

THE NEW IRAQ: RESOLVING PUBLIC AND PRIVATE OBLIGATIONS INCURRED UNDER SADDAM HUSSEIN'S RULE IN THE CONTEXT OF INTERNATIONAL ARBITRATION

By: *Darius Adam Marzec*¹

I. INTRODUCTION

Saddam Hussein's rule in Iraq collapsed on April 9, 2003, after an American-led coalition invasion.² The coalition quickly deposed the Iraqi dictator and began the process of turning the nation away from authoritarian rule, murder, and death, to civility.³ While Saddam Hussein is gone, and no government-supported oppression of people exists⁴, another form of tyranny persists: Iraq's modern economy is burdened with \$383 billion in public debt and judgments.⁵ Adding insult to injury, after the coalition troops

¹ Darius Adam Marzec is a J.D. candidate at Benjamin N. Cardozo School of Law.

² See Dexter Filkins, *Allawi Vows to Unite Iraq's Ethnic and Religious Groups*, N.Y. TIMES, Jan. 31, 2005, available at <http://nytimes.com/2005/01/31/international/middleeast/31cnd-iraq.html> (discussing the impact of the January 30, 2005 democratic election in Iraq); see also Sean D. Murphy, *Assessing the Legality of Invading Iraq*, GEO. L.J. 1, 1 (Aug. 2003) (analyzing the legality of the U.S. invasion, and the arguments for it). For a discussion of post September 11, 2004 American military strategy, see generally Jordan J. Paust, Symposium, *Terrorism: The Legal Implications of the Response to September 11, 2001: Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond*, 35 CORNELL INT'L L.J. 533 (2003).

³ See Mark Scandalow, *News Analysis: Record Shows Bush Shifting on Iraq War President's Rationale for the Invasion Continues to Evolve*, www.sfgate.com, Sept. 29, 2004, <http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2004/09/29/MNGE590O711.DTL> (last visited Jan. 31, 2005) (reviewing the changing rationales for the war in Iraq from a leftist perspective). Cf. James M. Lindsay & Ivo H. Daalder, *Shooting First: The Preemptive-War Doctrine Has Met an Early Death in Iraq*, LATIMES.COM, May 30, 2004, http://cfr.org/pub7066/james_m_lindsay_ivo_h_daalder/shooting_first_the_preemptivewar_doctrine_has_met_an_early_death_in_iraq.php# (arguing that President George W. Bush's preemptive war doctrine failed because the two assumptions involved were not accurate: first, the certain access to reliable intelligence on adversaries; and second, the technological superiority of the United States would make the costs of war more acceptable).

⁴ Despite recent reports of the Interior Ministry-operated detention center in Baghdad where "13 prisoners [were found] who had suffered abuse serious enough to require medical treatment[.]" the elected Iraqi Government does not officially condone torture. Ellen Knickmeyer, *Abuse Cited In 2nd Jail Operated by Iraqi Ministry, Official Says 12 Prisoners Subjected to 'Severe Torture'*, WASHINGTON POST, December 12, 2005, at A1. See Iraqi Constitution, Ch. 2 (detailing rights and freedoms of Iraqis).

⁵ See Alan B. Krueger, *What will be the Model for Peace in Postwar Iraq — Germany after World War I or after World War II?*, N.Y. TIMES, April 3, 2003, at C2 (claiming that "Saddam

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drove up to Baghdad through the desert, Iraq's banking system turned out to be insolvent.⁶

Furthermore, questions persist regarding the validity of public and private contractual agreements entered into while the Hussein regime was in place.⁷ As a result, certain academics, scholars and prominent persons from across Iraq and beyond⁸ have recom-

Hussein borrowed heavily to finance his war with Iran, the invasion of Kuwait, and the first Persian Gulf war. On top of this, the United Nations Compensation Commission received \$320 billion of claims for damages against Iraq related to its invasion of Kuwait") (hereinafter "Krueger"); see also Helle Dale, *Give Iraq a Clean Slate*, FoxNews.com, Apr. 27, 2003, <http://www.foxnews.com/story/0,2933,85286,00.html> (last visited Jan. 31, 2005) (hereinafter "Clean Slate").

We are told:

[m]uch of the Iraqi debt is owed to other Arab countries, but a significant portion could be relieved by Russia, France and Germany. Debt relief would be especially appropriate given that much of the money owed was spent on weapons purchases by a dictator who is no longer in power. Thus France is owed some \$6 billion by Iraq, and Russia \$7 billion to \$8 billion. German figures go into the billions as well.

Id. The effects of Iraqi indebtedness are stark:

[D]ebt [translates into] \$16,000 for every man[,] woman and child in Iraq, 25 times the debt of Brazil or Argentina. As U.S. Treasury Secretary John Snow has stated, the Iraqi people cannot bear the burden of the current debt level. This is especially true given that we now know where some of that money has gone. Almost \$1 billion in dollar bills has been dug out of basements and even dog kennels in Iraq where it had been squirreled away. An estimated \$6 billion has been shipped to foreign bank accounts by Saddam's family.

Id. Iraq's creditor nations are: Australia, Austria, Bulgaria, Canada, Czech Republic, China, Denmark, France, Germany, Holland, India, Iran, Italy, Japan, Jordan, Korea, Kuwait, Paris Club, Poland, Qatar, Romania, Russia, Saudi, Serbia, Spain, Switzerland, Turkey, United Arab Emirates, United Kingdom, and the United States. See generally <http://www.jubileeiraq.org> (last visited Feb. 6, 2005) (hereinafter "Jubilee Iraq").

⁶ See Cato Institute, Foreign Policy Briefing No. 80, *Monetary Options for Postwar Iraq*, at 3, Sep. 22, 2003, available at <http://www.cato.org/pubs/fpbriefs/fpb80.pdf> (last visited Jan. 23, 2005). The Cato Institute scholars opine that,

[w]e can expect that the Central Bank of Iraq and all of the commercial banks are insolvent, since their balance sheets are dominated by claims on the now-defunct Hussein government, which have been suspended by [Coalition Provisional Authority ("CPA")] order no. 4. . . . Bank liabilities are high since state lending was supported by mobilizing private deposits, which still constitute legitimate claims of Iraqi citizens on banks. We can also expect that there is no functional payments system or money market. The government has never been able to borrow in the open market, since there is no financial system outside the state-owned financial system.

See *id.* (citations omitted).

⁷ See Krueger, *supra* note 5.

⁸ See Jubilee Iraq, *supra* note 5. This website ran by this group of academics and prominent persons explains:

Jubilee Iraq was founded by a coalition of Iraqis and citizens in many creditor countries (including Britain, Canada, Germany, France, Italy and the US) in order to argue that the Iraqi people should not be required to repay odious debts that did not benefit them and that Saddam accumulated without their consent.

Id. For a complete list of people involved, see <http://www.jubileeiraq.org/supporters.htm> (last visited Feb. 10, 2005).

mended that the interested parties form an international arbitration tribunal to resolve debt arising out of deals dated after the rise of Mr. Hussein to power and before the 2003 American invasion and subsequent regime change.⁹ At the time of this writing, European creditor nations have agreed to sizable debt reductions, yet Iraqi obligations persist.¹⁰ This Note quickly surveys Iraqi liabilities to the world and outlines how an arbitral system of dispute resolution could lead to reduction of these liabilities. More precisely, this Note argues for intensive use of an arbitration tribunal, in light of factors such as prior arbitration tribunal history, cultural sensibility and the fairness to all affected parties.¹¹

⁹ See generally *id.*

¹⁰ See generally *infra* notes 32, 33.

¹¹ Prior arbitration history must be considered. For example, the United States Foreign Claims Settlement Commission tell us that:

As a result of the 1990 invasion and occupation of Kuwait by Iraq, and related events, thousands of United States nationals (U.S. citizens, corporations and other legal entities) suffered injuries, losses and damages. Numerous other U.S. nationals also have claims against Iraq that arose prior to Iraq's invasion of Kuwait. While most claims arising out of Iraq's invasion and occupation of Kuwait have been filed with the United Nations Compensation Commission ("UNCC") in Geneva, Switzerland, no viable forum has yet been provided for resolution of the thousands of claims against Iraq which fall outside the UNCC's jurisdiction ("non-UNCC claims"). In 1996, The Foreign Claims Settlement Commission ("FCSC") conducted a program for United States nationals (private citizens, corporations, and other legal entities) to register these potential non-UNCC claims against the Government of Iraq for breach of contract, loss of and damage to property, physical injury, and other losses. Examples of these potential claims registered with the FCSC include: (1) claims against Iraq which arose prior to Iraq's August 2, 1990, invasion of Kuwait; (2) claims of U.S. military personnel or their survivors (other than claims for inhumane treatment of a prisoner of war, which claims are compensable by the UNCC) which arose out of Desert Shield and Desert Storm, as well as Iraq's 1987 attack on the U.S.S. Stark.

Foreign Claims Settlement Commission, <http://www.usdoj.gov/fcsc/> (last visited Oct. 10, 2004); see generally U.N. SCOR, 2981st mtg., U.N. Doc. S/RES/687 (1991) (requesting compensation from Iraq for war victims for any damage or loss resulting from depletion of natural resources, environmental damage, and also for injury to foreign nationals, governments and corporations as result of the invasion). See also Kuwaiti Official Website, at http://demo.sakhr.com/diwan/emain/Story_Of_Kuwait/Occupation/Iraqi_regime_Crimes/iraqi_regime_crimes.html, (last visited Nov. 3, 2004) (saying that during the Iraqi occupation following the invasion, many Kuwaitis were tortured and extrajudicially killed).

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II. CURRENT IRAQI PUBLIC AND PRIVATE OBLIGATIONS

A. Public Obligations

Some estimate that the Iraqi people currently owe \$383 billion to outside creditors.¹² Iraq's public debt alone accounts up to an estimated \$130 billion of this liability.¹³ Some believe that over ninety percent of Iraq's debt financed Saddam Hussein-initiated¹⁴ wars.¹⁵ For example, Iraq owed the Paris Club¹⁶ alone \$21 billion

¹² See Krueger, *supra* note 5. *But see* THUNDERBIRD INT'L BUS. REVIEW, Vol. 42(1) 65, 67 (Jan.–Feb. 2000) (saying that “[i]n spite of the heroic efforts of the EIU’s statisticians, World Bank experts, OECD specialists, and other institutional researchers, nobody seems to know in detail what actually constitutes Iraq’s foreign debt or exactly how much Iraq originally borrowed on the international market.”) (hereinafter “Thunderbird Review”).

¹³ See Regime’s Debt, *infra* note 17.

¹⁴ See generally THE RISE AND FALL OF EVIL: SADDAM HUSSEIN’S BEGINNING, END, AND CAPTURE, <http://www.chronwatch.com/content/contentDisplay.asp?aid=5352> (last visited Feb. 10, 2005) (providing the chronology of Hussein’s raise to power and his fall. Attack on Iran and the invasion of Kuwait are indicated therein.).

¹⁵ See generally Jubilee Iraq, *supra* note 5; see also U.N. Children’s Fund, UNICEF Report: *The Situation of Children in Iraq*, at 2, (2002), available at http://www.unicef.org/publications/files/pub_children_of_iraq_en.pdf, (hereinafter “UNICEF Report”) saying that,

[a] worrying issue for the population’s future well-being is that Iraq’s pre-Gulf War debts are now said, according to various estimates, to total between \$130 and \$180 [billion], which will burden the economy even in the absence of sanctions unless the debts are renegotiated and rescheduled. Moreover, no figure has been set on the ultimate amount of reparations Iraq is expected to pay[.]

Id. at 12. For a critical view of Iraq’s post war economy, see generally, Rania Masri, *Resistance: In the Eye of the American Hegemon, “Freeing” Iraq’s Economy for its Occupiers*, at <http://www.swans.com/library/art10/iraq/masri.html> (last visited Feb. 6, 2004).

¹⁶ Paris Club is an association of lending states. See generally, www.clubdeparis.org (last visited Nov. 29, 2004). The official website describes it as:

An informal group of official creditors whose role is to find co-ordinated and sustainable solutions to the payment difficulties experienced by debtor nations. Paris Club creditors agree to rescheduling debts due to them. Rescheduling is a means of providing a country with debt relief through a postponement and, in the case of concessional rescheduling, a reduction in debt service obligations.

The first meeting with a debtor country was in 1956 when Argentina agreed to meet its public creditors in Paris. Since then, the Paris Club or ad hoc groups of Paris Club creditors have reached [agreements] concerning 80 debtor countries. Since 1983, the total amount of debt covered in these agreements has been \$468 billion . . .

In spite of such an activity, the Paris Club has remained strictly informal. It is the voluntary gathering of creditor countries willing to treat in a coordinated [sic] way the debt due to them by the developing countries. It can be described as a “non institution”. Although the Paris Club has no legal basis nor status, agreements are reached following a number of rules and principles agreed by creditor countries, which help a coordinated agreement to be reached efficiently.

<http://www.clubdeparis.org/en/presentation/presentation.php> (last visited Feb. 10, 2005).

before interest.¹⁷ The after-interest amount was \$39.8 billion.¹⁸ Iraq owed \$2 billion, before interest, to the United States, a member of the Paris Club.¹⁹ Moreover, “[the] international community regards Saddam Hussein as the root of Iraq’s financial and economic crisis.”²⁰ Nevertheless, the domestic and the international effort to reduce Iraqi debt yielded few results regarding debt reduction until November 21, 2004, when the members of the Paris Club agreed to debt relief.²¹ The Paris Club countries’ “representatives . . . met from November 17 to November 21[,] [2004] and agreed . . . with the representatives of the Republic of Iraq on a comprehensive debt treatment of the public external debt owed to them providing a total amount of debt reduction of 80 percent in three phases.”²² The member countries agreed to “an immediate cancellation of part of the late interest representing 30 percent of the debt stock as of January 1, 2005[,]” and deferring the remaining debt stock to a future time.²³ The Paris Club’s press release also reveals that,

[t]his results in [a] write-off of 11.6 billion [] dollars on a total debt owed to the Paris Club of 38.9 billion US dollars[.] The remaining debt stock will be rescheduled over a period of 23 years including a grace period of 6 years. This step will reduce the debt stock by another 11.6 billion[] US dollars increasing the rate of cancellation to 60%; Paris Club Creditors agreed to grant an additional tranche of debt reduction representing 20%

¹⁷ See Council on Foreign Relations, Iraq: The Regime’s Debt, http://www.cfr.org/background/background_iraq_debt.php (last visited Nov. 21, 2004) (hereinafter “Regime’s Debt”). However, note that an agreement has recently been reached with the Paris Club to reduce the debt level. See Press Release, *infra*, note 18.

¹⁸ See Press Release, The Paris Club, Nov. 21, 2004, *available at* http://www.clubdeparis.org/en/press_release/page_detail_commupresse.php (last visited Jan. 30, 2005) (hereinafter “Press Release”).

¹⁹ See Regime’s Debt, *supra* note 17.

²⁰ See Thunderbird Review, *supra* note 12, at 65, 81.

²¹ See Press Release, *supra*, note 18. We are told that:

[t]he members of the Paris Club which participated in the reorganization of Iraq’s debt were representatives of the governments of Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Italy, Japan, the Netherlands, the Republic of Korea, the Russian Federation, Spain, Sweden, Switzerland, the United Kingdom and the United States of America. Observers at the meeting were representatives of the government of Norway as well as the International Monetary Fund (IMF), the International Bank for Reconstruction and Development (IBRD), the Secretariat of UNCTAD, the European Commission and the Organization for Economic Cooperation and Development (OECD).

Id.

²² *Id.*

²³ *Id.*

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of the initial stock upon completion of the last IMF Board review of three[] years of implementation of standard [International Monetary Fund]²⁴ programmes [sic]. This debt treatment would reduce the total debt stock from 38.9 billion to 7.8 billion [] dollars. On a voluntary basis, each creditor country may also undertake debt swaps.²⁵

The Republic of Iraq is seeking similar debt treatment from other non Paris Club creditor nations.²⁶ Indeed, other creditor nations have expressed a willingness to cooperate with debt reduction. Saudi Arabia's "Foreign Minister Saud al-Faisal told a news confer-

²⁴ Hereinafter "IMF".

²⁵ See Press Release, *supra*, note 18. Indeed, the agreement has resulted in actual progress. According to the Governor of the Central Bank of Iraq, Sinan Mohammed Rida Al-Shabibi, [s]ince the end of November 2004, we have had a Paris Club agreement stipulating that 80 percent of the debt be forgiven and for this to be effective in three stages. The first stage [was] implemented on Jan. 1, 2005 [and] removed 30 percent of the debt. The second stage, to cancel another 30 percent, effective upon the signing of the standby agreement with the International Monetary Fund [] came at the end of December 2005. The final 20 percent will be forgiven on the successful application of the program. We [are currently pursuing] this program, and we are going to include a lot of reforms in the fiscal and monetary areas[.] [These reforms will help] the central bank [in] maintaining some level of reserves, economic stability in general, and [in] stability of the exchange rate. . . . [Moreover,] in the fiscal area, what is important is the reduction of subsidies[,] especially fuel subsidies[,] and [an] increase in prices. This was a [requirement] to have the second agreement, and this happened and is [now] decreasing the deficit in the budget. The fact that you increase the price of gasoline makes a reduction of subsidies possible. We had [a gasoline-price increase] during the middle of December. They were good conditions in order to have another 30 percent of the debt forgiven.

See John Zarocostas, *Iraqi Economy Digging Out of Debt*, WASHINGTON TIMES, World Briefings, Feb. 1, 2006, available at <http://www.washtimes.com/world/20060131-100121-2664r.htm> (last visited Feb. 19, 2006). See also *Bank and Fund In-Roads Into Iraq*, Bretton Woods Project, Update 49, January 23, 2006, [http://www.brettonwoodsproject.org/article.shtml?cmd\[126\]=x-126-507685](http://www.brettonwoodsproject.org/article.shtml?cmd[126]=x-126-507685) (last visited Feb. 19, 2006)(saying that "[n]on-Paris Club official debt constitutes about twice as much as that of the Paris Club. Only a small proportion of it has been reconciled so far. On [Jan. 19, 2006] Iraq issued its first bonds for trading as part of the restructuring of debt owed to commercial creditors"). Still, as "civil society groups call for greater national and international scrutiny over crucial reforms and a total cancellation of the country's 'odious debt'[,] the International Monetary Fund has proposed a "stand-by arrangement . . . with [its] conditions lead[ing] to a dramatic increase in fuel-prices, sparking riots in many parts of the country and leading to the resignation of the oil minister, Ibrahim Bahr al-Uloum[,] in protest[.]" *Id.* This "stand-by arrangement" is "necessary to secure the 80 per cent reduction of Iraq's debt with the Paris Club as agreed in November 2004, and as a seal of approval to initiate aid from other donors." *Id.* For the text of the test of the "stand-by agreement", see Press Release No. 05/307, International Monetary Club, *IMF Executive Board Approves First Ever Stand-by Arrangement for Iraq* (Dec. 23, 2005), available at <http://www.imf.org/external/np/sec/pr/2005/pr05307.htm> (last visited Feb. 19, 2006). Not surprisingly, Iraq's trade unions favor canceling of debts acquired by the Hussein regime and reject any imposition of structural adjustment conditions on any loans. See Press Release by Iraqi Trade Unions (Jan. 16, 2006), at http://www.jubileeraq.org/blog/2006_01.html#000921 (last visited Feb. 19, 2006).

²⁶ See Press Release, *supra*, note 18.

ence in Riyadh [on November 30, 2004] that “[t]he kingdom will abide by [its] commitment for a major drop in Iraq’s debt[.]”²⁷ Russia was in the process of “verifying its debt figures and . . . it expect[ed] to write off a total of around 90% of the debt, with the amount it [would] be owed at the end at around 700 million dollars to a billion dollars.”²⁸ In the end, Russia agreed to an 80 percent reduction of the debt level like its Paris Club counterparts.²⁹ While some of the non-Paris Club debt had been negotiated successfully on similar terms, “[o]nly a small proportion of [the debt] has been reconciled so far[.]”³⁰

While constituting an enormous victory and a boost to Iraq’s future, the Paris Club’s plan may run into difficulties since certain elimination of debt is contingent upon the implementation of IMF programs.³¹ Furthermore, not every other creditor nation may be willing to enter into such drastic debt restructuring as the Paris

²⁷ See JubileeIraq.com’s News Archive, Nov. 30, 2004, at http://www.jubileeiraq.org/blog/2004_11.html#000719 (last visited Nov. 30, 2004). The foreign minister did not give any further details. *Id.*

²⁸ See JubileeIraq.com’s News Archive, Nov. 29, 2004, at http://www.jubileeiraq.org/blog/2004_11.html#000719 (last visited Nov. 30, 2004).

²⁹ President Bush called on other nations to reduce Iraqi debt just as the Paris Club nations did. He said: “I encourage non-Paris Club creditor nations to agree to comparable debt reduction for Iraq[.]” See *Russia Agrees to Iraq Debt Plan*, Nov. 21, 2004, <http://www.cnn.com/2004/WORLD/meast/11/21/iraq.debt> (last visited Jan. 20, 2005).

³⁰ See *Bank and Fund In-Roads Into Iraq*, Bretton Woods Project, Update 49, Jan. 23, 2006, [http://www.brettonwoodsproject.org/article.shtml?cmd\[126\]=x-126-507685](http://www.brettonwoodsproject.org/article.shtml?cmd[126]=x-126-507685) (last visited Feb. 19, 2006). Despite the small portion of resolved non-Paris Club debt, the Governor of the Central Bank of Iraq, Sinan Mohammed Rida Al-Shabibi, appears optimistic that the Paris Club solution can possibly be applied to other debt. In a recent interview with a *Washington Times* correspondent, he remarked that,

[the Paris Club] template [is] to be used for other creditors, and we are working very hard with non-Paris Club creditors, including the Arab creditors. . . . We actually had a very important landmark in terms of reduction of the private debt, commercial debt. Already, we applied the Paris Club terms to that, and as part of it, we did debt buyback for the smaller amounts. Another part is debt-for-debt exchange. We actually had the commercial debt reduced from 100 percent to 20 percent, and the 20 percent will be converted to bonds. Through that, for the first time, Iraq will enter the international market. We applied the Paris Club terms to the non-Paris Club and to private creditors. We negotiated these terms, so the club was very useful for that. That [is] why we were able to negotiate successfully with the other creditors — non-Paris club, socialist and Eastern European countries, and the private creditors. So now, I would say we are on the right road in restructuring the debt and reducing it. Probably in three years’ time, Iraq will have a debt that is equivalent to gross domestic product (GDP), after it being five to six times the size of [the] GDP.

See John Zarocostas, *Iraqi Economy Digging Out of Debt*, WASHINGTON TIMES, World Briefings, Feb. 1, 2006, available at <http://www.washtimes.com/world/20060131-100121-2664r.htm> (last visited Feb. 19, 2006).

³¹ *Id.* Relying on the IMF may run into problems. A recent critique of the debt rescheduling tells us that,

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Club.³² Even if other nations accept the same debt cancellation with respect to the new Iraq, questions persist regarding Gulf War reparations, contracts with foreign companies and other compensation claims.³³ Therefore, some of the publicly held debt, as well as other obligations, would be fair game for the arbitral authority of the proposed Hussein Iraq Claims Tribunal and should be equitably settled by same.³⁴

[i]n November, Paris Club creditors agreed to write off 80 [percent] of Iraqi debts. Thirty per cent would be written off immediately, another 30 [percent] tied to an IMF standby programme [sic] expected in mid-2005 and a further 20 [percent] to be cancelled in 2008 if Iraq completes the three-year IMF programme [sic]. The US has cancelled 100 [percent] of the \$4.1 billion it says it is owed by Iraq, contingent on the completion of the Fund programme [sic]. Mahdi al-Hafez, Iraq's minister of planning, said that the Paris Club plan does not go far enough and that Iraq seeks the cancellation of 95 [percent] of its debts: "Iraq will resort to international arbitration if negotiations with these states reach a dead end." Finance minister Adel Abdul Mahdi said that Iraq had considered designating some of its obligations as "odious debt", loaned for "destruction and war", which need not be repaid. Civil society groups have said that the imposition of IMF conditions on the repayment of odious debt adds insult to injury. Mohammed Kamil of the Iraqi Prospect Organi[z]ation: "[W]hen Saddam executed people, he used to charge their families for the bullets used — this is precisely what the creditor countries who financed Saddam are asking of Iraqis today."

In mid-December Iraq cleared \$110 million of overdue debt payments to the World Bank. Payment of the arrears was necessary to allow the resumption of BWI lending, however observers have questioned the logic which sees a country at war and with infrastructure in tatters making such a payment at this time. "The World Bank, IMF, and Iraq's other state creditors — who account for 90 [percent] of claims against Iraq — want to bury their mistakes. They would rather give up their claims under the guise of charity than have the spotlight of international arbitration expose that they financed a vicious dictator against his people," said Patricia Adams, author of *Odious [D]ebts: Loose lending, corruption and the third world's environmental legacy*.

Charging Interest on Bullets: Calls Mount for Debt Cancellation, <http://www.brettonwoodsproject.org/article.shtml?cmd%5B126%5D=x-126-107746> (last visited Feb. 6, 2005). Moreover, further cuts contingent on the acceptance of IMF's restructuring programs appear to be politically unpopular. See *Bank and Funds In-Road Into Iraq*, *supra* note 25.

³² For instance, Finance Minister Velchev of Bulgaria [has made it clear that his country "will not write-off but reschedule Iraq's debt in view of the country's economy and oil sector potential." See *Bulgaria to Reschedule Iraq Debt*, Apr.18, 2004, <http://www.odiousdebts.org/odiousdebts/index.cfm?DSP=content&ContentID=10177> (last visited, Feb. 6, 2005).

³³ See *Regime's Debt*, *supra*, note 17; see generally <http://www2.unog.ch/uncc/introduc.htm> (last visited Feb. 10, 2004). We are told that:

[t]he United Nations Compensation Commission is a subsidiary organ of the United Nations Security Council. It was established by the Council in 1991 to process claims and pay compensation for losses resulting from Iraq's invasion and occupation of Kuwait. Compensation is payable to successful claimants from a special fund that receives a percentage of the proceeds from sales of Iraqi oil.

Id.

³⁴ See *infra* discussion in Section V.

However, why should the Iraqis benefit from debt relief simply because the Army uprooting their old regime bore American flags? Indeed, before key countries agreed to reduce the debt, American administration and a substantial part of the world community pushed aggressively to reduce Iraq's massive debt load.³⁵ The proponents of reducing Iraqi public obligations incurred or increased under the Hussein rule argue that this debt "prevent[s] economic revival and threaten[s] Iraq's political stability", is unfair to the Iraqi people, and because the majority of the public debt is odious.³⁶

If the massive public debt remains, Iraq's currency will weaken.³⁷ Heavy debt service will also be disastrous for trade and job creation.³⁸ Saleh Yasir of the Iraqi Communist Party said that "[t]here is no way to achieve democracy in Iraq without a solution for the economy, and resolving the debt is the most important component of this."³⁹ Proponents of reducing Iraq's public debt argue that requiring Iraq to repay it is not fair to the Iraqi people.⁴⁰ Indeed, asking today's Iraq to pay creditors interest and arrears from

³⁵ See Lex Riefell, *Reducing Iraq's Foreign Debt*, Herald.com, Feb. 6, 2004 (saying that the G-7 ministers [the foreign ministers of the leading industrialized countries], whose meeting took place in Boca Raton on February 6th, 2004, were more concerned about Iraq's debt rather than Argentina's, whose minister was not invited to the meeting, while the Iraqi counterpart was). Riefell also points out that the nineteen member state Paris Club organization has recently changed its debt reduction rules in respect to middle income countries such as Iraq, agreeing to debt reduction . . . only through a multiyear 'staged process.'" *Id.* Along with Iraq accepting an IMF economic recovery program, the debt reductions could equal "as much as 80 percent." *Id.*; see also *Iraqi President on Landmark Visit to Kuwait*, Channelnewsasia.com, at http://www.channelnewsasia.com/stories/afp_world/view/114474/1/.html, (last visited Nov. 3, 2004) (visiting Kuwait for the first time ever as an Iraqi head of state, President Ghazi al-Yawar focused the talks on "bilateral relations and a request for economic aid for Iraq," but the "Kuwaiti officials . . . avoided giving a direct answer to questions on whether the emirate will consider reducing huge Gulf War reparations it seeks from Iraq") (hereinafter "Visit").

³⁶ See *Paying for Executioner's Bullets: Iraqi Views on Debt and Reparations*, Jubileeiraq.com, at 1, at <http://jubileeiraq.org/files/iraqiviews.pdf> (last visited November 23, 2003)(hereinafter "Executioner's Bullets").

³⁷ See Executioner's Bullets, *supra* note 36, at 2. Sinan Al Shabibi, Iraq's Central Bank's governor, tells us that "[s]ince Iraq requires significant imports of goods and services, both for reconstruction and to meet the needs of ordinary Iraqis, a weak exchange rate will be one of the most immediately felt consequences if the debt is not written-off[.]" See Executioner's Bullets, *supra* note 36, at 2.

³⁸ See Executioner's Bullets *supra* note 36, at 2. A representative of an Iraqi charitable organization says that "[i]f Iraq's revenue was spent at home, and spent well, it could have an immense impact on the millions of impoverished people." *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

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the period when “the international community did not permit Iraq to earn any foreign currency⁴¹ to service the debt” is unfair.⁴²

Furthermore, Iraqis argue “that the payments made by Gulf countries to [Hussein’s Iraq] during the Iran-Iraq war were gifts[,] not loans.”⁴³ More fundamentally, when the Iraqi people are viewed as victims of the Ba’athist rule, even justifying such United Nations requirements as payment of Gulf War reparations of five percent of the oil revenues becomes harder, because it was ordered payable before the American invasion of Iraq and at the time when Mr. Hussein was Iraq’s face to the world.⁴⁴

If the Iraqi people had little to do with Mr. Hussein, they should not be expected to pay off his debts, according to the new Iraqi establishment.⁴⁵ Meeting with the Kuwaiti government delegation, Iraqi President Ghazi al-Yawar greeted the Kuwaiti people and government, saying “we always felt love and affection towards the Kuwaiti people. The Iraqi people had no hand in what happened in the past[.]”⁴⁶ The interim President was obviously referring to then-President Hussein’s 1990 invasion of Kuwait.⁴⁷

⁴¹ Some authors warn that international trade does not necessarily result in greater foreign exchange to the developing country.

Inappropriate and over-rapid liberalization could cause a range of problems for developing countries, such as financial instability (resulting from opening up financial markets to the vagaries of capital flows and speculation), displacement of local firms and net job losses by the entry or expansion of foreign service providers, and significant net foreign exchange outflows due to profit repatriation of foreign firms (which also mainly provide for the local markets and thus do not earn much foreign exchange for the host countries).

Goh Chien Yen, *Developing Countries Cautioned Against Services Liberali[z]ation Commitments in GATS/ WTO, Report on the UNCTAD Commission on Trade meeting in Geneva 3-6 Feb. 2003*, International Forum on Globalization Website, at <http://www.ifg.org/analysis/wto/cancun/gatt/devcaut.htm> (last visited Feb. 6, 2005).

⁴² See Executioner’s Bullets *supra* note 36, at 1.

⁴³ See *id.*; see also Thunderbird Review, *supra*, note 12, at 66 (saying that “Iraqi government continues to insist that the funds it received during the war with Iran (estimated between \$30 and \$50 billion) from the rich Arab states — mainly Kuwait, Saudi Arabia, and the United Arab Emirates — were grants, while these states classify them as debts.”)

⁴⁴ See *id.*, at 2, (saying that Iraq had not been represented on the U.N. Claims Commission and that Iraq enjoyed no sympathy at the time of the resolution). “The Youth Democracy Organi[z]ation” said that “[w]hen the Ba’athist regime invaded Kuwait, we Iraqis were as much victims as the Kuwaitis. Where is the international commission providing compensation for us? What is sauce for the goose should be sauce for the gander.” *Id.* For a post war resolution encouraging development and return to a civil society for Iraq, see generally U.N. SCOR, 4761st mtg., U.N. Doc. S/RES/1483 (2003) (appealing to the international community to aid Iraq after the American invasion in 2003).

⁴⁵ See Executioner’s Bullets *supra* note 36, at 2.

⁴⁶ See Visit, *supra* note 35.

⁴⁷ For a discussion of the Iraqi invasion of Kuwait, see Charles Recknagel, *Iraq: Invasion of Kuwait 12 Years Ago Ignited Continuing Crisis*, (Aug. 1, 2002), available at <http://www.global->

Disconnecting the current political situation of Iraq from Iraq under President Hussein, President Al-Yawar implied the doctrine of odious debts.

The doctrine of odious debts stems from American arguments during peace negotiations after the Spanish-American War⁴⁸ in 1898.⁴⁹ The United States argued that “Cuba should not be responsible for debt that [it] incurred under colonial rule because . . . the debt had been ‘imposed upon the people of Cuba without their consent’[,] it had not ‘been incurred for the benefit of Cuban people[,] . . . and [because] the creditors, from the beginning, took the chances of the investment’”.⁵⁰ Recent scholars argue that “[s]overeign debt is *odious* if (1) its purpose does not benefit the people and (2) it is incurred without the consent of the people.”⁵¹

Some scholars argue that such odious debt “should not be transferable to a successor government”⁵² or at least not be transferable when “creditors were aware in advance that” the debt incurred met the two above conditions.⁵³ Nevertheless, the international community has not accepted the doctrine of odious debts because of fear that countries would claim legitimate debts as odious, which would lead to a decrease in lending.⁵⁴ Proponents of

security.org/wmd/library/news/iraq/2002/020801_082002140807.htm (reprinted with the permission of Radio Free Europe/Radio Liberty).

⁴⁸ For a background on the Spanish-American War, see *The World of 1898: The Spanish-American War*, Library of Congress Website, <http://www.loc.gov/rr/hispanic/1898/intro.html> (last visited February 3, 2005).

⁴⁹ Michael Kremer & Seema Jayachandran, *Odious Debt*, Brookings Institution, (Apr. 2002), at 5, available at <http://www.brookings.edu/comm/policybriefs/pb103.pdf> (last visited Feb. 12, 2005) (hereinafter “*Odious Debt*”).

⁵⁰ *Odious Debt*, *supra* note 49, at 5-6. The authors also tell us that:

[t]he Soviet state repudiated tsarist debt in 1921 using a similar rationale: “no people is obliged to pay debts that are like the chains it has been forced to bear for centuries” [International Law Commission, 1977]. In 1923 Costa Rica claimed loans issued by the Royal Bank of Canada to Frederico Tinoco were odious. The arbitrator in *Great Britain v. Costa Rica*, U.S. Chief Justice Taft, rejected the relevance of Tinoco’s non-democratic status but nullified the debt on the grounds that “the bank knew that this money was to be used by the retiring president, F. Tinoco, for his personal support after he had taken refuge in a foreign country” (*Annual Digest of Public International Law Cases*, 1923).

Id. at 6, n. 3. (citation omitted).

⁵¹ *Odious Debt*, *supra* note 49, at 6. However, “the debts of a regime that loots but rules democratically or of a non-democratic regime that spends in the interests of the people would not be considered odious.” *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* Interestingly,

[t]he doctrine was invoked by Iran in an arbitration case about debts to the U.S. incurred by the former Imperial government in 1948. In 1997 the Iran-U.S. Claims

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reducing Iraq's odious debt are motivated by hopes of robust reconstruction of the country and of establishing political and economic stability.

B. Foreign Contracts

In addition to the massive debt load incurred by the Iraqi government on behalf of its people, Iraq entered into contracts⁵⁵ with

Tribunal ruled that the current government of Iran was liable for the debts, but the Tribunal wrote that in doing so it "does not take any stance in the doctrinal debate on the concept of 'odious debts' in international law."

Odious Debt, *supra* note 49, at 6, note 5.

⁵⁵ Let's take Russian oil contracts as a case study. See Florence C. Fee, *Russia and Iraq: The Question of the Russian Oil Contracts*, *The Middle East Economic Survey*, Apr. 7, 2003, available at www.mafhoum.com/press5/141E15.htm (last visited Jan. 30, 2005) (hereinafter "Fee"). Fee focuses on the main Russian- Iraqi contracts:

In 1997, Lukoil won the rights to develop the prolific West Qurna field in southern Iraq with 7.8bn barrels in proven reserves. Lukoil signed a 23-year contract giving it a 68.5 [percent] equity interest, with fellow Russian oil companies, Zarubezhneft and Mashinoimport, acquiring 3.25 [percent] each. The value of the investments foreseen in this contract is estimated to be approximately \$3.7 [billion]. During the eighties, Lukoil signed a series of construction, engineering and drilling contracts for West Qurna-I, each on a turnkey lump sum basis. The 1997 PSA for West Qurna seemed ideally placed. The company was doing no development work in the field because importing the required equipment and services would have violated UN sanctions against Iraq. But the Iraqi Government was not satisfied and put continued pressure on the oil firm to accelerate its development work. This situation continued until December 2002 when Baghdad, in a surprise move that caught Moscow completely by surprise, unilaterally rescinded Lukoil's West Qurna contract claiming Lukoil had failed to fulfill the terms of the 1997 PSA. Lukoil responded that UN sanctions had prevented it from continuing work at the field. But unofficially many in the industry interpreted the decision as a slap at and warning to the Kremlin. Since UN Resolution 1441 was passed in December 2002, Russia had done little to support the Iraqi regime's position at the UN and had joined the US led effort to demand Iraqi cooperation with the UN weapons inspections. Prior to the Qurna rescission and during the approach to war, the Iraqi Government had publicly touted an agreed multi-year Russian-Iraqi bilateral \$40 [billion] economic cooperation deal, including 67 oil and gas projects. Surprised at the publicity, the Russian Government swiftly proceeded to down play "the agreement" as prematurely "hastening the natural course of events." Lukoil and the Russian Government reacted quickly and vigorously to defend the West Qurna contract. Lukoil stated unequivocally that it had a valid contract, had adhered to its terms, and would fight the withdrawal of the Iraqi Government from its commitments by international arbitration if necessary. The Russian Government dispatched a high-level official diplomatic team, oilmen in tow, to visit Baghdad to try to reverse the Iraqi decision to terminate the West Qurna production sharing agreement. They failed. All these negotiations were taking place on the eve of the current conflict, but it is clear that Lukoil executives feel they have a valid contract, and that they took the appropriate steps to defend it prior to the conflict, a conflict which their government opposes.

Id. Furthermore,

foreign companies.⁵⁶ One source estimates these pending contracts

[t]oday, Lukoil's interest in the West Qurna field remains uncertain although many analysts in the international oil industry, and international law, agree that it seems their contract with the Iraqi Government remains valid. Zarubezhneft was awarded the equally attractive Bin 'Umar field, also in southern Iraq, and with a reported 6 [billion] barrels in proven reserves. This field had originally been set aside for the French oil company, Total, but those contract negotiations were suspended when Total rejected Iraq's demands that it break UN sanctions. It is not clear whether a contract was actually signed between Iraq and Zarubezhneft for Bin 'Umar. But all unofficial information indicates that the Russian company had been selected as the field developer and that a \$2 [billion] contract was in the offing. At the time of the outbreak of the war against the Saddam Hussein regime, it was also conjectured that Zarubezhneft could be in line to replace Lukoil for the West Qurna field, if Baghdad agreed, which it ultimately did not. Nevertheless, Zarubezhneft has consistently been the largest Russian firm lifting Iraqi crude under the UN oil-for-food program which began in December 1996. Since that time, Russian firms have lifted \$7.7 [billion] worth of oil exports, about 40 [percent] of the total liftings under the program, paying the full value of the crude lifted to the accounts controlled by the UN. Other Russian companies beyond Lukoil and Zarubezhneft have also been active in Iraq over the last several years. For example, Stroitransgaz (literally "building transportation gas") struck a deal with Baghdad to explore and develop oil and gas license areas in Block 4 in Iraq's western desert near Jordan. Stroitransgaz planned to carry out a five-year exploration survey before launching further development should it find commercial reserves. Independently, Stroitransgaz was also a designated contractor to build a new pipeline linking Iraq's northern and southern oilfields. In addition, neighboring Block 9 in Iraq had been set aside for another Russian firm, Tatneft, owned and operated by the Russian regional government of Tatarstan, an old, mature oil producing region in the Volga-Urals area of Russia. Tatneft is an experienced oil operator in Russia, but it does not have the international experience of Lukoil or Zarubezhneft. Slavneft, which had been majority state-owned until a recent privatization auction won by private companies Sibneft and TNK, also has a contract for the 2 [billion] barrel Luhais field.

Id.

⁵⁶ See Daniel Kimmage, *Russian Contracts in Iraq: Forgive or Forget?*, CDI Russia Weekly, Jun. 4, 2003, at <http://www.cdi.org/russia/260-11.cfm> (last visited January 30, 2005), saying that [the] West Qurna is one of Iraq's tastier morsels. According to data published in "Vedomosti" on 2 June, the field contains reserves of 8 billion-10 billion barrels of oil. A 1997 production-sharing agreement gave Russia's LUKoil a 68.5 percent stake in the field (with 3.25 percent stakes each for compatriots Mashinimport and Zarubezhneft). The agreement, which ran through 2020, envisaged investments of \$6 billion into the field's development. According to a report in "Kommersant" on 27 May, the contract would have brought the three Russian companies \$70 billion worth of oil. UN sanctions rendered the contract stillborn. Iraq canceled the contract with LUKoil in December, initially alleging that the company had failed to meet its obligations. LUKoil pointed indignantly to UN sanctions that prohibited work on the project. Subsequent reports indicated that Saddam Hussein's regime really intended to punish LUKoil for behind-the-scenes talks with the United States aimed at securing the company a role in a post-Saddam Iraq. Throughout, LUKoil insisted that unilateral termination represented a violation of the contract's terms and promised to pursue the matter through international arbitration. War temporarily quelled the controversy.

The issue resurfaced on 26 May, when Thamir al-Ghadban, Iraq's U.S.-appointed oil minister, told the BBC that LUKoil had "already lost" its contract to develop West Qurna. With their company suddenly in the unenviable position of a suitor spurned

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with foreign companies at a \$57 billion value.⁵⁷ A recent poll reveals that 62 percent of Americans believe these contracts⁵⁸ “should not be honored, because they were made with a government that no longer exists and a new Iraqi government should [not] be bound by the past decisions of Saddam Hussein’s government.”⁵⁹ “Reuters report[s] . . . that Russia negotiated the largest

by both Hussein and his successors, LUKoil representatives went on an verbal offensive. “Kommersant” reported spokesman Dmitrii Dolgov’s official reaction the next day: “We do not consider the remarks by Thamir al-Ghadban the official position of the legitimate government of Iraq. We will conduct negotiations about the future of the oil field only with lawfully elected authorities.” LUKoil Vice President Leonid Fedun went farther, threatening legal action in the event of the contract’s cancellation: “We’ll arrest tankers with Iraqi oil through the arbitration court in Geneva. LUKoil will present claims for \$20 billion in lost profits.” Coming on the heels of Russia’s 22 May vote for a U.S.-backed UN resolution to end sanctions against Iraq, al-Ghadban’s comments prompted a gloomy 27 May editorial in “Vedomosti.” “Russia has lost the diplomatic Iraqi campaign once and for all,” the editors began. They went on to conclude: “The bargaining failed: the resolution passed, and the U.S. position has hardly changed. The fate of the debt, it’s true, [has been] decided within the Paris Club of creditors, but the contracts will be canceled.

Id.

⁵⁷ See Clean Slate, *supra* note 5.

⁵⁸ See Mark N. Katz, *Is Russia Demanding too High a Price for Security Council Support on Iraq?*, A EurasiaNet Commentary, Oct. 23, 2002, available at <http://www.cdi.org/Russia/228-12-pr.cfm> (last visited January 30, 2005) (saying that “[a] 1997 contract signed by Lukoil is said to be worth upwards of \$20 billion, while a 2002 contract signed by Zarubezhneft could be worth \$90 billion.”). The chief Russian arguments for upholding the Saddam-era contracts are as follows:

Firstly, Russian firms, which now control 40 percent of legal Iraqi oil exports under the “oil for food” program, say the lifting of economic sanctions against Baghdad could deprive them of potential earnings. Further, Russian oil firms argue that they won these oil development contracts in Iraq under fair and open circumstances. Thus, the contracts should not be reopened and be subject to potential competitive bids from Western conglomerates. Finally, Moscow pundits have pointed out that Russia’s state budget is dependent on maintaining oil prices. Thus, a change in Iraq’s status quo may undermine Russia’s economic security. If Iraq is allowed to significantly increase oil exports, there is a chance of a global glut that could force energy prices to drop. Such a turn of events could create a budget crisis in Russia that the government can ill afford, Moscow experts say.

Id. Nevertheless the above reasoning is questionable because “Baghdad only awarded Russian oil firms such a large share of energy exports (as well as Saddam’s illegal ones) as an inducement to Moscow to help protect Iraqi interests in the international diplomatic arena.” Moreover,

Russian oil firms didn’t win their contracts to develop Iraqi oil fields based solely on economic factors. Politics was the determining factor; Saddam offered the oil deals as an incentive for Moscow’s diplomatic support. In a truly open bidding environment, Russian oil firms simply do not have the access to capital, technological capability and managerial talent to match Western conglomerates.

Id. Along the same lines, Russian firms may not be up to the challenge if the contracts with the Hussein government were to be recognized. *Id.*

⁵⁹ Fabrizio, McLaughlin Assoc., Inc. Poll, April 15, 2003, available at <http://www.fabmac.com/FMA-2003-04-15-Contracts-With-Saddam.pdf> (last visited Nov. 7, 2004). Only 19% of Americans believed that “the contracts should be honored because they were made in good faith.” *Id.* See generally Susan Sachs, *Hussein’s Regime Skimmed Billions from Aid Programs*,

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number of oil agreements with the pre-war government, although it is unclear how many represent contracts or preliminary protocols.”⁶⁰ The Soviet Union had a very good commercial relationship with Iraq during the 1970s and the 1980s through international trade, even after the imposition of sanctions in 1990.⁶¹ “Russian technicians [also] continued to run power plants, manage factories, and build railroads.”⁶²

A fascinating issue arises in a case of Saddam-ordered Russian taxicabs. Before the American invasion of Iraq, the previous regime ordered 5000 Russian made Volgas to join a deteriorating fleet of taxis in the country. Some have already been delivered after the American invasion. The question remains, however, whether newly elected authorities will honor that contract with Russia, especially in light of the fact that “[t]he contract with [Volga maker] Gaz was seen by analysts as rewarding Russia for opposing UN sanctions on Iraq.”⁶³

N.Y. TIMES, Feb. 29, 2004, (Khidr Abbas, Iraq’s interim minister of health “[cancelled] \$250 million worth of contracts with companies he believe[d] were fronts for the former government or got contracts only because they were from countries friendly to Mr. Hussein”, all part of the “political manipulation of the oil-for-food program); James Boxell, *Shell and BP Win Contracts In Iraq*, FINANCIAL TIMES [London], January 15, 2005, at 2 (saying that while the norm for the biggest oil producing nations is against opening up oil exploration to foreign oil companies, Iraq’s interim government has asked BP and Royal Dutch/ Shell companies “to help conduct technical studies of two of the county’s biggest oil fields.” Nevertheless, “[t]he projects offer no guarantee of future access to Iraq’s vast oil and gas reserves.”) (hereinafter “Boxell”).

⁶⁰ See Michael Lelyveld, *Russia Frets over Old Iraqi Oil Contracts*, AsiaTimesOnline.com, Apr. 18, 2003 http://www.atimes.com/atimes/Middle_East/ED18Ak02.html, (hereinafter “Lelyveld Article”). Furthermore, “[Reuters] counted at least four Russian deals, calling for investments of at least \$7.8 billion and production of over 1.2 million barrels per day. . .[i]n addition, Russia hoped for \$40 billion worth of deals under a long-term cooperation accord.” *Id.* Another point can be raised regarding the United States violating the “sanctity of contracts.” *Id.* “Robert Ebel, director of the energy and national security program at the Center for Strategic and International Studies in Washington, agrees . . . on the issue of contract sanctity[.]” saying “that governments and regimes have often changed in countries where oil companies have long-term contracts, [emphasizing that] [e]ven then, a signed contract is a signed contract and survives a change in governments.” *Id.*

⁶¹ See Leon Aron, *Russia, America, Iraq*, American Enterprise Institute for Public Policy Research, Apr. 30, 2003, available at http://www.aei.org/publications/filter..pubID.17061/pub_detail.asp (last visited Nov. 7, 2003); see also BBC News-UK Edition, *Russian Firms Urged to Leave Iraq*, May 12, 2004, available at http://news.bbc.co.uk/1/hi/world/middle_east/3706627.stm (last visited on January 20, 2005) (saying that even after the war, Russian firms was “involved in reportedly lucrative projects to rebuild at least three key power stations in Iraq.”) (hereinafter “RAI”).

⁶² See *id.*

⁶³ See BBC News- UK Edition, *Russian Taxicabs Headed for Iraq*, Dec. 4, 2003, <http://news.bbc.co.uk/1/hi/business/3290873.stm> (last visited January 24, 2005).

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Indeed, “Russian businesses hold hundreds of millions of dollars’ worth of contracts to explore, drill, and service Iraqi oil fields,⁶⁴ which are among the world’s richest.”⁶⁵ Moreover,

Russian and French oil corporations have each signed draft contracts with Iraq, to come into force only [after] the United Nations sanctions are lifted, for exploration, development and exploitation of the country’s energy resources – which geologists believe may be the world’s second largest after Saudi Arabia. The value of [these] draft contracts, if fully taken up, is estimated to have a potential of more than \$20 billion[.]⁶⁶

according to Walker. In terms of oil related industry, “Iraq nationalized its oil fields in the 1970s, and no foreign companies have been allowed to own oil fields in the country since. Under Saddam Hussein, some concessions were granted but they were later canceled or never came to pass because of United Nations sanctions.”⁶⁷ The oil contracts finalized with Saddam Hussein’s regime

⁶⁴ See RAI, *supra* note 61. “In 1997 Russia’s largest oil firm, LUKoil, negotiated a \$4 billion, twenty-three-year contract to rehabilitate the West Qurna oil field in southern Iraq. In addition, it is almost certain that Russian oil companies facilitated the export of Iraqi oil in circumvention of UN sanctions.” See RAI, *supra* note 61.

⁶⁵ See Boxell, *supra* note 59, at 2 (saying that “Iraq is estimated to hold at least 100 [billion] barrels of known oil reserves, while Saddam Hussein’s oil ministry claimed another 100 [billion] barrels were yet to be discovered. Deutsche Bank has estimated its oil reserves could last 100 years at previous [Organization of Petroleum Exporting Countries] (OPEC) production rates.”). Nevertheless, even if the reserves prove to be accurate, an aura of uncertainty looms over any companies seeking government contracted work in Iraq. See Terry Macalister, *Shell Loses out in a Contest to Develop Iraq’s Kirkuk Oil Field*, THE GUARDIAN, Nov. 25, 2004, at 20.

⁶⁶ See Martin Walker, *Kurd PM: French Russians to Lose Iraq Oil*, United Press International, Mar. 14, 2003, <http://www.upi.com/view.cfm?StoryID=20030314-095811-8865r> (last visited Jan. 30, 2005) (hereinafter “Walker”). When an Iraqi delegation visited Moscow, deputy foreign minister “Fedotov said that big contracts signed by Russian oil companies and the former Iraqi regime had been ‘left suspended’ after the war, and voiced hope that the new Iraqi leadership elected after the transition period will uphold them.” See *Iraqis to Discuss Saddam Era Deals*, WASHINGTON TIMES, Dec. 22, 2003, available at <http://washingtontimes.com/world/20031221-105934-5392r.htm> (last visited Jan. 25, 2005).

⁶⁷ Justin Blum, *Big Oil Companies Train Iraqi Workers Free; Global Companies Offer Services to Establish Goodwill, Win Business*, WASHINGTON POST, Nov. 6, 2004, at E1 (hereinafter “Blum”); see also Oystein Noreng, *Iraq’s Oil Sector-New Opportunities, Management Reports*, The CWC Group, Oct. 15, 2003, summary available at http://www.thecwcgroup.com/publish_man_detail.asp?RID=7 (last visited Jan. 30, 2005)], saying:

For foreign investors in the Iraqi oil industry, risk is essentially political, not geological. With a large number of oil fields found, there is little exploration risk, although there is a reservoir risk. The political risk is caused by uncertainty over what kind of government Iraq will have in the future, what oil policies it will pursue, what relations will be with the international oil industry, and, finally, what fiscal and other operating conditions it will offer.

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were suspended, with the U.N. Oil for Food Program excepted.⁶⁸ As of November 2004, “the experts at the [Iraqi Oil] [M]inistry [were] revising and reassessing previous contracts signed during the former regime’s era,”⁶⁹ yet “the Iraqi government has not established provisions to allow foreign investment in the oil industry[.] [C]ompanies [also] hop[e] such measures [will eventually] be enacted. Oil companies said they expect such decisions will be made after an elected government takes office.”⁷⁰ However, during Prime Minister Iyad Allawi’s recent visit, “Russian officials [pushed] for the resumption of oil contracts cancelled by Iraq before war broke out in March 2003.”⁷¹ Nevertheless, popular

⁶⁸ *Washington Suspends Russian Oil Contracts with Saddam’s Regime*, ArabicNews.com, July 7, 2003, <http://www.arabicnews.com/ansub/Daily/Day/030716/2003071617.html> (last visited January 30, 2005). We are told that

[c]oncerning the oil sector, the American ambassador said “our position is clear, the Iraqi oil and oil resources are for the Iraqi people and the decision to develop them and production in future will be taken by the future Iraqi government.” He added “therefore we have suspended the contracts signed by Russian companies with the former Iraqi regime, in another word, the contracts are not executed, nor violated.

Id.

⁶⁹ *Iraqi Oil Minister Denies Contracts Signed with Russian, US Firms*, BBC Worldwide Monitoring, Nov. 4, 2004 [originally published in *Al-Ta’akhi*, Baghdad in Arabic, Nov. 4, 2004]. Furthermore, Iraqi Foreign Minister Hoshyar Zebari revealed that “Russia and Iraq [were] scrutin[izing] commercial deals signed while deposed dictator Saddam Hussein was in power” with the ultimate end of “the task of the [set up] commission was to establish the legality of Saddam-era contracts.” See Posting, FreeRepublic.com, July 26, 2004, www.freerepublic.com/focus/f-news/1178756/posts (last visited Jan. 30, 2005).

⁷⁰ See Blum, *supra* note 67. Until now, the extent of Iraqi government contracts with outside oil companies involves [oil] “reservoir evaluations” and technical consultancies. See also Peter Klinger, *BP and Shell Establish New Toehold in Iraqi Oil Industry*, TIMES NEWSPAPERS LIMITED, Jan. 15, 2005, at 61.

⁷¹ See BBC News UK Edition, *Allawi Begins First Russian Visit*, (Dec. 6, 2004), at <http://news.bbc.co.uk/1/hi/world/europe/4071563.stm> (last visited January 29, 2005) (saying that while “Russia opposed the Iraq war . . . Moscow and Baghdad say they are intent on rebuilding their relationship and putting past bitterness behind them.”). The UN’s role in Iraq’s management turned out to be a small one, and the Oil for Food Program was ripe with high level corruption. Nevertheless, after the UN’s Oil for Food Program was extended after the invasion, “Russians [appeared to be] happy, since the resolution appear[ed] to make it easier to ensure that several lucrative oil contracts - not to mention the billions Iraq owes Russia in bilateral debt - are honoured [sic] by giving the UN a wider role than previously expected.” See also BBC News UK Edition, *Green Light for Iraqi Oil*, May 23, 2003, <http://news.bbc.co.uk/1/hi/business/2933756.stm> (last visited Jan. 25, 2005). Moreover, “[i]nternational energy experts [also] urged the United States to honor Russian oil contracts signed with the former government of Iraq to keep confidence in the stability of investment.” The actual “Russian oil companies have reacted to the Iraq war with statements ranging from outrage to pessimism at their prospects for realizing contracts signed with the Saddam Hussein regime. Many believe that the coalition partners will invalidate the oilfield contracts in favor of their own national firms.” See Lelyveld, *supra* note 35. Also,

Leonid Fedoun, vice president of Russian giant LUKoil [threatened a lawsuit regarding] Iraq’s huge West Qurna oil field for at least \$20 billion. In 1997, LUKoil signed

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Iraqi feelings militate against honoring such contracts.⁷² For example, Barhim Salih, a leading Iraqi Kurdish official, said that French and Russian oil and gas contracts signed with the Saddam Hussein regime in Iraq “will not be honored[]” because they were “signed against the interests of the Iraqi people.”⁷³

Since commercial contracts signed by the old Iraqi regime are producing so much friction, and cumbersome and costly law suits are likely to follow, these disputes ought to be handled by a fair arbitration tribunal set up for the purpose of giving the new Iraq a clean slate, or something as close to it as possible. Indeed, according to the proponents of reduction of claims on Iraq, the argument that Iraq deserves a clean slate is a good one.⁷⁴

a 23-year contract for the field as the head of a consortium that included Zarubezhneft. The project could produce 600,000 barrels of oil per day, Reuters reported.

Id. Fedoun further added that

‘[n]obody can develop this field without us in the next eight years. If somebody decides to squeeze LUKoil out, we are going to appeal in the Geneva arbitration court [the International Commercial and Industrial Arbitration Court], which will immediately arrest this field.’ The case could last up to eight years. Fedoun also threatened to have tankers of Iraqi crude halted to keep from losing the \$3.7 billion investment in West Qurna.

Id. See also Fee, *supra* note 55 (after the invasion, “Russian Foreign Minister Igor Ivanov made clear in late March 2003 that the contracts between Russian oil companies and the Government of Iraq were legally binding agreements and should remain in full force despite any change of administration in the country.”). Russia may have another reason for wanting to preserve its companies’ contracts with Iraq: Russian state-owned companies. Fee, *supra* note 55. Additionally,

Zarubezhneft’s role in Iraq relates to the approximate \$8 [billion] Soviet-era debt Iraq owes Russia. Of the number of developing countries which still owe Russia debt from the Soviet time, Moscow is most interested in those debtor countries able to pay off. In this respect Iraq was always the number one prospect given its proven oil reserves wealth. Zarubezhneft’s role in Iraq was to establish oil projects which would be able to produce monetizeable assets in the country and thus utilize proceeds of crude sales to pay off that Iraqi debt owed to Russia. And should Zarubezhneft ever sell off its Iraqi assets, the proceeds would pass, via Zarubezhneft, into the Russian Central Bank and add to the country’s hard currency reserves.

Fee, *supra* note 55.

⁷² Jubilee Iraq, *supra* note 5.

⁷³ Walker, *supra* note 66.

⁷⁴ See generally Jubilee Iraq, *supra* note 5.

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III. TODAY'S IRAQ SHOULD NOT HAVE
 TO PAY HUSSEIN'S DEBTS

*Background of a Shattered Economy and of
 Relatively Recent Debt*

When one considers the past and present circumstances relating to Iraq's economy and debt, one begins to understand why the Paris Club offered such a favorable debt restructuring deal to Iraq.⁷⁵ The Iraqi public debt went from negligible in "[the year] 1975 to around [120 billion dollars] in 1997."⁷⁶ Because "[r]ecent studies reveal that Iraq's real GDP has plummeted by 75 [percent] since the 1991 Gulf War and [in the year 2000 was] estimated to resemble its GDP of the forties, prior to the oil boom and the modernization of the country",⁷⁷ reducing public debt is imperative.

Analyzing what caused the amassing of this debt points to Saddam Hussein's culpability. During the 1980s and the time of Iraq's war with Iran, "40-75 [percent] of Iraq's [gross domestic product]" consisted of military expenditures.⁷⁸ Hussein's war spending "was financed through a combination of massive international borrowing, the abandonment of development projects, and the curtailment of civilian imports and social services".⁷⁹ The amount of exports declined and imports hit record highs while foreign reserves were reduced.⁸⁰ The existence of "[c]orruption and mismanagement of resources on a grand scale" under Hussein re-

⁷⁵ Press Release, *supra* note 18.

⁷⁶ Thunderbird Review, *supra* note 12, at 72.

⁷⁷ Thunderbird Review, *supra* note 12, at 66. Importantly, Iraq used to enjoy the status of a "higher middle income country" during the 1970s until the 1980s' war with Iran and the 1990 invasion of Kuwait, followed by the mainly American expulsion from the latter and the restrictive sanctions mechanism during the 1990s collectively reduced Iraq's per capita income "to the ranks of 'Forth World' states like Rwanda, Haiti, Zaire, and Somalia." See Thunderbird Review, *supra* note 12, at 72. Furthermore, the UNICEF report tells us that:

The contributing factor to the very high rate of malnutrition and mortality [of children] throughout the 1990s was the breakdown of key Iraqi infrastructure such as power grids and water distribution networks as a result of two major wars and over a decade of comprehensive international sanctions. In the south/Cent[er] of Iraq, the rates of malnutrition steadily increased between 1991 and 1996, before the onset of the Oil for Food Programme [sic] (OFFP). Chronic malnutrition rose from 18.7 to 32 per cent; and acute malnutrition increased from 3 to 11 percent. [sic]

See UNICEF Report, *supra* note 15, at 2.

⁷⁸ See Thunderbird Review, *supra* note 12, at 71 (saying that "the Iraqi government didn't hesitate to spend double or even triple the amount of the country's oil revenue.").

⁷⁹ Thunderbird Review, *supra* note 12, at 71.

⁸⁰ Thunderbird Review, *supra* note 12, at 71-72.

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gime produced edifices with “no real economic value”.⁸¹ As a result of highly imprudent macroeconomic policies, “a massive exodus of capital as well as human resources” took place during the 1980s and 1990s.⁸² Finally, the Hussein regime did not have a competent “debt-management strategy” and as a result, “an acute shortage of well-trained negotiators and [debt management] specialists” occurred.⁸³ Furthermore, “the fall in oil prices along with the war-caused decline in oil exports played a major role in causing a [\$]19.4 billion decline in the purchasing power of Iraqi exports between 1980 and 1986.”⁸⁴ Moreover, Iraq’s public debt was made worse by the willingness of Western and Arab creditors to lend a combined \$90 billion to Iraq before it invaded Kuwait.⁸⁵ Finally, the imposition of United Nations Security Council’s sanctions on Iraq “greatly accelerated the collapse of Iraq’s economy[.]”⁸⁶ leaving a shadow of a once-prosperous Middle Eastern nation.

In the light of a broken economy, yet under the auspice of the rule of law, Iraq ought to set up an arbitration tribunal to resolve fairly the issues of its obligations to the outsiders. Indeed, arbitration tribunals, like the proposed one, have worked well in the past.

⁸¹ Thunderbird Review, *supra* note 12, at 71. We are told that:

[o]ver 78 luxury palaces around Iraq have been built for the sole use of Saddam, his family, or close supporters (one of them is about five times the size of the White House and one and a half times the size of Versailles). Monuments have been erected. Lavish guesthouses with high vacancy rates and huge government centers have been developed, and the biggest and most costly mosque in the world was also constructed.

Id.

⁸² See Thunderbird Review, *supra* note 12, at 72 (saying that as result of these imprudent macroeconomic policies, Iraq suffered from “a chronically large budget deficit, overvalued exchange rates, high . . . taxes, skyrocketing inflation rates, [and] insufficient domestic savings.”).

⁸³ *Id.*

⁸⁴ See Thunderbird Review, *supra* note 12, at 73 (attributing the drop in Iraqi exports’ purchasing power to a drop in oil price from the peak at “U.S. \$34 in 1982 . . . to as low as U.S. \$7 per barrel in 1986” and to a “reduction in Iraq’s oil export capacity” due to certain port closures).

⁸⁵ *Id.* Western nations such as the United States, Britain, France, Italy and the Soviet Union extended around \$40 billion dollars of credit to Hussein during the Iraq- Iran war. Arab states such as “Saudi Arabia, Kuwait, the United Arab Emirates, and Qatar” poured into Iraq around \$50 billion dollars. *Id.*

⁸⁶ *Id.* “Iraq lost approximately \$130 billion worth of oil revenues” as a result. *Id.* The trade embargo converted Iraq’s debt problem from “short term liquidity to absolute unsustainability” while Hussein’s grip on power remained unaffected. *Id.* Presumably, some of the oil revenues would be used to pay down the debt. *Id.*

IV. PRIOR HISTORY DICTATES THAT ARBITRATION TRIBUNALS
EFFECTIVELY RESOLVE SIMILAR PROBLEMS

A. Iran – United States Claims Tribunal of 1981

The 1979 Islamic Revolution⁸⁷ in Iran resulted in “the most significant arbitral body in history.”⁸⁸ Iran seized the American embassy and took hostages⁸⁹ therefrom;⁹⁰ the 1981 Algiers Accords⁹¹ secured their release and gave rise to the Iran- United States Claims Tribunal.⁹²

The Iranian Islamic revolution shattered commercial relations between Iran and the United States.⁹³ Since Iran expropriated American investments and sought “to withdraw its assets from the United States and to repudiate its financial obligations to the U.S. nationals, the U.S. government froze [\$12 billion of] Iranian assets in the United States and abroad.”⁹⁴ Subsequently, due to U.S. nationals litigating their claims against Iran, much of the frozen assets were attached by courts within one year.⁹⁵

⁸⁷ For a background on the Islamic Revolution in Iran, see generally AFKHAM, GHOLAM R. *THE IRANIAN REVOLUTION: THANATOS ON A NATIONAL SCALE* (1985); see also AMERICAN HOSTAGES IN IRAN (Warren Christopher, ed., 1985); *infra* note 90.

⁸⁸ See *THE IRAN- UNITED STATES CLAIMS TRIBUNAL, 1981- 1983*, at preface, (Richard Lillich, Ed., 1984) (hereinafter “IRAN-US CLAIMS TRIBUNAL”).

⁸⁹ Iran detained American diplomatic and consular personnel. IRAN-US CLAIMS TRIBUNAL *supra* note 85, at 2; see also MATTI PELLONPAA & DAVID CARON, *THE UNCITRAL ARBITRATION RULES AS INTERPRETED AND APPLIED* 3 (1994) (hereinafter “PELLONPAA”) (citing H. HOLTSMANN & J. NEUHAUS, *A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY* (1989) (explaining that the seizure of the United States Embassy in Tehran caused “deprivation of the liberties of the 52 Americans present.”)).

⁹⁰ See, e.g., S. MOODY, *444 DAYS: THE AMERICAN HOSTAGE STORY* (1981); P. SALINGER, *AMERICA HELD HOSTAGE* (1981).

⁹¹ 81 DEP’T STATE BULL. 1 (1981), *reprinted in* 20 I.L. M. 223 (1981).

⁹² IRAN-US CLAIMS TRIBUNAL, *supra* note 85, at 1.

⁹³ Bilateral trade between the U.S. and Iran was 5.7 billion dollars in 1977, before the Revolution. In contrast, post Revolution trade declined to \$501 million in 1980. IRAN-US CLAIMS TRIBUNAL, *supra* note 88, at 2 (citing Bureau of Census, Dep’t of Commerce, *Highlights of U.S. Imports and Exports* 37, 87 (1981)).

⁹⁴ IRAN-US CLAIMS TRIBUNAL, *supra* note 88, at 2 (citing Exec. Order No. 12,170, 44 Fed. Reg. 65,279 (1979)).

⁹⁵ IRAN-US CLAIMS TRIBUNAL, *supra* note 88, at 2-3 (citing Note, *Prejudgment Attachment of Frozen Iranian Assets*, 69 CALIF. L. REV. 837 (1981) (addressing the issue of the Presidential order to freeze the status quo of any Iranian assets in the United States and its territories)); see also Note, *Prejudgment Attachment of Iranian Assets in the United States: Waiving Sovereign Immunity*, 13 INT’L L. & POL. 675 (1981); PELLONPAA, *supra* note 89, at 3 (saying that over “2,000 law suits were brought against Iran before U.S. courts”).

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The frozen assets played a role in the release of the American hostages.⁹⁶ Iran sought the return of its assets and the American claimants sought adequate compensation.⁹⁷ Iran agreed to “establish[] an international mechanism permitting prompt and effective adjudication of claims and assuring payment of them.”⁹⁸ Algerian government’s first declaration, the General Declaration,⁹⁹ part of the Algiers Accords,¹⁰⁰ for example, traded successive release of American hostages for nullification of attachments on, and the return of property to Iran.¹⁰¹ “The second declaration, the Claims

⁹⁶ IRAN-US CLAIMS TRIBUNAL, *supra* note 88, at 3. (explaining that due to the extensive attachment of these frozen assets, lifting of the freeze would not release most of them back to Iran).

⁹⁷ IRAN-US CLAIMS TRIBUNAL, *supra* note 88, at 3.

⁹⁸ IRAN-US CLAIMS TRIBUNAL, *supra* note 88, at 3-4. (citing Cutler, *Negotiating the Iranian Settlement*, 67 A.B.A.J. 996 (1981)). The authors point out, however, that other options existed. They point out that:

[T]he United States and Iran could have agreed to defer both the claims and assets questions until after the hostages had been released, thus leaving the freeze on Iran’s assets in place until . . . [claims were resolved; or] the United States and Iran could have settled the claims of U.S. nationals by a lump-sum payment that would then have been distributed by the U.S. Foreign Claims Settlement Commission on the basis of its adjudication of claims. This second option would have been consistent with the U.S. practice since World War II.

IRAN-US CLAIMS TRIBUNAL, *supra* note 88, at 3 (citing R. LILICH & B. WESTON, *INTERNATIONAL CLAIMS: THEIR SETTLEMENT BY LUMP SUM AGREEMENT* 30-31 (1975)).

⁹⁹ Declaration of the Government of the Democratic and Popular Republic of Algeria, *reprinted in* 1 Iran-U.S. C.T.R. 3 (1981) (hereinafter “The General Declaration”) (saying that “[i]t is the purpose of [the United States and Iran], within the framework of and pursuant to the provisions of the two Declarations of the Government of the Democratic and Popular Republic of Algeria, to terminate all litigation as between the Government of each party and the nationals of the other, and to bring about the settlement and termination of all such claims through binding arbitration”).

¹⁰⁰ Algeria played a central intermediary role in the process “leading to the agreements.” See PELLONPAA, *supra* note 89, at 4.

¹⁰¹ IRAN-US CLAIMS TRIBUNAL, *supra* note 88, at 4. Technical agreements covered in the Undertakings of the Government of the United States of America and the Government of the Democratic and Popular Republic of Algeria, *reprinted in* 20 I.L.M. 229 (1981); the Escrow Agreement, *reprinted in* 20 I.L.M. 234 (1981), and others. IRAN-US CLAIMS TRIBUNAL, *supra* note 88, at 4, n. 12.

Settlement Agreement,¹⁰² established . . . the Iran-United States Claims Tribunal.”¹⁰³

i. Structure, Jurisdiction and the Rules of the Iran-U.S. Tribunal

This new international body was to be “composed of nine members (three appointed by the United States, three by Iran, and three third country arbitrators chosen by the six party-appointed arbitrators) or such multiple of three as the two governments might agree.”¹⁰⁴ United States and Iran agreed to bear equally the expenses of the Tribunal.¹⁰⁵ The Claims Tribunal’s jurisdiction covered only the nationals of the two countries.¹⁰⁶

Per the Claims Settlement Agreement, the parties-appointed arbitrators were charged with selecting the remaining three third country arbitrators, “locat[ing] premises, . . . hiri[ng] essential staff, find[ing] competent interpreters and translators, adopt[ing] interim rules of organization and procedure, agree[ing] on a budget, and decid[ing] a series of threshold issues of jurisdiction and interpretation.”¹⁰⁷ The arbitrators decided on a three-Chamber structure for the Tribunal.¹⁰⁸ The Chambers would adjudicate both private and official claims, but the full Tribunal would meet to interpret the Algiers Accords “and those legal issues that could best be resolved by all arbitrators together.”¹⁰⁹

The tribunal’s enforcement mechanism was codified in article IV of the Claims Settlement Declaration and is considered to be

¹⁰² The Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, *reprinted in* 1 Iran-U.S. C.T.R. 9 (1981) (hereinafter “The Claims Settlement Agreement”). The document established the Iran-U.S. Claims Tribunal to:

[d]ecid[e] claims of nationals of the United States against Iran and claims of nationals of Iran against the United States, and any counterclaim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of that national’s claim, if such claims and counterclaims are outstanding on the date of this Agreement, whether or not filed with any court, and arise out of debts, contracts (including transactions which are the subject of letters of credit or bank guarantees), expropriations or other measures affecting property rights, [and] claims of the United States and Iran against each other arising out of contractual arrangements between them for the purchase and sale of goods and services.

IRAN-US CLAIMS TRIBUNAL, *supra* note 88, at 4, note 12.

¹⁰³ The Claims Settlement Agreement, *supra* note 102.

¹⁰⁴ The Claims Settlement Agreement, *supra* note 102, at art. III(1).

¹⁰⁵ The Claims Settlement Agreement, *supra* note 102, at art. VI, §3.

¹⁰⁶ The Claims Settlement Agreement, *supra* note 102, at art. VII.

¹⁰⁷ IRAN-US CLAIMS TRIBUNAL, *supra* note 88, at 7.

¹⁰⁸ IRAN-US CLAIMS TRIBUNAL, *supra* note 88, at 7.

¹⁰⁹ IRAN-US CLAIMS TRIBUNAL, *supra* note 88, at 15.

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“the most interesting and innovative feature.”¹¹⁰ It established a “Security Account out of which awards are paid to successful American parties before the Tribunal.”¹¹¹

Furthermore, although in a modified form, “[t]he Tribunal [was] the first body to use the UNCITRAL¹¹² Arbitration Rules.”¹¹³ The Claim Tribunal’s practice “represents the most important body of practice concerning . . . the [r]ules because of the Tribunal’s large docket and most importantly because the practice of the Tribunal [was] public.”¹¹⁴ Consequently, the UNCITRAL Rules have been adopted as a procedural framework by many international and domestic organizations.¹¹⁵

The UNCITRAL Rules really make the tribunal and require highlighting. For example, UNCITRAL Rule 15 gives the parties before the Tribunal the right to be “treated with equality. . . and each party is given a full opportunity to present[] his case[.]” Additionally, including the right to request that the Tribunal “hold hearings for the presentation of evidence by witnesses, including expert

¹¹⁰ PELLONPAA, *supra* note 89, at 6.

¹¹¹ PELLONPAA, *supra* note 89, at 6. “The original amount of the account was U.S. \$1 billion, but Iran was obligated to replenish it so as to keep the balance at the minimum of U.S. \$500 million ‘until the president [of the tribunal] has certified that all arbitral awards against Iran have been satisfied in accordance with the Claims Settlement Agreement, at which point any amount remaining in the Security Account shall be transferred to Iran.’” *Id.*

¹¹² United Nations Commission on International Trade Law (UNCITRAL) issued this model law that applied to commercial arbitration. *See generally* <http://www.uncitral.org/en-index.htm> (last visited Feb. 3, 2005) (hereinafter “UNCITRAL Rules”); *see also* PELLONPAA, *supra* note 89, at 1, 7. The Claims Settlement Agreement, *supra* note 102, at art. III. The article reads:

Members of the Tribunal shall be appointed and the Tribunal shall conduct its business in accordance with the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) except to the extent modified by the Parties or by the Tribunal to ensure that this Agreement can be carried out. The UNCITRAL rules for appointing members of three-member tribunal shall apply *mutatis mutandis* to the appointment of the Tribunal.

Id.

¹¹³ IRAN-US CLAIMS TRIBUNAL, *supra* note 88, at 7 (saying that the rules “were designed to apply primarily to single claim, private ad hoc arbitrations”). For a copy of these rules, *see* UNCITRAL Rules, *supra* note 109. Clearly, then, private parties are not entitled to change the procedural rules themselves. IRAN-US CLAIMS TRIBUNAL, *supra* note 88, at 7.

¹¹⁴ PELLONPAA, *supra* note 89, at 7.

¹¹⁵ *See* PELLONPAA, *supra* note 89, at 10, notes 27-28 (listing some of the organizations that have accepted the rules, including: Spanish Court of Arbitration, Australian Commercial Disputes Centre Limited, Court of Arbitration at the Polish Chamber of Commerce, Stockholm Chamber of Commerce, and International Chamber of Commerce). Western organizations are not alone in their acceptance of UNCITRAL Rules. Indeed, the Tunisian Arbitration Code of April 1993 “was largely inspired by the UNCITRAL Rules.” *See also* PCA International Law Seminar, Anthony Connerty, *Strengthening Relations with the Arab World through Dispute Resolution*, 99, 100 (The International Bureau of the Permanent Court of Arbitration, ed., Oct. 12, 2001) (hereinafter “PCA”).

witnesses, or for oral argument.”¹¹⁶ More importantly, article 15 section 1 says that the “arbitral tribunal may conduct the arbitration in such manner as it considers appropriate”,¹¹⁷ therefore providing the flexibility often attributed to arbitration over Court proceedings.¹¹⁸ Nevertheless, the tribunal is limited by the UNCITRAL Rules: by the article 15 principle of party equality; by the article 1 section 1 ability of the parties to modify the rules in writing; and by the “mandatory norms of ‘the law applicable to the arbitration.’”¹¹⁹

The place of arbitration is governed by article 16 of the UNCITRAL Rules and provides that “[u]nless the parties have agreed upon the place where the arbitration is to be held, such place shall be determined by the arbitral tribunal, having regard to the circumstances of the arbitration.”¹²⁰ Strong psychological considerations, however, dictate that the arbitration should be held in a neutral third country.¹²¹ The location of arbitration should also be influenced by the applicable local law, if any; some localities may deny certain parties the ability to arbitrate or may not hold valid the resulting award.¹²² While a number of Iran-U.S Claims Tribunal’s awards were not immediately recoverable, enforcement “of awards rendered in international commercial arbitration [now] takes place by virtue of international agreements.”¹²³ Having highlighted some of the key features of the Iran-U.S. Claims Tribunal, how did the tribunal perform?

¹¹⁶ UNCITRAL Rules, *supra* note 112, at art. 15 §1-§3 (“In the absence of [a hearing] request, the tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials.”). UNCITRAL Rules, *supra* note 112, at §2. Section 3 of art. 15 further demands that all information and documents be shared by the parties. UNCITRAL Rules, *supra* note 112, at art. 15, §3.

¹¹⁷ UNCITRAL Rules, *supra* note 112, at §15(1).

¹¹⁸ See PELLONPAA, *supra* note 89, at 21.

¹¹⁹ See PELLONPAA, *supra* note 89, at 22-26.

¹²⁰ See UNCITRAL Rules, *supra* note 112, at art. 16 §1; PELLONPAA, *supra* note 86, at 52. We are also told that “[t]he arbitral tribunal may determine the locale of the arbitration within the country agreed upon the countries.” Article 16 section 3 tells us that “the tribunal may meet at any place it deems appropriate for inspection of goods, other property or documents.” UNCITRAL Rules, *supra* note 112, at art. 16, §3.

¹²¹ See PELLONPAA, *supra* note 89, at 54.

¹²² See PELLONPAA, *supra* note 89, at 58-59. Local rules may also “exclude certain categories of arbitrators.” See PELLONPAA, *supra* note 89, at 58. For example, Saudi Arabian law tells us that “an ‘arbitrator shall be a Saudi national or Muslim expatriate.’” PELLONPAA, *supra* note 89, at 59, note 139.

¹²³ See PELLONPAA, *supra* note 89, at 65-66. We are told that “the New York Convention provides the most effective mechanism for enforcement of international arbitral awards,” however, the parties should pick the place of arbitration where the Convention applies. See PELLONPAA, *supra* note 89, at 66.

ii. Positive Results

Most commentators consider the Iran- U.S. Claims Tribunal as widely important and successful,¹²⁴ despite both the United States and Iran having become critics of the Tribunal at one time or another.¹²⁵ The former's claimants feared a lowered standard of due process, and the latter requested that one third-country arbitrator be removed during a high profile case.¹²⁶ The positive results extend to the Tribunal's application of the UNCITRAL Rules. Indeed, the Tribunal's practice is used to suggest that the Arbitration Rules "provide fair and effective procedures for peaceful resolution of disputes between States concerning the interpretation, application and performance of treaties and other agreements, although they were originally designed for commercial arbitration."¹²⁷ In fact, the rules have also been adopted by "the United Nations Compensation Commission established with a view to deciding claims against Iraq arising out of the Gulf War."¹²⁸

Nevertheless, some questions remain unanswered. First is the applicability and relation of national law to the Tribunal's proceedings.¹²⁹ The relevant UNCITRAL article 33 provides that the "tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable."¹³⁰ The Claims Settlement Declaration tells us that "[t]he tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the tribunal determines to be applicable, taking into account relevant usages of trade, contract provisions and changed circumstances."¹³¹ The rule, therefore, is that the parties to arbitration have the autonomy to select the substantive law to be applied to their dispute.¹³² However, in practice, choice of law provisions in many

¹²⁴ See WESTBERG, *INTERNATIONAL TRANSACTIONS AND CLAIMS INVOLVING GOVERNMENT PARTIES: CASE LAW OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL*, xv (1991).

¹²⁵ *Id.*

¹²⁶ *Id.* In 1984, two Iranian arbitrators manhandled a European arbitrator in the stairwell of the Tribunal building, possibly out of frustration. *Id.*

¹²⁷ See PELLONPAA, *supra* note 89, at 8.

¹²⁸ See PELLONPAA, *supra* note 89, at 9; *see also supra* note 9.

¹²⁹ See PELLONPAA, *supra* note 89, at 28-34.

¹³⁰ UNCITRAL Rules, *supra* note 112, at art. 33, §1.

¹³¹ The Claims Settlement Agreement, *supra* note 102, at art. 5.

¹³² See PELLONPAA, *supra* note 89, at 79-80.

contracts often designate the applicable law if a dispute were to arise.¹³³

The second question concerns “whether the tribunal has inherent power to reopen its proceedings in exceptional circumstances.”¹³⁴ While these questions remain unresolved, the Tribunal’s flexibility per article 15, section 1 ensures that proceedings are not hampered.¹³⁵

While the UNCITRAL Arbitration Rules seem to have made the Iran-U.S. dive into arbitration a positive experience, is there anything intrinsic about arbitration that makes it an attractive solution? Let us examine some other cases where arbitration has been used.

B. Other International Arbitration Claims Tribunal Experience

A body of experience exists arising out of other arbitration tribunals created to resolve multinational claims. Jay Treaty Commissions were the first instance of American international arbitration experience and “are generally viewed as beginning the modern era of international arbitration.”¹³⁶ The mixed commission, based on the Treaty, sought to settle any debts to Britain and to resolve issues pertaining to confiscated British property in the United States.¹³⁷ Still, British creditors continued to experience trouble in the state courts, even after the federal Constitution was adopted.¹³⁸

¹³³ See PELLONPAA, *supra* note 89, at 87.

¹³⁴ See PELLONPAA, *supra* note 89, at 34.

¹³⁵ See PELLONPAA, *supra* note 89, at 35.

¹³⁶ See Remarks of Barton Legum presented in a Panel Discussion on “Investment Disputes and NAFTA Chapter Eleven” at the 95th Annual Meeting of the American Society of International Law, April 4–7, 2001, <http://www.worldbank.org/icsid/news/n-18-1-6.htm> (last visited Nov. 27, 2004).

¹³⁷ See *id.* The mixed commissions traced their existence to the Jay Treaty. Furthermore, [t]he Jay Treaty provisions that we are concerned with here focused on a bone of contention between the US and Britain that was first addressed by the Treaty of Peace of 1783 with Britain. The fourth article of that treaty “agreed that creditors on either side, shall meet with no lawful impediment to the recovery of the full value . . . of all bona fide debts heretofore contracted.” The fifth article agreed that “the Congress shall earnestly recommend it to the legislatures of the respective states, to provide for the restitution of all estates, rights and properties, which have been confiscated, belonging to real British subjects . . .” The sixth article provided that “there shall be no future confiscations made, nor any prosecutions commenced against any . . . persons for or by reason of the part he or they may have taken in the . . . war” of Independence.

Id.

¹³⁸ See *id.*

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“The sixth article of the treaty John Jay negotiated in 1794 acknowledged the difficulty that British creditors had experienced obtaining justice in state courts within the United States.”¹³⁹ Indeed, “[i]t obligated the U.S. to pay full compensation to the extent that the state courts had failed to satisfy the demands of justice.”¹⁴⁰ Unfortunately, in July of 1799, severe personality clashes led the American commissioners to withdraw from the commission.¹⁴¹ “The issue of compensation for the British creditors was finally resolved by a lump-sum settlement agreed to in a Convention of 1802 between Britain and the U.S.”¹⁴²

Alabama Claims Arbitration was named after a Confederate ship believed to have sunk over sixty Union ships during the American Civil War.¹⁴³ The Americans alleged that the British outfitted the defeated Confederate vessels in contravention to international law.¹⁴⁴ Alabama Claims Arbitration represents the British assent to arbitration to settle resulting American claims.¹⁴⁵ The 1871 Treaty of Washington codified certain international law principles and created a five person arbitration tribunal to “provide for the speedy settlement of [American] claims.”¹⁴⁶ The tribunal awarded the United States \$15,500,000 in gold.¹⁴⁷

¹³⁹ *See id.*

¹⁴⁰ *See id.* Indeed, “[i]n March 1798, Congress appropriated \$300,000 to fund the payment of awards by the arbitral commission. The commission began its work early in 1798.” *Id.* To claim compensation, “individual British creditors commenced the arbitral proceedings by submitting a ‘claim’; the parties supplemented their initial pleadings with memoranda called ‘memorials’; the commission held hearings at which testimony and argument were presented; and the commission rendered reasoned decisions.” *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* For further discussion of the Jay Treaty, see The Papers of John Jay, available at <http://www.columbia.edu/cu/lweb/resources/archives/jay/> (last visited Nov. 25, 2004).

¹⁴³ WILLIAM R. SLOMANSON, *FUNDAMENTAL PERSPECTIVE ON INTERNATIONAL LAW* 327 (1990).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ Treaty of Washington (Treaty Between Great Britain and the United States for Amicable Setting of All Causes of Difference Between the Two Countries) 1871, at Art. 1. Article 1 reads in part:

Tribunal of Arbitration [is] to be composed of 5 Arbitrators to be appointed in the following manner, that is to say: one shall be named by Her Britannic Majesty; one shall be named by the President of the United States; His Majesty the King of Italy shall be requested to name one; the President of the Swiss Confederation shall be requested to name one; and His Majesty the Emperor of Brazil shall be requested to name one.

Id.

¹⁴⁷ HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY, Washington, Government Printing Office, 653, 656-57 (John Bassett Moore, ed., 1898).

V. THE HUSSEIN IRAQ CLAIMS ARBITRATION TRIBUNAL

What worked well for the Americans can certainly be fitted to work well for a resilient nation like Iraq. Perhaps that is the reason why a group of academics has recently called for the creation of an arbitration tribunal to resolve, in a fair manner, the Iraqi debt obligations undertaken during Hussein's rule, allowing Iraq to compete on an equal footing with other nations.¹⁴⁸

A. Structure, Jurisdiction and the Rules of the Hussein Iraq Claims Tribunal

First, to ensure a lack of bias in the proceedings, the Tribunal must be set up in a neutral place.¹⁴⁹ The arbitrators would be appointed by a commission representing both Iraqi and foreign interests. While Iraqi arbitrators would be included, it is crucial that the biggest creditor nations be represented, as well. The same logic applies to foreign contractual claimants, thus guaranteeing a place for a Russian arbitrator on the Tribunal.¹⁵⁰ The arbitrators would then be entrusted to set up shop, including locating premises, getting a staff together, securing translation services, adopting some type of interim organization model, deciding on a budget and other preliminary jurisdiction and interpretation issues faced by the Iran-US Claims Tribunal.¹⁵¹

While the Iran-U.S. Claims Tribunal would serve as a model for the proposed Tribunal, it could not be limited to the United States and Iraqi nationals, like article VII of the Claims Settlement Agreement limited the jurisdiction of the Iran-U.S. Claims Tribunal in 1981.¹⁵² The Iraq Claims Tribunal's purpose is multilateral in nature; it would attempt to reduce a latent burden of the previous regime's abuses on the Iraqi people while furnishing a process for resolving obligations to produce fairness to creditors. More importantly, parties claiming against Iraq are diffuse, although some nations such as Russia have a larger stake in any outcome.¹⁵³

¹⁴⁸ See generally Jubilee Iraq, *supra* note 5.

¹⁴⁹ PELLONPAA, *supra* note 89, at 54.

¹⁵⁰ See *supra* note 55 (discussing Russian oil contracts).

¹⁵¹ PELLONPAA, *supra* note 89, at 7.

¹⁵² The Claims Settlement Agreement, *supra* note 102, art. VII.

¹⁵³ See *supra* note 55 (discussing Russian oil contracts).

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The Iraqi Tribunal would also have to adopt “the most innovative feature” of the Iran model, namely the “Security Account out of which awards are paid to successful . . . parties before the Tribunal.”¹⁵⁴ Furthermore, the parties before the Tribunal should have the right to be treated equally, including the right to a hearing where evidence and witnesses could be presented.¹⁵⁵ Adopting the UNCITRAL Rules will also allow the Tribunal to retain the flexibility that distinguishes arbitration from a court trial.¹⁵⁶

Much controversy still surrounds the American invasion of Iraq.¹⁵⁷ The new Iraqi government is still in its formative stages.¹⁵⁸ It is likely that without international and American involvement, the current government may not be able to survive.¹⁵⁹ The United Nations is well suited to assist Iraq with setting up the Tribunal. Indeed, the United Nations has the experience and expertise needed for such a role; it currently operates several bodies involved in international arbitration, with the most prominent being the Permanent Court of Arbitration.¹⁶⁰ Its universal membership may reduce accusations of bias or unfairness of any established Tribunal. After determining who will help Iraq set up the Tribunal, a neutral place should be picked where cases can be heard.¹⁶¹ Neutral arbitrators should be chosen, and Iraqis and other Arabs ought to be fairly represented on the Tribunal.¹⁶²

Due to the positive experience with, and the reliability of the Iran-US Claims Tribunal, as alluded to earlier, the Iraqi Tribunal

¹⁵⁴ PELLONPAA, *supra* note 86, at 6.

¹⁵⁵ See UNCITRAL Rules, *supra* note 112, at art. 15 §§ 1-3; see also *supra* note 116.

¹⁵⁶ See UNCITRAL Rules, *supra* note 112, at art. 15 § 1.

¹⁵⁷ See *supra* note 2.

¹⁵⁸ The election for regional assemblies and a national assembly that will draft the permanent constitution was held on January 30, 2005. By most accounts, the election was a success, although more than fifty Iraqis died trying to vote. See Edward Wong, *Iraqis Who Died While Daring to Vote Are Mourned as Martyrs*, N.Y. TIMES, Feb. 4, 2005, <http://nytimes.com/2005/02/02/international/middleeast/02najaf.html> (last visited Feb. 2, 2005) (saying that “[a]t polling centers hit by explosions, survivors refused to go home, steadfastly waiting to cast their votes as policemen swept away bits of flesh.”). Furthermore, the most recent, January 30, 2006 election to elect the parliament, was a success. See *Shiite Alliance Wins Plurality in Iraq*, Cnn.com, Feb. 14, 2006, <http://www.cnn.com/2005/WORLD/meast/02/13/iraq.main> (last visited Feb. 19, 2006) (stating that the “Shiite-backed United Iraqi Alliance won a plurality of votes in the January 30 elections but fell short of an outright majority.”).

¹⁵⁹ See Thom Shanker & Eric Schmitt, *U.S. Plans to Ease Offensive and Transfer Some Troops to Train Iraqi Units*, N.Y. TIMES, Feb. 2, 2004, <http://nytimes.com/2005/02/02/politics/02military.html> (last visited Feb. 2, 2005).

¹⁶⁰ See generally <http://www.pca-cpa.org/ENGLISH/RPC/> (last visited Feb. 12, 2005).

¹⁶¹ PELLONPAA, *supra* note 89.

¹⁶² See *infra* note 176 (discussing the dearth of Arab arbitrators).

should also be based on the former.¹⁶³ Just like the Iran-US experience, the Iraqi tribunal should adopt a variation of the UNCITRAL Rules. The use of the UNCITRAL arbitration rules also increases the legitimacy of the Tribunal. For example, these rules have previously been adopted by “the United Nations Compensation Commission . . . to decide claims against Iraq arising out of the Gulf War.”¹⁶⁴ Since this model law was originally designed for arbitration of commercial disputes has “provide[d] fair and effective procedures for peaceful resolution of disputes between States concerning the interpretation, application and performance of treaties and other agreements[,]”¹⁶⁵ it will provide sufficient procedures to arbitrate Iraqi contracts with foreign companies and the remaining public debt.

Interestingly, contracts with foreign companies are commercial in nature, and therefore a wide body of law exists on the applicable law controlling the dispute; most likely, the parties have already agreed on the controlling law to any dispute.¹⁶⁶ Moreover, based on Rule 33, “failing [a] designation [of law] by the parties, the arbitral tribunal [will] apply the law determined by the conflict of law rules which it considers applicable.”¹⁶⁷ The Tribunal will apply international law to arbitration of publicly held debt, and if any deficiency in that body of law exists, the Tribunal ought to decide cases by “applying such choice of law rules and principles of commercial and international law . . . [as well as] relevant usages of trade, contract provisions and changed circumstances[,]”¹⁶⁸ by analogy.

B. Fairness Concerns

Creditors should be paid per contractual agreements. However, what happens when the borrowing regime is criminal?¹⁶⁹ George Soros has recently said that a loss of debt repayment in the case of oppressive regimes would lead to less lending and the de-

¹⁶³ See *supra* note 124, at xv.

¹⁶⁴ PELLONPAA, *supra* note 89, at 9.

¹⁶⁵ PELLONPAA, *supra* note 89, at 8.

¹⁶⁶ PELLONPAA, *supra* note 89, at 28-34.

¹⁶⁷ UNCITRAL Rules, *supra*, note 112, at 33, §1; *supra* note 130.

¹⁶⁸ The Claims Settlement Agreement, *supra* note 102, at art. V.

¹⁶⁹ See <http://www.indict.org.uk/crimes.php> (last visited Jan. 20, 2005) (listing Hussein's alleged crimes); see generally <http://humphrys.humanists.net/iraq.html> (last visited Jan. 20, 2005) (addressing the limited freedom in Hussein's Iraq).

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creased survival of such regimes, thus leading to a presumably good outcome.¹⁷⁰ But the Arbitration Tribunal would involve other contracts entered into by Hussein's government perhaps for legitimate purposes, such as Iraq's taxicab purchase.¹⁷¹ Therefore, the proposed Tribunal would analyze the extent to which Iraq benefited from the debts that the claimants provided it.¹⁷²

Cultural differences have in the past interfered with arbitral schemes relating to Arab countries.¹⁷³ Nevertheless, proper representation of Iraqis on the arbitral boards, and a greater willingness to accept somewhat foreign arbitration principles, ought to make the Iraqi Arbitration Tribunal a fairer process.¹⁷⁴ As mentioned before, conducting arbitration via a tribunal established with the United Nations' help, and with the Permanent Court of Arbitration experience, ought to advance the fairness of the project.¹⁷⁵ Furthermore, any country or organization assisting Iraq with the formation of the Tribunal ought to consider the disparity of wealth among Iraq contract nations such as France or Russia. Iraqi representation on the Tribunal is also key. Indeed, Nabil N. Antaki suggests that the inequality of bargaining power be taken into account, perhaps weighed in favor of the Arab country.¹⁷⁶

¹⁷⁰ Jubilee Iraq, *supra* note 5.

¹⁷¹ See generally *supra* note 55.

¹⁷² See generally Jubilee Iraq *supra* note 5; <http://www.cisd.org> (last visited February 4, 2005).

¹⁷³ See PCA, *supra* note 115, at 319, 320, 325 (while the author focuses on foreign investment, the same principles apply).

¹⁷⁴ PCA *supra* note 115, at 325. The author points out that,

[m]any host countries also dislike receiving directions or orders from a 'foreign' court. They fear for sovereignty and suspect that foreign jurisdictions could be biased. Under these conditions, the solution could well be the shifting of the national courts' traditional jurisdiction over arbitral proceedings to an independent international jurisdiction. While the World Trade Organization or NAFTA [North American Free Trade Agreement] could be inspirational models, the PCA [Permanent Court of Arbitration] already has the necessary infrastructure and valuable experience in handling problems of territorial sovereignty, state responsibility, treaty interpretation and jurisdiction and the administration of international justice (footnote omitted).

Id. at 324-25.

¹⁷⁵ PCA *supra* note 115, at 324-25.

¹⁷⁶ PCA *supra* note 115, at 328. In light of the mainly American invasion of Iraq in 2003, including counsel from the international community and from Iraq is a prudent measure for any arbitration tribunal to gain legitimacy. The relevant statistics are skewed against a Muslim country like Iraq. We are told that,

[the] great majority of lawyers that have represented parties to the proceedings have been American. One consequence of this has been that distinctively American advocacy techniques have often parked the proceedings. The preponderance of U.S. counsel is only partly explained by the fact that many of the Investor Parties to pro-

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The somewhat unprecedented inclusion of Iraqis or other Arabs on the Tribunal might raise cultural conflicts. Any parties to arbitration ought to remain with the understanding that

[t]he world is characterized by a number of traditions . . . each . . . [with] its own concept of conflict resolution and [that] the practice in each region of the world is deeply rooted in the prevailing local tradition.¹⁷⁷ With distinct regional transitions come different understandings of fundamental concepts of “confidentiality, independence and impartiality.”¹⁷⁸

The object of the arbitrators on the Tribunal will be to apply the law consented to by the parties, or that determined by law.¹⁷⁹ In the context of Muslim law and jurisprudence,

the general principles of law are shared by all cultures and their source is not exclusive to any legal system . . . and it is consequently wrong for an international arbitrator who has to apply these general principles in a multicultural dispute to refer only to their Western source.¹⁸⁰

Even in that context, however, the Arab world is not without arbitration institutions. The Cairo Regional Centre for International Commercial Arbitration and the Tunis Centre for Conciliation and Arbitration “provide international arbitration rules which are broadly similar to the types of rules seen in other international arbitration institutions” of Europe and Asia.¹⁸¹ Approaching the

ceedings have also been American. Non-U.S. parties have often also decided to retain U.S. counsel. (citations omitted).

See PCA *supra* note 115, at 326-27. Furthermore, the trend of international arbitrators with dual nationality continues, presumably easing the concern for fairness. See PCA *supra* note 115, at 327. Federalism concerns might also be relevant in setting up the Arbitration Tribunal. For example, the U.S. Federal Arbitration Act (“FAA”) may preempt state law regarding arbitration. If Iraqis eventually organize themselves as a Federal state, such concerns might come to play as well. For a discussion of American federal preemption by FAA, see Stephen K. Huber & E. Wendy Trachte-Huber, 1 Hous. Bus. & Tax L.J. 184, 188-93, 2001.

¹⁷⁷ PCA *supra* note 115, at 331.

¹⁷⁸ PCA *supra* note 115, at 331. We are told that “[j]ustice is served only when the rules of due process and procedural public order take into consideration the traditions of all the parties.” See PCA *supra* note 115, at 331. This line of reasoning raises another fascinating conclusion: If Iraq is hardly a homogeneous society, and instead has various ethnic and religious groups as part of its nation, perhaps a more regional approach to arbitration is needed. Nevertheless, such a regional arbitration scheme is likely to be dismissed quickly as impracticable.

¹⁷⁹ PCA *supra* note 115, at 331.

¹⁸⁰ PCA *supra* note 115, at 331.

¹⁸¹ PCA *supra* note 115, at 99, 100. These rules are similar rules of the “International Chamber of Commerce . . . in Paris, Arbitration Association in New York, [and] the China International Economic and Trade Arbitration Commission in Beijing[.]” PCA *supra* note 115, at 100.

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arbitration tribunal with these fairness concerns in mind, just results are likely to follow.

Nevertheless, while the idea of the arbitration tribunal certainly seems rosy, reasonable people understand that it might be less successful than the Iran-U.S. Tribunal. Arbitration tribunals, such as the Jay Treaty Commissions, have failed before, due to personality clashes.¹⁸² But in this author's view, the new democrats of Iraq deserve to arbitrate Saddam's debt, and other existing or alleged obligations, by means of an arbitration tribunal. Besides, the act of engaging in the process is likely to yield results even if the Tribunal fails. Having tried the arbitration tribunal first, Iraq might be in a better bargaining position to settle on a lump sum,¹⁸³ or on a debt-rescheduling scheme. Fairness is imperative for any Iraqi arbitration tribunal to work well; if all the parties remain conscious of cultural and historical issues involved in creation and the running of the Tribunal, fair results to all the parties may be expected.

VI. CONCLUSION

As mentioned throughout this article, the Iraqi people had experienced wars, dictatorial rule, and oppression of body and spirit; therefore, for the reasons given herein, lessening current burdens is imperative. If Iraq's goal is to help itself rebuild and compete on an equal footing with other peaceful nations, the majority of its remaining unsettled public debt has to "be arbitrated away" or at least renegotiated and rescheduled to accomplish that aim. Finally, contracts with foreign companies must be reconsidered, both in light of honoring the rule of law and with an understanding of the prior regime's excesses and outright fraud. The arbitration tribunal will help secure a foundation for a culture that meets business obligations and will cleanse away the wasteful and questionable deals struck with the Hussein clan. This, in turn, will benefit both the new Iraq and the world community. The ending words of an Iraqi poem read:

[I]n Iraq a thousand serpents drink the nectar
From a flower the Euphrates has nourished with dew.

¹⁸² See *supra* note 136.

¹⁸³ See *supra* note 136.

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I hear the echo
Ringing in the Gulf:
“Rain . . .
Drip, drop, the rain
. . .
Drip, drop.”
In every drop of rain
A red or yellow color buds from the seeds of flowers.
Every tear wept by the hungry and naked people
And every spilt drop of slaves' blood
Is a smile aimed at a new dawn,
A nipple turning rosy in an infant's lips
In the young world of tomorrow, bringer of life.
And still the rain pours down.¹⁸⁴

Let yesterday's rain of oppression be the growth of a new Iraqi life.
Setting up the arbitration tribunal is an honorable place to start.

¹⁸⁴ Badr Shakir al-Sayyab, *Rain Song*, (Lena Jayyusi & Christopher Middleton, trans.), <http://www.angelfire.com/nt/Gilgamesh/rainE.html> (last visited Jan 25, 2005).

