

COMMENTS

COMMERCIAL LAW REFORM ISSUES IN THE RECONSTRUCTION OF IRAQ

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I. INTRODUCTION

In April 2003, the United States and its coalition partners, through the Coalition Provisional Authority (CPA), began the essential and monumental task of rebuilding Iraq. As much as bridges, tunnels, pipes, and schools in Iraq needed repair, so did its legal system. In particular, Iraq lacked the modern legal infrastructure that is required for job creation and economic growth and development, which are themselves cornerstones of a free, democratic, stable, and secure society. This Comment explains the role and approach taken by the CPA, with the assistance of U.S. agencies and other coalition partner personnel, on a broad range of commercial issues relating to the reconstruction of Iraq.

II. FRAMEWORK FOR LEGAL SUPPORT OF IRAQ RECONSTRUCTION ACTIVITIES

A. International Law of Occupation and Commercial Law Reform in Iraq

The CPA undertook the reform of Iraq's commercial laws pursuant to its constituent states' obligations under international law as occupiers of foreign territory. The rights and duties of occupying powers under international law

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are generally set forth in two conventions: the Fourth Geneva Convention¹ and the Hague Convention and the annexed Hague Regulations.²

As each of the primary coalition states and Iraq are parties to the Fourth Geneva Convention, the CPA recognized as controlling the Convention's provisions relating to the modification of the occupied territory's laws by the occupying power. The Fourth Geneva Convention does not specifically address an occupying power's rights or responsibilities with regard to the commercial laws of the occupied territory. Nevertheless, complementing an affirmative duty to keep a territory's penal laws in effect and enforced through the territory's tribunals to the extent consistent with security needs and other obligations under the Convention, Article 64 provides:

The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfill its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.³

As this Comment discusses in Part III, it became apparent immediately that certain commercial law reforms were necessary to maintain the jobs and to attract the capital required to reconstruct Iraq. The CPA thus viewed these reforms as essential to enable the CPA to administer Iraq effectively and to fulfill its other obligations under the Fourth Geneva Convention, such as providing for the basic needs of Iraq's people, through reconstruction.

Because Iraq is not a party to the Hague Convention, the provisions of the Convention and the annexed Hague Regulations did not expressly govern the CPA's administration of Iraq. Although not bound as a matter of treaty law by the text of the Hague Regulations, the CPA nonetheless looked to the provisions as a source of customary international law evidencing, and further interpreted by, state practice. Thus, the CPA viewed Article 43 of the Hague

¹ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

² Convention (IV) Respecting the Laws and Customs of War on Land and its Annex, Regulations Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277 [hereinafter Hague Regulations].

³ Fourth Geneva Convention, *supra* note 1, art. 64.

Regulations, which provides that the occupier “shall take all the measures in [its] power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country,”⁴ in light of the expansive legal reforms undertaken during occupations that were governed by the Hague Regulations, such as the U.S. occupations of Japan and Germany following the Second World War. From such state practice, the CPA concluded that customary international law provided additional authority to reform Iraq’s commercial laws to support the reconstruction of Iraq as necessary and to meet the needs of the Iraqi people.

United Nations Security Council Resolution 1483 supplemented these treaty and customary international law authorities for commercial law reform in Iraq. In paragraph 4 of Resolution 1483, the Security Council

[c]alls upon the Authority, consistent with the Charter of the United Nations and other relevant international law, to promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future.⁵

Thus, Resolution 1483 contemplates that CPA actions to promote the welfare of the Iraqi people and to restore conditions of stability are consistent with the international law of occupation. As commercial law reforms were essential to creating the economic conditions necessary to move towards those objectives, Resolution 1483 supplied further authority for such reforms.

B. The Commercial Law Reform Process

Commercial law reform work in Iraq was coordinated between the CPA and the U.S. government through “cells” coordinated by the U.S. National Security Council (NSC) staff. These cells covered a range of topics, including economic and legal issues. A senior NSC staff member chaired each cell, which included representatives from several agencies, notably the Departments of Commerce,⁶ Defense, State, and the Treasury. With advice and input from

⁴ Hague Regulations, *supra* note 2, art. 43.

⁵ S.C. Res. 1483, U.N. SCOR, 58th Sess., 4761st mtg. at 2, U.N. Doc. S/RES/1483 (2003).

⁶ In April 2003, the Commerce Department’s International Trade Administration formed

these cells, the CPA acted consistent with direction from Washington and coordinated these matters with those of policy makers in Iraq, including the Governing Council, Iraqi ministries, and Iraqi civil society groups, as well as with coalition partners.

The CPA Office of General Counsel drafted amendments and additions to Iraq's commercial laws. As important and painstaking as this commercial law work was, CPA's General Counsel also performed a myriad of other legal tasks, including representing and advising the CPA with respect to matters of public international law, administrative law, contract law, litigation, and Iraqi asset recovery. Faced with limited staff and resources in Iraq, the CPA General Counsel sought the advice and assistance of various U.S. government and coalition partner legal offices, including the Department of Commerce's Office of General Counsel, regarding matters of commercial law reform.

During the process of drafting a given amendment or addition to Iraq's commercial law, CPA counsel would also consult with CPA ministry advisors, who were CPA officials responsible for advising the various interim Iraqi ministers on the substance of the reform under consideration. CPA officials also consulted Iraqi ministry staff and members of the Iraqi Governing Council directly on contemplated commercial law measures.

Following U.S. interagency review of a particular commercial law reform and concurrence by the Iraqi Governing Council, the CPA Administrator approved and promulgated the amendment or addition in the form of a CPA Order. In the hierarchy of authorities observed during the administration of the CPA, Orders were considered binding instructions or directives to the Iraqi people. In some circumstances, Orders explicitly superseded existing inconsistent statutes and regulations. Orders could be elaborated or clarified by CPA Memoranda, which in practice primarily served to create or to adjust procedures relating to implementation of a particular Order.

In just over a year of administration, the CPA issued 100 Orders, more than a quarter of which enacted reforms of a commercial nature, and a dozen

the Iraq Investment and Reconstruction Task Force to assist companies, U.S. and foreign, interested in reconstruction and commercial opportunities in Iraq. Communicating nearly continuously with the U.S. business community, the Task Force also came to serve as a collection point for the views of U.S. industry on what commercial reforms were necessary to repair and spark development of the Iraqi economy. The Task Force worked closely with the CPA, and continues to work with other U.S. government agencies and international organizations to provide U.S. companies with the latest information on the commercial environment in Iraq. The wide variety of activities of the Task Force are described at its website: www.export.gov/iraq.

Memoranda. Following an examination in Part III of this Comment of the commercial law regime the CPA encountered upon its arrival in Iraq, the key commercial law reforms brought about through these actions are discussed in Part IV.

III. OVERVIEW OF PRIOR IRAQI COMMERCIAL LAW

Iraq has a long and distinguished history as a center of Islamic jurisprudence. In the modern era, the core of its legal system has been its Civil Code. The Civil Code emerged from a committee formed during the 1930s at the suggestion of the prominent Egyptian jurist Abd al-Razzaq Ahmad al-Sanhuri, who envisioned a civil code for Iraq based on Islamic and European (primarily French) legal principles. By the time the committee neared the end of its work in the mid-1940s, it had access to an additional source of law, the draft of the new Egyptian Civil Code (also by al-Sanhuri). The Iraqi Civil Code was completed in 1946, enacted as Law No. 40 in 1951, and became effective in 1953. Clearly influenced by its Egyptian antecedent, the Civil Code remains the main source of Iraqi commercial law, particularly with respect to the formation, discharge, and dissolution of contracts.

Building upon the Civil Code's foundational principles, the Commercial Code was promulgated in the Law of Commerce No. 30 of 1984. It regulates commercial matters pertinent to businesses, including trade names, company registrations, company books and accounts, negotiable instruments, commercial mortgages, letters of credit and other financial transactions, and carriage and delivery terms for international sales transactions. Numerous post-1984 statutes, regulations, decrees, and resolutions affecting commercial matters amended or expanded upon the Civil and Commercial Codes.

Unfortunately, despite the relatively recent updates, the Iraqi commercial law extant in 2003 in many respects failed to reflect modern commercial practices or even the contemporary legal standards in other Arab-majority countries. Worse, under Ba'athist Party rule, these statutory foundations of Iraqi commercial law were encumbered by numerous preemptory, command-economy decrees issued by Saddam Hussein and his Revolutionary Council. As a result, assembling an authoritative compilation of relevant Iraqi commercial laws proved to be extremely difficult.

It was clear, however, that by the end of the Saddam Hussein regime, Iraq's commercial law contained numerous barriers and deficiencies preventing the country and its people from attracting needed trade and investment, and otherwise precluding full participation in the global economy. Among the

legal provisions and deficiencies that threatened to frustrate reconstruction efforts were the following:

- Constitutional prohibitions of the private ownership of natural resources and the basic means of production,⁷ and of foreign ownership of “immobile” (real) property;⁸
- The prohibition of investment in, and establishment of, companies in Iraq by foreigners who are not resident citizens of Arab countries;⁹
- A commercial agency law requiring that anyone representing another person or company in a commercial transaction must be of Iraqi nationality and be “fully loyal to his homeland”¹⁰ and lacking adequate provisions for the resolution of disputes and termination of agents under the law;
- A labyrinth of laws and regulations containing elaborate and time-consuming registration and/or licensing requirements for commercial companies, agents, distributors, branches, representative offices, and intellectual property rights, including loyalty oaths and “Arab Boycott of Israel” certifications;¹¹
- Regulations requiring that the government license and inspect all goods coming into and leaving the country;¹²
- Lack of Iraqi copyright protection for many foreign, including United States, copyright owners due to Iraq’s lack of membership in key copyright treaties;
- Lack of a government procurement law; and
- Lack of a public system for recording liens or other security interests in movable or personal property.

⁷ IRAQ CONST. of 1990, art. 13.

⁸ *Id.* art. 18.

⁹ IRAQ COMPANIES LAW NO. 21 art. 12 (1997).

¹⁰ IRAQ COMMERCIAL AGENCY LAW NO. 50 art. 4 (2000).

¹¹ *See, e.g., id.*; IRAQ REGULATION NO. 5 OF BRANCHES AND OFFICES OF FOREIGN COMPANIES AND ECONOMIC ESTABLISHMENTS art. 4(7) (1980); IRAQ TRADEMARKS AND DESCRIPTIONS LAW NO. 21 (amended) arts. 5(12), 24(2) (1957).

¹² *See, e.g.,* Muslim Trade Network, at <http://www.muslimtrade.net/tradeguidline/index.html> (summarizing Iraq foreign trade regulations).

IV. CPA REFORMS OF IRAQI COMMERCIAL LAW

A. Iraqi Access to Foreign Investment and Enterprises

Ba'athist-era restrictions on foreign or non-Arab ownership of Iraqi companies, investment, and business operations in Iraq constituted a significant barrier to Iraq's ability to access the international capital resources that would be essential to its reconstruction. To address this urgent issue, the CPA issued Order 39 on September 19, 2003.¹³ Order 39 significantly altered the international business environment in Iraq by permitting one hundred percent foreign ownership and management of Iraqi business entities, except in natural resources sectors, including oil, and with respect to banks and insurance companies.¹⁴ Order 39, which replaced "all existing foreign investment law," afforded foreign investors treatment on terms no less favorable than those applicable to Iraqi investors.¹⁵ One purpose of this Order was to eliminate limits on the amount of foreign participation in a new or existing business entity so that businesses could be wholly owned by a foreign investor or owned jointly with an Iraqi investor. Following the issuance of Order 39, a foreign investor could establish a branch office, manage the entity, and transfer abroad all funds associated with the investment, including profits and proceeds from the sale of the investment.

Order 46 of December 20, 2003, amended Order 39 and instructed the Minister of Trade, in consultation with the CPA and in coordination with the Minister of Finance and Minister of Planning, to "promptly issue regulations to assist in the implementation" of Order 39.¹⁶ Accordingly, on February 29, 2004, the Ministry of Trade issued revised instructions and an application form for registering the branches and trade representation offices of foreign companies.¹⁷

¹³ *Foreign Investment*, Ord. No. 39, Coalition Provisional Authority, CPA/ORD/19 September 2003/39 (2003).

¹⁴ *Id.* § 6(1).

¹⁵ *Id.* §§ 3(1), 4(1).

¹⁶ *Amendment of Coalition Provisional Authority Order 39 (CPA/ORD/19 September 2003/39)*, Ord. No. 46, Coalition Provisional Authority, CPA/ORD/20 December 2003/46 (2003).

¹⁷ IRAQI MINISTRY OF TRADE MINISTERIAL INSTRUCTION NO. 149, REGISTRATION OF BRANCHES AND TRADE REPRESENTATION OFFICES BY FOREIGN COMPANIES (Feb. 29, 2004), available at http://www.export.gov/iraq/pdf/instructions_registration_foreign_0204.pdf.

Expanding upon Order 39's elimination of restrictions on foreign ownership of Iraqi companies, the CPA issued Order 64 on March 3, 2004. Order 64 amended Iraqi Company Law No. 21 of 1997 to allow any Iraqi, foreign person, or legal entity to establish or to own an interest in a domestic Iraqi company.¹⁸ In order to provide greater speed and certainty to the business formation process, the amendment also required the Registrar in the Iraqi Ministry of Trade either to approve or to disapprove in writing, within ten days, any application to register a new company.¹⁹ As it did with respect to the registration of branches and trade representation offices of foreign companies, on March 15, 2004, the Ministry of Trade issued revised instructions and an application form for registering domestic Iraqi companies.²⁰

B. Protection of Intellectual Property Rights

To address deficiencies in Iraq's protection of intellectual property rights and to align Iraqi law with current internationally-recognized standards of protection, in particular those required by the World Trade Organization (WTO), attorneys for the U.S. Patent and Trademark Office worked with the CPA to develop several amendments to various Iraqi laws on trademarks, patents, and copyrights. CPA Order 80, of April 26, 2004, amended the Trademark and Descriptions Law No. 21 of 1957 and retitled it as the Trademark and Geographic Indications Law. CPA Order 80 promulgated modern trademark provisions such as protection for well-known marks and geographical indications.²¹ That same day, CPA issued Order 81, which amended and consolidated the Patent and Industrial Designs Laws and Regulations No. 65 of 1970 as the Patent, Industrial Design, Undisclosed Information, Integrated Circuits and Plant Variety Law.²² The new law provides Iraq with a modern industrial property law, including patent protection for pharmaceutical products, and up-to-date protection for industrial

¹⁸ *Amendment to the Company Law No. 21 of 1997*, Ord. No. 64, Coalition Provisional Authority, CPA/ORD/29 February 2004/64 (2004).

¹⁹ *Id.* § 1(25).

²⁰ IRAQ MINISTRY OF TRADE MINISTERIAL INSTRUCTION NO. 196, THE REGISTRATION OF COMPANIES (Mar. 15, 2004), available at http://www.export.gov/iraq/pdf/instructions_registration_domestic_031504.pdf.

²¹ *Amendment to the Trademarks and Descriptions Law No. 21 of 1957*, Ord. No. 80, Coalition Provisional Authority, CPA/ORD/26 Apr 04/80 (2004).

²² *Patent, Industrial Design, Undisclosed Information, Integrated Circuits and Plant Variety Law*, Ord. No. 81, Coalition Provisional Authority, CPA/ORD/26 April 04/81 (2004).

designs, trade secrets, test data, integrated circuits, and new plant varieties. On May 1, 2004, the CPA issued Order 83, which amended Iraqi Copyright Law No. 3, providing copyright protection of literary and artistic works, including works in digital form, as well as protection for producers of phonograms, broadcasters, and performers.²³

C. Fair and Transparent Government Procurement Law

Under the Ba'athist regime, public contracts were, to a large extent, used as a tool to reward loyalty to the party and Saddam Hussein. Particularly in light of the substantial foreign assistance being made available to Iraq, it was thus necessary for the CPA to promulgate a fair and transparent process of government procurement for the country. On May 16, 2004, the CPA issued Order 87 on Public Contracts.²⁴ The Order consisted principally of a set of guidelines, but created, among other things, an Office of Government Public Contract Policy within the Ministry of Planning and Development Cooperation to oversee the implementation of the guidelines articulated in the Order.²⁵ It also tasked that Office with developing additional policies and procedures pertaining to the award of government contracts and dispute resolution procedures.²⁶

D. Foreign Trade

Under the Ba'athist Regime, Iraq's trade laws contained various protectionist measures, including burdensome licensing and inspection requirements and customs duties. Recognizing that such measures would significantly hinder the importation of goods and materials necessary for reconstruction efforts, on June 8, 2003, the CPA issued Order 12, which promulgated a trade liberalization policy.²⁷ Order 12 suspended most tariffs, customs duties, import taxes, licensing fees, and similar surcharges for goods entering or leaving Iraq, as well as most other trade restrictions on such goods from the Order's date of

²³ *Amendment to Copyright Law*, Ord. No. 83, Coalition Provisional Authority, CPA/ORD/29 April 2004/83 (2004).

²⁴ *Public Contracts*, Ord. No. 87, Coalition Provisional Authority, CPA/ORD/14 May 2004/87 (2004).

²⁵ *Id.* § 2(1)(a).

²⁶ *Id.* § 21(1)(b).

²⁷ *Trade Liberalization Policy 2004*, Ord. No. 12 (rescinded), Coalition Provisional Authority, CPA/ORD/7 June 2003/12 (2004).

issuance until December 31, 2003.²⁸ The CPA extended its suspension on collection of the Ba'athist-era tariffs, customs duties, fees, taxes, and surcharges for the duration of its administration of Iraq by issuing Trade Liberalization Policy 2004 in Order 54 on February 26, 2004.²⁹ Perhaps more importantly, Order 54 replaced Order 12's blanket suspension of most non-monetary trade restrictions with specific trade liberalizing amendments to existing Iraqi law.³⁰ Most notably, Order 54 introduced a non-discrimination principle to Iraqi trade law, under which are prohibited restrictions "as to the kind, origin or source" of non-contraband goods that may be imported into or exported from Iraq.³¹

The CPA promulgated the Trade Liberalization Policy, along with revisions to the intellectual property rights regime, the introduction of a government procurement law, and other commercial law reforms, in part with a view toward facilitating Iraq's eventual accession to the WTO. On February 11, 2004, backed by strong U.S. support, Iraq took an important step towards full membership by achieving "observer" status in the WTO.³²

E. Other Relevant Legal Reforms

Other CPA Orders directed to legal reforms in support of Iraq's economic development include the Banking Law of 2004 (Order 94),³³ the Interim Law on Securities Markets (Order 74),³⁴ and Consolidation of State-Owned Enterprises (Order 76).³⁵ In addition, rather than promulgate legislation in certain areas, the CPA proposed laws to the interim Iraqi government as models for future legislative consideration. These included model laws on such subjects as labor, consumer protection, commercial agencies, investment

²⁸ *Id.*

²⁹ *Trade Liberalization Policy 2004*, Ord. No. 54 (amended), Coalition Provisional Authority, CPA/ORD/24 February 2004/54 (2004).

³⁰ *Id.* § 5.

³¹ *Id.* § 2(2).

³² Press Release, Coalition Provisional Authority, Iraq Achieves Observer Status at the WTO (Feb. 12, 2004), at <http://www.cipa-iraq.org/pressreleases/20040212/WTO.html>.

³³ *Banking Law of 2004*, Ord. No. 94, Coalition Provisional Authority, CPA/ORD/6 June 2004/94 (2004).

³⁴ *Interim Law on Securities Markets*, Ord. No. 74, Coalition Provisional Authority, CPA/ORD/18 April 2004/74 (2004).

³⁵ *Consolidations of State-Owned Enterprises*, Ord. No. 76, Coalition Provisional Authority, CPA/ORD/20 May 2004/76 (2004).

promotion, competition, commercial leasing, trade negotiating authority, secured transactions, and insurance.

V. CONCLUSION

The interim Iraqi government assumed full governance authority on the morning of June 28, 2004. In its final Order, Order 100, the CPA transferred the various decision-making and advisory authorities it had created for itself under its previous Orders to the appropriate organs of the interim Iraqi government.³⁶ Under the Transitional Administrative Law of Iraq (TAL), which functions as an interim constitution for Iraq, the Iraqi interim government has the authority to draft new laws and to repeal laws put in place during the CPA period, with the limitation that the new laws cannot violate the TAL.³⁷ Article 26 of the TAL provides that the “laws, regulations, orders and directives issued by the Coalition Provisional Authority pursuant to its authority under international law shall remain in force until rescinded or amended by legislation duly enacted and having the force of law.”³⁸

Although the CPA accomplished much in the way of commercial law reform, significant work remains to be done by the people of Iraq and their government to create a commercial law environment optimal to economic development and modernization. It remains to be seen whether the interim Iraqi government and its permanent successor will choose to retain the legal reforms introduced by the CPA. In some cases, such as in the area of intellectual property, Iraq’s desire to join the WTO may buttress support for the laws beyond the need to assure Iraqi and foreign businesses that their intellectual property rights will be respected. In other cases, perhaps self-interest alone will provide strong support for maintaining a structure that encourages investment and trade, thereby unleashing the evident Iraqi spirit of entrepreneurship. Although it is for the Iraqis ultimately to determine which commercial law regime best suits their circumstances and policy objectives, one may hope that the CPA’s leadership has left Iraq a permanent legacy of commitment to the rule of law and to a commercial law approach that supports, rather than hinders, Iraq’s economic future.

³⁶ *Transition of Laws, Regulations, Orders, and Directives Issued by the Coalition Provisional Authority*, Ord. No. 100, Coalition Provisional Authority, CPA/ORD/28 June 2004/100 (2004).

³⁷ LAW OF ADMINISTRATION FOR THE STATE OF IRAQ FOR THE TRANSITIONAL PERIOD art. 3, at <http://www.cipa-iraq.org/government/TAL.html>.

³⁸ *Id.* art. 26.

