To the Victor Go No Spoils - The United States as an Invading Military Force and Its Relationship with Economic Contracts in Occupied Iraq

Michael Davey
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I. Introduction

Shortly before dawn in Iraq on the morning of March 20, 2003, explosions from United States’ missiles rocked what would have been an otherwise tranquil Baghdad morning.1 After more than six months of deadlocked debate in the United Nations over the consequences to Iraq for failing to comply with orders to disarm,2 President George W. Bush ordered the U.S. invasion of Iraq to commence.3 Citing the need to protect the security of both the United States and the world, the end of Saddam Hussein’s regime began with a few dozen Tomahawk missiles and precision bombs.4

Twenty-two days later, the Hussein government collapsed, amid U.S. troops driving down the streets of Baghdad.5 By April 20, 2003, the United States had begun the process of rebuilding post-war Iraq; a reconstruction project on a scale unparalleled since the end of the Second World War.6 As of April 2005, the United States military remains in Iraq

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4. Id.
6. Peter Slevin and Monte Reel, U.S. Pledges to Persevere In Rebuilding; General in Charge of Effort Vows Iraqis Will Elect Their Own Leaders, WASH. POST, Apr. 20,
as occupiers and rebuilders, and does not seem likely to leave anytime soon, considering the violence that is still prevalent.⁷ Even though the technical military campaign has been ended, the proper role for the military is to remain in order to restore the government of Iraq as a functioning entity, and secure the gains made by a military occupation.⁸

As in all rebuilding efforts, there must be some consideration paid to economic infrastructure, such as natural resources and transportation. These types of considerations lead to the inevitable question of what the United States’ proper role in these economic investments should be. After all, this is not the traditional situation of the United States offering an economic loan to an impoverished country, or a private McDonald’s franchise being opened in Moscow’s Red Square. Rather, there presently exists the unique situation of the United States’ presence in Iraq as an occupying (and hence governing) military force until a new Iraqi state government can be officially established. Thus, the question then becomes what differences, if any, may arise when a conquering and occupying military force engages in economic contracting?

First, this comment will take a historical look at past regime changes and their effect upon pre-existing international contracts. Then, this comment will consider any economic contracts made with the former Hussein regime, and analyze their legal significance now that one of the parties to those contracts no longer exist. Can the United States, as a military occupying force, step in and assume the old Iraqi regime’s position in such contracts?

Secondly, this comment will examine the relationship between the United States and new economic contracts that have yet to be made. If the United States, in the place of the former Hussein government, enters into such contracts, does the World Trade Organization Agreement on Government Procurement or the United Nations Charter of Economic Rights and Duties of States prevent the United States from making unilateral decisions about which countries may or may not be allowed to bid upon them?

II. Historical Regime Changes and Their Impact on Pre-Existing Contracts

Under the traditional common law, there must be at least two parties engaged in an exchange of promises in order for a contract to be in legal

existence. The obvious corollary to this rule is that a contract becomes dissolved upon the death or incapacity of one of the entities necessary to its completion, or when a necessary event for the completion of the contract is rendered impracticable or impossible. This usually black-and-white landscape can become muddied when one or more of the parties to a contract are sovereign nations. Do the same general rules of contract apply if one of the contracting parties that is a "government" becomes dissolved or deposed before the contract is completed?

Indeed, one can look to at least three other periods in history to see how these problems were resolved under international law. Illuminating are the effects that the 1917 Soviet coup in Russia, the Cuban Revolution that culminated in 1958, and the break-up of Yugoslavia in the early 1990's had on the legal status of pre-existing contracts.

In 1918, the Russian Imperial Tsar abdicated the throne, was held in house arrest in Siberia, and eventually murdered by Bolshevik revolutionary supporters. A civil war soon followed, with a provisional government assuming control of the country, followed by the victorious Bolsheviks seizing the reins of power and forming the Union of Soviet Socialist Republics. This political upheaval naturally resulted in legal consequences for any contracts which the former Imperial government was party to.

One such example is found in the case of Lehigh Valley R.R. Co., v. State of Russia, which involved an action by the State of Russia against an American Railroad company for a breach of contract. One of the defenses mounted by the railroad company was that the contract was originally entered into between the defendant and the Imperial

10. Id. at § 262.
11. Id. at § 263.
14. Thompson, supra note 12, at 189.
15. Id.
16. Lehigh Valley R.R. Co., v. State of Russia, 21 F.2d 396 (2d Cir. 1927). The Imperial Russian government had entrusted the Lehigh Valley Railroad Company with the transport of a freight shipment of ammunition and explosives. On July 30, 1916, a fire broke out at the freight yards where the Imperial ammunition was being kept by the Railroad company. The explosives and ammunition exploded, and a complete loss resulted the Imperial Russian government commenced this suit alleging a breach of contract of the Railroad as a common carrier. In the midst of this suit, the Imperial Russian government was overthrown, and the Railroad company alleged that this suit could not be rightfully continued because the rights attached to the destroyed property (and thus to the contractual relief) belonged to the Imperial Russian government, which no longer existed. Id.
government of Russia, and as a result, the current Soviet Government of 
Russia did not have legal standing to bring a breach of contract claim.\footnote{17} In affirming the lower court's decision, the Second Circuit Court of 
Appeals held that notwithstanding the current political situation in 
Russia, the international state of Russia still remained, and could 
continue any actions properly begun before the change in government.\footnote{18} The Court also noted "abatement of the action or a dismissal could only 
be sustained by reason of the nonexistence of the state."\footnote{19} Having found 
the sovereign Russian state to still be in existence, the Second Circuit 
allowed the breach of contract claim.\footnote{20}

In 1959, revolutionaries, led by Fidel Castro, successfully overthrew 
the government of dictator Fulgencio Batista, replacing it with a new 
socialist regime.\footnote{21} During Castro's seizure of power, the new 
revolutionary government began to expropriate many United States 
interests, both real and liquidated properties, located on the island of 
Cuba.\footnote{22} Most of these actions resulting in lawsuits being filed by either 
American interests or by the Cuban government regarding the 
international legal status of such maneuvers.\footnote{23}

In one of these suits, the Castro's revolutionary government 
expropriated an American corporation that ran an electric utility in Cuba 
before the Revolution.\footnote{24} One of the primary issues before the Second 
Circuit Court of Appeals was whether or not the Castro government had 
assumed all of the debt obligations of the corporation seized, thus 
resulting in Cuban indebtedness to American banks.\footnote{25} The Court 
escaped resolution of this issue by ruling instead that Cuba was liable for 
the debts of the expropriated electric corporation because it had 
discriminated against the interests of both the United States and its 
nationals in violation of international law.\footnote{26} However, the Court did 
 premise its ruling on the assumption that upon expropriation, the 
Revolutionary government of Cuba had assumed the obligations of both

\begin{itemize}
\item \footnote{17} Id. at 399.
\item \footnote{18} Id. at 400.
\item \footnote{19} Id.
\item \footnote{20} Id.
\item \footnote{21} Microsoft\textsuperscript{\textregistered}, supra, note 13.
\item \footnote{22} Banco Nacional de Cuba v. Chase Manhattan Bank, 658 F.2d 875, 878. (2d Cir. 
\item \footnote{23} Id. \textit{See also} First National City Bank v. Banco Para Comercio Exterior de Cuba,
F.2d 895 (2d Cir. 1981).
\item \footnote{24} Banco Nacional de Cuba v. Chemical Bank New York Trust Co., 822 F.2d 230 
(2d Cir. 1987).
\item \footnote{25} Id. at 236.
\item \footnote{26} Id.
\end{itemize}
foreign and international creditors. Therefore, the Court had indirectly found the new Revolutionary government liable for the debts incurred by a corporation under the old government.

Finally, in 1991, the Socialist Federal Republic of Yugoslavia (hereinafter SFRY) was splintered as a result of ineffective leadership, civil wars, and long-time ethnic hostilities between Serb, Croat, and Bosnian Muslim factions. When the smoke finally cleared in 1992, five separate states had emerged—Slovenia, Croatia, Macedonia, Bosnia/Herzegovina and the Federal Republic of Yugoslavia.

With their emergence also came concerns over property rights, financial assets, and the status of pre-existing contracts held by the former SFRY. In June of 2001, representatives from each of the five states came together in Vienna to conclude a treaty that would finally spell out the answers to these difficult questions. The most significant portion of that treaty for purposes of this article is “Annex G,” which declares that the five successor states are obligated to respect all contracts, patents, copyrights, and trademarks previously made by any private or public actors of the former SFRY.

In all three of these situations, we see a trend that seems to stand for the proposition that within the realm of international law, a sovereign nation is more than simply the formal government at its head. Rather, all of the historical precedents recounted above reflect the rule that the contractual rights and obligations held by a sovereign state will survive

27. Id. at 237.
28. Id.
30. Id. Note that in February of 2003, the breakaway State of the Federal Republic of Yugoslavia officially changed its name to “Serbia and Montenegro.” This name still stands today. Id.
32. Id.
33. Agreement, annex G, art. 2, para. 2, at 35. Annex G, article 2(2) reads as follows:
(2) All contracts concluded by citizens or other legal persons of the SFRY as of 31 December 1990, including those concluded by public enterprises, shall be respected on a non-discriminatory basis. The successor States shall provide for the carrying out of obligations under such contracts, where the performance of such contracts was prevented by the break-up of the SFRY.
Id.
34. Agreement, annex G, art. 3, at 35. Annex G, article 3 reads as follows:
The successor States shall respect and protect rights of all natural and juridical persons of the SFRY to intellectual property, including patents, trade marks, copyrights, and other allied rights (e.g., royalties) and shall comply with international conventions in that regard.
Id.
notwithstanding any political upheavals or governmental depositions that may occur. What follows from this, therefore, is that any and all contractual obligations and entitlements held by the former Hussein regime must have legally survived the recent war.

III. Contracts of the Former Hussein Regime and the "Act of State" Doctrine

With Iraq and Saddam Hussein, however, a new problem is now confronted. In all of the cases referred to above, there existed a contract dispute regarding the proper standing or obligations of the new government that rose to power through civil war, revolution, or both. However, in the present situation with the United States and Iraq, there was no internal force that seized the reins of power and ousted the Hussein government. Rather, an invading American force overthrew Saddam's government, and left no "official" Iraqi state government in its place. The United States did, as a military occupying force, rightly assume all administrative and governmental responsibilities.\(^{35}\) Does this mean, following the trend in the cases discussed above, that all rights and obligations of the former Hussein government have now attached themselves to the United States as well?

It would seem, based on historical legal precedent discussed above, that the answer to this question would be yes. That is, any and all obligations of the former regime would probably attach to the United States while in the role of military occupier, before political and administrative control is officially handed over to a new Iraqi government.\(^{36}\) If this is indeed true, then many private businesses and corporations who may have been a party to a contract with the former Iraqi regime, and who fear a breach of any contractual obligations following the war, may be now presented with a unique opportunity to settle any contractual problems with the United States, instead of waiting until all contractual rights are once again passed to a new Iraqi government in the future.

Why would it be in the best interests of these private parties to deal with these contracts now, instead of waiting until yet another governing entity takes over? The answer lies in the "Foreign Sovereign Immunities Act,"\(^{37}\) which has codified what was, under the common law, the "act of state" doctrine.

The "act of state" doctrine has its common law roots in the 1897


\(^{36}\) See cases cited supra notes 16, 22-24.

U.S. Supreme Court case of *Underhill v. Herndandez*,\(^{38}\) where the Court considered a claim brought by Underhill, alleging that he was falsely imprisoned by one General Hernandez while a resident in Venezuela.\(^{39}\) The Court refused to hand down a decision on the merits of Underhill's claim, stating that "the courts of one country will not sit in judgment of the acts of the government of another, done within its own territory."\(^{40}\)

In 1918, the Supreme Court heard two cases in which it favorably cited *Underhill*, both involving the seizure of land by the Mexican government during the Mexican Revolution.\(^{41}\) In both cases, the Court held that it was still inappropriate to pass judgment upon the governmental actions of a foreign power, under fear of straining relations between the United States and Mexico.\(^{42}\) These decisions form the underpinning of the "act of state" doctrine. They stand for the proposition that when a case or controversy involves the official act(s) of a sovereign foreign government, committed within that government's jurisdiction, the courts of the United States should not, and will not, sit in judgment of those decisions.

The "Foreign Sovereign Immunities Act" (hereinafter the FSIA), passed by Congress in 1977, codifies this common law "act of state" doctrine.\(^{43}\) With limited exceptions,\(^{44}\) the FSIA states that foreign states are immune from the jurisdiction of both the U.S. federal and state courts.\(^{45}\) Furthermore, the term "foreign state," as used in the FSIA, refers to all political subdivisions, agents and instrumentalities of a foreign state.\(^{46}\) This definition includes foreign corporations and all other separate legal entities.\(^{47}\)

\(^{39}\) Id. at 251-2.
\(^{40}\) Id. at 252.
\(^{42}\) Oetjen, 246 U.S. at 301 and Ricaud, 246 U.S. at 309.
\(^{43}\) 28 U.S.C. § 1604. Section 1604 reads:
Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.
\(^{44}\) See 28 U.S.C. §§ 1605, 1607.
\(^{45}\) See id. § 1604.
\(^{46}\) See id. § 1603(a). Section 1603(a) reads: "A 'foreign state,' except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b)." Id.
\(^{47}\) See id. § 1603(b). Section 1603(b) reads:
An "agency or instrumentality of a foreign state" means any entity—
(1) which is a separate legal person, corporate or otherwise, and
(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a
There is currently, however, some ambiguity among U.S. courts as to how, or if, the act of state doctrine, as codified under the FSIA, should be applied to breach of contract cases involving a foreign state. From its inception under the common law, the act of state doctrine has been predicated upon two related foreign policy concerns. One, a court should be wary about rendering judgment in a case involving a foreign sovereign, for that judgment may result in a strain upon U.S. foreign relations with that sovereign.\textsuperscript{48} Second, there is a concern that any judgment rendered by a court in favor of, or against, a foreign sovereign party may be in direct conflict with the U.S. foreign policies set by the executive branch towards that particular foreign sovereign.\textsuperscript{49} Opponents of the use of the act of state doctrine in contract cases argue that both underlying policy concerns are traditionally absent from contract suits.\textsuperscript{50} Commercial contract cases will rarely involve situations where the court’s resolutions will affect, or be in conflict with any direct executive pronouncements of U.S. foreign policy.\textsuperscript{51}

If one considers, then, the common law and public policy underpinnings of the act of state doctrine, it becomes apparent that this theory will not be of any concern to a party who, in fear of a loss or repudiation of contractual obligations, brings suit against the United States as successor-in-interest of the contractual duties of the former Hussein regime. Most notably, the act of state doctrine would have no apparent application to those actions, because U.S. courts would not be placed in a position of rendering a decision that could have either a direct or indirect effect upon U.S. foreign policy. Rather, courts would simply be asked to adjudge the contractual obligations that exist upon the federal government.

Thus, it is important for any legal actor who was a party to a contract with Saddam’s regime, and who fears repudiation of any contractual terms now that the old government is no longer in power, to resolve any and all issues while the United States remains as a military occupying force. Technically, the United States handed over all administrative and governmental duties to the Iraqis in the summer of


\textsuperscript{49} \textit{Id.} at 81.

\textsuperscript{50} \textit{Id.}

\textsuperscript{51} \textit{Id.} at 82.
2004.\textsuperscript{52} At that point, following the precedents established by \textit{Underhill v. Hernandez} and its progenies, all of the contractual obligations of the Hussein regime, having passed to the U.S. following the Iraqi occupation, would then have seemingly passed again onto the shoulders of the new Iraqi government. If attempts are made to enforce these contracts against the new Iraqi government (after the withdrawal of power by the U.S.), then any and all private litigants face the problem of encountering the FSIA and the act of state doctrine in the courts of the United States.

IV. United States’ Foreign Policy Regarding Contracts in Iraq and Possible Violations of International Law

Having concluded that the United States as a military occupying force was legally the party-in-interest to all pre-existing contracts of the former Hussein regime, it next becomes necessary to examine just what role the United States may have over all future contracts to be entered into while military occupation and presence is taking place.

A. \textit{The United States’ Experience in Economic Rebuilding}

The first inquiry that needs to be made is what the United States’ view of international law is regarding economic opportunities such as these within an occupied territory. In 1907, in the case of \textit{Ho Tung & Co. v. United States}, the U.S. Court of Claims had to decide on the appropriate tariff rate that should have been imposed during the U.S. military occupation of Manila.\textsuperscript{53} In deciding that case, the court noted that as a matter of law, there was no distinction between the temporary occupation of Manila and the “usual occupation of belligerent territory.”\textsuperscript{54} Thus, during the U.S. presence in Manila, the U.S. military

\textsuperscript{52} David Ignatius, \textit{After the Handover}, WASH. POST, Jun. 29, 2004 at A23.

\textsuperscript{53} Ho Tung & Co. v. United States, 42 Ct. Cl. 213 (1907).

The claimants in this case were shipping merchandise to American-held Manila, following the Spanish-American War. Prior to the claimant’s arrival to Manila, President William McKinley signed a military order proclaiming a new military tariff that was lower in value than the pre-existing Spanish tariff in Manila. McKinley’s order had not reached Manila at the time of the claimant’s arrival, however, and the claimants paid to the military port authorities the amount of the old Spanish tariff. Upon learning of the date of the President’s order, the claimants sued in order to recover the difference between the Spanish tariff they paid and the lower American tariff they argued that they would have paid, had the information only arrived to Manila sooner. The Court ruled against the claimants, stating that the President’s order was could not modify any existing municipal regulation in an occupied territory until actually received and promulgated by the military government of such territory.

\textit{Id.}

\textsuperscript{54} \textit{Id.}
was exercising its rights as an occupying force, which included "the right to take possession of the machinery for the collection of revenues within the occupied district, and to make such collections." A similar distinction could easily be drawn to the present situation of the United States in Iraq. While the present military occupation is undoubtedly a temporary measure, it would seem that the U.S. retains all rights afforded an occupying force to take control of the economic infrastructure in Iraqi territory and reap the benefits of such control.

The last time that the United States was engaged in a post-war occupation of similar magnitude was directly after World War II. Following the Allied victories in both Germany and Japan, the United States entered into agreements that resulted, among other things, in economic gains. After the fall of Hitler's Reich, the United States entered into a multilateral treaty that established Germany's reparation scale payments to the conquering Allied Nations. Specifically, the treaty stated that the United States was entitled to twenty-eight percent of the total German reparation amount, excluding merchant ships, inland water transport, and industrial or capital equipment removed from Germany, of which the United States was entitled to only 11.8%.

Upon the surrender of Japan, another multilateral treaty was entered into, in which the United States was granted full administration, legislation, and jurisdiction over former Japanese territories.

\[55. \text{Id.}\]
\[56. \text{Slevin, supra note 6.}\]
\[57. \text{Agreement Between The United States of America and Other Governments Respecting the Distribution of German Reparation, the Establishment of an Inter-Allied Reparation Agency, and the Restitution of Monetary Gold, Jan. 24, 1946, art. 1, 61 Stat. 3157.}\]
\[58. \text{Id. The treaty provides, in relevant part, as follows:}\]
\[\text{ARTICLE 1: Shares in Reparations.}\]
\[\text{A. German reparation (exclusive of the funds to be Allocated under Article 8, of Part I of this Agreement), shall be divided into the following Categories:}\]
\[\text{Category A, which shall include all forms of German reparation except those included in Category B;}\]
\[\text{Category B, which shall include industrial and Other capital equipment removed from Germany,}\]
\[\text{And merchant ships and inland water transport.}\]
\[\text{B. Each Signatory Government shall be entitled to the Percentage share of the total value of Category A and the percentage share of the total value of Category B set out for that Government in the Table of Shares set forth below:}\]
\[\text{TABLE OF SHARES: (in pertinent part)}\]

<table>
<thead>
<tr>
<th>Country</th>
<th>Category A</th>
<th>Category B</th>
</tr>
</thead>
<tbody>
<tr>
<td>United States of America</td>
<td>28.00 %</td>
<td>11.80 %</td>
</tr>
</tbody>
</table>

\[59. \text{Treaty of Peace With Japan, Sept. 8, 1951, U.S.-Japan, art. 3, 3U.S.T.3169.}\]
Furthermore, the U.S. obtained full recognition by Japan of the validity of private and state property dispositions previously made by the U.S. military. The United States also received the right to "seize, retain, liquidate, or otherwise dispose," of any property then belonging to Japan or its citizens.

Clearly then, in the last two instances where the United States found itself in the position as occupying military force in a foreign territory following the cessation of hostilities, it approached post-war organizational structures in a way that resulted in significant economic gains for the United States, at the expense of the occupied country.

Is the United States' apparent preference towards economic gain to occupying forces consistent with accepted international law? The Code of International Armed Conflict (hereinafter The Code) states that during a military occupation of a territory, the occupying power is prohibited

Article 3 reads:

Japan will concur in any proposal of the United States to the United Nations to place under its trustee system, with the United States as the sole administering authority, Nansei Shoto south of 29° north latitude (including the Ryuku Islands and the Daito Islands), Nanpo Shoto south of Sofu Gan (including the Bonin Islands, Rosario Island and the volcano Islands) and Parece Vela and Marcus Island. pending the making of such a proposal and affirmative action thereon, the United States will have the right to exercise all and any powers of administration, legislation and jurisdiction over the territory and inhabitants of these islands, including their territorial waters.

Id.

60. Id. at art. 4(b). Article 4(b) reads: "(b) Japan recognizes the validity of dispositions of property of Japan and Japanese nationals made by or pursuant to directives of the United States Military Government in any of the areas referred to in Articles 2 and 3." Id.

61. Id. at art. 14(a)(1)(2)(I). Article 14(a)(1)(2)(I) reads, in pertinent part, as follows:

(2)(I): Subject to the provisions of sub-paragraph (II) below, each of the Allied Powers shall have the right to seize, retain, liquidate or otherwise dispose of all property, rights and interests of:

(a) Japan and Japanese Nationals,
(b) persons acting for or on behalf of Japan or Japanese Nationals, and
(c) entities owned or controlled by Japan or Japanese nationals, which on the first coming into force of the present Treaty were subject to its jurisdiction. The property, rights and interests specified in this sub-paragraph shall include those now blocked, vested or in the possession or under the control of enemy property authorities of Allied Powers, which belonged to, or were held or managed on behalf of, any of the persons or entities mentioned in (a), (b) or (c) above at the time such assets came under the controls of such authorities.

Id.


(1) Territory is considered occupied when it is actually placed under the authority of the hostile army.
from destroying the public or private property within the territory.\textsuperscript{63} However, the occupying power shall be regarded as an administrator or usufruct,\textsuperscript{64} and may thus enjoy the benefits of such public or private property, so long as that property is not destroyed.\textsuperscript{65} Furthermore, the occupying power may even take possession of all liquid assets of the conquered state that may be used for military purposes,\textsuperscript{66} may levy taxes to support the occupation administration,\textsuperscript{67} and may demand requisitions to support the armed forces.\textsuperscript{68} Thus, the Code seems to reflect, at least on its face, the view held by the United States that a military occupation force might properly profit from the resources found within enemy territory.

B. The United States' Decision to Ban Countries from Iraqi Contracts and Violations of International Law

One of the specific and important targets of U.S. rebuilding is Iraq's natural resource production, most notably, its oil infrastructure.\textsuperscript{69} Traditionally, oil production and distribution has made up approximately ninety-five percent of Iraq's foreign exchange earnings,\textsuperscript{70} resulting from the 2.452 million barrels per day output that Iraqi oil fields can average when operating normally.\textsuperscript{71} Unfortunately, the entire Iraqi oil infrastructure has been disabled as a result of the war, with most of the northern pipeline operations completely destroyed.\textsuperscript{72} Experts have estimated that it will take investments totaling between three to five million dollars to restore the Iraqi oil production to pre-Gulf War levels.\textsuperscript{73}

Another specific target of U.S. military efforts is the Baghdad

\begin{itemize}
  \item (2) The occupation extends only to the territory where such authority has been established, and can be exercised.
  \item 63. \textit{LEVIE, supra} note 62 at 766.
  \item 64. The \textit{Merriam-Webster Dictionary} defines "usufruct" as "the legal right to use and enjoy the benefits and profits of something belonging to another." See \textit{THE MERRIAM-WEBSTER DICTIONARY} 804 (5\textsuperscript{th} ed. 1997).
  \item 65. \textit{LEVIE, supra} note 62 at 766-7 (§ 1171.2).
  \item 66. \textit{Id. at} 767 (§ 1171.3).
  \item 67. \textit{Id. at} 740 (§ 1141.2).
  \item 68. \textit{Id. at} 739 (§ 1141.1).
  \item 69. Borzou Daragahi, \textit{Iraqis Begin Talks With U.S. Army to Select Oil Minister; Outlook Dim For Quick Recovery Of Northern Wells, Production Levels}, \textit{WASH. TIMES}, Apr. 22, 2003, at A16.
  \item 71. \textit{Id.} This figure represents a 2001 estimate, as the normal oil production was disrupted as a result of the war. \textit{Id.}
  \item 72. Daragahi, \textit{supra} note 69.
  \item 73. \textit{Id.}
\end{itemize}
International Airport,\textsuperscript{74} as U.S. troops work to ensure the safety of planes against future attacks.\textsuperscript{75} Even as the U.S. troops work to secure Baghdad International, private airline companies are jockeying with the U.S. Transportation Department to be allowed flight plans to and from Baghdad.\textsuperscript{76} Moreover, the terminal has had another recent addition, much to the approval of U.S. troops on the ground—a Burger King.\textsuperscript{77} In the five months since its opening, this Burger King has made daily sales between fifteen and eighteen thousand dollars, making it one of the top ten most profitable Burger King franchises on Earth.\textsuperscript{78}

Indeed, the U.S. military is beginning to unilaterally offer and award contracts to private American domestic corporations to handle various tasks and services on the Iraqi oil pipelines.\textsuperscript{79} These contracts have a stipulated value of not less than $500,000 and not more than $500 million U.S.C. They are being offered for a full range of tasks, including the extinguishing of oil fires, oilfield and refinery maintenance, and distribution of fuel products within Iraq itself.\textsuperscript{80}

The present policy of the United States regarding contract opportunities in Iraq is quite unique. The U.S. announced in December, 2003, that it would be exercising ultimate control over the distribution of all future Iraqi contracts, and that it would not allow countries (and their companies) that did not actively assist in the war in Iraq to bid for any primary contracts.\textsuperscript{81} The U.S. has shown its willingness to exercise absolute discretion regarding any contracts by recently removing Canada from the list of bidding-barred nations, allowing our neighbors to the

\textsuperscript{74} Baghdad International Airport was the new name given to Saddam Hussein International Airport after occupation by U.S. armed forces. See Gary Dimmock and Norma Greenaway, \textit{Coalition tightens grip on Baghdad: Three Journalists Killed in Allied Shell Strikes on Hotel, Al Jazeera Headquarters. No Word on Whether Massive Bomb Attack Struck Saddam, Sons}, \textit{The Ottawa Citizen}, Apr. 9, 2003, at A3.


\textsuperscript{76} Edward Wong, \textit{Airlines Coveting Baghdad, If Airport Can Be Made Safe}, \textit{N.Y. Times}, July 29, 2003, at A1. The U.S. Transportation Department is currently reviewing over a dozen applications from American airline companies seeking permission to fly into and out of Baghdad international. The Transportation Department has stated that American Airlines, United Airlines and Delta Airlines were all granted these flying rights prior to 1990. \textit{Id.}


\textsuperscript{78} \textit{Id.}


\textsuperscript{80} \textit{Id.}

north to compete as primary contractors during the next bidding round. As of January, 2004, Russia, France, Germany, and Mexico were among the major nations still barred from any primary bidding.

Not surprisingly, this decision by the U.S. has resulted in pointed criticisms overseas, especially from France, Germany, and the European Union. In fact, the European Union (hereinafter "the EU") has stated that it has serious doubts regarding the very legality of the U.S. decision when placed against the backdrop of international economic law. Specifically, the EU has challenged the U.S.'s control over Iraqi contracts by pointing to the World Trade Organization Agreement on Government Procurement.

In 1994, during the Marrakesh Round of international trade talks, the Government Procurement Agreement was drafted and annexed to the original World Trade Organization agreement. The Agreement on Government Procurement (hereinafter the AGP) was created in order to promote transparency and equality in the arena of international government procurement of contracts, and was designed to eliminate protectionist foreign trade policies by Member states while liberalizing and expanding the sphere of world trade.

The actual reach of the AGP is broad, as it covers any regulation or procedure relating to contractual procurement of any goods or services by a Member state, including the valuation of such contracts. The

83. Id.
86. Id.
88. Id.
89. Id. at art. I, para. 2 at 122. Article I, paragraph 2 reads: (2) This agreement applies to procurement by any contractual means, including through such methods as purchase or lease, rental or hire purchase, with or without an option to buy, including any combination of products and services. Id.
90. Id. at art. II at 122. Article II reads, in pertinent part:
(1) The following provisions shall apply in determining the value of contracts for purposes of implementing this Agreement.
(2) Valuation shall take into account all forms of remuneration, including any premiums, fees commissions and interest available.
(3) The selection of valuation method used by the entity shall not be used, nor shall any procurement requirement be divided, with the intention of avoiding the application of this agreement.
AGP also sets out the guidelines by which procurement tender offers and selections must be handled by a Member state. It is in this area that the U.S. policies in Iraq may indeed run afoul of international law.

Article III of the AGP ensures that each Member state may not offer procurement treatment to any other Member state that is less favorable than the treatment afforded to the domestic suppliers or producers of the offering state. Article VII, a related section, stipulates that each Member state must ensure that all contract tender offers that are made to other Member states are done so in a non-discriminatory manner. Finally, in order to “ensure maximum international competition,” Article X mandates that each Member state offering procurement must invite the maximum number of both domestic and international suppliers to tender offers.

Clearly, the U.S.’s policy regarding contract opportunities in occupied Iraq violates not only the spirit of the AGP, but of all three of the specific articles listed above. By acting as the ultimate judge-and-jury over which countries may or may not be allowed to participate in the reconstruction of Iraq, the U.S. is overtly discriminating against some nations in favor of others. Moreover, the United States is intentionally stifling international competition in the Middle East, simply to sanction those nations that refused to assist in the Iraqi invasion. It would seem that this foreign policy initiative was constructed with either a blind or contemptuous eye towards the AGP.

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Id.

91. *Id.* at art. III, IV, X at 123-24, 131-32.
92. *Id.* at art. III, para. 1 at 123. Article III, paragraph 1 reads, in pertinent part:
   (1) With respect to all laws, regulations, procedures and practices regarding government procurement covered by this Agreement, each Party shall provide immediately and unconditionally to the products, services and suppliers of other Parties offering products or services of the Parties, treatment no less favorable than:
      (a) that accorded to domestic products, services and suppliers.

Id.

93. *Id.* at art. VII, para. 1 at 127. Article VII, paragraph 1 reads:
   (1) Each Party shall ensure that the tendering procedures of its entities are applied in a non-discriminatory manner and are consistent with the provisions contained in Articles VII through XVI.

Id.

94. *Id.* at art. X, para. 1 at 131. Article X, paragraph 1 reads:
   (1) To ensure optimum effective international competition under selective tendering procedures, entities shall, for each intended procurement, invite tenders from the maximum number of domestic suppliers and suppliers from other Parties, consistent with the efficient operation of the procurement system. They shall select the suppliers to participate in the procedure in a fair and non-discriminatory manner.

Id.

95. Allen, *supra* note 82.
As base a violation of the AGP as the U.S.'s decision appears at first glance, it may still be readily defensible on the world stage. Indeed, the United States can point to Article XXIII of the very same accord, which declares that the AGP shall not be construed as prohibiting any Member state from taking any action that it deems necessary for reasons of national security or defense.\(^{96}\) When this pronouncement was first made, back in December of 2003, United States Deputy Defense Secretary Paul D. Wolfowitz stated that “for the protection and essential security interests of the United States,” it was essential that the contract-barring decision be put into effect.\(^{97}\)

The question now becomes: what level of justification is needed in order for a Member state to legally invoke Article XXIII? If any Member state calls a press conference and officially recites the magic words of “national security,” is the specter of the AGP instantaneously dissolved into the ether of state sovereignty? As the United Nations is premised upon the fundamental tenet of sovereign equality, this simple action just may be enough.\(^{98}\) However, if this were all a Member state needed to do in order to escape any unfavorable situation, then the entire corpus of the AGP would be but mere surplusage.

The AGP itself affords no answers. In reality, any claim by the U.S. of national security interests will hold greater weight than usual at this point in time, as the situation in Iraq remains unstable at best. However, the mere claim of “national security” is probably not going to be seen by the rest of the world (especially by those countries cut-out of a piece of the Iraqi pie) as a clean-cut absolution of U.S. obligations under the AGP. Although it has been made, and may ultimately prevail, the shepherd's cry of “national security” will more than likely be a wolf that devours a fair share of the United States’ international political capital.

Assuming that the U.S. can successfully win the debate over any violations of the AGP, a political battle must still be fought on yet another front. Namely, is the U.S. Iraqi contract-barring policy in violation of the United Nations Charter of Economic Rights and Duties of States?

The General Assembly of the United Nations passed the Charter of Economic Rights and Duties of States (hereinafter the CERDS) in 1974 in order to establish uniformity and to establish “a new system of

\(^{96}\) AGP at art. XXIII, para. 1 at 144. Article XXIII, paragraph 1 reads, in pertinent part:

(1) Nothing in this Agreement shall be construed to prevent any Party from taking any action ... which it considers necessary for ... procurement indispensable for national security or for national defense purposes. \textit{Id.}

\(^{97}\) Spinner, \textit{supra} note 81.

\(^{98}\) U.N. CHARTER art. 2, para. 1.
international economic relations based on equity, sovereign equality and interdependence of interests of developed and developing countries." The drafters of the CERDS were hopeful that the Charter would promote expansion of international trade and international economic cooperation. Unfortunately, many of the objectives of the CERDS have now been disrupted by the U.S.'s Iraqi-contract decision.

International economic discrimination is addressed and condemned under Article 4 of the CERDS, as it explicitly forbids any State from engaging in inequitable international trade based upon another State's "political, economic or social systems." Article 4 reminds States that the purpose of international trade is cooperation, and that each State is free to engage in international trade as it sees fit. This ideal is further expanded upon in Articles 24 and 26, where the CERDS proclaims that all States have upon them a duty to conduct their affairs in the international economic market with the interests of all other States in mind, as well as in the interests of tolerance and cooperation.

Finally, Articles 8, 9, and 10 are noteworthy because they remind the world that all States are "juridically equal," and thus all States have

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100. Id.
101. Id. at art. 4. Article 4 reads, in pertinent part:
Every State has the right to engage in international trade and other forms of economic co-operation irrespective of any differences in political, economic and social systems. No State shall be subjected to discrimination of any kind based solely on such differences.

Id.
102. Id.
103. Id. at art. 24. Article 24 reads:
All States have the duty to conduct their mutual economic relations in a manner which [sic] takes into account the interest of other countries. In particular, all States should avoid prejudicing the interests of developing countries.

Id.
104. Id. art. 26. Article 26 reads:
All States have the duty to coexist in tolerance and live together in peace, irrespective of differences in political, economic, social and cultural systems, and to facilitate trade between States having different economic and social systems. International trade should be conducted without prejudice to generalized non-discriminatory and non-reciprocal preferences in favour [sic] of developing countries, on the basis of mutual advantage, equitable benefits and the exchange of most-favoured-nation [sic] treatment.

Id.
105. Id. art. 10. Article 10 reads, in pertinent part:
All States are juridically equal and, as equal members of the international community, have the right to participate fully and effectively in the international decision-making process in the solution of world economic, financial and monetary problems.

Id.
the right to participate in any decision-making that implicates the world’s economic relations or problems. These last three articles, taken together, truly stand for the belief that hegemony or unilateral decision-making has no place in the modern international economic forum.106

As it was with the above analysis of the contract-barring decision under the Agreement on Government Procurement, it is not terribly difficult to see how the policy laid down by the U.S. regarding all future Iraqi contracts serves only to frustrate (some would even say "shatter") the clear goals of the CERDS. The U.S. is carrying out this autonomous decision-making in the face of an international charter that flatly denounces any such behavior in the economic realm. As the impetus for this policy choice was to punish those countries that decided not to intervene in the Iraq crisis (a political decision), there arguably also a clear violation of CERDS Article 4.107

While the United States is able to employ the somewhat-plausible justification of "the interests of national security" if ever attacked under the Agreement on Government Procurement, it will have a harder time doing so under the CERDS. Textually, the CERDS contains no article that uses the word "exception," or the phrase "shall not apply."108 The language and construction of CERDS is such that purports to exist in all circumstances and at all times. The United States will have a hard, if not impossible task, of defending the Iraqi-contract decision in the light of the ideals and tenets held sacred under this Charter. Under CERDS, there is no "national security" umbrella for the U.S. to open in the rainstorm of international economic parity.

V. Conclusion

As current military occupier and quasi-administrator, the United States must acknowledge both the lessons of the past as well as the obstacles in the future when deciding upon policies regarding all pre-existing and future economic contracts in Iraq. History has proven time

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106. Id. at art. 8, 9, 10. See text of Article 10 above. Articles 8 and 9 read as follows:
(8) States should co-operate in facilitating more rational and equitable international economic relations and in encouraging structural changes in the context of a balanced world economy in harmony with the needs and interests of all countries, especially developing countries, and should take appropriate measures to this end.
(9) All States have the responsibility to co-operate in the economic, social, cultural, scientific and technological fields for the promotion of economic and social progress throughout the world, especially that of the developing countries.

Id.

107. Compare Spinner, supra note 81, with id., supra note 101.
108. CERDS, supra note 99.
and again that regime changes that alter the basest political or ideological nature of a sovereign nation do not result in the dissolution of that nation’s international contract obligations. While politically or territorially a State may be completely erased and redrawn, bearing no semblance to its former self, all of its contract rights and duties remain in force.

The United States must recognize this, for while acting as military occupier of Iraq, it also became the successor-in-interest to all contracts made by the former Hussein regime. This transfer of interest carries with it contractual obligations that the U.S. must abide by, as well as all potential liabilities that may be suffered.

The pre-existing contracts are not the only concern that the U.S. has, as it must also be careful how it handles all future contracts made during U.S. occupation as well. The current policy of the U.S., in barring all countries that did not lend support for the War in Iraq from bidding upon new contracts seems to violate many of the fundamental precepts of international economic law. These policies, if they continue in their current form, could very well carry with them a price tag of their own for the United States, namely in the form of political capital, international reputation, and perhaps serious reprisals upon the world stage.

One estimate by the Office of Management and Budget places the total amount of money to be spent by the United States on Iraqi reconstruction to be approximately $18.4 billion dollars. While this estimate does take into account future contracting activity by the U.S., it does not appear to consider any of the consequences that could very well result from a mishandling of pre-existing and future contracts. It seems that litigation, remedy and international sanction costs have not been factored into this equation, although all three could become an immediate reality and quickly spiral out of control if the history books and treaties remain dusty on the shelves. It would seem as if the days of Caesar, Napoleon and Fredrick the Great have vanished; in the modern world, war is no longer a profitable hobby.

110. Id.