be "purged" (that is emptying the caves of their compressible clay content and subsequently filling them with an incompressible substance). Because this is a very expensive operation, exploratory boring is carried out prior to construction to determine the volume of purging necessary. However, the specifications are amended to indicate a smaller volume of boring.

If the volume indicated in the specifications is smaller than the estimated volume, the informed contractor will submit an overall offer that is lower than the others to get the contract but will state a high unit price for purges. Once the quantities mentioned in the specifications have been reached, further purges will then be necessary. Confronted with this totally "unforeseeable" situation, a contract amendment will be signed with the on-site contractor, using the unit prices stipulated in its offer. As a result, the contractor will more than cover its costs and be able to "reward" its informant.

If the volume indicated in the specifications is overstated, the contractor, thanks to its knowledge of the ground, will commit to a lower volume of purges, offering to cover the cost of any overruns from its estimate. It will underbid the others and get the contract while still having the resources to "reward" its informant.

"Omissions"

In many contracts, it can emerge – in the event of a dispute – that the decision maker has no means of enforcing the terms of the contract because the "penalties" section has been deleted from the original document. As a result, if a contractor intentionally fails to meet its commitments, no penalties can be imposed.

There is nothing new about this procedure, which may be used when there is collusion between a decision maker and contractor. It gives a firm a special advantage by waiving the obligations that bind its competitors, such as deadlines for project completion. It can also lead to payments of subsidies or advances with nothing in return.

"Imposed" maintenance

The final method commonly used to generate substantial, steady inflows of cash over the long term is to acquire equipment or materials that can be maintained only by the installer or an exclusive contractor. While the procurement contract can be negotiated on particularly attractive terms, the same cannot be said for the maintenance of equipment or materials, since here the supplier sets its own terms.

This scenario is especially prevalent in computer technology and office automation systems. Here, the acquisition of hardware, in some cases at highly competitive prices, is conditional upon acceptance of a multi-year maintenance contract for servicing the equipment, as well as the compulsory purchase of a range of specific maintenance products (without which the manufacturer's guarantee is null and void). These highly profitable sales enable the supplier to make steady, substantial profits, at least part of which they can return in any form to the decision maker.

A similar approach is to sell equipment that is incompatible with the customer's existing stock. In time, the customer will have to make costly changes to ensure its office automation equipment is compatible with the new devices or, more radically, replace its equipment wholesale. It goes without saying that the supplier will then use "aids" (promises of commissions or other benefits) to coax officials into choosing it to renew or replace its equipment and that these "aids" are maintained over the entire life span of a contract, thus ensuring years of income for both partners.

In-house misappropriation

The cases discussed so far are of services provided by entities that are independent of procurement contract decision makers. However, similar situations can arise if work is performed in-house by an official's own staff when they have no choice but to implement their boss's instructions. They too, then, may be prompted to "skew" the results of their studies, *e.g.,* by neglecting to list all the consequences of a technological choice (materials currently used made obsolete; the need for periodic upkeep by the contractor; rewriting the computer software used until that point; "erroneous" estimates of certain items of expenditure, etc.).

In most cases, such voluntary omissions are used to justify subsequent contracts (using the negotiated procedure), which enables decision maker to look forward to "commissions" for many years to come.

Risks of corruption in the selection procedure

The type of procurement procedure chosen may reflect a desire to circumvent legislation. The procedures themselves are not at fault, since they are all designed to ensure candidates fair access and equal opportunities to public procurement contracts. But in the wrong hands they can camouflage the misappropriation of public funds, corrupt practices, influence-peddling, and acquisition of illegal interests. A further result is that tenderers are no longer on an equal footing.

The risks are not always the same, however, depending upon whether the call for tenders is open or restricted, whether it is directly negotiated, or whether it takes place through an intermediary purchasing group. Some procedures lend themselves more readily than others to misuse. In addition, the decision maker can sometimes manage to avoid having to initiate a call for tender, which reduces the transparency of the procurement and creates opportunities for abuse.

Abuses involving buying groups

A buying group helps procurement managers with relatively low procurement requirements. The mandatory call for tender is issued by the group, and the public procurement manager simply chooses which goods to buy from a catalogue. In addition, if only a small volume of goods is needed, the prices offered by the group are usually lower than those that the public procurement manager would be able to obtain directly from suppliers. In return for relieving the procurement official of the burden of tendering procedures, and in order to cover expenses, the group charges a commission on the goods it sells.

This simple, useful mechanism can nonetheless be abused. There are two practices in particular that can lead to the genuine misuse of the procedure.

A customer of a buying group may want one of its own suppliers to be benchmarked by the group to avoid having to issue a call for tender every time it orders a product. It may therefore ask the group to issue a call for tender that is tailored to a highly specific product. Regardless of the number of offers received, only one product is capable of meeting all the requirements, given that the specifications were tailor-made for it. The product is therefore benchmarked and can be used by the customer. If, despite all these precautions, another supplier still submits an equivalent offer, it would always be possible to charge a slightly higher than normal commission in order to erode profit margins, so that being benchmarked would not be profitable. Such procedures have been reported in countries where a buying group has a virtual monopoly on procurement.

The group may also decide to favour suppliers who are already benchmarked at the expense of new arrivals – particularly when an innovative tender is submitted. The group draws up, usually with the firm proposing the new product, specifications that match the distinctive characteristics of the new product. The specifications are then discreetly circulated to the group's friends and the group initiates the tendering procedure only once its usual suppliers are ready to respond to the call for tender. Several products in fact match the tender specification, but, for a variety of reasons, the contract is always awarded to one of the group's usual suppliers with which it has agreed various "arrangements", such as kickbacks on commissions.

Abuses of open tender procedures

Although an open call for tender entitles all candidates to submit offers, various techniques can affect the equality of access to public procurement contracts. The following techniques are the most widely used.

Reduced publicity

Where it is not mandatory to publish a notice in an official public procurement journal, a call for tender may be published in journals or reviews with very limited circulation. In some cases, regardless of the value of the contract in question, an "oversight" can mean that the call for tender is not published at all, whether at local, national or international level. Thus, only a few privileged firms who are "in the know" are able to respond to the notice or submit a tender.

> In the 1990s, a large number of the calls for tender for constructing a metro in a European city were only published in the national press, not in the official journal of public procurement notices.

Subjective criteria

Although selection criteria for tenders must be justified, additional criteria may be more subjective and difficult to account for, so distorting assessment of tenders. This is the case, for example, with the "architectural aspect" or "environmental appropriateness" of a project, which are matters of subjective, personal appreciation.

Unrealistic deadlines

Despite all the precautions set out in regulations, deadlines for publishing information may be too short to allow firms with no prior notification to submit a credible tender or even to study a project. Indeed, in some cases even the regulatory notice periods are too short to allow potential tenderers to carry out a serious cost appraisal.

Officials often justify shortened deadlines on the grounds of urgency, if not compelling urgency, but experience shows that such excuses are in fact given only because short deadlines can exclude unwanted candidates. National regulations should give exact definitions of the conditions under which the concept of urgency may be applied.

> For the extension of a university, the increase in the number of students at the start of the academic year in September was put forward as an urgency justifying the use of non-competitive procedures. However, as the higher student intake had been known for two years, it could not be held to be an unforeseeable event.

Difficulties in obtaining documents

Even when minimum regulatory deadlines are respected, the conditions for obtaining the specification document may mean that only local firms or very large groups can obtain it. For example, it might have to be obtained on the spot (with no provision made for posting it to tenderers) or the cost of making specifications available may be very high.

In addition, in some calls for tender, important documents included in the specification (drawings, geological studies, etc.) may not be ready at the start of the selection process. They are sent later, but even when the deadline for submitted tenders is extended (which is not always the case), there is often not enough time to study these documents properly and submit a technically well-drafted tender. The only firms that can study their tender properly and submit prices within the deadlines are those that had prior knowledge of the contents of the documents.

Information leaks

A specifications writer or a senior official may give certain suppliers important advance knowledge of the content of a call for tender. This contravenes the principle that all candidates should be treated equally.

> During a call for tenders for constructing a building near a watercourse, the competitors were not informed of the construction of a dam upstream of the future construction site. By lowering the level of the water table, the dam avoided the need for special foundations, which all competitors, apart from the local firm involved in the construction of the dam, had included in their tenders.

Restricted calls for tender

Calls for tender are known as "restricted" when only a short list of candidates is permitted to submit a tender. In principle, this procedure is used when the work can only be performed by a limited number of firms or for low value contracts. However, it is also misused to exclude firms that may be less favourably disposed towards the decision maker (*e.g.* those that will not accept being discriminated against) or foreign suppliers less familiar with "local practices".

Drawing up a list of candidates

The most important step in a restricted call for tender is to draw up a list of candidates based solely on technical criteria. Failure to issue notice of a call for candidates and the failure to actually call for candidates are the most commonly observed infringements of the regulations. Their purpose is to prevent too many candidates being included in the list of firms invited to tender.

The decision maker (the person in charge of the contract or the tender review board) chooses firms from this list, without having to state the selection criteria. These chosen firms are asked to submit a tender. If they should fail to give the decision maker satisfaction, he or she can deselect them or invite new candidates (increased competition) to submit proposals in subsequent consultations.

As a general rule, everything proceeds "smoothly", and contracts are divided among a restricted number of selected suppliers. In reality, decision makers prefer to select firms that they know, either because they have already used them or because they provide the expected guarantees of quality, compliance, and effective procurement. For their part, the firms on the list have no interest in seeing new competitors added to their group. They thus seek to retain the trust of decision makers by supplying suitable services and by even offering them some personal "sweeteners".

Conspiracy

When decision makers always consult the same firms and obtain satisfactory service within reasonable deadlines, they may consequently feel that they are making the best use of the public purse by taking few risks. Indeed, in many cases they justify the policy in terms of safeguarding local jobs. However, this approach can encourage some corrupt practices amongst the favoured firm.

Group agreements

Firms that are regularly selected sometimes agree among themselves on a *modus vivendi*, which allows them to satisfy the decision maker without having to compete fiercely for contracts.

The firms divide contracts up among themselves according to their own criteria (schedule, nature of the work, deadlines, etc.), provided that the decision maker makes no changes to either the selection procedure or the list of candidates. Any firm that does not play along is excluded from the public procurement contract, whereas those which do play the game increase their prices to reflect their constraints and so "compensate" both their fellow contractors *(e.g.,* through subcontracting) and the decision maker (through commissions). Ultimately, it is the taxpayer who foots the bill for all these additional expenses.

Decision-making approach

This conspiracy between firms (which usually arises without any prompting from procurement officials) can take various forms: an official association; a secret association that puts forward the name of a firm that submits the "best" tender and agrees on an acceptable contract price; or a secret association that chooses which one of its members will submit the unique bid that will win the contract, with the others receiving kickbacks from this or subsequent transactions.

Groups are organised by trade in a highly corporatist way in order to respond to the technical complexity of operations.

Some members in charge of transactions set out the rules to follow in forthcoming or ongoing projects, make a note, then come together in meetings at national, regional, or local levels to discuss the tenders that should be submitted.

To ensure that the system works properly, prior knowledge of forthcoming contracts (the type of operation and provisional cost) is required. It guides them in their internal discussions about how to allocate contracts.

Implementation of decisions

When the call for tender is issued, the review of candidates' bids must be purely formal. The "competitors" (the other members of the group) enter unusable quotations or prices that are too high.[2] The firm selected by the group is the only one to submit a satisfactory tender and therefore wins the contract.

A decision maker may sometimes be confronted with a conspiracy between firms in which all submit tenders far higher than the contracting authority's price estimate. The call for tender is declared inconclusive, and a negotiated procedure is opened (see next section). However, irrespective of the firm with which procurement officials subsequently

negotiate, they will be dealing with a conspirator. The outcome is an increase in the cost of the contract, which will ultimately be borne by the taxpayer.

Although such practices may not be termed corrupt, they nonetheless seriously compromise equality of access to public procurement contracts and the overall integrity of the process.

Kickbacks

The competitors who have deliberately ruled themselves out of the contract will receive kickbacks. They may, for example, be brought into the operation as subcontractors, benefit indirectly from the operation, or be awarded (by the group) the next national or local contract. If they cannot be compensated by a new contract within a short period of time, they may receive compensation through an invoice for fictitious services or public works.

Stock market manipulation and insider dealing

Conspiracy over major public works contracts can give rise to stock market manipulation. If a group listed on the stock exchange is awarded a large contract obtained through conspiracy, those in the know can use this information to their own advantage. They may decide, for example, to purchase cheap shares in the successful company before a contract has been awarded. The value of these shares will automatically increase when the good news about the contract award is released. All they have to do then is cash in their shares.

Likewise, the sale of shares in a company before official notification of its failure to win a major contract is a way of avoiding the loss in share value that will automatically ensue. If only a small number of shares are involved, such dealings are very difficult to detect. Anti-corruption inspectors should not, however, overlook them as they offer scope for substantial enrichment and, in some conditions, constitute insider dealing.

The negotiated procedure

All directly negotiated contracts – when only chosen suppliers are invited to negotiate a contract – are suspect in the eyes of inspectors because they can give rise to dealings ranging from embezzlement, fraud, the misappropriation of public funds, and corruption. That is why the procedure is permitted only in a number of specific cases (listed in EU directives and various national regulations). Special attention should be paid to the following because they are susceptible to abuse.

Tests, research and experiments

Passing off a contract as R&D, testing, or experimental work requires decision makers to supply proof. Major civil engineering or specialised construction can easily fall into this category, unlike standard building work (routine public works, the construction of standardised residential buildings, conventional industrial facilities, etc.).

After an unsuccessful call for tender

To ensure a call for tender is declared inconclusive, decision makers specify stringent technical requirements and low contract prices. In the course of the subsequently directly negotiated procedure, it is a straightforward matter to bring services into line with usual requirements and/or to increase the initial financial package so that, in return for

"compensation", the contract can be awarded to the most amenable firm. This is one of the easiest forms of misappropriation and inspectors should give priority to investigating such cases.

Emergency or compelling urgency

This provision is used frequently to justify direct negotiation, even though national and EU case history has helped to considerably reduce the range of scenarios it may cover. One scenario frequently invoked as grounds for using negotiated procedures is national security.

European Court of Justice case history has helped to curtail the use of national security, significantly reducing the frequency with which it is invoked at both national and EU levels. Blankets for the army are now seldom purchased through direct negotiation in the name of military secrecy, while consulates are no longer repainted in the interests of the nation.

That said, no procedure is totally fraud- or corruption-proof. Dishonest contracting parties will always seek out loopholes to fraudulent ends that are punishable under criminal law.

Procedures to avoid issuing calls for tender

In the EU, a call for tender must be issued for any contract whose value exceeds the threshold set by a member country. However, decision makers who seek to choose friendly firms feel that open tenders leave too much to chance. They may therefore try to arrange things so that threshold requirements no longer apply.

Splitting up contracts

One common technique for ensuring that public procurement procedures do not apply is to award contracts whose value does not exceed the specified thresholds. To that end procurement officials may, for example, misrepresent a building job or split projects up into smaller ones.

> In the building industry, instead of issuing a call for tender for the entire operation, consultations are carried out by activity: plumbers, glass-fitters, painters, carpenters, etc. While such practices are banned, the waters can be muddied to avoid detection by using different addresses for the same building, first specifying the address on one street and then on another. In addition, contracts can be staggered over time and, if necessary, guarantees can be provided that the building is usable in its current state, that the various work contracts are not linked, and that they do not have an impact on its use.

Splitting up invoices

In the wake of a merger or takeover, one firm may have a number of different trading names, an increasingly frequent situation that lends itself to malpractice. For example, when the number of orders contracted in the same financial year approaches the financial threshold, suppliers are asked to submit invoices under their different trading names. Each "different firm" is then awarded a number of contracts that falls short of the threshold and

can continue to work after going through the shorter, non-competitive consultation procedures.

Risks during the execution of contracts

The previous sections primarily describe "subtle" forms of misappropriation, such as fraudulent intellectual services, fake projects, illegal commissions, and embezzlement. These mostly take the form of tangible services that have not been supplied or have been poorly carried out; the hiring of illegal or undeclared workers; overseers and inspectors who are accomplices in misappropriation; and a range of practices and tricks of the trade which enable contractors to generate the financial flows required to fund the bribery schemes to which they are party.

Once a contract has been awarded, misappropriation can occur in multiple forms during the execution of a contract, be it construction work, the provision of a service, or the delivery of supplies.

Misappropriation during the execution of a supplies contract

Misappropriation during the delivery of supplies is relatively easy to detect or uncover. It comes in different guises.

Discounts

When a government buyer obtains promotional discounts (quantitative or otherwise), they are usually incorporated into invoices as price reductions or increases in the quantities delivered. Sometimes, however, suppliers offer discounts offered directly to buyers:

A supplier opens an account in the name of a buyer. The account is credited with the amounts that match the discounts omitted from the invoices. Using this account, the buyer purchases additional goods sold by the supplier. Such goods may be equipment for which the buyer does not have credit or which requires licences that are not readily obtainable. In some cases the buyer may make personal purchases, or buy things for family or friends. The goods concerned will not be listed in any inventory because they do not legally exist.

A discount is paid by transferring the sum into an account that does not belong to the buyer's government department but to an association with a very similar name with which the buyer has ties. This process can be used to endow parallel structures (*e.g.,* the buyer's association) with financial or material assets.

> As part of a major sporting event, contracts were awarded to a well-known company by a public body called XYZT. In agreement with the managers, quantitative discounts were invoiced separately, under the name XYZT, an association registered at the same address and whose chairman was an elected official.

A deal is offered to a buyer who purchases, say, three products at the market rate and receives a fourth one free. The buyer has the fourth, free, product delivered later to another address. This process is a way of providing friendly organisations or individuals with equipment or operating resources.

Amendments to orders

Amending an order is another technique for misappropriating funds. A product is ordered and an invoice made. Just before the product is due to be delivered, the supplier is asked to modify the order and supply a cheaper product, while the original invoice is sent to the local authority. Since the price paid is higher than the value of the goods delivered, the supplier provides the customer with a credit voucher or a cheque to make up the difference. However, the voucher or cheque is made out to a beneficiary with a name that resembles, but is not the same as, the purchaser's. This process requires the purchaser to connive with the person in charge of verifying the service supplied (since the invoice does not match the goods supplied). It also means there will be accounting irregularities, as the refund is not made out to the customer, even though the names used are sometimes so similar that a "mistake" can easily be made.

There is another, much simpler, scheme that can be used to buy a particularly desirable product that has not been budgeted, for example. The buyer buys the product he or she wants at a price agreed beforehand with the supplier. It has the same reference number as the product he or she is supposed to have purchased, but the buyer gives it a generic name – a printer might be labelled hardware, for example. As well as acquiring equipment that could not otherwise be bought, the system lends itself to the misappropriation of public funds for personal profit.

Part exchange of equipment

When buying new equipment, a purchaser often disposes of old equipment because it is worn out, broken, unsuitable, or has simply become obsolete (although still in good working order). As a rule, the purchaser sells the old products at a very low price, either directly or through a specialist broker. In the latter case, the purchaser does not profit from the sale because the income goes straight into the public purse. However, in some cases the purchaser can come to an arrangement with a supplier who buys the used goods from the purchaser. A part-exchange price, generally very low, is agreed from which the costs of disconnecting, dismantling, and removing the equipment may be deducted. The final sum, usually fairly small, is then deducted from the price of the new equipment or offered as credit.

When the equipment in question consists of computers or office equipment that are still in good working order, slightly more complicated arrangements may be found which will put a higher value on the transfer of ownership. The old equipment is dismantled and transported to a depot for destruction – only it is not actually destroyed. The price of dismantling and transporting the equipment is a set part-exchange price. The firm that has signed the contract to supply the new equipment thus finds itself in possession of goods that have a zero book value (purchase price equal to the costs of dismantling and transporting the goods) but which are nonetheless in perfect working order.

The firm can now dispose of the equipment without entering the transfer into its books. It sells the goods to a broker specialised in buying and selling unwanted stock, who can either sell it as second-hand equipment or dismantle it and market it as spares. The declared price of this transaction between the firm and the broker will be zero. In contrast, the firm will receive a sum of money in cash which it can either keep as a slush fund or, more probably, hand over in part to the original owner (the purchaser of the new goods) as a "thank you present".

Misappropriation during the execution of a service provision contract

The provision of services may also give rise to misappropriation, although mechanisms are usually more sophisticated than for the procurement of goods. The practices discussed here amount to tax evasion (*i.e.*, concealing profits) by service providers. Although the practices are not necessarily corrupt, they may be prompted by the need to increase income and profits and "compensate" a procurement official after securing a contract.

Modifying services

Once a contract has been awarded, buyer and provider may agree to downgrade the services specified in the contract. The aim is to reduce the quality of the services so that the buyer can earn a commission from the savings made by the provider.

> A contract was awarded for office cleaning services. This contract called for full, daily cleaning of the furniture in each office. Afterwards, following negotiation, it was agreed that only wastebaskets and ashtrays would be emptied every day, while the offices would be cleaned once a week rather than once a day. A share of the resulting savings made would be remitted to the decision maker either in the form of cleaning services (for his personal residence), or as cash which would ensure regular income for him for several years given that the contract, which was multi-year from the onset, would be regularly renewed.

In the case of intellectual services, a verbal agreement between the decision maker and the service supplier may be sufficient for the latter to reduce the supply of services. In this way, the provider's planned workload and quality requirements are significantly eased. The provider nevertheless continues to submit progress reports, usually to obtain advance payments. From the savings made the provider pays "rewards" to the decision maker.

Double payments

Another technique is to order a study that has already been produced and is in the possession of an official or a supplier. This practice, known as "recycling", allows decision makers and suppliers to share substantial illicit gains. The decision maker fictitiously purchases the study which the provider can repeatedly recycle. The practice is easy to use but difficult to detect unless it is by someone who knows about the original study.

Misappropriation during the execution of a construction contract

This is the most complex technique to detect because public works and building contracts are carried out in stages, each of which may be awarded to different contractors who may or may not be linked to each other through group or sub-contracting contracts.

Misappropriation arises from the numerous ancillary types of work that spring from the main contract, but which are treated separately. Examples include preparatory and additional work, as well as work that is not carried out or does not comply with selection process specifications.

The same people are involved in all the schemes. They are site managers, supervisors, and officials from the design office heading the operation. All are, to a lesser or greater extent, subordinate to the contract holder and undoubtedly find it more comfortable to take their cut from any misappropriation than to oppose it. Sometimes, however, they themselves may be the organisers of the misappropriation.

Preparatory work

A construction or civil engineering job involves preparing the land (levelling, demolition, tree felling) and performing related activities like rubble clearance, traffic deviation, landscaping, etc. The contract holder may subcontract these operations, which are usually covered by private law contracts. Subcontractors in turn choose other contractors to carry out different parts of the contract. These cascaded subcontracts produce sums that are remitted to the decision maker under a system of false invoices or undeclared work.

However, the decision maker may also decide to manage preparatory work, as it is often independent of the main contract, and there are a number of ways to make illicit gains. For demolition and ground preparation work, contracts are awarded as arbitrarily determined lump sums. If there are several firms competing for the contract, the decision maker can demand a lower lump sum price or higher output, or make reference to unexpected difficulties (*e.g.* the need to use more powerful plant). The aim is to obtain the payment of additional sums that will allow the contractor to maintain its profit margin while paying a commission to the decision maker.

> As part of the preparatory work, for which contracts were awarded on a lump-sum basis, the specification called for the felling and grubbing up of trees and removal of the ground cover along the route of a future road. The estimates called for the removal of ground cover to an average depth of 20 cm and the felling of 2 000 trees more than 30 cm in diameter. Oddly, the invoices submitted six months later referred to the removal of ground cover and soil to a depth of 40 cm and the felling of 4 000 trees.

The removal of rubble, particularly from large urban building sites, is a critical concern for local authorities. Hundreds of thousands of tonnes of earth and stone may have to be excavated and shipped away (often by waterway) to prevent disruption and damage to nearby roads. Such work is contracted on a unit basis (per cubic metre or tonne cleared and transported), which can easily be distorted and lead to misappropriation.

Additional work

Contracting authorities often ask contractors to perform additional work during the term of the contract. This work is covered either by riders to the original contract or by service orders. In any event, such work should be justified on technical grounds.

Additional work commissioned by a service order

Where an incorrect estimate means that the work originally planned is inadequate (greater volume of drainage effluent than initially foreseen, poor quality sub-soil requiring larger foundations, more and deeper footings, etc.), the prime contractor issues a service

order for the additional work, provided that it does not exceed 20% of the initial estimate. Since it is very difficult, under the circumstances, to determine whether the wrong initial estimate was established deliberately or accidentally, it is clear to see how, for work covered by such a service order, all types of misappropriation would be possible.

Additional work covered by a rider

When the volume of additional work exceeds the initial estimate, a rider to the contract must be drawn up. For example, land found to be polluted by oil to a greater depth than initially thought requires a rider to increase the amount of decontamination work required.

However, the grounds for such riders are not as clear-cut as might seem at first, and they are often schemes for contractors to earn large enough profit margins to pay procuring officials bigger kickbacks. A rider may be the result of a deliberately undervalued estimate or a deliberate failure to include, for example, a car park or an access road. The work continues without a new call for tender being issued at the unit price set on the contract holder's tender.

Since the contractor company had been told in advance that work would be deliberately underestimated, it submitted a low bid for the original contract. It now asks for high unit prices to do the additional work, so recouping and increasing its profit margin without too much risk.

The same approach underlies schemes in which tender documentation deliberately overprices certain technically demanding jobs. The contractor in the know consequently hones its tender to win the contract but still make a profit as additional work emerges. Since it is always hard to distinguish between a deliberate mistake and an unforeseeable event, the contractor can easily release the financial resources which will allow him or her to express gratitude to the decision maker.

Procurement officials sometimes demand additional work that is actually unrelated to the original contract. The job may be for the good of the community (surfacing a public square, for example), but may also be for the personal benefit of the decision maker, *e.g.,* building a private swimming pool, restoring a building, etc. In both cases, if corruption is involved, there will be false documents in the firm's accounts.

> After the construction of a motorway, a General Finance Inspectorate strongly criticised the financial misappropriation, disavowal of responsibilities and lack of realism that often surrounds major development projects. In detail, it criticised the construction of a luxurious operating centre in which each employee (in principle working on the motorway) had over 17 m^2 of office space, the existence of five full motorway interchanges in a valley inhabited by only 41 000 people, the financing of a sports club by the firm, etc. In contrast, the technical manuals describe this motorway as an "exemplary construction project completed on time and to very high standards in terms of its architectural design and integration into the environment".

Modified or incomplete work

Two other types of misappropriation (mentioned earlier in the section on risks of corruption in the planning phase) are when work that has been planned to specific,

sometimes exacting, standards is either not performed or under-performed. The contractor can earn a handsome profit from which the decision maker gets a kickback.

Such practices are possible only with the connivance of inspectors who certify that the non-specified work is essential. The contractor does not even have to make a fake invoice, as the decision maker has used a friendly inspector to certify the work.

Notes

1. The use of such criteria is theoretically prohibited, but it is sometimes difficult to distinguish between specified criteria that are objective and those that are subjective.
2. These quotations may have been "fabricated" for them by the candidate chosen to win the contract, notably through the use of specialized software.

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Private Sector Development in the Middle East and North Africa

Supporting Investment Policy and Governance Reforms in Iraq

Iraqi parliamentary elections, held without major security incidents in March 2010, are the latest in a series of indicators suggesting that the country may be achieving greater stability in governance and security – a key prerequisite for foreign and domestic investment, growth and job creation. Furthermore, the business environment is gradually improving as a result of an ongoing institutional capacity building process supported by the international community. The MENA-OECD Initiative on Governance and Investment for Development is part of this effort, playing a key role in building the capacity of the National Investment Commission and its one-stop shop for investment licensing. The Initiative has helped raise awareness on corruption and bribery issues, provided training for the negotiators of international agreements, and advised on implementing regulations for the landmark Investment Law of 2006. This publication examines these issues, and MENA-OECD involvement in advancing them, for the period 2007-2008.

The publication notes that while security improvements and rising oil revenues allowed Iraqi economic reconstruction to progress substantially in 2007-2008, challenges remain, particularly in fields such as infrastructure, electricity production and distribution, water and fuel supply, and telecommunications. Unemployment rates reached historic peaks, and investment remained relatively modest due to persistent political uncertainties. Governance reforms resulted in a nascent rehabilitation of Iraqi State institutions and legal frameworks, as well as growing awareness of reform challenges on the part of Iraqi officials, civil society and business. In addition, Iraq has resumed its relationships with most countries in the MENA region and has been increasingly engaged with the international community through consultations, accession to key international organisations, and its recognition of key international conventions and standards. These gains must be further consolidated.

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