

(1)// AFRICAN FORUM AND NETWORK ON DEBT AND DEVELOPMENT
(A) Conference proceedings report [of the] International Conference on Fair
and Transparent Arbitration Mechanism on Illegitimate and Odious Debts

CONFERENCE PROCEEDINGS REPORT



INTERNATIONAL CONFERENCE ON FAIR & TRANSPARENT ARBITRATION MECHANISM ON ILLEGITIMATE AND ODIIOUS DEBTS

Johannesburg, South Africa, March 30-31, 2009



ECONOMIC JUSTICE NETWORK of FOCCISA
Fellowship of Christian Councils in Southern Africa

About AFRODAD

AFRODAD Vision

AFRODAD aspires for an equitable and sustainable development process leading to a prosperous Africa.

AFRODAD Mission

To secure policies that will redress the African debt crisis based on a human rights value system.

AFRODAD Objectives include the following:

- 1 To enhance efficient and effective management and use of resources by African governments;
- 2 To secure a paradigm shift in the international socio-economic and political world order to a development process that addresses the needs and aspirations of the majority of the people in the world.
- 3 To facilitate dialogue between civil society and governments on issues related to Debt and development in Africa and elsewhere.

From the vision and the mission statements and from our objectives, it is clear that the Debt crisis, apart from being apolitical, economic and structural issue, has an intrinsic link to human rights. This forms the guiding philosophy for our work on Debt and the need to have African external debts cancelled for poverty eradication and attainment of social and economic justice. Furthermore, the principle of equity must of necessity apply and in this regard, responsibility of creditors and debtors in the debt crisis should be acknowledged and assumed by the parties. When this is not done, it is a reflection of failure of governance mechanisms at the global level that protect the interests of the weaker nations. The Transparent Arbitration mechanism proposed by AFRODAD as one way of dealing with the debt crisis finds a fundamental basis in this respect.

AFRODAD aspires for an African and global society that is just (equal access to and fair distribution of resources), respects human rights and promotes popular participation as a fundamental right of citizens (Arusha Declaration of 1980). In this light, African society should have the space in the global development arena to generate its own solutions, uphold good values that ensure that its development process is owned and driven by its people and not dominated by markets/profits and international financial institutions.

AFRODAD is governed by a Board of seven people from the five regions of Africa, namely East, Central, West, Southern and the North. The Board meets twice a year. The Secretariat, based in Harare, Zimbabwe.



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**INTERNATIONAL CONFERENCE ON FAIR & TRANSPARENT ARBITRATION
MECHANISM ON ILLEGITIMATE AND ODIUS DEBTS**

30 – 31 MARCH 2009 JOHANNESBURG, SOUTH AFRICA

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BOX 1: General principles and characteristics of arbitration

There is no universally accepted definition of arbitration, however, definitions commonly used are: Arbitration is a procedure for the settlement of disputes, under which the parties agree to be bound by the decision of an arbitrator, whose decision is in general final and legally binding on both parties. (CIArb)

Arbitration is a process where, by agreement, parties to a contract submit their differences or disputes to the consideration and decision of one or more independent persons. Arbitration has the force of law and generally an arbitrator's decision, called an award, can be enforced in the courts just as a judgment of the court. (Harold Crowter)

A private mechanism for the resolution of disputes which takes place in private pursuant to an agreement between two or more parties, under which the parties agree to be bound by the decision to be given by the arbitrator according to law after a fair hearing, such decision being enforceable at law. (Brown & Marriott)

Arbitration is a device whereby the settlement of a question, which is of interest for two or more persons, is entrusted to one or more other persons – the arbitrator or arbitrators – who derive their powers from a private agreement, not from authorities of a state, and who are to proceed and decide the case on the basis of such an agreement (David).

Other Dispute Resolution methods include negotiation, conciliation, mediation and litigation.

- The dispute resolution continuum starts with negotiation, where a party has the most personal power and decision making authority with regard to the terms on which the dispute is resolved to litigation where a party has least power and control.
- Arbitration is similar to mediation thus; consensual, Parties appoint neutral arbiter. Arbitration is similar to litigation thus; adjudicatory, Third party makes final decision.
- Fundamental features of arbitration include; alternative to litigation, Party autonomy, Agreement to arbitrate, Privacy and confidentiality, Arbitral tribunal, Finality.
- What is a dispute? It is a specific disagreement on rights or interests; a disagreement on a point of law or fact; a claim by one party opposed by the other Justifiable; a disagreement on issues capable of resolution by; negotiation, mediation and 3rd party adjudication (i.e. arbitration and litigation).
- Arbitral Tribunal; consists of one or more persons; is appointed: by the parties or an institution according to Arbitration Agreement.
- Final and Binding; on the parties; as to the matters referred to the arbitral tribunal for resolution; No right of appeal in most jurisdictions.
- Object of Arbitration; Fair resolution of disputes; by an impartial tribunal; without unnecessary delay or expense; Parties free to agree manner of resolution; Subject only to safeguards necessary in the public interest; Intervention by the courts restricted

Advantages of arbitration include:

- Privacy, Flexibility, Expertise, Cost, Finality and Enforceability of the award, Neutrality and Equality, Power of the arbitral tribunal

INTRODUCTION

The debt crisis is a complex and an ongoing problem for most southern and third world countries. Its origins stem from both external and internal factors that have impacted negatively on Africa's development. Despite the great promises of the 1960s and 1970s that came with the liberation of Africa from colonialism most of Africa is today wallowing in poverty largely brought about by the neo-colonial power relations that Africa continues to have with the developed world.

However, several initiatives designed to address the debt crisis have in most cases aggravated the problem and failed to resolve the fundamental factor underlying the debt crisis; the power imbalance that exists between debtors and creditors. New Instruments and Institutions that should bring about structure changes that will reshape global relations around the debt crisis are now required. A Fair and Transparent Arbitration mechanism to specifically address the debt problem should be established under the United Nations system.

In sub-Saharan Africa the debt overhang has stunted investments, economic growth and trade with the outside world. Yearly debt repayments have continued to divert financial resources from expenditure on social services like education and health leaving a population in a social quagmire, where the prospect for improvement in their economic lives has remained a pipe dream.

Sub-Saharan Africa receives \$10 billion in aid but loses \$14 billion in debt payments per year. In Burundi, for instance, elimination of education fees in 2005 allowed an additional 300,000 children to attend school.

While more than 80 million Nigerians live on less than \$1 per day, in 2005 Nigeria agreed to pay over \$12 billion to the Paris Club of creditors in exchange for partial debt cancellation.

In 2003, Zambia spent twice as much on debt repayments as it did on health care. But partial debt cancellation allowed the government to grant free basic healthcare to its population in 2006.

Several debt relief efforts developed by Creditors to address the African Debt crisis have failed. AFRODAD contends that arbitration offers an alternative that addresses or eliminates the power imbalance.

Conference Objectives

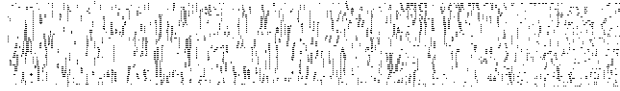
- To provide a forum and tap on deliberations on the current debt debates and challenges of implementing debt arbitration
- Explore ways and means of consolidating and building structures of global civil society support for debt arbitration.
- To seek advice and direction on the way forward that would put pressure on stakeholders especially policy makers for the establishment of the arbitration mechanism on debt.
- To increase awareness of the existence of arbitration as an alternative dispute resolution mechanism around the debt dispute.
- Provide a platform to share knowledge on the use of the arbitration mechanism in resolving the debt problem.
- Expose failures of the current debt relief initiatives and the global power imbalance that continues to perpetuate the debt problem and the lack of governance structures to provide checks and balances.
- Exploring mechanisms/structures or processes outside government structures through which citizens can participate in the debt management process.

Conference Expected Outcomes:

- Shared strategy and commitment to take forward the issue of debt arbitration
- Global taskforce tasked to push for debt arbitration.
- Better understanding of arbitration as a mechanism to solve debt crisis.

DAY ONE 30 MARCH 2009

OPENING SESSION 1



Welcome and Opening Remarks

By Rev D Lesejane, representing the churches, Chair of ESSET-Ecumenical Service for Socio-Economic Transformation



Rev. Desmond Lesejane started by welcoming all the participants to South Africa and hope them well throughout the conference days. He noted that despite their bounty natural and human resources, developing countries have been milked dry. The repayment of debt has become a dark hole where money is continuously thrown in without satisfying our most basic needs. In a way the debt has become a new way of colonization hampering the development of many countries. 'This is more so given that the policies applied by the indebted governments are more often by creditors than by parliaments of countries concerned.

He recognized the importance of the conference because it grapples with some of these issues and more importantly tries to promote the establishment of a Fair and Transparent Arbitration Mechanism on Debt. He hoped the conference will unpack the concept of arbitration and begin to discuss what form this may take. 'This is important because despite initiatives like the Heavily Indebted Poor Countries (HIPC) and the Multilateral Debt Relief Initiative (MDRI) developing countries continue to spend 100 million dollars everyday on debt servicing', said Rev.D. Lesejane.

The heavy burden that debt puts on many developing countries cannot be overemphasized so it is important that NGOs, Civil Society Organizations, academics and many other stakeholders grapple with these issues. For effective advocacy it is essential that civil society including faith based organisations finds better ways of building alliances across the latter day boundaries.

'Here in South Africa one of the questions on debt is whether the majority should pay for debt that was contracted by a minority during the days of apartheid? This is especially given that the debt was contracted to finance the brutality that was visited on this majority' asked Rev.D. Lesejane

At the heart of his question really, is an assessment of the legitimacy of debts. He advised participants to look at in-country mechanisms of monitoring the procurement of new debts and how they are utilized. 'Our countries continue to accumulate debt for questionable projects and priorities which at times remain luxury and white elephants' he said.

With these above remarks Rev. D. Lesejane declared the conference officially opened.

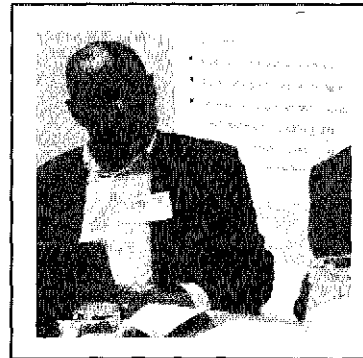
SESSION 2 UNPACKING THE CONCEPT OF DEBT ARBITRATION

Chair by Sofia Svartfvar EJN

PRESENTATION 1

Background and Rationale for an International Arbitration Court on Debt

Opa Kapijimpanga, Chairman and Founder of AFRODAD



In his presentation on the Background and Rationale for an International Arbitration Court, Opa Kapijimpanga, Chairman and Founder of AFRODAD, pointed out that although not all Heavily Indebted Poor Countries (the HIPC) have benefited from the HIPC Debt Relief initiative (1999) and the subsequent Multilateral Debt Relief Initiative (MDRI 2005), we have been left with many lessons of enduring these processes. The lessons include the fundamental fact that the debt relief initiatives were not sustainable.

He gave the following reasons:

- They were creditor-led with decisions about who could and who could not get debt relief being made by creditors on premises that sometimes were arbitrary. The debtor countries were in a minor position on the whole selection process.
- The initiatives were a result of pressure from civil society and were not structural and not based on fair or just global financial architecture.
- They were based on some philanthropic attitude which would seem to condone the value system of a brutal capitalism.

Opa went on to say the critical mass of civil society pressure was not sustainable and wanted to see today's campaigns for debt relief be based more on a common value system based on position of justice, equity and human rights.

AFRODAD has extensively researched cases of debtor responsibility over the years and the studies have shown that internal mechanisms have also contributed to the debt crisis. Opa felt that the people found guilty of perpetuating policies that exacerbated the debt crisis should be brought to book as a deterrent.

He mentioned the activities of the Export Credit Agencies (ECA) and that of Vulture Funds which should be examined closely as they easily constitute illegitimate and odious debts. Vulture funds are companies or businesses that 'buy up' the debt of poor countries when the debt is about to be written off and then sue for the full value of the debt plus interest on the sum.

As the Vulture Funds do not publicize their actions; the number of such claims are unknown. For instance; in 2003, Iceland Supermarkets sued Guyana for over a million pounds. After an outcry by Jubilee Debt Campaign and partners, they dropped the case. Nestle also dropped a claim against Ethiopia after a campaign by Oxfam and others. But other companies have not dropped their claims and have actually won.

There are 40 Law suits of Vulture Funds around the world. These vulture funds are technically legal and valid. This kind of capitalism is unfair. Arbitration is important in these cases. You can not work within the legal system because they are legal and need an independent arbiter. UN through the charter can protect the people. The African Union need to be approached and take up cases on behalf of the African people.

European partners campaign for the use of existing mechanism than create new structure than a court because it's a proper outcome.

During HIPC period arbitration seen as important to determine debt relief. Need for structural changes and institutions. Institutions at national, regional and international have weaknesses and can be worked on.

Opa Kapijimpanga spoke passionately about the need to act now and establish a fair and transparent arbitration court to resolve the current debt impasse. AFRODAD is convinced that despite the UN's weaknesses as a global institution, it is still the most suitable to establish an arbitration court because of its legitimacy across nations.

He recommended that in the next three years, there should be more concrete activities towards achieving the ultimate goal and test casing for arbitration at national, regional and global levels. There is need to build 3-4 cases viable for arbitration.

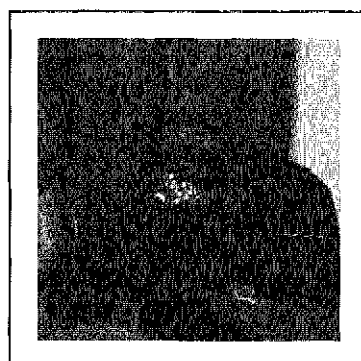
In his conclusion, he called upon the conference's participants to agree to move ahead on this journey that hopefully will instill responsibility in both Debtors and Creditors and accordingly safeguard the interests of the global citizens.

PRESENTATION 2

The failures and Weaknesses of the Current Debt Management

AFRODAD Policy Advisor on Debt, Vitalice Meja

AFRODAD Policy Advisor on Debt, Vitalice Meja, presented the failures and weaknesses of the current debt management mechanisms, looking at the three main ones: Paris Club Debt Rescheduling Negotiations, Highly Indebted Poor Countries Initiative 1999 (HIPC) and Multilateral Debt Relief Initiative (MDRI) 2005.



Paris Club:

- Meant for debt rescheduling, the Paris Club is the bilateral creditors' club that forms the first line of addressing the debt problem
- Under this mechanism there is no additional resource flow to the debtor country but the postponement of the debt servicing period for later period (i.e. treating the symptom)
- It is mainly composed of creditors and the decision of the amount of debt rescheduling is decided in the absence of the debtor country and then communicated to them
- There is no representation during the deliberations (the creditor is the judge, the jury and the collector)
- Debtor voice lacking in this mechanism.

Highly Indebted Poor Country Initiative (HIPC)

- For those that also face an unsustainable debt situation even after the full application of traditional debt relief mechanisms (Paris Club agreement)
- Must have a track record of sustained implementation of economic reform programs
- Have a Poverty Reduction Strategy Paper
- Economic policy Conditionality attached to the mechanism
- Mechanism controlled from outside, no debtor inputs

Multilateral Debt Relief Initiative (MDRI)

- Initiated in 2005 and covers countries in post Completion Point phase of the e-HIPC
- It is the direct financial contribution of the multilateral institutions towards debt relief mechanisms to poor countries
- Meant to support countries that even after the HIPC initiative still experience debt distress.
- Direct financial contributions from the World Bank and International Monetary Fund
- Debt arbitration must be on the table.

Mr Meja gave the problems of these frameworks as follows:

Misplaced Debt Sustainability Analysis Indicators

- Export-to-GDP ratio of at least 30 percent – External shocks not factored in (poor countries are and will remain for some time vulnerable to external shocks - shocks to export prices and natural disasters and shocks to import prices - Current global recession and climate change has a negative impact on commodity pricing and agricultural production respectively)
- Revenue in relation to GDP of 15 percent - Revenue generation in relation to the GDP have remained below 13 percent among the HIPCs
- Growth assumptions are considered too optimistic - simply too optimistic growth rates of a country's exports and underestimate a country's future financing needs (Over - estimations of exports and underestimations of future financing needs result in highly unrealistic low future debt-to-export ratios, which then indicate unrealistic long-term debt sustainability)
- The average growth rates for 2000-10, assumed for the first 22 enhanced decision-point countries, are 5.5 per cent for real GDP and 8.6 per cent for exports
- It does not go far enough and leaves poor countries vulnerable to future debt crises – among the group of eight countries that had reached the Completion Point (CP), three of them (Benin, Burkina Faso, Uganda) were already above the enhanced initiative's target of a 150% debt-to-export ratio and needed a top up by 2004 hence the MDRI
- One size fits all frameworks – country special circumstances are not factored in.

Mr Meja pointed out that the goal of the Initiative was to restore the long-term debt sustainability of the beneficiary aimed at restoring the solvency of highly indebted poor countries; it was not aimed at being repeated in the future. However, the introduction of Multilateral Debt Relief Initiative is a clear show that the mechanism did not work.

- Not comprehensive – it has no inbuilt mechanisms to deal with domestic debts - and odious and illegitimate debts which have become a problem and are currently heavily discussed internationally
- Not comprehensive – Many deserving countries have been left outside the framework including the post conflict and countries with protracted arrears
- DSA not calculated based on a country's need for sustainable development, i.e. no correlation between debt relief and poverty
- There is no co-responsibility in the debt crisis. The debtor is the villain
- The current relief are a drain on the Official Development Assistance flows
- Poor countries are not represented in the determination of various thresholds and indicators guiding the mechanisms
- Civil society critique the failures of these mechanisms, poor countries like Tanzania, Bangladesh and Malawi suffered
- Countries like Uganda getting back into the debt trap again
- Domestic debt not captured by these mechanisms, link with the economic reforms

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- Illegitimate debts not captured in the mechanisms
- Many deserving conflicts and post-conflict countries not captured, Liberia, Burkina Faso, and Zimbabwe
- The framework does not have sustainable development agenda
- Co-responsibility element lacking debtors to blame in the current debt mechanisms
- Debt relief counted as ODA.

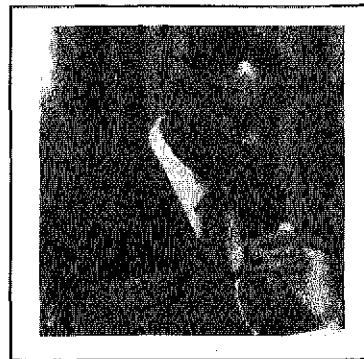
He went on to say that the program is based on the achievement of a track record of macroeconomic stability and structural reforms, but it ignores the fact that fiscal variables are generally much slower to react than monetary ones. In the medium term, large primary deficits in HIPC countries cannot be promptly reduced because of low revenues and the inherent political difficulties in reducing public spending in countries where most of the population is already below the (many definitions of) poverty line.

As a result the slow fiscal adjustment, together with the lack of access to international capital markets and adequate inflows of concessional lending, forced the governments to refer to domestic markets to finance their primary deficits.

PRESENTATION 3

An International Debt Arbitration Mechanism under the United Nations System: Challenges, Issues and Prospects

Dr Cephas Lumina UN Human Rights Council on Human rights and foreign debt



In his capacity as an International Expert, UN Human Rights Council on Human rights and foreign debt Dr Cephas Lumina gave his views on the United Nations system. The United Nations was established by its Charter of 26 June 1945, based on three mutually reinforcing pillars of peace and security, human rights and development.

Over a decade ago, the UN called on all donor countries to cancel official debt of the heavily indebted poor countries. At the time, the former Secretary General, Kofi Annan argued that debt relief would be an integral part of the international community's contribution to development and urged for establishment of an arbitration process. The UN currently has 192 member states, virtually all states of the world. Based on the sovereign equality of all states, it is the only universal and most representative global body. The UN has six principal organs: the General Assembly; the Security Council; the International Court of Justice; the Economic and Social Council; the Trusteeship Council (now defunct) and the Secretariat. The debt arbitration mechanism is likely to be taken by the General Assembly as it is the organ responsible for international law.

Creditors claim their mechanisms are bearing results. They always demand good



governance. They are limited. MDGs difficult to meet due to limited resources released from debt relief. Impact of debt relief diluted by economic reforms accompanying them.

In 1998, the Trade and Development Board of the United Nations Conference on Trade and Development concluded that 'innovative approaches to the debt problem involving the affected countries were required. In a similar vein, the First Conference of African Ministers of Economy and Finance held in Dakar, Senegal in 2005, called for the establishment of a new mechanism outside the Paris and London Clubs frameworks for dealing with Africa's debt problem.

The issue of excessive indebtedness of developing countries has been on the agenda of various UN bodies for over two decades. Despite several efforts and different programmes set up by the UN, very little has been achieved in terms of finding a durable solution to the crisis.

Generally, UN human rights bodies regard the foreign debt as a human rights issue. There are three main issues that would pose a challenge for the UN to establish an arbitration court:

1. UN suggests that the debt resolution should be in a form of a treaty. Treaties are based on consent and are binding only on the states that have ratified them. In view of the reluctance of creditor countries to support the debt issue, one must be cautious about their support for a treaty which would arguably threaten their interests. Furthermore, given that the arbitration depends on consent, it is difficult to conceive of a situation where these countries would enthusiastically support the creation of a tribunal to determine debt disputes on the basis of the human rights related principles of equity, justice, participation and inclusion.
2. The negotiation and adoption of a treaty is a lengthy process. Drafts are usually prepared by the ILC and presented to the General Assembly which then convenes a diplomatic conference to negotiate the text.
3. General Assembly resolutions do not typically create legally binding obligations and the Assembly cannot compel action by any member state. Thus, a debt arbitration mechanism created by resolution would not be binding on any member state.
4. Nevertheless, a recommendation by the General Assembly concerning the establishment of an international debt arbitration mechanism would be a significant reflection of global opinion on new approaches to the debt problem and would pave way for preparatory work by the International Law Commission on debt arbitration treaty.

SESSION 3

LEGAL PRINCIPLES AND COMPILED CASES FOR ARBITRATION

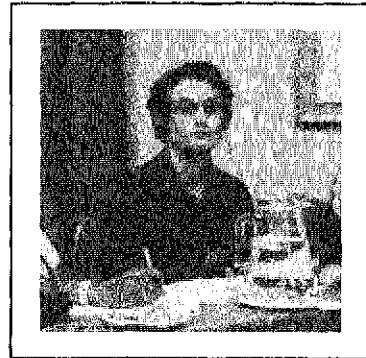
Chair by Martha Nanjobe

PRESENTATION 1

Legal principles to cancel illegitimate and odious debts

Renaud Vivien CADTM

Renaud Vivien from CADTM, Belgium presented legal arguments based on public international law. He pointed out the nature of law applicable depended on the loan contracts and does not contain all the arguments for the cancellation of illegitimate and odious debts.



He was quick to emphasize that the agreements between States and International Financial Institutions (IFIs) are governed by Treaty law (Geneva Convention). The Vienna Convention on the Law of Treaties (1969) contains several measures which could be called upon to prove that some debts, agreed between States, were in fact illegal. Thus Article 46 concerns the competence to conclude treaties, Article 49 concerns fraud, Article 51 the coercion of a representative of a State, and Article 52 the coercion of a State by the threat or use of force.

The Versailles Treaty (1919) bans the transfer of colonial debts to newly independent States. Article 255 of the Versailles Treaty released Poland and Ethiopia from paying that portion of the debt which, in the opinion of the Reparation Commission, is attributable to the colonisation of these countries by Germany and Italy respectively.

He said it should be kept in mind that the World Bank (WB) is directly involved in some colonial debts since in the 1950s and 1960s it generously loaned money to colonial countries for them to maximise the profits they derived from colonial exploitation. It must also be noted that the debts granted by the World Bank to the Belgian, French and English authorities within their colonial policies were later transferred to the newly independent states without their consent.

Charter of the United Nations: The principles of international law are such as those included in the Charter of the United Nations, the Universal Declaration of Human Rights, and the two complementing covenants on civil and political rights and economic, social and cultural rights of 1966, as well as the peremptory norms of international law (*jus cogens*). It is thus necessary to analyse the democratic character of a debtor State beyond its appellation: any loan must be considered odious if a regime, democratically



elected or not, does not respect the fundamental principles of international law such as fundamental human rights, the sovereignty of States, or the absence of the use of force.

- **Jus cogens** : article 53 of the Vienna Convention on the law of Treaty allows for the cancellation of acts which conflict with jus cogens and which also account for the following norms: prohibition of wars of aggression, prohibition of torture, prohibition to commit crimes against humanity and the right of peoples to self-determination. Contracts signed by a regime whose acts violate jus cogens are null and void. Thus, jus cogens implies that not only the initial debt but also the subsequent loans incurred to reimburse should be cancelled.

Customary rules: Such as the principle of non-interference in the internal affairs of States. Structural adjustment policies imposed by IMF and the WB clearly violate this rule.

General Principles of law: Equity, fraud, fundamental change in circumstances, bad faith, the competence of the signatory, etc. It has to be said that it is imperative that all the donors (States, private banks, IMF, the World Bank) must observe these principles.

All those sources must be applied by the arbitrators and also by all national courts, in virtue of the **Doctrine Calvo**. Indeed, **national courts** have the right to judge the legality and the constitutionality of debts.

Vivien pointed out that states had the right to nullify debts on the basis that;

- States had no obligation to pay debts
- The obligation of states to fulfil human rights
- Legality of the unilateral action of governments based on national and international law

In his final remarks, he concluded that repudiating illegal debts is founded in international law and economically reasonable. **Arbitration and debt audits are compatible and enhance each other**. For example, audits help judicial action by giving evidence and the judicial action can lead to reparations. **Audits and arbitration are also tools for responsible lending**.

He said the urgent matter now is to suspend debt payments. Through the repudiation of illegitimate and odious debts, a democratic government is totally within its rights in unilaterally and immediately suspending those payments.

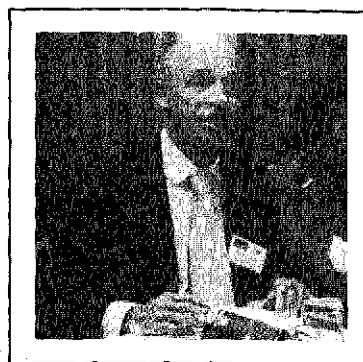
Parallel, Southern States should present a common front against debt payment. In the North, social movements would support this position. In Belgium, CADTM is trying to push the government to apply the Senate resolution calling for the cancelling the debt of developing countries. States could also introduce an action inside the Council of Human Rights and request for a ruling by the International Court of Justice on the

consistency between the international regulations governing developing countries' foreign debt and the general framework of legal principles and human and people's rights.

PRESENTATION 2

International Debt Management Framework, Legalities, Practicalities, Technical Feasibility And Formal Instruments for an FTA court.

Charles Abraham Legal Expert on Sovereign debts



Charles P. Abrahams spoke about the legality, practicality, technical feasibility and formal instruments for a fair and transparent arbitration tribunal or court in the context of the current power imbalance in the international debt management. He started off by contextualizing his presentation in the context of the current economic and financial global crisis unfolding.

In the light of the current global crisis and the historical debt crisis that has been with us for decades, the question to be asked is whether the present sovereign debt mechanisms are suitably able to resolve the sovereign debt crisis?, asked Charles. Sovereign debt restructuring resembles three concentric circles. In the centre ring, the government of the debtor country negotiates with the IMF to obtain a balance of payments loan in return for a well defined set of economic policies to eliminate its payment problems. In the second ring, the debtor country negotiates with creditor governments, organized in the Paris Club to lighten the burden of servicing outstanding debt and obtain new financing. In the third and outer ring, the debtor government negotiates with private creditors, organized in the London Club, for debt relief and new financing.

Paris Club mechanism: The problem with the Paris Club is that its institutional mechanism is completely biased towards the creditor countries. To make the point: The Club operates on three principles being imminent default, conditionality and burden sharing. Stemming from the first principle, the Club begins negotiations when the French government receives a debtor country's formal request for a meeting with the debtor's official creditors to negotiate a debt relief agreement.

The manner and set up of the mechanism portrays a clear bias in favour of the creditor countries. There is an underlying assumption embedded in the mechanism that when a country runs into debt problems, the causes thereof lie in bad macro-economic policies, corruption or insufficient democratic governance. The mechanism does not hold the creditor countries politically responsible for their lending practices. It only regards the debtor state as having failed hence them having been subjected to structural adjustment policies for nearly three decades.



Other mechanisms proposed: A number of proposals have been put forward ranging from the IMF's Sovereign Debt Restructuring Mechanism (SDRM), followed by the business community's launch of Collective Action Clauses (CACs) to Chapter 9 insolvency procedure and Fair and Transparent Arbitration Process (FTAP).

What is Arbitration? Unlike mediation, conciliation or negotiation, arbitration is a form of dispute settlement where two or more parties bring their dispute before a tribunal which decides on the issue and make a final determination. Arbitration is a dispute resolution process in which the disputing parties present their case to a third party intermediary (or a panel of arbitrators) who examine all the evidence and then make a decision for the parties. This decision is usually binding. Like court-based adjudication, arbitration is adversarial. The presentations are made to prove one side right, the other wrong. Thus the parties assume they are working against each other, not cooperatively. Arbitration is generally not as formal as court adjudication, however, and the rules can be altered to some extent to meet the parties' needs.

As in court-based adjudication, arbitration outcomes are typically win-lose, not win-win. Thus, the arbitrator usually decides that one side was right and the other wrong. They do not often go out of their way to develop new approaches for meeting the interests of both sides simultaneously, as a mediator would do, though if a win-win solution is apparent, the arbitrator would probably recommend it.

It is common for international contracts to mandate that arbitration be used to resolve any disputes that arise. While mediation also provides some of these advantages, it is a cooperative process, not an adversarial one. If the parties are so angry with each other that they cannot communicate effectively, even with help, or cannot cooperate at all, arbitration is usually more effective than mediation. It is also more effective when the problem involves the determination of facts or interpretation of law.

The disadvantages of arbitration stem from the same characteristics. Arbitration is adversarial, thus it generally does nothing to create win-win solutions or improve relationships. Often it escalates a conflict, just as court-based adjudication is likely to do. In addition, arbitration takes decision making power away from the parties.

Case for a FTAP: there are two proposals for a Fair and Transparent Arbitration Process. One, a broader proposal that combines aspects of domestic insolvency procedures with human rights and two, a narrower proposal that calls for the establishment of an International Court of Arbitration.

The main elements underlying the broader proposal are, amongst others:

1. An impartial arbitration panel that would resolve an actual insolvency of a sovereign debtor state by awarding sufficient debt relief to solve the country's debt problems on a sustainable basis;

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2. The country's need for financial resources to fulfill the basic needs of its population provides the guiding principle for the arbitration process;
3. It is a comprehensive process and therefore requires equal treatment of all debtors and creditors, public and private;
4. A broad participation of civil society and transparency at all stages of the process;
5. The arbitration process must include a decision as to which debts are legitimate and should be dealt with in that process;
6. In case of violation of the arbitration award, the arbitration process can be recalled.

Features for a FTAP: However, any arbitration mechanism, whether broad or narrow, must have some minimum basic features that distinguish it from other processes. The parties must by agreement submit their dispute to arbitration, without which the parties cannot be compelled. Article 25(1) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States which creates the International Centre for the Settlement of Investment Disputes provides that "Jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment between a contracting state and a national of another contracting state, which the parties to the dispute consent in writing to submit to the centre.

Article 36(2) of the statute of International Court of Justice (ICJ) provides for State parties to submit to the compulsory jurisdiction of the ICJ. A similar provision is found in Article 41 of the Permanent Court of Arbitration where the contracting state parties undertake to maintain the court to arbitrate international differences.

The parties must agree on the constitution of the arbitration panel. Generally the parties agree on the number of arbitrators to be appointed, invariably an uneven number (3) and each party has a right to appointing its own arbitrator with both parties appointing a neutral arbitrator. Generally the manner in which arbitrators are appointed is to be found in the further feature of arbitration which is the procedure and rules governing the arbitration.

In the case of ICSID, it has its own set of rules adopted by the Administrative Council of the Centre pursuant to Article 6(1)(a)–(c) of the Convention (the ICSID Regulations and Rules). The ICSID Regulations and Rules comprise Administrative and

Financial Regulations and Rules of Procedure for Arbitration Proceedings whilst the law applicable is the law of the State party as well as international law.

An important aspect of arbitration is the enforcement of its award. Without enforcement, the award would be of no effect save for the bona fides of the party against whom the award was given. For this reason, in many states are parties to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, also known as the New York Convention.



Feasibility: the question of feasibility of sovereign debt arbitration in an international mechanism is an exception rather than the norm. Contracts with sovereign debtors typically do not provide for arbitration of debt disputes but rather submission to the jurisdiction of the courts of New York or London. However, it does appear that there is an exception to an exception, as is the case with the Argentinean bondholders.

Case of Argentinean bondholders: In September 2006 a group of Italian bondholders of Argentine defaulted debt submitted a request for arbitration to the International Centre for Settlement of Investment Disputes (ICSID). They claim that Argentina's actions in connection with US\$4.4 billion of debt issued by Argentina and held by the Italian claimants breached Argentina's obligations under a bilateral investment treaty (BIT) between Argentina and Italy. The question that has arisen in this case is whether ICSID has jurisdiction to resolve a dispute brought by holders of defaulted sovereign debt pursuant to a BIT. The general question is why the Italian bondholders opted for arbitration rather than litigation in New York?

This question goes to the heart of Section 25 of the ICSID convention which provides for jurisdiction to any legal dispute arising directly out of an investment which the parties to the dispute consent to in writing. Can a loan to a sovereign debtor be considered an investment? It would appear that based on the existing case pronouncements of ICSID (*Amco Asia Corp. v Republic of Indonesia*) the tribunal gave a very wide interpretation to what constitutes investment. In this case we had the transfer of the rights from Amco to Pan Am and the tribunal held that Pan Am can invoke arbitration. The case of *Fedax v The Republic of Venezuela*, involved six US dollar denominated promissory notes issued by Venezuela to a Venezuelan company, *Industrias*, in payments for services rendered. *Industrias* assigned the promissory notes to *Fedax*. In 1996, *Fedax* filed a request for arbitration seeking payment of the outstanding principal and interest on the notes which Venezuela since stopped. *Fedax* supported its jurisdictional argument by invoking the provisions of a BIT between Venezuela and the Netherlands and the tribunal agreed. It held that loans qualify as an investment within ICSID's jurisdiction, as does, in given circumstances, the purchase of bonds.

SUBSTANTIVE OUTCOMES BEFORE THESE TRIBUNALS

The fact that ICSID decisions suggests that it has jurisdiction to hear disputes arising out of sovereign debt disputes raise some issues of concern. Let's look at how tribunals have dealt with the most important principles that underpin a bilateral investment treaty as indicative of how it might deal with substantive issues sovereign debt issues such as debt illegitimacy, odious debts and other defences which debtor states or civil society may raise as to why debts should not be repaid to creditors? Principles that have been considered before various arbitration tribunals are: Fair & Equitable Treatment, Full Protection & Security, National Treatment, Most Favored Nation (MFN) Treatment, Restrictions on Expropriation and Indirect Expropriation, and Free Transfer of Funds.

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Biwater case: In 2003, the Republic of Tanzania obtained \$140 million in World Bank, African Development Bank and European Investment Bank funding for a comprehensive program of repairing, updating, and expanding Dar es Salaam's water and sewerage infrastructure. The funding was conditioned on having a private operator manage and operate the water and sewerage system. Only Biwater Gauff (a joint venture of two European companies, one registered in England and Wales and one registered in Germany) submitted a tender, and it was awarded the bid. The terms of the tender required Biwater Gauff to establish a local operating company, with a minimum number of shares to be held by a Tanzanian company or national. The operating company, City Water Services Limited, then entered into three key contracts with the Dar es Salaam Water and Sewerage Authority ("DAWASA").

The most important contract was the Water and Sewerage Lease Contract, which required City Water to provide water and sewerage services for a ten-year period in a designated area and implement certain capital works associated with the modernization project. The contract required City Water to pay rental fees to DAWASA. City Water would collect an operator tariff, which would fund its operations; a lessor tariff, which it would turn over to DAWASA; and a first-time connection tariff, which would be placed in a trust account to fund low-income users' connection charges. In return, DAWASA gave City Water exclusive use of certain assets that City Water would lease from DAWASA, gave City Water the exclusive right to operate the designated water services, and promised not to operate in any way that would hinder or conflict with City Water's operations.

City Water commenced performance August 1, 2003. In addition to the infrastructure problems, which were hard to fix, City Water found it difficult to bill and collect from customers for the services it provided, both because it faced unauthorized competitors and because many residents resisted the rise in the rates. A significant issue was its failure to implement the new billing process, which was the "lifeblood of the system" and would help fund City Water's operations. City Water had underestimated the difficulty of the project and failed to allocate sufficient managerial and financial resources to it. City Water requested an increase in the Operator Tariff, but Tanzania rejected the request after an auditor's report suggested it was unwarranted. Relations between the government and Biwater Gauff continued to deteriorate, and although they tried discussing renegotiating the contracts under the guidance of an expert mediator, mediation failed. Between May 13, 2005 and June 1, 2005, DAWASA and other government authorities took certain steps, including repudiating the lease contract and occupying City Water's facilities, taking over the management, and deporting City Water's senior managers.

Biwater Gauff then brought a claim under the bilateral investment treaty (BIT) between the United Kingdom and the Republic of Tanzania, alleging expropriation of its property and unreasonable or discriminatory treatment. The company also claimed that Tanzania had violated its obligation to provide fair and equitable treatment and full



protection and security and to permit the repatriation of investment funds. Biwater Gauff requested damages in the range of US\$19 – 20 million.

LEGAL ISSUES

Two legal issues in particular are worth highlighting within the complex factual and legal issues raised in the dispute.

The first key feature of the Biwater Gauff decision is the tribunal's approach to the ICSID Convention's requirement that the Centre's jurisdiction "shall extend to any legal dispute arising directly out of an investment." While most investment treaties define investment broadly (and Tanzania conceded that Biwater's investment qualified under the BIT), an ICSID dispute must also satisfy the Convention's jurisdictional limitations. The Convention does not define investment, but recently several tribunals, most notably that in *Salini v. Morocco*, have identified five criteria that an investment must meet to qualify under the Convention:

- (1) duration;
- (2) regularity of profit and return;
- (3) assumption of risk;
- (4) substantial commitment; and
- (5) significance for the host State's development.

The Salini criteria can be traced to Christoph Schreuer's influential treatise on the ICSID Convention, in which he described qualities typical of investments found to satisfy the Convention's jurisdictional criterion, although Professor Schreuer was not advocating the establishment of jurisdictional requirements or the formulation of a definition.

Rather than follow the line of cases that had adopted the Salini approach, the Biwater Gauff tribunal held that there was no basis for a "rote, or overly strict, application of the five Salini criteria in every case." The drafters of the Convention had deliberately left the term "investment" undefined, and the tribunal was reluctant to impose a strict test that would arbitrarily exclude certain transactions from the scope of the Convention. Moreover, given the broad definition of investment in most BITs, a narrow interpretation would lead to the Convention's contradicting individual agreements that purport to grant jurisdiction to the Centre, as well as violating what might be viewed as an international consensus. The tribunal therefore substituted a more flexible and pragmatic approach to what constitutes an investment under the Convention, and concluded that it did indeed have jurisdiction. It rejected Tanzania's main argument – that Biwater Gauff had invested in the project only as a "loss leader" with a low rate of return in the hope of securing other profitable opportunities later. The tribunal refused to draw any link between a party's motives for entering into an investment and its ability to qualify for protection under the ICSID regime.

Second, the decision is notable for the erudite debate between the two arbitrators in the majority, Bernard Hanotiau and Toby Landau, and the concurring and dissenting

arbitrator, Gary Born, on the proper role that should be played by "causation." All of the arbitrators agreed that Tanzania's acts constituted expropriation of Biwater Gauff's investment. Messrs. Hanotiau and Landau concluded, however, that all of the compensable damage to Biwater Gauff's investment had occurred prior to Tanzania's violations of the BIT, which occurred between 13 May 2005 and 1 June 2005. According to the majority, then, Tanzania's conduct did not cause any injury, notwithstanding its unlawful nature. In Mr. Born's view, it is unacceptable to separate the concepts of the unlawful conduct and injury: the "wrongful seizure clearly caused injury to City Water by depriving it prematurely of the use and enjoyment of its property." Rather, the appropriate focus with respect to causation was the quantum of damage attributable to the injurious act. Because Biwater Gauff had failed to prove any monetary damages arising from the injury it suffered, it was not entitled to any recovery.

The tribunals findings can be summarised as follows:

Expropriation

In relation to Biwater's expropriation claim, the tribunal held that:

- expropriation may result from the cumulative effect of individual acts which do not themselves constitute expropriation;
- in order for a breach of contract to amount to an expropriation, a State must exercise elements of governmental authority. A Minister's press conference announcing the termination of the contracts, the withdrawal of a VAT exemption, the occupation of City Water's facilities and the deportation of City Water senior staff had all involved an exercise of sovereign authority that violated City Water's rights without justification, thereby amounting to an expropriation;
- there need not be a substantive or quantifiable economic loss in order for expropriation to exist, although this goes to the issues of causation and quantum;
- Biwater's performance under the contract would be taken into consideration in so far as it contributed to an understanding of the surrounding facts. Although an ICSID tribunal may not decide a contractual dispute, as commercial tribunals would do, it may "*take into consideration*" the facts surrounding a contract and its performance in determining claims arising under the BIT.

Other Treaty Standards

Although the tribunal was reluctant to generalise as regards "fair and equitable treatment", it identified several components of the standard: protection of legitimate expectations, good faith, transparency, consistency and non-discrimination. Furthermore, any violation of the "reasonableness" and "non-discriminatory" standards also constitutes a violation of the fair and equitable treatment standard.

Adopting the analysis set out in *Saluka v. Czech Republic*, the arbitrators determined that "reasonableness" requires a State's conduct to bear a reasonable relationship to some rational policy and "non-discrimination" requires that a State give a rational justification



for any different treatment of a foreign investor. Only some of Tanzania's conduct was found to have violated these standards.

Damages

According to the decision, in order to obtain damages, a party must show that:

- The value of its investment was diminished or eliminated; and
- The actions of the other party were the actual and proximate cause of such diminution.

In this case, the tribunal concluded that the value of City Water on the date of the expropriation was nil. Furthermore, the fact that the investment had no value was attributable to City Water's actions rather than Tanzania's. An expropriation had taken place but there was no demonstrable economic loss. In such a case, non-pecuniary remedies such as injunctions and declaratory or restitutionary relief rather than economic recovery may have been appropriate but were not claimed.

Aguas Argentinas case

New research conducted for Rights & Democracy finds clear evidence that human rights arguments have been raised by the respondent host-government in at least one of these ongoing international arbitrations arising out of the Aguas Argentinas concession. As will be described below, the tabling of these human rights arguments in the Aguas Argentinas case places the onus squarely upon the arbitration tribunal to address such arguments and to consider their relevance to the legal dispute. Indeed, the tribunal hearing the dispute acknowledged at an early stage of the proceedings that the case “may raise a variety of complex public and international law questions, including human rights considerations.” A ruling in that arbitration could emerge in 2009. The particular dispute in question arises out of a major investment in the water utility of the municipality of Buenos Aires by a consortium of foreign investors, including Suez, Vivendi, Anglian Water Group and Aguas Barcelona. Together with local investors, the foreign firms created a local entity, Aguas Argentinas S.A. which entered into a 30 year contract to manage the water and sewage concession. Over the course of the investment, the investors would quarrel with local authorities about a host of issues. Later, as Argentina's financial crisis deepened, the investor grappled with the government over the freezing of water-prices charged to consumers. The investor argued that it was contractually entitled to modifications of tariff-rates in the event of inflation or currency devaluation, so as to maintain the “economic equilibrium” of the project over its lifetime. The Government of Argentina countered that Aguas Argentinas (a local company) was party to the concession contracts and that the foreign investors—who were not themselves signatory to such contracts—should not be able to bring an arbitration case which depends upon the alleged breach of those contractual commitments. Rather, it would be for the local company to pursue the matter in the local courts. Moreover, the Government countered that Aguas Argentinas has failed to live up to its contractual obligations—including in relation to water quality and supply.

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In March of 2006, the Argentine Government terminated the concession, alleging technical failures by Aguas Argentinas. By this time, the foreign investors had long since resorted to international arbitration, alleging that various Argentine actions violated protections in BITs signed by Argentina with the investors' home countries: France, Spain and the United Kingdom. By August of 2006 an arbitration tribunal had ruled that it had jurisdiction to examine the investor allegations on their merits. At the crux of the claims by the foreign investors is an argument that Argentina has breached its contractual undertakings —leading to a knock-on breach of its BIT obligations to protect foreign investments. Notably, in legal filings in this ICSID proceeding, Argentina has made human rights a major part of its defense.

Argentina has insisted that its BIT obligations must not be interpreted in a vacuum divorced from the rest of international law. In particular, Argentina stresses that the BIT “must be construed in a manner which does not affect the fulfillment of other international obligations between the states signatory of such BITs.” According to Argentina, such an approach would ensure that BIT obligations would be read in light of other rules of international law linking Argentina, the United Kingdom, France and Spain, including “any treaty on human rights contemplating the human right to water”.

Second, after arguing for the applicability of human rights law, Argentina insists that its treatment of the claimants in the Aguas Argentinas arbitration was motivated by various business failings on the part of Aguas Argentinas, coupled with an overriding obligation on Argentina's part to protect the population's right to water. In Argentina's view, these shortcomings by Aguas Argentinas compelled the Argentine authorities to intercede so as to ensure that the right to water was not undermined by third parties.

The Government argues that, by virtue of a sustained state of emergency arising in December 2001, Argentina meets the strict conditions imposed by customary international law in order to be excused from liability for any treaty breaches. A key part of Argentina's necessity defense is the identification of a number of human rights obligations under the UN Charter, various human rights treaties, and domestic law which obliged the Government to act so as to protect and uphold rights to life, health and sanitation. Acknowledging the central role of water to such rights, the Government noted that it was incumbent to take emergency measures designed to ensure continued and expanding access to water and sanitation during the financial crisis.

In response to these arguments, the claimant water companies argue that Argentina had other alternatives short of an outright abandonment of the earlier-agreed water regulation framework and commitments made to foreign water companies. In particular, the companies contend that Argentina could have established “systems of cross-subsidies to ensure that the poorest categories of consumers were shielded from increases in water prices during the crisis period, whilst the wealthier consumers and industry (which continues to export in dollar terms) would have seen increases in line with the inflation of other basic products.”



Argentina's defense of necessity (in an effort to excuse emergency measures harming foreign investment) has engendered sharp disagreement amongst arbitrators in other arbitrations—as has the invocation by Argentina of its obligation to protect the human rights of Argentine citizens. As earlier noted, the tribunal in the *CMS v. Argentina* case quite peremptorily dismissed Argentina's human rights arguments. Subsequent tribunals, however, have given greater attention to a more generalized human rights defense raised by Argentina. According to this defense, the emergency measures taken in the face of the financial crisis were necessary to uphold Argentina's constitutional order and basic rights and liberties of the Argentine public. However, when faced with such a generalized human rights defense, tribunals are reaching sharply divergent conclusions. For instance, in the 2007 ruling in the *Sempra v. Argentina* arbitration, an ICSID tribunal revealed that an expert witness for the US gas company had conceded that Argentina would have been compelled by the American Convention on Human Rights to have maintained its constitutional order in the face of its 2001-02 financial crisis. The arbitrators took the view that the constitutional order (and survival of the state) were not imperiled by the crisis and that various policy measures were available to Argentina. This precluded Argentina from relying on a defense of necessity in relation to the emergency measures taken during that crisis.

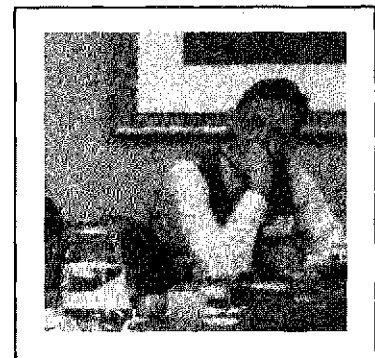
Taking a starkly different view, another ICSID tribunal, in a 2008 ruling in the *Continental Casualty v. Argentina* case has held that the extreme social and economic hardship and dislocation suffered by Argentina clearly led the government to act out of a state of necessity. Indeed, the tribunal pointedly noted that arbitrators should accord a significant margin of appreciation to states acting in times of such grave crisis, and not seek to second-guess the policy choices of governments. Moreover, the arbitrators gave serious weight to the need for states to act proactively to protect constitutional guarantees and fundamental liberties rather than wait until it is too late to protect such liberties in the face of looming catastrophe.

Charles concluded by noting that from the above case examples, it is clear that those proposing a Fair and Transparent arbitration mechanism should seriously take into account the effect that such decisions may have on future arbitration on sovereign debt matters.

PRESENTATION 3

**International Debt Management Framework,
Legalities, Practicalities, Technical Feasibility and
Formal Instruments for an FTA court.** Jurgen Kaiser

Jurgen spoke on recognising the centrality of power imbalance in the International debt management framework. He looked at the legalities, practicalities and technical feasibility and formal instruments for an FTA court. Jurgen presented a legal setup. He pointed out



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that legal aspects enter sovereign debt management only, when individual creditors litigate, and to a minor extent, at the verification of claims in negotiations (not international, but only private law). Default is a violation of a contract, but normally creditors do not take a sovereign debtor to court (although there are exceptions); the normal procedure is politicking and the Club approach, i.e. creditors agreeing among themselves in informal groupings about treatments towards individual debtors.

As de facto international debt management functions informally, a standing court is not a "natural choice" for debt arbitration, if any, it is the ad-hoc arbitration, but both have pros and cons. Nor is a "treaty" necessary to establish an arbitration court; a broad variety of creditors is not likely to be bound by the same (type of) treaty any way.

Jurgen emphasised the need to make a distinction between arbitrating a whole debt stock on the basis of unsustainability or individual responsibility and categories of claims on the basis of legitimacy. However: Jubilee is the first to ever discuss the application of basic principles of the rule of law.

In the changed landscape since the outbreak of the financial crisis, creditors do have a problem, which provides us with an opportunity. Coherence is intrinsic to an insolvency process, but alien to the creditors' traditional Club approach. Creditor coherence has already been a problem when "new" official and private lenders weren't yet as important as they are today. The poor solutions of the past, like HIPC/MDRI are not there any more for some countries, which have gone through debt relief; IFIs insistence that no crisis will ever re-occur because of the DSF is ridiculous, but they uphold it for lack of alternatives.

They were to honest in the HIPC Status of Implementation-Report 2009, admitting that four countries were facing new immediate debt distress, and an additional ten ran a "moderate" risk; IMF now tries to take individual countries off the list; the first one being Rwanda, with no other reason indicated than that the governments export-promotion strategy will eventually take effect - in the middle of the global recession.

The crisis will hit:

- (1) Report 2008: Where will the baseline scenario cross HIPC thresholds
- (2) erlassjahr's Schuldenreport: considers additionally the concentration of XGS and climate change effects
- (3) IMF March 2009 paper on effects of the financial crisis on low-income countries;

All include very preliminary estimations, but we get an idea of the magnitude and possible hot spots. There is a essential need during campaigning to question the key role of IFIs; WB and IMF have presence in almost any finance ministry in Africa; so their capacity to design policies and defend their own institutional interests is overwhelming, said Jurgen. For the various arbitration proposals this means that ICSID is not an option; neither a "reformed" one.



Centrality of debtor government positions in an ad-hoc as well as an institutionalized process). Leverage of debtors is different from situations, where they have to beg for fresh money; they can indeed exert pressure on creditors by simply not paying up: the creditors' Club approach has served to neutralize debtors' power position. Finding an alternative fair and transparent forum will serve to re-install this (informal) power of a debtor. Strategic priority must be now to communicate convincingly alternatives to governments, particularly those in severely affected countries. The service of the Permanent Court of Arbitration can help to encourage governments towards starting an ad-hoc process.

SESSION 4

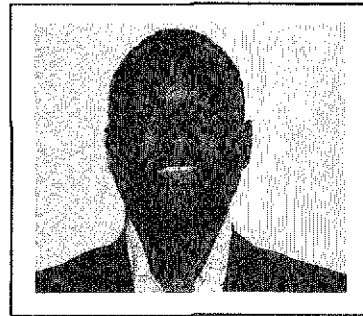
ILLEGITIMATE AND ODIUS DEBT CASES FOR ARBITRATION

Chair by Martha Nanjobe

PRESENTATION 1

Summary of AFRODAD compiled debt case claims to be submitted for arbitration

AFRODAD Programme Officer for FTA,
Tirivangani Mutazu



AFRODAD Programme Officer for FTA, Tirivangani Mutazu presented detailed case claims on Odious and Illegitimate debts. In 2005, AFRODAD started building up 10 good case claims that would be viable for arbitration by an international Debt Tribunal under the auspices of the United Nations.

Five cases dealt with illegitimate and odious debts and five with the role of international financial institutions in the development processes of the debtor countries. These claims will be deposited with the Secretary General of the United Nations and the African Union calling for these claims to be discussed at the beginning of the arbitration process.

There are five case claims covering the role of the International Financial Institutions in the development processes of African countries resulting from pushed privatization/investment projects in Zambia, Cameroon, Tanzania and Malawi.

These claims demonstrate that the International Financial Institutions' insistence and experimentation with privatization did irreparable damage that still affects the country's ability to stand on its economic feet today - years after such programmes were abandoned.

Poor families suffered from the reduction in subsidies and disconnection from services when they were unable to pay. To many it meant a denial of basic human rights and in most cases it carries irreversible life impacts. After years of inflicting pain and suffering on the poor and helpless masses, it is now clear to the advocates of privatization, especially the World Bank and the International Monetary Fund that the state remains the dominant provider of health, education, water and electricity.

The International Financial Institutions are still responsible for the development set back and its consequences. Cancelling debts and mere policy shifts are not enough. Most



of the public providers of utilities in these countries need substantially more financing, especially for investment in extending service provision. They are trapped in a vicious circle of deteriorated infrastructure, high system losses, high costs and low revenue.

There is empirical evidence that poverty and poor standards of life in many Third World countries are directly attributable to the interventions and policy advice from the multilateral aid agencies.

Over the years the third and moral worlds are up in arms against the IFIs for the negative impact of the structural adjustment programmes and the conditionalities that are associated with them.

The conclusions suggested by these case claims indicate clearly that countries such as Zambia have legitimate cases against the IMF and World Bank. (please see full claim cases for Argentina, Ecuador, Indonesia, The Phillipines, South Africa, Nigeria, DRC, Chad-Cameroon, Senegal, Malawi, Tanzania and Zambia in the paper attached).
In his conclusion; Mutazu said;

The main purpose of Arbitration is to secure that both the Creditors and the Debtors will take more responsibility for the use of financial resources. Debtors have an equal responsibility for the Debt crisis.

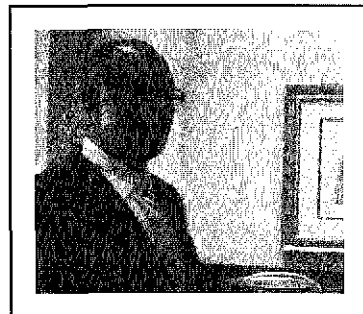
- AFRODAD studies have shown that internal mechanisms have also contributed to the debt crisis. Apart from a lack of management capacity and sheer theft and corruption, there is evidence of misuse of financial resources obtained through loans.
- What the Arbitration process will do is to secure that responsibility is taken as well by creditors; debtors already taking their responsibility for repayment of debts which they do not consider too illegitimate or which they have misused. In a way, the Arbitration process will hopefully create a level playing field and instill responsibility for both parties.

PRESENTATION 2

Zimbabwe's Illegitimate and Odious Debts - A case of Arbitration.

Senator Obert Gutu, Zimbabwe's Parliament

Overview of the debt situation in Zimbabwe.- As at December 2008, Zimbabwe's external debt stood at USD5,255 billion, with a current account balance of USD597 million. He said the Republic of Zimbabwe is bankrupt since it has no capacity to service the debt. The Zimbabwean Prime Minister, Morgan Tsvangirai advised the nation that the all-inclusive government's main priority was to heal the broken economy and supply food for the hungry millions of Zimbabwe.



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The all-inclusive government inherited approximately USD4,7 billion external debts owed to bilateral, multilateral and commercial creditors. Whilst Zimbabwe is on record as seeking at least USD5 billion in order to jump start its comatose economy, the country has an external debt of around the same amount.

Senator Gutu urged the new inclusive government to call for the establishment of an international debt arbitration mechanism whose core mandate is to deal with disputes centred on odious debts. The argument put forward that Zimbabwe should advocate for a system that seeks to provide a forum where the inclusive government shall have the onus to prove that the external debt that it inherited from the former ruling party government does not attach to the state but to the previous administrations as these obligations were not incurred for the benefit of the people of Zimbabwe but individuals previously in power.

He then concluded by saying the new inclusive government in Zimbabwe should unequivocally declare that it will not honour any debts that are proved to be odious.

SESSION 5

SHARING EXPERIENCES AND POSITIONS OF DEBT CAMPAIGNERS

Chair by Eugene Rwibasira

PRESENTATION 1

Murat Kotan of Jubilee Netherlands spoke of the Dutch position on the Permanent Court of Arbitration (PCA) and how to develop a mutual cooperation. He said the PCA had regional courts across the world and the African court was based in South Africa. He recommended that all African countries in debt should resolve their matters in the South African Permanent Court of Arbitration.

He said there are two main steps that need to be put in place immediately:

- Establish an arbitration court
- Work on responsible financing in the future.

PRESENTATION 2

Beverly Keene from Jubilee South gave experiences in campaigning against bad debt for countries in the South. She pointed out that Jubilee South had come with an open mind to listen, debate and engage in the debate on the creation of a debt arbitration court. She however said Jubilee was not in a position to make any decisions at the moment. She understands 'arbitration' as more of a negotiation. She then asked what was it that we wanted to cede if the debt is not legitimate and we do not owe and it has already been paid over many years. Why negotiate when you should not be paying anything in the first place?

Keene believes that negotiation is something we get into, not what we can reject; therefore arbitration might not be the answer to the debt problem for countries in the South. She said we need to come up with a force that brings the governments concerned to solve the debt accumulation. Simply cancelling debt does not solve the problem, how do we move from debt domination? Jubilee South is also campaigning to change the language and terms used from creditors and debtors to lenders and borrowers.

Keene called for everyone to challenge the notion of aid, donors and lenders. Challenge and look at the difference between insolvency and being indebted. Most countries of the South like Argentina, take out loans to pay off other loans and not for development.

PRESENTATION 3

Churches position on arbitration of illegitimate and odious debt, Percy Makombe from Economic Justice Network gave a straight forward presentation stating firstly that the Church has serious concerns relating to lending accountability. The United Nations

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Human Rights Commission has adopted numerous resolutions on the issue of the debt and structural adjustment. One such resolution, adopted in 1999, asserts that: “the exercise of the fundamental rights of the population of an indebted country to food, housing, clothing, work, education, healthcare services and healthy environment, may not be subordinated to the application of structural adjustment policies or economic reforms generated by the debt.”

The same sentiments were shared by the UN Commission on International Law, which says, 'a state cannot be expected to close its schools, its universities, its courts of law, and to abandon its public services to the point of chaos and anarchy in the community, simply to keep the money for repaying its foreign or national creditors.'

He said the Church has been working on debt problems by concentrating mainly on delegitimizing debt.

“We have continued the spirit of the Jubilee in fighting for the cancellation of foreign odious and illegitimate debts. Church acknowledges the work done by AFRODAD but its approach has been less legal and more political. This is so in order to build that groundswell of opinion calling for the cancellation of debts not least because there is overwhelming evidence of the illegitimacy of debt”.

Churches have not been involved in campaigns for arbitration but are still grappling with the concept. The Church will continue to ask why the poor have no food and join hands with other civil society organisations who believe that people's basic needs take precedence over creditors' claims.

PRESENTATION 4

Parliamentary view on Debt Arbitration – Ugandan Member of Parliament, Ekanya Geofry presented to the conference, the position of the Uganda Parliament on Debt Arbitration with background information on Uganda's debt status.

Geofry said Uganda's national debt has been unstable over the last two decades. He reckons the undulating changes in the country's debts position are due to several factors such as:

- Lenders have diverse objectives of lending and may originate supply-driven loans
- Government gets tempted to borrow excessively because of the anticipated bailouts that lead to moral hazard problems that reduce her incentive to maintain solvency
- Government gets tempted to borrow excessively because the tax burden created for future generations may account for little against the benefits enjoyed by the Government's current constituents
- Borrowing has been increasing in Uganda due to the thought that continued large scale borrowing to finance public expenditure would reduce poverty



Uganda's current total external debt is currently US\$4 billion. The Parliament has legal jurisdiction to appraise, monitor and evaluate all matters that pertain to the Government's debt situation.

The Parliament executes her mandate under the Uganda Constitution (powers of government to borrow or lend) through the Committees which are governed by the Rules of Procedure of the Parliament of Uganda. The parliament handles loan matters through the Committee of National Economy. Uganda is the only East African country that approves loans through parliament.

Parliamentarians argue that the arbitrators should collect inputs from key stakeholders from the economies of concerned parties. Other stakeholders should provide their views to civil society and political parties.

He said most importantly, MPs are demanding that the arbitration process should incorporate negotiations on ecological debt as well as for the return of stolen wealth or property by corrupt governments or those implicated in debt mismanagement.

This demand should be explicitly embedded as an article in the International Debt Arbitration Treaty ratified by both creditors and debtors.

Furthermore, MPs are demanding respect and equality during the loan negotiations, end to policy conditionality and operation of Export Credit Agencies among others.

Geofry's final word was that MPs and civil society must work together and utilise the available instruments and institutions to fight illegitimate and odious loans and grants that continue to be extended to the poor nations both bilateral and multilateral.

SESSION 6 THE WAY FORWARD

Chair by Opa Kapijimpanga

PRESENTATION 1

The Way forward in getting the arbitration issue on the international agenda - Steps and procedures to be followed when submitting the illegitimate and odious debt cases to the African Union and United Nations for arbitration.

By Martha Nanjobe



INTRODUCTION

The current framework for dealing with debt crises has not yielded benefits for debtors. The criteria and conditions for debt cancellation are prescribed by creditors in their self interest; and debt cancellation has not led to the anticipated poverty reduction. Furthermore, the issue of canceling illegitimate and odious debt has not been resolved.

The Debt relief initiative was established to deal with debt crises, and the 'relief' was meant to enable indebted countries achieve the Millennium development Goals (MDGs). However, the design of debt relief programs was meant to safeguard donors' interests rather than interests of the debtor nations. Moreover, debt relief by itself could not provide the universal remedy for severely indebted poor countries firstly because multilateral debt cancellation depended on completing the HIPC process, meaning that the MRDI is subject to the same strict qualifying criteria and conditionalities as the HIPC initiative. Thus, delays within HIPC result in delays in obtaining multilateral debt cancellation. Secondly, many countries in need of debt cancellation are still outside the MDRI, and can be regarded as "HIPCs outside the HIPC framework". Debt sustainability challenges facing low-income countries will remain formidable and/or insurmountable if the conditions for meeting them are solely prescribed in creditors' self-interest.

Furthermore, cancelling un-payable, illegitimate and odious debts remains unresolved. For instance International Financial Institutions (IFIs) continued lending to the DRC with full knowledge that Mobutu was diverting a sizeable amount of the funds for personal gain. Poor citizens are not protected against this kind of behavior yet their taxes repay the debts. There is need for a system to balance power between debtors and creditors to resolve debt disputes and to encourage debtor governments and their citizens to demand relief. There are fundamental issues surrounding the debt crisis that remain unaddressed. These relate to power, domination, odious and illegitimate debts.



Demands for arbitration have been made, but official creditors have blocked different forms of arbitration, for instance arbitration for specific types of debts, such as illegitimate or odious debts.

To date official creditors control the timing, pace and depth as well as the conditions of debt relief. In this way, the burden of major economic adjustments for losses falls on debtors, but in reality the real burden for such adjustments falls on taxpayers, including poor people who experience the costs quite acutely.

Rationale for debt arbitration

There is need to establish mechanisms to deal fairly and transparently with debt. Such system should recognize that loan agreements take two parties; and either party can be reckless, irresponsible, and delinquent in its actions and should therefore bear the burden of crises that result from their reckless, irresponsible or delinquent conduct in contracting loans. The burden should not be solely born by the debtor. Secondly, creditors should not be judges in their own case. There is need for a fair and impartial forum to address loan disputes and/or crises. Thirdly, is the principle of accountability - sovereign debt crises are public crises involving use of taxpayer funds. A fair and just resolution of debt crises requires open, transparent and accountable system for citizens and tax payers.

Proposals to restructure debt do not take into account the role of creditors as designers and primary beneficiaries of a system that encourages reckless lending and borrowing. For instance, the design of the Sovereign Debt Restructuring Mechanism (SDRM) does not promote a balanced process and equal representation by debtors and creditors. The creditor is a judge in its own cause; the SDRM would be overseen by the creditor's (IMF) executive board, which is dominated by official creditors of the G-7; and the SDRM ensures that IMF staff and Board play a preemptive role in shaping the outcome of the debt crisis resolution negotiations by setting the country's level of debt sustainability, on the basis of which will be determined the necessary debt reduction. In addition, IMF is expected to take on a substantial role in shaping the debtor's economic policies by providing technical assistance and advising on fiscal, monetary, and legal policies during the period in which the country is being granted relief.

Demands for arbitration are meant to correct an unequal and inequitable relationship between creditors and debtors. Arbitration offers a more flexible form of jurisdiction, with less burdensome procedures and thus greater accessibility. The arbitration tribunal would be independent, and would create a balance between debtors and creditors and avoid situations where creditors are both as judges and parties in a dispute. Furthermore, arbitration would create a forum for civil society to present their demands to the tribunal. An arbitration tribunal would evaluate the legitimacy of the debtor country's debt and pronounce itself on illegitimate and odious, including debt contracted by democratic governments but closely linked with corruption; debts which violate human rights (economic, social, cultural, civil and political).

STEPS AND PROCEDURES TO BE FOLLOWED IN SUBMITTING DEBT CASES FOR ARBITRATION

Proposals for an arbitration tribunal relate to establishing a Fair and Transparent Arbitration mechanism as part of finding a sustainable solution to Debt crises. Arbitration would reshape international relations between creditors and debtors by promoting equity and transparent global relations; and would be a means to debt cancellation and repudiation of illegitimate and odious debts.

(a) Law governing arbitration

There is need to determine the law that will govern debt arbitration. Choices need to be made between modifying existing laws or drafting a new law/treaty. When considering modifying existing treaties, one could consider the United Nations Commission on International Trade Law (UNCITRAL) "Model Law on International Commercial Arbitration" which is aimed at harmonizing national legislation on arbitration. The model law has features which include protecting party autonomy, upholding natural justice principles while conducting hearings; and the limited circumstances in which national courts may interfere in the arbitral process. Legislation based on the Model Law has been enacted in at least 37 countries. It has been proposed that the UNCITRAL Model Law's mandate could be expanded to include arbitration on debt.

(b) UN Commission on Debt

The UN could by international treaty, establish a United Nations Commission on Debt based on the same model as UNCITRAL. Article 3 of the United Nations Charter empowers UN members to "settle their international disputes by peaceful means in such manner that international peace and security, and justice are not endangered". Furthermore, a General Assembly Resolution of 1970, quoting Article 2 (3), of the UN Charter states that:

"States shall seek early and just settlement of their international disputes by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their choice".¹⁹

Establishing the Arbitration tribunal under the UN would be logical because many Conventions relating to arbitration have been enacted under the auspices of the United Nations, for instance: The Protocol on Arbitration Clauses of 1923 (24-09-1923), The Convention on the Execution of Foreign Arbitral Award of 1927 (26-09-1927), The Convention on the Recognition and Enforcement of Foreign Arbitral (New York), 1958 (10-06-1958), The United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules (15-12-1976), UNCITRAL Conciliation Rules (4-12-1980), UNCITRAL Model Law on International Arbitration (21-06-1987), UNCITRAL Notes on Organizing Arbitral Proceedings (14-06-1996),

Establishing the Arbitration tribunal under UN has several advantages. Firstly, UN support would confer the tribunal with a higher level of acceptability or legitimacy.



Secondly, the UN has a pool of resources, human, financial and logistical, that the tribunal can utilize to commence operations. Such resources may be difficult to mobilize outside the framework of the U.N. system. Finally, the U.N. has a better institutional memory of the history, magnitude and developmental implications of southern indebtedness.

(c) The International Court of Justice (ICJ)

The ICJ may be used where the lender is a state and where the loan contract does not specify any particular forum (which is the norm in state to state contracts). Advantages of the ICJ are that its judges are relatively independent of any one state and more likely to be open to non-traditional arguments. Its decision would be influential; although ICJ judgments do not create law to the same extent as customary international law and treaties. They are a subsidiary source of international law.

In addition, the ICJ can provide an Advisory Opinion. The opinion would not be binding in itself, but would provide legitimacy to illegitimate and odious debt doctrines thereby allowing it to be applied to individual situations. An Advisory Opinion can be framed in general terms, thereby entailing less risk on the part of any one debtor state and allowing the Court to address the validity of the doctrines rather than any one particular dispute. Alternatively the UN General Assembly could seek an Advisory Opinion from the ICJ. However, it would require the support of a majority of states in the General Assembly who choose to vote on the issue – about 60 states.

Nevertheless, recourse to the Court is limited because states involved must consent to the ICJ's jurisdiction. Exceptions are where all the states before the court have accepted the court's jurisdiction in advance, or where a treaty between them specifies recourse to the ICJ. Alternatively, UN bodies can request an advisory opinion. By virtue of their institutional ethos, some bodies may be more willing than the General Assembly to make a request. However, the ICJ will only entertain such a request if the issue falls within the scope of the agency's duties.

IDENTIFY ISSUES FOR ARBITRATION

There is need to determine the jurisdiction of the Arbitration tribunal in terms of the cases that they can preside over. Possible issues include:

(a) Whether or not to have debt cancellation.

Heavily indebted low income countries face a difficult situation of debt regardless of the skill of their economic management. The external Debt overhang of majority of LDCs impedes their development efforts and growth since debt servicing consumes a large part of the budgetary resources that could be directed to productive and social areas. While debtors have demanded for debt cancellation, creditors were unwilling to undertake debt cancellation, instead opting for providing ODA to ensure that indebted countries do not fall back into arrears. This type of debt relief safeguards loan

repayments to creditors instead of working in the interest of the people of debtor countries. So whether or not there should be debt cancellation is a subject of arbitration. Furthermore, the criteria for deciding to cancel debts lends itself to arbitration. Creditors' decisions are intended to protect the international financial system yet debtors argue that a human rights criterion should reflect the partnership expected between developed countries and developing countries. Debt repayment at the expense of human development would thereby violate human rights.

(b) Illegitimate and Odious debt

Another issue that should be subjected to arbitration is illegitimate and odious debt. Applying illegitimate and odious debt in a legal manner requires that they should be precisely defined. However, definitions may result in a more restrictive definition than some activists would like to adopt but since debtors are concerned about making a legal argument, the definitions should be suit requirements of a judicially enforceable claim.

Odious debts are those contracted against the interests of the population of a state, without consent, and with the full awareness of the creditor. In such cases, the debt is odious under international law and unenforceable against the alleged debtor state. *p 21 Advancing the Odious debt doctrine*. A claim for odious debt therefore involves two assertions: (1) a *definitional claim* that 'odious debts' exist under certain conditions, and (2) a *legal claim* that 'odious debts' are not enforceable against the alleged debtor state under international law.

1. Absence of Consent: The population must not have consented to the transaction in question. This is so because it is unlikely that the law would forbid a person from willingly entering into a contract that is detrimental to him or her.

2. Absence of Benefit: Absence of benefit to the population can be in two ways: (1) in the purpose of the transaction and (2) in fact. The purpose requirement refers to the fact that creditors should not be punished for good faith loans that were misspent by corrupt governments, and the fact requirement refers to the principle that populations that benefit in fact from bad faith loans are still required to repay them (unjust enrichment).

3. Creditor Awareness: under this requirement the creditor must be aware of the absence of consent and benefit.

(c) Types of Odious Debts

Three types of odious debts have been identified:

1. **Hostile Debts:** debts that are actively aggressive against the interests of a population.
2. **War Debts:** debts contracted by a state to fund a war.
3. **Debts Not in the Interests of the Population:** This refers to debts that were neither hostile nor war debts, but were harmful burdens assumed by a state for which the population received no benefit.



Illegitimate debt is based on the following principles:

Debts contracted by dictatorships or repressive regimes, and used to strengthen the hold of these regimes, are illegitimate. A debt contracted by governments whose money is stolen by leaders and senior public officials, is illegitimate. In addition, debts contracted and used for improperly designed projects and programs are illegitimate. This places a heavy responsibility on creditors, particularly on the World Bank for its failed development projects and on the IMF for failed prescriptions.

Illegitimate debt also refers to debts that increased due to high interest rates and donor conditions. This view argues that the original debt (the principle) has already been paid many times over, so the continued existence of a debt burden is illegitimate. Debts, which cannot be serviced without impoverishing a country's people are also illegitimate. This is usually referred to as "immoral debt", the opportunity cost of which is for countries to put aside the needs of citizens so as to repay debts.

The arbitral tribunal can also consider principles of human rights, justice and equity. Disputes regarding validity could arise from questions of the gross negligence of the lender or false representations made by the lender or its agents and issues such as disagreements over calculation of interest, amounts of repayments, etc. Arbitration tribunals should also be vested with broad powers to investigate and determine questions of fact and law relating to debts, impact of debt servicing on the debtor's ability to provide basic services such as health, education and food to its citizens), and the extent to which debt servicing undermines fundamental human rights generally.

Procedure for submitting cases for arbitration

(a) Who has locus to submit cases for arbitration?

Who is entitled to refer cases to arbitration? Normal contract principles refer to the privity doctrine – that is, parties to the contract have the right to refer a case to a dispute resolution fora. However, there is concern that debtor governments may abuse the system by misusing funds and then refer cases to arbitration; or they may refuse to refer a case for arbitration because they fear that doing so would compromise their chances for further debt.

(b) Locus standi of 'debt affected peoples'

Under what circumstances can civil society refer a case to arbitration? It is arguable that peoples affected by debt should have the basic right - locus standi - to bring cases before an arbitration tribunal. However, while the effects of a loan may be relevant in assessing its worth, and hardship caused by a debt by lending moral force to the argument to cancel or forgive the debt, it does not create a legal relationship between lenders and citizens of debtor states. Thus while affected peoples may have a genuine grievance resulting from debt-induced hardships this does not in itself result in a justifiable dispute between those affected and the lender.

However, this may require an exploration of the issue: who is the sovereign in sovereign debt? Is it the government? Or the citizens whose taxes are used to repay the debt? So, although civil society is not party to loan agreements, they are a key stakeholder as they are directly affected by decisions and consequences of such loan agreements. On the basis of equity, human rights and justice as well as basic human rights, people affected by the debt problems have the fundamental right to be heard and may therefore bring forth cases for arbitration.

Another argument relates to the law of agency. Agency law contains provisions regarding the way in which one person or entity can create legal obligations for another. This arrangement is similar in international law where government creates legally binding obligations for the state, including its population. Agency law is useful in that the power of making binding commitments for another carries with it the special responsibility of acting in the interests of that person, known as a fiduciary obligation. A theory of sovereignty should serve the same purpose at the international level: to make explicit the relationship between the sovereign government—the agent who signs the contract—and the principal—the population against whom the contract is ultimately enforced. Lincau p. 64. To the extent that people are viewed as sovereigns, their payment of debt, not authorized by them and from which they derive no benefit, is incongruous.

Practical difficulties

1. Sovereign Immunity and Arbitration

At international law sovereign states possess a degree of immunity from private tribunals or courts of other states. Submission to an arbitral tribunal would require the waiver of sovereign immunity with respect to the matter at hand by sovereign states, failing which the tribunal would, at international law, have no authority to determine the dispute.

2. Any tribunal, as a judicial organ of international law, must be accorded its own competence. In the case of the arbitration tribunal, it would have to rule on the validity or illegality (and potentially on the illegitimacy) of the debt contracted by a State, which could lead to the nullification of a particular debt. Would creditors submit themselves to a jurisdiction which could lead to the nullification of debts contracted by governments? Equally, the debt problem is closely linked with the corruption of debtor governments, which places them in a difficult situation, since the analysis would be concerned with the legality or legitimacy of their debts. Would they accept that a decision would equally signify government corruption in the process of borrowing?

3. Creating an international tribunal raises the issue of willingness of debtors and creditors. States would need to take the initiative and create a treaty on debt arbitration. Creation of any international tribunal goes through stages of **negotiation**, **conclusion** and **ratification** of a treaty. This implies negotiations between States, and between states and the IFI. Negotiations involve trade-offs which may lead to watering down of the force of the treaty.



Moreover, states can participate or refuse to participate in negotiations prior to the conclusion of the international tribunal. Moreover, if such agreement were concluded, States and the IFI could equally refuse to sign or to ratify it. Under the 1969 *Vienna Convention on the law of treaties between States*, States and international organizations which do not sign, ratify or become parties to a treaty or convention remain third parties and are not legally bound by it.

4. Another fundamental problem relates to the law applicable to the tribunal. Would it apply International law? The domestic law of debtor countries; or that of creditor countries? Both? And, for private creditors: international commercial law or the domestic law of debtor countries? The definition of the applicable law is not simply a technical legal issue, but essentially a political problem.

Martha concluded her presentation by saying:

The operationalisation of the arbitration tribunal could have a significant effect on the bargaining dynamic between creditor and debtor states, possibly leading to debt write-downs. However, it is necessary to decide the forum in which to take arbitration cases, determine the law applicable, have a precise definition of terms and issues that will be arbitrated upon, and have a persuasive argument regarding the right of civil society to present cases for arbitration. By setting out the parameters of acceptable policy, such a decision would facilitate efforts by Southern states to develop common stances on this issue.

WORKING GROUPS RECOMENDATIONS

The conference delegates were then put into three working groups to brain storm on an effective way forward. Guiding questions were drafted and given to the groups for discussions. They were the following:

1. What key action points would you propose in taking the Fair and Transparent Arbitration Process forward?
2. What role should CSOs play in taking the FTA forward at the national, regional and international levels?
3. What role should Southern Governments play in the creation of Arbitration mechanism and how can Civil Society stimulate this role?
4. Do you support the formation of a global task force on Arbitration? If yes what should be its mandate?

The three groups came up with the following recommendations;

A Consensus Points from the Groups

- Global taskforce needed.
- Use existing mechanisms and frameworks to address debt crisis
- Continue to engage policy makers and relevant government and Inter - governmental officials e.g. UN General Assembly and G77

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- Unpack the concept of Debt Arbitration and generate public literacy
- Initiate Official and Citizen Debt Audits

B What key action points would you propose in taking the Fair and Transparent Arbitration Process forward?

- Pursue the possibilities of using the Permanent Court of Arbitration.
- Follow up on suggestions by independent experts (UN)
- International court (court of justice)
- Pursue the appropriate institutional framework
- Separate the 2 issues of focus: Debt stock and Individual loans
- Pursue Long term alternative sources of development financing
- Collect illegitimate and odious debt evidence, profile and contextualize it for arbitration
- Coopt both creditors and Debtor governments buy-in. Governments have to believe and secure their political will
- Engage national and regional parliaments

C What role should CSOs play in taking the FTA forward at the national, regional and international levels?

- Form partnerships, lobby and engage inter-governmental organizations like SADC, African Union and United Nations.
- Defend budgetary allocations on social spending
- Make use of national arbitration courts on specific cases.
- CSOs must lobby their respective parliaments at national, regional, and international levels.
- Continue conversation through list serve
- Generate public education on debt issues.

D What role should Southern Governments play in the creation of Arbitration mechanism and how can Civil Society stimulate this role?

- Compel governments to make reports public
- Send reports to UN
- Influence G77, G20, G8
- Use other available structures within the UN such as the Commission on human rights, commission on economic and social rights
- Repudiate and demand FTA
- Southern governments should state the conditions of an FTA court.



E Do you support the formation of a global task force on Arbitration?

If yes what should be its mandate?

Taskforce necessary and AFRODAD to take the lead.

What would be its mandate?

- Research
- Task force is necessary and AFRODAD to take the lead, establish national chapters, network with other partners

CONCLUSIONS FROM THE CONFERENCE

- The operationalisation of the arbitration tribunal/court could have a significant effect on the bargaining dynamic between creditor and debtor states, possibly leading to debt write-downs.
- It is necessary to decide the forum in which to take arbitration cases, determine the law applicable, have a precise definition of terms and issues that will be arbitrated upon, and have a persuasive argument regarding the right of civil society to present cases for arbitration.

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