

The Iraq sovereign debt restructuring

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Key points

- At the time of the US invasion in 2003, Iraq had around 130 billion US dollars in external debt that needed to be restructured. The restructuring was one of the largest in history, yet no clear and detailed historical account exists. Through primary sources and interviews with key actors involved, this article tells the story of how Iraq managed to get a deal done.
- The restructuring was permeated by politics to inflict harsh terms on creditors, at a time when creditor-friendly restructurings were the norm. Despite its apparent success, in going for a politically expedient deal at the Paris Club, the restructuring missed an opportunity to enshrine a doctrine of odious debt in international law.

1. Introduction

Iraq was the most indebted nation in the world when the USA and its Coalition partners invaded on 19 March 2003.¹ Iraqi indebtedness was a result of debts incurred as part of the Iran–Iraq War (1980–1988) and crippling economic sanctions imposed during the 1990s. In early 2003, the US government backed one of the largest sovereign debt restructurings in history to help reintegrate Iraq into the global economy. Getting rid of the debt burden was required to facilitate trade and avoid attachment of assets by creditors. The restructuring was a political process, setting it apart from most restructurings in the 1990s and 2000s, which were creditor-friendly affairs. This article details and analyses the Iraq sovereign debt restructuring and shows how it managed to inflict harsh terms on its creditors.

Enforcement of sovereign debt repayments became easier with the rise of globalization and interconnected capital markets. During the 1990s, holdout creditors increasingly sued wayward debtors and won by cutting off countries from the global financial system.² Iraq had no cash in 2003 and received all its foreign currency from the sale of oil, which made it vulnerable to aggressive creditors if the debt burden was not dealt with.³ If creditors could attach judgments to oil-related assets, the restructuring could prove tricky—to say the least.

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1 According to the IMF's online database on sovereign debt, the most indebted nation in 2003 was Liberia, with a debt-to-GDP of 515%. The IMF does not include Iraq for 2003. Table 1 shows Iraq total government liabilities were 573% of GDP.

2 See eg Lee Buchheit and Mitu Gulati, 'Restructuring Sovereign Debt after NML v. Argentina' (2017) 12(2) Capital Markets Law Journal 224; Chuck Fang, Julian Schumacher and Christoph Trebesch, 'Restructuring Sovereign Bonds: Holdouts, Haircuts and the Effectiveness of CACs' (2020) ECB Working Paper Series 2366.

3 The IMF, 'Iraq: Use of Fund Resources—Request for Emergency Post-Conflict Assistance' (29 September 2004) IMF Country Report 04/325, 29.

The Iraqi debt restructuring was able to circumvent aggressive creditors. Political pressure and a worldwide immunization of foreign assets forced through one of the most complex debt restructurings to date.⁴ The USA spent significant political capital and used close-to unprecedented tools to force creditors to exchange debt claims. However, it stopped short of enshrining a doctrine of odious debt in international law despite initial overtures in that direction. Political expediency was preferred to a new sovereign debt restructuring regime.

2. War and odious debts

Earlier studies of the Iraq sovereign debt restructuring focus mainly on the outcome of the negotiations and rely on secondary sources.⁵ The Iraq debt burden on the eve of the invasion was 160 billion US dollars, or more than 570 per cent of GDP, as shown in Table 1. The debt was a consequence of politically motivated lending during the Iran–Iraq War, where Iraq’s then-allies had lent generously to defeat an unpopular geopolitical enemy (Iran).⁶

The main creditors were Paris Club members, countries not part of the Paris Club (mainly the Gulf states), and commercial creditors. The lines between each were blurred because commercial lending was often given at the behest of governments, while bilateral loan documentation was missing.⁷ The money Iraq owed was not spent on the Iraqi people; it was provided in the name of geopolitics, leaving the Iraqi people saddled with debt whilst an oppressive regime was personally enriched.⁸ But the debt burden still had to be dealt with.

The doctrine of state succession says that successive governments must honour previous regimes’ debt, as a matter of public international law.⁹ A new government inherits both the assets and liabilities of their predecessor, regardless of differing political philosophies. One exception to state succession would be the doctrine of odious debt, were it to be recognized in international law.¹⁰ The doctrine of odious debt states that if debt was

4 The Iraqi debt stock included all types of debt (external bonds, commercial loans, bank deposits, trade credits, export grants) owed to different creditors (government, commercial and private creditors).

5 See Bessma Momani and Aidan Garrib, ‘Iraq’s Tangled Web of Debt Restructuring’ in M Lamani and B Momani (eds), *From Desolation to Reconstruction: Iraq’s Troubled Journey* (2010) 155–74; Martin A Weiss, ‘Iraq’s Debt Relief: Procedure and Potential Implications’ (2011) CRS Report for Congress 15.

6 See Simon Hinrichsen, ‘Tracing Iraqi Sovereign Debt Through Defaults and Restructuring’ (2019) LSE Economic History Working Papers 304.

7 Ibid.

8 Saddam’s personal net wealth was estimated at somewhere from 2 to 40 billion dollars, see Justine Blau, ‘Where Are Saddam’s Billions?’ *CBS News* (11 April 2003) <<https://www.cbsnews.com/news/where-are-saddams-billions/>> accessed 29 September 2020.

9 The historical norm of continuous repayment is well covered in Odette Lienau, *Rethinking Sovereign Debt: Politics, Reputation, and Legitimacy in Modern Finance* (2014) Harvard University Press; Jerome Roos, *Why Not Default? The Political Economy of Sovereign Debt* (2019) Princeton University Press.

10 Seema Jayachandran and Michael Kremer, ‘Odious Debt’ (2006) 96(1) *American Economic Review* 82. There is an argument that the doctrine of odious debt already exists in international law, but it has never been used in practice, see eg Jeff King, *The Doctrine of Odious Debt in International Law: A Restatement* (1st edn, 2016) Cambridge University Press. Changing international law occasionally happens but needs support from powerful nations, see Stephen J Choi and Mitu Gulati, ‘Customary International Law: How Do Courts Do It?’ in Curtis A Bradley (eds), *Custom’s Future: International Law in a Changing World* (2016) 117–47.

Table 1. Iraq government creditors before the restructuring, 2003

Creditor	Outstanding debt (dollar billion)	GDP (%)
Paris Club	39	139
Gulf states	53	189
Non-Paris Club bilateral	17	60
Reparations	32	114
Commercial debt	20	70
Foreign exchange reserves	—	—
Total debt (ex-reparations)	128	458
Total liabilities	160	573

Source: Hinrichsen (n 6). The table shows outstanding debt before the restructuring, broken down by type of creditor. Reparations constitute liabilities for the state but are not treated as debt as defined by the Paris Club. The total debt burden is shown both with and without reparations as a result. *Note:* Outstanding debt does not sum to total because of rounding

issued with no benefit and no consent of the people, and the creditors knew it at the time, then a new government should not be responsible for the old regime's debt. Odious debt, then, would be an exception to state succession.

Even though governments almost always adhere to the principal of state succession, it is almost impossible to legally enforce sovereign debt contracts and no sovereign bankruptcy regime exists.¹¹ Following World War I, several attempts were made to formalize model arbitration clauses in sovereign bonds,¹² but until the 1950s, defaulting countries were effectively immune from legal action.¹³ Even in the latter half of the century, restructurings were still largely voluntary *ad hoc* affairs.¹⁴ Collective Action Clauses (CACs), which offer a way to restructure sovereign bonds if a majority of creditors agree, were absent from Iraqi debt contracts.¹⁵ Iraq therefore had no way of legally forcing creditors to exchange their claims. It left Iraq with the option of a negotiated restructuring or a repudiation by declaring its debt odious.

Repudiation of debt has occurred throughout history, most famously after the Russian Revolution in 1918,¹⁶ but recent invocations of odious debt have been rare. Exceptions

11 Anna Gelpern, 'Sovereign Debt: Now What?' (2016) 41 Yale Journal of International Law 41, 45–95. Before the twentieth century, it was more common to enforce debt by sanctions or 'gunboat diplomacy', see eg Kris J Mitchener and Marc D Weidenmier, 'Supersanctions and Sovereign Debt Repayment' (2010) 29(1) Journal of International Money and Finance 19.

12 Mark C Weidemaier, 'Sovereign Immunity and Sovereign Debt' (2014) University of Illinois Law Review 67.

13 Anna Gelpern, 'What Iraq and Argentina Might Learn from Each Other' (2005) 6(1) Chicago Journal of International Law 391.

14 Jérôme Sgard, 'How the IMF Did It—Sovereign Debt Restructuring Between 1970 and 1989' (2016) 11(1) Capital Markets Law Journal 103.

15 See Anna Gelpern and Jeromin Zettelmeyer, 'CACs and Doorknobs' (2020) 15(1) Capital Markets Law Journal 98 for an overview and description of CACs.

16 Christina Laskaridis, Nathan Legrand and Eric Toussaint, 'Historical Perspectives on Current Struggles Against Illegitimate Debt' in Philip Mader, Daniel Mertens Natascha van der Zwan (eds), *The Routledge International Handbook of Financialization* (2020) 482–93; Lienau (n 9).

include Ecuador's default in 2008¹⁷ and the Greek Parliament's Truth Committee on Public Debt.¹⁸ Because of the origin of Iraq's debt stock, invoking the doctrine of odious debt was possible, but it would require a new approach by the institutions involved. A standard sovereign debt restructuring, meanwhile, was up against potentially aggressive creditors who were used to receiving generous treatment and who could attach Iraq's assets abroad.

3. The Iraq debt restructuring

The story of Iraq's sovereign debt restructuring is told in detail here for the first time.¹⁹ In addition to primary sources, I have conducted interviews with people involved in the restructuring. When information from an interview is used, I use standard citation to show where the information has been sourced. The potential for bias is present; as memories fade, some might have a positive spin on their own actions. In addition, several interested parties have also been involved in the sovereign debt literature. It is nonetheless the only way to gather certain information, and all details provided have been checked against other interviewees as well as primary documentation.²⁰ The story is therefore this author's best attempt at reconstructing what happened between 2003 and 2006. The interviews include the lawyers for the Iraqi government: Lee Buchheit²¹ and Jeremiah Pam;²² advisors for the commercial restructuring: Nazareth Festekjian from Citigroup²³ and Daniel Zelikow from JP Morgan;²⁴ officials for the US government: Anthony Marcus,²⁵ Clay Lowery²⁶ and Olin Wethington²⁷ and the UK negotiator for the Paris Club, Andrew Kilpatrick.²⁸ I also rely on primary sources—documents from the restructuring, press releases, annual reports—as well as some secondary literature.

17 Anna Gelpern, 'Debt and the People, Part II: The Hot . . . and Concluding Disquietudes' (*Credit Slips*, 2010) <<https://www.creditslips.org/creditslips/2010/03/debt-and-the-people-part-ii-the-hot-disquietudes.html>> accessed 8 January 2020. The IACPC was appointed by the president and found Ecuadorian debt to be illegitimate, leading to a strategic default, see Internal Auditing Commission for Public Credit, *Final Report of the Integral Auditing of the Ecuadorian Debt* (2008). Both Arturo Porzecanski and Adam Feibelman argue that Ecuador were far from proving their case, see Adam Feibelman, 'Ecuador's Sovereign Default: A Pyrrhic Victory for Odious Debt?' (2010) 25(7) *Journal of International Banking Law and Regulation* 357; Arturo C Porzecanski, 'When Bad Things Happen to Good Sovereign Debt Contracts: The Case of Ecuador' (2010) 73(4) *Law and Contemporary Problems* 251.

18 The Truth Committee on Public Debt, 'On Public Debt, Preliminary Report' (2015) <https://www.hellenicparliament.gr/UserFiles/8158407a-fc31-4ff2-a8d3-433701dbe6d4/Report_EN_final.pdf> accessed 1 October 2020.

19 As far as the author is aware, at the time of writing (September 2020), there have been no other comprehensive accounts of the Iraqi restructuring featuring all aspects of the restructuring.

20 Interviews were recorded with consent and are on file with the author. Each interviewee had the opportunity to review statements attributed to them for comment before publication.

21 Lee C Buchheit, *in person interview* (1 May 2019 in New York). Recording on file.

22 Jeremiah Pam, *in person interview* (7 May 2019 in Washington, DC). Recording on file.

23 Nazareth Festekjian, *in person interview* (2 May 2019 in New York). Recording on file.

24 Daniel Zelikow, *email correspondence* (10 March 2020). Records on file.

25 Anthony Marcus, *in person interview* (6 May 2019 in Washington, DC). Recording on file.

26 Clay Lowery, *in person interview* (8 May 2019 in Washington, DC). Recording on file.

27 Olin Wethington, *in person interview* (9 May 2019 in Washington, DC). Follow-up *phone interview* (28 August 2019). Recordings on file.

28 Andrew Kilpatrick, *in person interview* (23 July 2019 in London). Follow-up *phone interview* (28 August 2019). Recordings on file.

Iraqi debts

A debtor country usually knows how much money they owe, but not to whom, as this depends on the type of debt. External bonds are publicly traded and can be held by anyone, while bilateral government loans are easier to identify.²⁹ Iraq's creditors included all types of claims and creditors, with commercial creditors ranging from government contractors and suppliers, to hedge funds, asset managers, banks, trade creditors, and state-owned entities. It also affected the strategy of the restructuring because a loan from a bank that is given illegally might be considered odious, but trade credits for goods and services are probably not.

After the UN imposed sanctions in 1990, Iraq stopped keeping track of who was owed what and the IMF had not conducted an Article IV consultation since the early 1980s.³⁰ The restructuring was thus an extremely complex endeavour. The Iraqi obligors (the debtor entities) were a diverse group as the line between the Iraqi government and Iraqi commercial enterprises had been blurred. The obligor included not only the government itself but ministries, state-owned enterprises and quasi-governmental institutions such as banks—especially Rafidain and Rasheed.³¹ Coordinating between the different debtors was more complicated than in normal restructurings as the entire public sector of Iraq was included as a debtor.³²

Reparations were quickly left out of the restructuring, mainly for international political reasons. The US Treasury put together some initial numbers but looked for reasons not to include reparations in the restructuring.³³ Reparations had been structured by UN resolutions to be paid directly out of oil revenues, and a new resolution would be required to change the legal set-up.³⁴ Unlike sovereign debt, reparations were easy to enforce because the United Nations Compensation Commission had been set up to take money directly from Iraqi oil revenues. The original Resolution 705 stipulated 30 per cent of Iraqi oil revenues should go towards paying reparations. It was lowered to 25 per cent in 2000 and to 5 per cent in 2003.³⁵ Just changing the legal status of reparations would require a political battle at the UN, which could be vetoed by any one of the five permanent Security Council members.

Immunizing Iraqi assets and reconciling debts

UN Resolution 1483 lifted sanctions, terminated the Oil-for-Food Programme, structured the post-invasion government, called for a debt restructuring, set up the Development

29 In between external bonds (unknown) to bilateral sovereign loans (known) are commercial loans, syndicated loans, trade credits, supplier credits, etc., which have known creditors to various degrees.

30 Shinji Takagi and others, 'The IMF and Fragile States: Eight Selected Country Cases' (2018) IEO Background Paper BP/18-01/02, 56.

31 Definitions of obligors are available at <<http://www.eyidro.com>> accessed 22 July 2019.

32 Hadi N Deeb, 'Project 688: The Restructuring of Iraq's Saddam-Era Debt' (2007) *Restructuring Newsletter*, Cleary Gottlieb Winter, 5. Most institutions were located outside the relative safety of the Green Zone in Baghdad, an added security risk.

33 Lowery (n 26).

34 UN Security Council Resolution 705 [1991], Doc S/RES/705.

35 By UN Security Council Resolution 1330 [2000], Doc S/RES/1330 and UN Security Council Resolution 1330 [2003], UN Doc S/RES/1483.

Fund for Iraq (DFI) and called on all members to immunize Iraqi oil sales from creditor attachment.³⁶

The Central Bank of Iraq (CBI) formally held Iraqi assets, both domestically and in foreign accounts. The assets could be attached by creditors as Iraq was in default and could be sued. The DFI was therefore set up by the Coalition Provisional Authority (CPA), the interim government, to receive assets from the CBI. The assets included future petroleum revenues, and it was considered immune under UN privileges.³⁷ Other Iraqi assets were to be immunized by countries individually, which in the USA was implemented through Executive Order 13303.³⁸ The DFI paid wages, pensions and used for cash disbursements.³⁹ Cash to run the government was withdrawn from the DFI and flown to Iraq.⁴⁰ Immunizing Iraqi foreign assets from, 'any form of attachment, garnishment, or execution',⁴¹ was, alongside the creation of the DFI, the most important features of UN Resolution 1483 for the debt restructuring.⁴²

Resolution 1483 was hotly debated with the international community divided between the USA and its allies and countries that opposed the Iraq war. The USA and the UK had circulated drafts of the resolution, which essentially legitimized the invasion. The immunization of Iraqi oil assets was included in early drafts, and there is little evidence that it was a major point of contention.⁴³ It would protect Iraqi assets but also enabled global oil companies, mostly American and British, to get involved without the risk of creditor judgments. From the US government's point of view, reconstruction depended on getting rid of the debt overhang,⁴⁴ and on 16 October 2003, Congress urged Paris Club creditors to get together to provide debt relief.⁴⁵ There was a political argument for debt relief, too. The White House and the Treasury could not go to Congress and ask for appropriations, only to turn around and see the money flow to other creditors, such as Saudi Arabia or China, on already delinquent loans.⁴⁶ The Treasury appointed Olin Wethington to oversee the economy directorate at the CPA, the transitional government of Iraq, in October 2003.⁴⁷

36 Ibid.

37 Iraqi savings were initially parked at the DFI, which at its peak held around 12 billion dollars (Zelikow (n 24)). The CBI slowly replaced the DFI as the main holder of Iraqi public savings. The DFI was administered by the New York Federal Reserve.

38 The President of the USA, 'Executive Order 13303: Protecting the Development Fund for Iraq and Certain Other Property in Which Iraq Has an Interest' [22 May 2003] 68 FR 31929. The order was renewed by both Presidents Bush and Obama. It expired in 2014, see Lee C Buchheit and Mitu Gulati, 'Sovereign Debt Restructuring and US Executive Power' (2019) 14(1) Capital Markets Law Journal 114. The executive order was marred by controversy, as some argued it immunized US oil companies, see eg Claire Kelly, 'The War on Jurisdiction: Troubling Questions About Executive Order 13303' (2004) 46 Arizona Law Review 46 483.

39 UN Resolution 1483, art. 12; Wethington (n 27).

40 Ibid.

41 UN Resolution 1483, art. 22.

42 The security and government-related questions are left for other articles to explore.

43 Paras 12–21 in the draft resolution governing the Development Fund of Iraq <<https://www.globalpolicy.org/component/content/article/168/36079.html>> accessed 29 September 2020. In early drafts, it was called the Iraqi Assistance Fund.

44 Lowery (n 26).

45 US House Resolution 198 (16 October 2003), US 108th Congress. See also Paris Club, 'Preliminary Discussion on the Situation of Iraq's Paris Club Debt' (*Press Release*, 24 April 2003); Paris Club, 'Paris Club Creditors Reviewed Iraq's Situation Towards Them' (*Press release*, 10 July 2003).

46 Lowery (n 26).

47 His role was, effectively, to be the interim central bank governor, with the title of Director of Economic Policy, reporting to Bremmer (Wethington n 27).

The CPA started to explore, but not to formally start, the restructuring until sovereignty passed back to Iraq.⁴⁸ The Trade Bank of Iraq (TBI) was established as a stopgap measure to facilitate imports and exports until then. Because of Iraq's weak economic situation, it was key to establish an institution that could facilitate trade finance. The two main banks, Rafidain and Rasheed, were in no position to offer letters of credit (normal in trade finance), and judgment creditors would have attached collateral if they could. The TBI was therefore made immune from attachment as well.⁴⁹ The legal structure allowed some relief on Iraqi supply-chains, but its scope was limited.⁵⁰

James Baker was appointed Special Envoy in December 2003 to lobby Iraqi creditors for debt relief in a political capacity and to lay the groundwork for the restructuring. He targeted key creditors that would have to be engaged later. A group that included the Iraqi Finance Minister and Central Bank Governor travelled the world to obtain political buy-in for a restructuring.⁵¹ In late 2003, The Treasury (for financial matters), the State Department (diplomacy) and the National Security Council (to represent the executive) gathered in the States to agree on an approach.⁵² Meanwhile, the Treasury oversaw an initial inventory of debt as nobody knew how much debt Iraq had.⁵³

The procurement process to hire separate legal advisors for Iraq started in early 2004, with Cleary Gottlieb appointed in June 2004.⁵⁴ Lee Buchheit led the Cleary team, and his job was to run the restructuring for Iraq and manage other financial advisors.⁵⁵ At the first meeting between the White House, Treasury, IMF and Cleary, the main subject of discussion was whether Iraqi debt could be declared odious. Declaring the debt odious implied that the debt was illegitimate and would have led to a cancellation of all debt. There was talk at the highest levels in the US administration about declaring Iraqi debt odious, even going so far as to have Secretary of the Treasury Snow suggest it publicly.⁵⁶ It generated lots of support and debate in the think tank world⁵⁷ and academia, as a series of articles in the following years show.⁵⁸

48 Pam (n 22).

49 Zelikow (n 24).

50 Wethington (n 27). The TBI was incorporated as a bank and capitalized with 100 million dollars. A decade later, the financial sector was underdeveloped: credit from banks to the private-sector account for less than 10% of GDP compared to over 55% on average for the region, see World Bank Group, 'Iraq: Systematic Country Diagnostic' (2017) World Bank Report 112333-IQ, 76.

51 Lowery (n 26); Wethington (n 27).

52 Additionally, US Paris Club negotiators are jointly from the Treasury and State Department, see Pam (n 22) and Lowery (n 26).

53 Ibid. A difficult process, as explained earlier. It started by looking at records in ministries and the central bank and asking other sovereigns how much they thought they were owed. The IMF played a coordinating role but had no data from the 1980s when it left Iraq, see Takagi and others (n 30) 60.

54 Deeb (n 32) 4.

55 Buchheit (n 21).

56 Momani and Garrib (n 5) 158–19.

57 Patricia Adams, 'Iraq's Odious Debts' (2004) Cato Policy Analysis 526.

58 Jayachandran and Kremer (n 10); Anna Gelpern, 'Odious, Not Debt' (2007) 70(3) *Law and Contemporary Problems* 81; Jai Damle, 'The Odious Debt Doctrine after Iraq' (2007) 70(4) *Law and Contemporary Problems* 139 are examples of refereed articles. For the current debate at the time, see eg the June 2005 edition of *Finance and Development* 42(2), where 'Letters to the Editor' include discussions between several of the cited authors.

The US government took the position in public to support the idea of declaring Iraqi debt odious, but in private among the institutions directly involved—the US Treasury and the IMF—the concept was not discussed much. The IMF publicly rejected the idea.⁵⁹ The institutions normally involved in sovereign debt restructuring judged a standard approach would be more efficient.⁶⁰ Support for the idea seemed to mostly originate outside of the institutions normally engaged in debt restructurings, particularly at the Pentagon, think tanks and interest groups in Iraq and the USA.

The legal advisors advocated against the doctrine of odious debts, with the IMF and the Treasury strongly supporting a standard restructuring instead.⁶¹ They were against the plan not because the debt was not odious but because it would unnecessarily complicate the restructuring.⁶² There is no legal doctrine for odious debt, and it would have been a ‘minefield of definitions’ as there would have been a need to set a precedent for what parts of the Iraqi debt stock were illegitimate.⁶³ According to some participants, the discussion never went to the National Security Council at the White House.⁶⁴ There are also somewhat differing accounts of how much support the idea of declaring Iraqi debt odious had. Creditors at risk likely wanted to avoid enshrining a doctrine of odious debt into international law and as a result were ready to take a larger net present value haircut. Iraq did maintain the right to declare specific debt odious, which it did for several commercial claims, but the idea of a broad invocation did not move forward.

The political buy-in (at least amongst the Coalition) meant substantial debt relief was available without any invocation of odious debt. In October 2003, the USA organized a conference to raise financial support for Iraqi reconstruction. It gathered pledges to write off 27 per cent of Iraqi outstanding debt, with the majority from Paris Club members.⁶⁵

Sovereignty officially passed back to Iraq on 28 June 2004. It was decided that the Paris Club would be the best place to start restructuring negotiations.⁶⁶ Restructurings have a process but no manual: the debtor starts wherever a deal might be reached. The tactical reason for going to the Paris Club was that a deal comes with a comparability of treatment clause, in addition to the political buy-in.⁶⁷ A deal would be a floor beyond which no other creditors could get a better deal.⁶⁸ Paris Club members all had substantial claims on Iraq and the geopolitical alliances of the Coalition were well-represented, following James Baker’s initial diplomatic rounds.⁶⁹ Normally, countries undergoing restructurings do not

59 Raghuram Rajan, ‘Straight Talk: Odious or Just Malodorous?’ (2004) 41(4) Finance and Development.

60 Wethington (n 27).

61 Marcus (n 25).

62 Buchheit (n 21).

63 Ibid.

64 Wethington (n 27).

65 Momani and Garrib (n 5) 160.

66 Eighteen members participated in the Paris Club restructurings: Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Italy, Japan, Korea, the Netherlands, Russia, Spain, Sweden, Switzerland, UK and the USA; Norway, the World Bank, UNCTAD, the European Commission, the IMF and the OECD were observers.

67 <<http://www.clubdeparis.org/en/communications/page/the-six-principles>> accessed 26 July 2019.

68 Wethington (n 27) and Buchheit (n 21).

69 Pam (n 22).

have a lot of political friends, because they are creditors. Iraq was different. Paris Club negotiations opened with the USA willing to stand up for Iraq, with some in the National Security Council (which represented the White House) aiming for substantial, possibly even total, debt relief.⁷⁰ The USA was keen on achieving a consensus outcome, and the Paris Club was judged to be the best place to achieve it.⁷¹

Paris Club negotiations

The Paris Club is a well-oiled machine for sovereign debt restructurings, having executed 434 deals with 90 countries since it was first established in 1956.⁷² Iraq required two types of debt relief: flow treatment and reduction of the debt stock. The first was relatively easy as Iraq was not paying its current debt. However, at the Paris Club, flow treatment usually comes before debt stock reduction. For Iraq, stock reduction came up front, which is unusual.⁷³ Iraq was treated under the Evian Approach, offering ‘comprehensive debt treatment’, reduction with no standard terms.⁷⁴ The approach was only approved in October 2003 and did away with economic indicators in favour of a non-standard debt sustainability analysis (DSA) from the IMF for highly indebted countries.⁷⁵ The IMF had been brought in early in 2003 to put together a DSA for the rescheduling and to prepare Iraq to be a party to a stand-by agreement.⁷⁶

The Iraqi solvency and capacity to pay its debts would be based on the DSA, which largely depended on assumptions about oil prices and production. The Iraqi government generated all its revenue from oil sales: between 2005 and 2007, 94 per cent of revenues, 96 billion dollars in total, came from the sale of crude oil.⁷⁷ The accuracy of the assumptions was therefore essential for debt sustainability. Because of the US desire for substantial debt relief, there was political pressure from the negotiations team to reduce Iraq’s capacity to service debt, according to a report from the Independent Evaluation Office of the IMF issued in 2018.⁷⁸ The IMF assumed the price of oil would be under 26 dollars per barrel, forever.⁷⁹ Figure 1 shows the future market for Brent oil, as well as the oil price during negotiations. At the time of the DSA’s publication, the oil price was 46 dollars and rose throughout 2005 and 2006. The assumption did not change during the negotiations, even as the price of oil rose to over 60 dollars.

70 Buchheit (n 21).

71 Wethington (n 27).

72 <<http://www.clubdeparis.org/en>> accessed 22 May 2020. The Club is housed at the French Treasury in Paris. For a history of the Paris Club, see Gong Cheng, Javier Díaz-Cassou and Aitor Erce, ‘Official Debt Restructurings and Development’ (2018) 111 *World Development* 181.

73 Marcus (n 25) and Lowery (n 26).

74 <<http://www.clubdeparis.org/en/communications/page/evian-approach>> accessed 23 July 2019.

75 Weiss (n 5) 5–6.

76 The IMF (n 3). Meetings between the IMF and the CPA occurred throughout the spring of 2004 in Oman, Beirut, Abu-Dhabi and London (Wethington (n 27)).

77 Government Accountability Office, ‘Stabilizing and Rebuilding Iraq: Iraqi Revenues, Expenditures, and Surplus’ (2008) Report to Congressional Committees 08-1031, 2.

78 Takagi and others (n 30) 57.

79 The IMF (n 3).

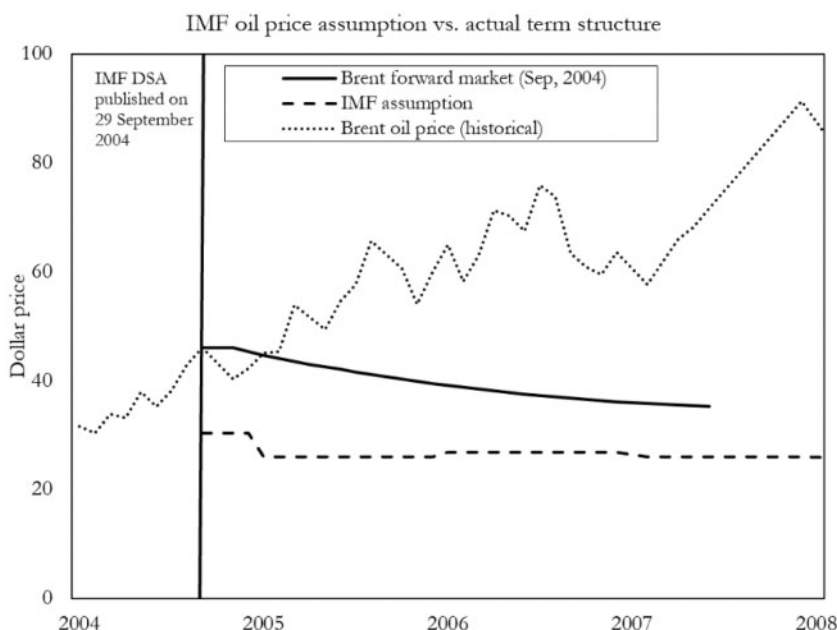


Figure 1. IMF oil price assumption and actual term structure.

Sources: The solid line is the forward oil market as of 29 September 2004, from Bloomberg. The assumption for oil is from the IMF (n 3) 25, debt sustainability analysis, dated 29 September 2004. The historical oil price is the spot price of Brent oil, as it occurred over 2004–2008.

Initial staff meetings at the Paris Club started in July 2004, with bilateral meetings in the fall. The deal was ultimately agreed in November 2004. Paris Club negotiations are generally completed within 1 day, and usually no more than 48 hours.⁸⁰ The Iraqi negotiations went on for over a week, following months of preparation.

At issue was a fundamental difference between the Coalition—led by the USA and the UK—and non-Coalition countries, mainly European countries and Russia. The Europeans considered the IMF's DSA a work of fiction because of how vastly its oil price assumptions differed from reality.⁸¹ Iraq did not have enough cash on hand to do a cash-for-debt deal, so it would have to be debt-for-debt. The bid-offer on principal haircuts going into the negotiations was 95 per cent (USA/UK) and 50 per cent (Europe/Russia).⁸² However, an 80 per cent write-down was the likely outcome from the beginning. The US delegation and the head of the Paris Club had agreed on the number beforehand as a realistic compromise.⁸³ The US delegation would negotiate with everyone who wanted a complete write-off, mainly the Iraqis and parts of the US government. The Paris Club

⁸⁰ Buchheit (n 21) and Marcus (n 25).

⁸¹ Buchheit (n 21).

⁸² Paul Wolfowitz pushed for 100% initially, then lowered the opening offer to 95% alongside the UK, according to both Buchheit (n 21) and Momani and Garrib (n 5) 162. The White House deferred the final decision to the Treasury.

⁸³ Wethington (n 27).

secretariat would try to get the Europeans and Russians up from their 50 per cent principal haircut, while the USA would negotiate everyone else down to 80 per cent.⁸⁴

The last creditor holding out was Russia. The general sense was always that a reasonable compromise could be reached through diplomacy.⁸⁵ At the Asia-Pacific Co-operation summit in Chile (November 2004), Bush personally got involved to close the deal with Putin. Three bilateral meetings at the summit's margins were required before Putin agreed to the 80 per cent principal haircut.⁸⁶ In fact, the actual last party to agree was Iraq, which attempted to get 100 per cent debt relief.⁸⁷ All creditors met on 21 November 2004, a Sunday in Paris, expecting an agreement, but Iraq continued to hold out and only agreed a few hours after the deadline had passed.⁸⁸ The deal was struck, with the following terms outlined in the Agreed Minutes:⁸⁹

- Debt reduction of 80 per cent in three tranches.
 - 30 per cent immediate debt cancellation, as of 1 January 2005.
 - 30 per cent additional debt rescheduling for 23 years, with a 6-year grace period, conditional on approval of a standard IMF programme.
 - 20 per cent of initial debt stock debt rescheduled after three years on similar terms, conditional on review of the IMF programme (but no means testing).
- A six-year grace period for principal repayments, and a three-year grace period for (full and partial) interest rate payments.
- An interest rate of 6 per cent.
- Voluntary debt-for-debt swaps.
- Comparable treatment of other external creditors.
- Net present value (NPV) debt reduction of 89.75 per cent.

The deal was harsher on creditors than other restructurings during the same period: NPV haircuts on debt restructured between 1998 and 2005 ranged from 13 per cent (Uruguay, 2003) to 73 per cent (Argentina, 2005).⁹⁰ The restructuring spread out the principal haircuts, rather than taking them up-front, mostly for accounting and budgetary reasons. All countries have different accounting rules, which means each country treats debt relief differently.⁹¹ It meant losses could be booked over many years.⁹² Several countries—

84 Weiss (n 5) 6. The USA helped bring 'up' several of the holdouts, too (Wethington (n 27)).

85 Buchheit (n 21).

86 Pam (n 22); Roula Khalaf, William Wallis and James Harding, 'Iraq Debt Accord Ends US-Europe Stand-Off' *Financial Times* (front page of the print edition on 22 November 2004). The Russian Finance Minister had been un-responsive until then, for reasons unknown.

87 Wethington (n 27).

88 Ibid. The Iraqi negotiators were the Finance Minister (Adel Mahdi), the Central Bank Governor (Sinan Al Shabibi) and Iraq's legal advisors, Cleary Gottlieb (Lee Buchheit and Jeremiah Pam).

89 Paris Club, 'The Paris Club and the Republic of Iraq Agree on Debt Relief' (*Press Release*, 11 November 2004).

90 Federico Sturzenegger and Jeromin Zettelmeyer, 'Haircuts: Estimating Investor Losses in Sovereign Debt Restructurings, 1998–2005' (2008) 27(5) *Journal of International Money and Finance* 780.

91 Lowery (n 26).

92 Festekjian (n 23).

Germany prominent among them—had not marked down their loans. Any write-offs would hit the budget upfront if they were front-loaded.⁹³

Lazard Frères was brought in as financial advisors to execute the deal. In December 2004, the USA forgave 100 per cent of its 4.1 billion dollars claim, while all other Paris Club members restructured according to the initial terms.⁹⁴ Next, the focus turned to the remaining creditors. With an almost 90 per cent net present value reduction of debt, Iraq had the terms to offer its other creditors.

Non-Paris Club bilateral debt negotiations

Other bilateral creditors comprised two categories: Gulf States and countries not in the Paris Club, such as China. The Gulf States were the largest creditor overall with 53 billion dollars of debt. Iraq hired Houlihan Lokey Howard and Zukin as financial advisors, and Houlihan oversaw explaining to these countries what the Paris Club deal entailed.⁹⁵ The IMF DSA had assumed comparable treatment on the rest of the creditor universe. All countries were IMF members, and this helped obtain agreements in principle from bilateral creditors, but only in principle. Even if they did not restructure, then they would not obstruct the restructuring moving forward.⁹⁶ A key point was the evidence of indebtedness clause. It meant each new loan superseded and replaced any old contracts.⁹⁷ Old debt would be foregone, and Iraq would have a new known stock of external debt.

The largest Gulf State creditors were Saudi Arabia (39 billion), Kuwait (8 billion), Qatar (1.5 billion) and Jordan (1.3 billion); to this date, none have restructured. The Gulf States were opposed to debt relief in late 2003, having all been on the receiving end of Saddam's wars.⁹⁸ Several soft pledges to restructure on Paris Club terms were made at the height of the restructuring talks in late 2004 but nothing came of them. In fact, Iraq and Saudi Arabia could not even agree on how much debt was outstanding.⁹⁹ As of 2020, Saudi Arabia still considers it is owed money, with the Foreign Minister, Adel Al-Jubeir, denying it has written off anything.¹⁰⁰ The second largest creditor, Kuwait, refused to budge as well, as did Qatar. Kuwait has tied repayment of debt to national recognition. There is no evidence that either Kuwait or Qatar has officially restructured any debt despite significant international pressure early on. Jordan has a large claim—having been a

93 Even though the loans had been on the books for many years and were clearly worthless, a principal haircut would be treated as a revenue hit, see Martin Kelleners, 'Performance and Budget Modernization—the German Experience' (2012), Finance Ministry Presentation, Middle East and North Africa Senior Budget Officials <[http://www.oecd.org/gov/budgeting/D2-AM%20-%20Roundtable%20-%20M.%20KELLENNERS%20-%20Germany%20\(English\).pdf](http://www.oecd.org/gov/budgeting/D2-AM%20-%20Roundtable%20-%20M.%20KELLENNERS%20-%20Germany%20(English).pdf)> accessed 12 August 2019; and Lowery (n 26).

94 Weiss (n 5) 6. In 2011, Iraq settled with some US citizens for damages during the Gulf War, see State Department, 'Settlement of Claims of U.S. Victims of the Sad-dam Hussein Regime with the Government of Iraq' (2011) <<https://2009-2017.state.gov/r/pa/prs/ps/2011/06/166691.htm>> accessed 29 September 2020.

95 Pam (n 22).

96 Ibid.

97 Deeb (n 32) 7.

98 Momani and Garrib (n 5) 167 and 168.

99 Ibid. The Gulf States had political incentives to not restructure, as they wanted leverage over Iraq.

100 Middle East Monitor, 'Saudi Arabia Denies Writing off Iraq's Debt' (31 March 2017) <<https://www.middleeastmonitor.com/20170331-saudi-arabia-denies-writing-off-iraqs-debt>> accessed 29 September 2020.

long-term trading partner of Iraq—but has not provided any documentation.¹⁰¹ The claim is still outstanding, likely due to ineligibility.¹⁰²

Most of the smaller creditors settled over the following few years. The Czech Republic, Hungary, Indonesia, Malaysia, Romania and South Africa all settled on Paris Club terms, while Bulgaria, Bosnia, Serbia and Slovenia settled on Paris Club-like terms for debt owed to former Yugoslavia.¹⁰³ Slovakia, Cyprus and Malta wrote off all debt.¹⁰⁴ Others took a bit longer: China restructured its bilateral loans in 2007 (amounts unknown) and subsequently restructured 8.5 billion dollars in claims in 2010, having originally pledged to do so as early as 2007. The claims were held by China's development banks and had to go through a budgetary process before a restructuring could be done.¹⁰⁵ The UAE indicated they would write off its 4.2 billion dollar debt in 2012, although there is no evidence they did.¹⁰⁶ Egypt was difficult and did not settle until 2015, and even then, it only did so in exchange for oil shares.¹⁰⁷ The outstanding issue for Egypt was a tie-up of worker remittances from Iraq. The remittances had been delivered to Iraqi banks but had been stolen before they were sent to Egypt.¹⁰⁸ It was unclear if the remittances could be defined as debt, which stalled negotiations. The countries which took the longest time to settle all had similar outstanding issues.

By 2008, the last phase for the Paris Club write-down was complete. The Iraqi debt overhang was no longer a priority, with an implicit understanding that the Gulf States would not push for repayment.¹⁰⁹ By 2019, 65 out of 73 sovereign creditors had restructured, with the remainder mostly consisting of Gulf State uncollected debt.¹¹⁰ By 2019, the immunization of Iraqi oil has lapsed, but sovereigns rarely pursue other sovereigns. Because the Gulf States were never brought onboard as part of the early restructuring, they never restructured their claims. In addition to having been on the receiving end of Iraqi aggression, another reason is possibly the geopolitical and religious context. It is likely that creditors with Sunni majorities (all of them) had concerns about increased Iranian influence in Iraq and, therefore, hesitated in settling the claims.

101 Marcus (n 25).

102 It could be that loans violated UN sanctions.

103 They were essentially the same; some took a larger write-off for some cash up front.

104 Special Inspector General for Iraq Reconstruction, Quarterly Report and Semi-annual Report to the United States Congress (2008) 138.

105 Kevin Acker, Deborah Brautigam and Yufan Huang, 'Debt Relief with Chinese Characteristics' (2020) Sais-Cari Working Paper Series 39, 10.

106 Haneen Dajani, 'UAE Cancels Dh21bn of Debt Owed by Iraq' (*The National*, 17 January 2012) <<https://www.thenational.ae/uae/uae-cancels-dh21bn-of-debt-owed-by-iraq-1.357148>> accessed 29 September 2020.

107 Ayah Aman, 'Egypt Forgives Iraqi Debt in Exchange for Oil' (*Al-Monitor*, 23 January 2015) <<https://www.al-monitor.com/pulse/originals/2015/01/egypt-iraq-talks-agreement-debt-oil-military.html>> accessed 29 September 2020.

108 Marcus (n 25).

109 Ibid; Lowery (n 27).

110 Paris Club, 'The Paris Club Delivers the 3rd Phase of Debt Reduction for Iraq' (*Press release*, 22 December 2008). I have been unable to find evidence that Brazil, Greece, Jordan, Kuwait, Pakistan, Poland, Qatar, Saudi Arabia or Turkey have restructured.

Commercial debt claims and restructuring

Dealing with the Paris Club and other governments was high politics, while the commercial restructuring was more operational in nature. The commercial restructuring deal-offer was made in 2005 and was fixed at Paris Club terms, with JP Morgan and Citi brought in as financial advisors to deal with the so-called London Club of large commercial creditors.¹¹¹ The US government was barely involved in the commercial restructuring, having achieved the Paris Club deal.¹¹² The structure of the deal was decided by the Iraqi government, following advice from JP Morgan, Citi and Cleary Gottlieb.¹¹³ The key things to decide for the structure were (i) past due interest, ie how much each claim had in accrued interest; (ii) whether to offer a cash-for-debt or a debt-for-debt swap and (iii) how to reconcile claims.

The government decided each claim would receive 10.25 per cent of its accrued value. All loans would accrue at a fixed interest rate from the date of default, Libor + 75 bps, according to the Reconciliation Methodology that was developed by the financial advisors.¹¹⁴ It did not matter if the debt had a contract that accounted for past due interest; all claims were treated equally. The larger creditors, mostly European banks, held letters of credit or outright loans. The accrual rate was, thus, a good deal for all trade credit claims.¹¹⁵ The French banks pushed hard for adhering to contracts when calculating the spread over Libor. This would have benefitted the banks and larger claimants at the expense of smaller ones and was dropped in favour of treating everyone equally.¹¹⁶ Most small commercial claims were trade credits, with no interest rate specified in the contract.¹¹⁷

The deal was a debt-for-debt swap because Iraq did not have enough cash to pay all its creditors.¹¹⁸ There were hundreds of attachment orders outstanding against Iraq, which meant any deal had to resolve as many claims as possible.¹¹⁹ Bonds were issued in return for restructured debt but only for the largest creditors. Everyone owed more than 35 million dollars in principal was offered a debt-for-debt deal, while smaller creditors—legally unable to hold external bonds—received cash. Issuing bonds had been preferred by JP Morgan and Citi (who make a living trading bonds) but had some backing in Iraq, too—at least officially.¹²⁰ The lawyers advised against a debt-for-debt swap because all bond

111 Iraq is unlike most Paris Club deals where the debtor leaves wanting to escape comparability of treatment terms; Iraq used it to argue for commercial creditors to accept a similar deal (Buchheit (n 21)).

112 Zelikow (n 24).

113 Pam (n 22).

114 Reconciliation Methodology (ex C): <<http://www.eyidro.com/recon-method.pdf>> accessed 23 July 2019.

115 The claims came in different currencies—mainly US dollars, Yen and European currencies—but given claims pre-dated the euro's existence, a formula for converting old currencies was worked out, per Festekjian (n 23).

116 Buchheit (n 21).

117 Festekjian (n 23).

118 Ibid.

119 Zelikow (n 24).

120 Joanna Chung and Stephen Fidler, 'Why Iraqi Debt Is No Longer a Write-off' *Financial Times* (16 July 2006) <<https://www.ft.com/content/b94bccb4-14e7-11db-b391-0000779e2340>> accessed 29 September 2020.

prospectuses included risk assessment disclosures, which would not align with the propaganda coming out of the White House in 2005. For political purposes, Cleary Gottlieb suggested an all-cash offer on comparable terms to the Paris Club.¹²¹

The lawyers also wanted aggregate CACs, even though only one bond was being swapped into a 5.8 per cent coupon bond, maturing in 2028. The reason behind this was to make it easier for Iraq to re-open this bond or issue more bonds should it need to in the future. It ended with a compromise as JP Morgan and Citi would only agree to single-issue CACs, which was the market-standard at the time, rather than second-generation CACs.¹²² The lawyers did not consider using first-generation CACs as a deal-breaker at the time and did not push.¹²³

The main issue for settling commercial claims was reconciling outstanding debt.¹²⁴ Ernst and Young (E&Y) was appointed as reconciliation manager, working out of Jordan. Debt had to meet the following definitions to be eligible:¹²⁵

1. Evidence of written agreement.
2. Entered before the sanctions (dated 6 August 1990).¹²⁶
3. Fit the definition of credit.
4. Be external debt (defined as debt in all currencies except Iraqi dinars).

If the claim had not been sold and E&Y could reconcile it to available documents, it would be settled. Because the debts were so varied, they were all treated equally in terms of eligibility, regardless of governing law and currency. From the moment a claim was submitted, the panel's decision became final, with about half of claims awarded to claimants.¹²⁷ In normal restructurings, creditors have Euroclear or DTCC numbers to certify their claim, which are mostly external bonds. Here, creditors turned up in Dubai and Jordan with boxes of paper.¹²⁸

Iraq did not assert odious debt for all the claims, but it reserved the right to do so on specific claims.¹²⁹ One man from India showed up to a creditor meeting in Dubai with an

121 Buchheit (n 21).

122 Also called first-generation CACs, working within one bond issue rather than the whole range.

123 Buchheit (n 21).

124 Cleary, Gottlieb knew of several precedents of how not to do it. In 1975, Nigeria ordered 16 million tonnes of cement to arrive within a year to plug a shortage, far exceeding port capacity, see Hanaan Marwah, 'Untangling Government, Market, and Investment Failure During the Nigerian Oil Boom: The Cement Armada Scandal 1974–1980' (2020) 62(4) *Business History* 566. The result was a run-up in trade debt that needed to be settled. The government took out a newspaper advertisement, asking anyone it owed money, to contact them. A lot of people did, and Nigeria was inundated with claims, entangling it in a debt reconciliation nightmare. It settled only one-third of the claims (Buchheit (n 21)).

125 Adopted from the Iraqi Ministry of Finance's, *Memorandum for Potential Holders of Claims* (30 January 2008).

126 The statute of claims according to both New York and English law is six years, so claims had expired. As claims were made under a plethora of different legal standards, however, the offering document specified that by submitting a claim, claimants agreed to forgo the right to sue. It was important that no agencies or ministries inside Iraq talked to the external debt holders, as acknowledgement of debt would have reactivated the claim. All talks had to go through lawyers.

127 Buchheit (n 21).

128 Festekjian (n 23).

129 Zelikow (n 24).

old fax, showing a claim and wanting to be paid. He was kindly asked to submit his claim to E&Y.¹³⁰ Another gentleman had delivered 10,000 dollars' worth of frozen chicken to the docks in Basra the morning the sanctions took effect.¹³¹ He was not paid. An Irish meat exporter and a Swiss jeweller were told that documentation for the underlying goods would be required after they complained, and they withdrew their complaint.¹³² Sovereign debt restructurings do not normally include such unusual claims. About 817 claims (out of a total of 11,776) could not be reconciled, and a special arbitration panel was convened (the rest were settled).¹³³

Once the parameters were set, Iraq published the commercial debt offer on 25 July.¹³⁴ JP Morgan and Citi arranged meetings with individual creditors in Dubai to market the settlement. It was a take it or leave it to offer, with no creditor committee negotiations. Five creditor committees were created nonetheless, none representing all creditors. The largest, the London Club Coordinating Group, represented European and Middle East banks, while the others were the Washington Club, the Iraq Creditors Club, the Korean Creditors Coordinating Committee and the North African Trade Creditors Committee.¹³⁵ Advisors took the view that negotiating individually would be fatal as it would negate the Paris Club deal if terms were improved. The argument for equal treatment was made by the Iraqi Central Bank Governor in 2005, in a letter to one of the creditor committees. The problem raised by the Governor was not that the creditor committees made invalid points, rather that all had valid points. It was thus impossible to accommodate one group over another.¹³⁶

A way to evaluate the fairness of the offer is to compare it to what the larger creditors had marked loans at in their books. The largest commercial creditor was the Italian bank Banca Nazionale del Lavoro (BNL). The loan was mired in controversy. It originated in the late 1980s by the bank's Atlanta Branch and was underwritten by the US Department of Agriculture. The money was designated for agricultural imports but used to buy weapons illegally instead.¹³⁷ It is a prime example of odious debt. BNL held 3.4 billion dollars' worth of loans (in notional and accrued interest) to Iraq and its state-owned banks, classified as non-performing loans. The loans figure in BNL annual reports from 2000 and were marked to fair value. They are listed explicitly in terms of accrued value and can be compared directly to the settlement offer. From 2000 to 2004, BNL valued the loans at between 10 and 12 per cent of accrued value.¹³⁸ In 2005, when the exchange happened, they received 683 million dollars' worth of the 2028 bonds, valuing them at 239 million in their annual report, with the loans moving from 'non-performing' to 'performing'.¹³⁹

130 Festekjian (n 23).

131 Buchheit (n 21).

132 Zelikow (n 24).

133 Iraqi Ministry of Finance, 'Iraq Announces Conclusion of Commercial Debt Settlement' (*Press release*, 18 July 2006).

134 Iraqi Ministry of Finance, 'Iraq Announces Terms of Commercial Debt Settlement Offer' (*Press release*, 26 July 2006).

135 Lee C Buchheit, 'Use of Creditor Committees in Sovereign Debt Workouts' (2009) 10 *Business Law International* 205.

136 The letter is in Buchheit, *ibid* 211.

137 See Hinrichsen (n 6) 12–13.

138 Banca Nazionale del Lavoro, *Annual Reports, Consolidated Financial Statements* (2000–2005).

139 *Ibid* 64.

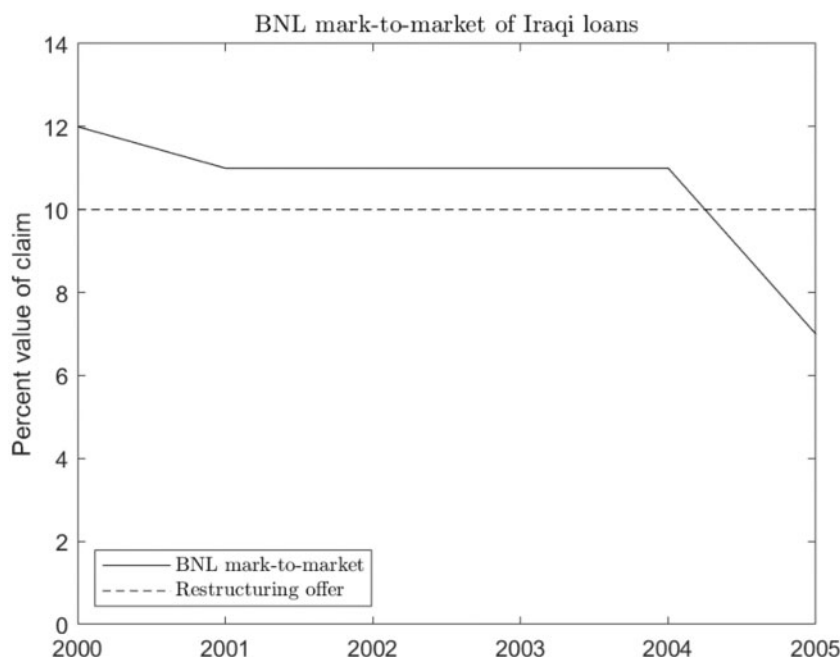


Figure 2. BNL mark-to-market of Iraq loans (per cent of nominal and accrued).

Sources: The mark-to-market is from the audited BNL, *Annual report, Consolidated Financial Statements* (2000, 2001, 2002, 2003, 2004, 2005). The restructuring offer is the net present value of the Paris Club offer.

Figure 2 shows the restructuring offer and the BNL marks in the years leading up to the restructuring. BNL's accounting valuation would suggest the offer of 10.25 per cent of accrued value was fair.

This is not to say that commercial creditors did not complain about being strong-armed; they did.¹⁴⁰ They also accepted the offer. The commercial debt settlement offer was made on 26 July 2005. By December, all large creditors had accepted (14 billion dollars), triggering the second phase of the Paris Club, the IMF stand-by agreement of January 2006 and a 30 per cent further debt reduction.¹⁴¹ The deadline for large commercial creditors to submit claims was fixed, and creditors who had earlier proclaimed they would not participate showed up with boxes of claims in hand, on the day.¹⁴² A year later, on 18 July 2006, the restructuring was essentially complete.¹⁴³ In total, 11,776 individual Saddam-era claims were tendered (817 went through arbitration). Of 491 commercial

140 Joanna Chung, 'Iraqi Debt Restructuring Draws Complaints' *Financial Times* (20 December 2005) <<https://www.ft.com/content/f2e6917c-7193-11da-836e-0000779e2340>> accessed 29 September 2020.

141 Joanna Chung and Andrew Balls, 'Crucial Phase in Iraq Debt Restructuring Completed' *Financial Times* (23 December 2005) <<https://www.ft.com/content/f23f8f60-73f2-11da-ab91-0000779e2340>> accessed 29 September 2020.

142 Festekjian (n 23).

143 Press releases announcing settlements and participation rates are available at the Debt Reconciliation Office, run by Ernst & Young: <<http://www.eyidro.com>> accessed 12 July 2019 and the Paris Club website: <<http://www.clubdeparis.org/en/traitements/iraq-21-11-2004/en>> accessed 15 July 2019.

claims, 96 per cent of eligible claims (as considered by E&Y) accepted the deal for a total of 19.7 billion dollars, according to the Ministry of Finance.¹⁴⁴

Two facts made the commercial restructuring a lot easier than that of the Paris Club. First, the immunization of Iraqi oil assets was helpful in marketing the commercial offer.¹⁴⁵ It meant potential holdouts would have to wait a long time to collect, versus up-front payment on delinquent loans now. It took away the legal options for any vulture funds, who broadly speaking did not engage.¹⁴⁶ Secondly, commercial creditors—as opposed to governments in the Paris Club—must mark non-performing loans down, and as shown earlier, the offer was about fair value or better. It did not hit anyone's profit and loss statement.

4. Haircuts and odious debts

The Iraqi debt explosion was awesome in size when compared to any country or period in history. Few historical precedents exist in the intersection of post-conflict reconstruction and debt relief, amid such international political scrutiny.¹⁴⁷ Figure 3 shows the net present value haircuts for all sovereign debt restructurings from 1980 to 2009, measured by the size of the restructuring. Iraq stands out as being particularly severe for creditors in the upper right corner.

The NPV haircut for Iraq was much larger than other restructurings. Only Argentina's 2005 restructuring comes close, and it came with a low participation rate of 76 per cent and years of litigation as shown earlier. Immunizing Iraqi foreign assets was and is largely unprecedented.¹⁴⁸

The restructuring was thus a success, insofar as it removed the debt overhang and allowed Iraqi output to outgrow the debt stock.¹⁴⁹ Government debt-to-GDP in 2019 was 50 per cent, mostly thanks to output growth rather than an outright fall in debt. The composition of the debt stock changed. External debt has fallen to 34 per cent of GDP, much of it loans to the Gulf States that have been *de facto* cancelled.¹⁵⁰ Iraq has increased its stock of local debt (in dinars) since the restructuring, although it has also increased its foreign exchange reserves. Table 2 shows outstanding Iraqi debt; almost half of gross debt is legacy debt owed to the Gulf States.

144 Iraqi Ministry of Finance (n 134).

145 Festekjian (n 23).

146 Buchheit (n 21).

147 A few were mentioned by participants in the restructuring. The closest was perhaps the German debt relief of 1953, when the London Debt Agreement cut external German debt in half, contributing to a successful reconstruction after World War II, see Gregori Galofré-Vilà and others, 'The Economic Consequences of the 1953 London Debt Agreement' (2019) 23(1) European Review of Economic History 1. Another is Polish debt relief in the early 1990s. Poland got a Paris Club deal that cut its debt stock in half, received IMF help from 1990–1995 and turned things around in its re-entrance to the Western world, see James M Boughton, *Tearing Down Walls, The International Monetary Fund 1990–1999* (2012).

148 Buchheit and Gulati (n 38).

149 The restructuring only. Iraq cannot be considered an economic or security success.

150 But not cancelled. It has political ramifications as collection can be attempted at some future point.

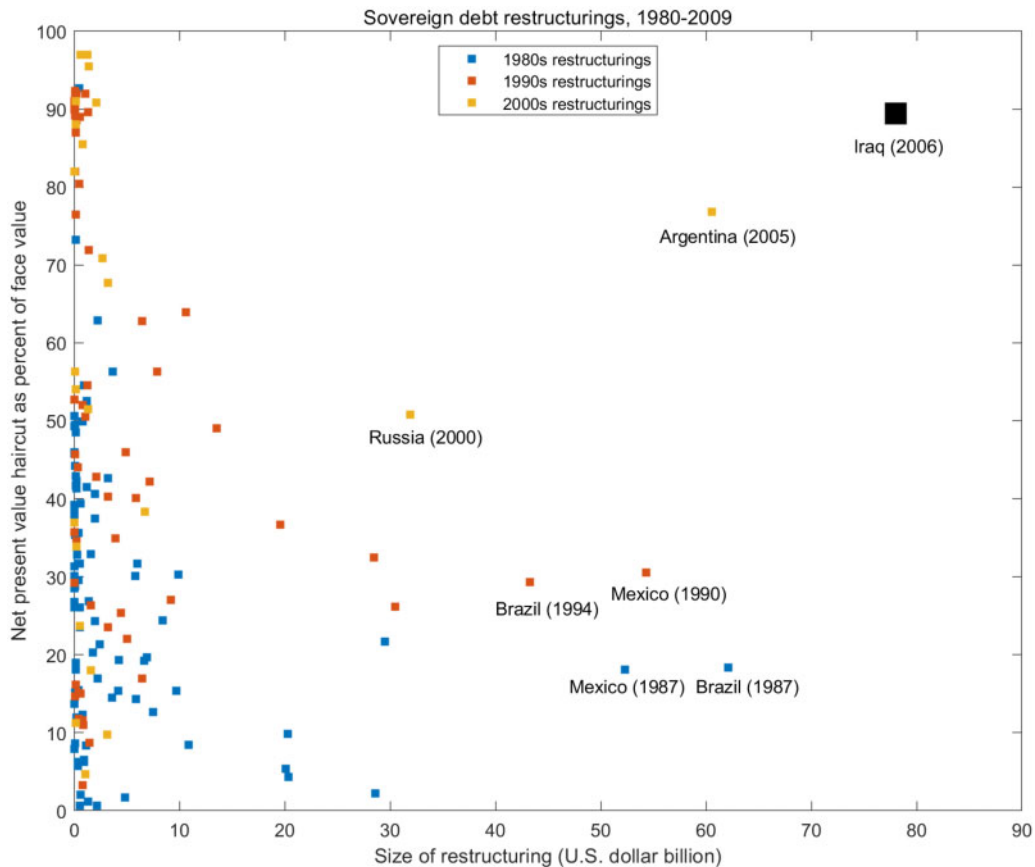


Figure 3. Comparison of NPV haircuts in debt restructurings (1980–2009).

Sources: The data for Iraq’s restructuring are the amount of debt from Table 1 that was restructured, as outlined in this article. The haircut for Iraq is the net present value from the Paris Club. All other NPV haircuts and sizes of restructuring are from the [online appendix](#) in Juan J Cruces and Christoph Trebesch, ‘Sovereign Defaults: The Price of Haircuts’ (2013) 5(3) *American Economic Journal: Macroeconomics* 85.

The Iraqi debt restructuring was therefore also a case of missed opportunities. The build-up of debt in the 1980s was political in nature, originating from the USA and its allies in support for Iraq during the Iran–Iraq War.¹⁵¹ If a doctrine of odious debt has any place in international law, a good place to start could have been Iraq’s commercial and bilateral debts. There is no doubt that going to the Paris Club instead of declaring Iraqi debt odious was politically expedient, but it left unanswered the question of who was at fault.¹⁵²

¹⁵¹ Hinrichsen (n 6).

¹⁵² It is possible the debate over odious debt meant it was easier to get creditors to agree, simply to avoid invoking the doctrine of odious debt. Another option, also not favoured by the USA, would have been the Sovereign Debt Restructuring Mechanism proposed by the IMF, ‘Proposed Features of a Sovereign Debt Restructuring Mechanism’ (*Prepared by the Legal and Policy Development and Review Departments*, 2003) <<https://www.imf.org/external/np/pdr/sdrm/2003/021203.pdf>> accessed 29 September 2020.

Table 2. Iraqi debt by creditor, 2019

Creditor	Outstanding debt (dollar billion)	GDP (%)
Paris Club	6	3
Gulf states	49	22
Non-Paris Club official	48	8
Reparations	4	2
Commercial debt	—	—
External dollar bonds	5	2
Local debt	36	16
Foreign exchange reserves	−65	−29
Total debt (ex-reparations)	113	50
Total liabilities	53	23

Sources: The overall debt stock and GDP data are from the IMF's online database. Paris Club levels are based on term loans outstanding, sourced from Bloomberg; see text for the Gulf states. Non-Paris Club debt is the residual and includes the IMF and World Bank loans. Reparations outstanding as of December 2019 are for damages to oil assets in Kuwait. External and local debts as well as (positive) foreign exchange reserves are from the CBI.

It allowed the creditors to settle debts owed without answering any uncomfortable questions about why loans were extended in the first place. Instead, the Paris Club deal, and the subsequent commercial restructuring, swept under the rug any debate about the morality of paying creditors at all.

5. Conclusion

A recent problem for countries in default is that sovereign debt restructurings have been increasingly creditor friendly since the 1980s. The Iraqi restructuring imposed large haircuts on creditors, both principal and in net present value terms, largely thanks to political pressure from the USA. A unique feature was that Iraqi oil assets were immunized from creditor attachment, leaving creditors with few options but to settle.

The Iraqi debt restructuring was nevertheless a missed opportunity to set an important precedent by declaring Iraqi debt odious. Iraq had vast political backing from a US hegemon, and while the deal was ultimately successful in writing off Iraqi debts, it had the possibility to reform how sovereign debt is restructured.