FAIR AND TRANSPARENT ARBITRATION ON DEBT

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Preface:

This Issues Paper is an attempt to help move the debate on Debt in Africa beyond the unfulfilled demands made by the severely indebted low income Debtor countries and by global civil society for Debt cancellation. Total debt cancellation of both bilateral and multilateral Debt will provide finance for economic and human development. For Africa this could mean a minimum of US$ 13 billion per year. The legitimate demands for Debt cancellations have not met with a genuine and positive response by Creditor governments and institutions. As donors creditor governments and institutions continue to dominate the decisions regarding the Debt relief initiatives. Their perceptions to the issues of Debt tend to have the interest of safeguarding the existence and well-being of the international financial system rather than have any concern for the development of the people of the indebted countries. This reflects a lack of fair and transparent global governance that should protect the interests of the weak debtor nations and their people.

A structural change is now required to reshape the global relations around the Debt crisis. Global civil society, the African Governments and the intergovernmental institutions are called upon to demand and work towards the establishment of a Fair and Transparent Arbitration mechanism under the United Nations as part of a sustainable way of finding a solution to the Debt crisis. Various options are available at the global level to deal with the problem. In the final analysis, we suggest that an International Arbitration Court is long overdue and is feasible.

This Issues Paper is in two parts; the first provides the introduction and rationale for Arbitration and the second part provides a summary of the opinions sought from African Lawyers from the East, Southern and West Africa on the arbitration process. These were Dr. Halima Noor-Abdi (Kenya), George Kunda (Zambia), Quentin Tannock (Zimbabwe) and Dominic Ayine (Ghana). We thank the contributors for their good efforts. AFRODAD takes full responsibility for the content of this document. Their specific contributions are available at AFRODAD as Discussion Papers.

AFRODAD has also published a Technical Paper entitled: The Efficacy of Establishing an International Arbitration Court on Debt. The paper provides a comprehensive rationale for the establishment of an arbitration mechanism that would play a key role in reshaping international relations between the rich and poor nations on the basis of equity and transparent global relations.

We take this opportunity to thank The World Council of Churches (WCC) for enabling AFRODAD to undertake this work. We also thank Dr. Rogate Mshana for his encouragement in our ongoing search and advocacy for sustainable paths to development in Africa.

Opa Kapijimpanga
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Introduction

The persistence of the debt crisis faced by the severely indebted low-income countries and the inability of the international community to find both immediate and sustainable solutions has raised concern and the need for structural changes at the global level to resolve the problem. There are many facets to the debt crisis but the fundamental weakness is that the Creditors, who constitute the donors, continue to dominate the decision making regarding how to resolve the Debt crisis. For many years now, the Debt Relief Initiatives have been designed by donors to safeguard their interests. This reflects a lack of global governance to protect the interests of the weak debtor nations and their people. A democratic or rights-based framework for resolution of the current debt crisis is therefore necessary.

It is important to note from the outset that the debt problem is inextricably tied to other factors (political, economic and social) prevailing in both creditor and debtor countries. These factors, more than the absence of a dispute settlement system, are mainly responsible for the current level of southern debt. The other main factor a contributory factor to the persistence and magnitude of the current Debt crisis is the **intransigence** of some northern creditors (states, international financial institutions and commercial banks) in the face of calls for debt cancellation or reduction. The need for a Fair and Transparent Arbitration mechanism is therefore based on the absolutely necessary need for resolving the power imbalance between the Creditors and Debtors.

Part A Background and rationale for Arbitration:

Arbitration is one of the alternative methods of resolving a dispute outside the traditional court system. In this process a third independent party would provide a final decision on a dispute.

Dispute in the arbitration process can be defined to include the existence of divergent or opposite views which cannot be reconciled by two parties and which therefore requires a third party, to make a decision on which view should prevail depending on the arguments presented by the two parties. Arbitration agreements allow for settlement or final decisions to be made on grounds other than purely legal principles, such as considerations of justice, equity and human rights.

In the case of the Debt problem faced by heavily indebted low income countries all over the world, there are the divergent or opposite views between the Debtors and the Creditors that should be subjected to Arbitration. These include the following:

a). The absolute need for cancellation of official bilateral and multilateral debts:

While the debtors have made undisputed and legitimate claims and demands for debt cancellation, the creditors on the other hand claim that debt cancellation is not the action needed to resolve the problem. So whether or not there should be debt cancellation is a subject of arbitration. The Calls for debt cancellation have been made in the following contexts (to name a few):

- Jubilee 2000 movement, which collected millions of signatures from all over the world calling for total debt cancellation. The Call was ignored by the Creditor governments and international Financial Institutions.

- The Secretary General's Report of December 2000 to the Financing for Development Preparatory Committee Meetings noted the difficult situation of debt confronted by heavily indebted low-income countries; no matter how skilled their economic management is. He noted that there are cases where debt cancellation could be called for.

- The Third United Nations Conference on the Least Developed Countries (UN LDC-III) which was held in Brussels in May 2001 had fully acknowledged that the external Debt overhang of the majority of LDCs constitutes an obstacle to their development efforts and growth and that Debt service takes up a large part of the scarce budgetary resources that could be directed to productive and social areas and that the debt overhang harms the internal and external investment climate. The Creditors however were not willing to undertake debt cancellation: they opted for providing ODA with the view to ensuring that these countries do not fall back into arrears[1]. Clearly, this type of debt relief is directed at safe guarding loan repayments to the creditors rather than work towards the interest of the people of the Debtor countries.

- The African Ministers of Finance meeting in Addis Ababa in November 2000 as part of the Regional Meetings on Financing for Development called for an independent body that would not be unduly influenced by the interest of the creditors to examine the situation of HIPC and other Debt stressed countries in respect to debt reduction, conditionalities and other issues related to the Debt problem. To provide a debt-servicing moratorium, including accrued interest, in order to allow African countries to find durable solutions to their debt problems.

- The High Level Panel appointed by the Un Secretary General top provide expert opinions of various issues in the context of Financing for Development process, led by Mr. Ernesto Zedillo recognised the existence of the Debt crisis and the inadequacies of the current Debt relief initiative, to the extent of anticipating a HIPC-III.

[1] United Nations General Assembly Doc. A.Conf.191/11 8 June 2001: Programme of Action for the Least Developed Countries Adopted by the Third UN Conference on LDC in Brussels, 20 May, 2001. See section on Debt and in particular paragraph 86.

b). Reassigning the responsibility for the Debt crisis and burden partitioning where that might be necessary. Currently, the assumption of the current Debt relief Initiatives is that the Debtor countries are solely responsible for the crisis. While accepting part of the responsibility, due to lack of proper debt management, corruption and other shortcomings, the Debtors point to the large impact of the external factors that have been identified to have contributed to the Debt crisis including the existence of a global trade regime in which the Debtor countries continue to suffer declines in terms of trade and ongoing lack of global market access; natural disasters and factors introduced by inappropriate policy advice by IMF and the World Bank as well as the push factors in lending, to mention a few. Creditors never seen to be part of the problem, which they obviously are.

c). The way to resolve the debt crisis remains a point of divergence too as reflected in the fact that Creditor initiated and imposed Debt Relief Initiatives such as HIPC do not address the Debt crisis adequately. They are meant to protect the interests of the Creditors and that of international financial system rather than that of Debtors countries and in particular their people. The divergence in terms of the criteria or the basis for why the problem should be resolved is generally very clear.

d). There is a need for Arbitration on specific types of Loans or debt in particular the odious and illegitimate debts which are categorised to include the following:

- Debts that cannot be serviced without causing harm to people and communities. It is a violation of human rights to repay debt at the expense of meeting human development needs.
- Debts incurred by illegitimate debtors and creditors acting illegitimately which includes odious debts and loans stolen through corruption.
- Debts incurred from illegitimate uses such as projects that did not benefit the people as were intended.
- Debt incurred through wrong policy advice or a result of external factors over which debtors have no control.
- Debt in which the money was actually stolen and banked in the North

e). Return of wealth stolen from developing countries and held in the rich countries.

f). One of the major reasons for the lack of political will to resolve the debt crisis is that the Creditors see the protection of the international financial system as the basis of decision. Debtors on the other hand argue that a human rights criterion would better reflect the so-called partnership that is expected to exist between the developed countries and the developing countries. In this regard, debt repayment at the expense of human development is clearly a violation of human rights. The criteria used for making the decision on whether or not to have debt cancellation lends itself to arbitration.

Instruments and institutions:

There is a need for finding an appropriate instrument and institution to deal with the special case of the Debt problem. Existing instruments such as the Permanent Court of Arbitration based in The Hague, the United Nations Commission on Trade could either have its mandate extended to include Debt issues or a new Commission specifically for Debt could be established. We also argue that in the end, the optimal solution is to set up an International ArbitrationCourt on Debt through a Treaty[2]

Part B: Issues raised by the Lawyers

Arbitration in general

Arbitration is the procedure whereby parties to a dispute refer that dispute to a third party for a final decision. It has been a means of dispute resolution for many thousands of years in various cultures in the world.

It is a means of 'alternative' dispute resolution, as it is an alternative to other, especially legal, means of dispute resolution. Speaking in the context of Trade and Investment disputes former President of South Africa Nelson Mandela has said:

> "We have a special interest in alternative dispute resolution. It is an approach that has stood us in good stead through our negotiated transition and has taken root in the field of labour and community conflict."[3]

Arbitration agreements may allow for a settlement to be made on grounds other than purely legal principles, such as considerations of justice and equity and Human rights.

What constitutes a dispute should be widely interpreted. The International Court of Justice has stated that:

> "A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons." [4]

It should be noted that, however broad the understanding of what constitutes a dispute might be, it is clear that in principle a simple failure to pay a debt does not constitute a dispute, although this may naturally have lead to a 'conflict of interests' between the parties. The International Court of Justice in the South West Africa case stating that:

> "A mere ascertation is not sufficient to prove the existence of a dispute... Nor is it adequate to show that the interests of the two

[2] See AFRODAD The Efficacy of establishing an International Arbitration Court on Debt as well as the document: AFRODAD: Establishment of an International Arbitration Court on Debt.

[3] Message from President Mandela to the Conference on the Resolution of International Trade and Investment Disputes in Africa, March 1997

[4] (1924) PCIJ Ser.A, No 2, 11.

parties are in conflict. It must be shown that the claim of one party is positively opposed by the other." [5]

Other forms of resolving Conflicts:[9]

Negotiation

Disputes such as those that might arise around Debt are inevitable in international relations. Negotiations between states are usually conducted through normal diplomatic channels or through competent government ministries concerned. Any disagreements render issues to be taken to the highest level of government.

Mediation

When the parties to an international dispute or domestic dispute are unable to resolve it by negotiation, the intervention of a third party is a possible means of breaking the impasse and producing an acceptable solution. The third party may simply encourage the disputing states to resume negotiations, or does nothing more than provide them with an additional channel of communication or facility. The mediator may actively participate in the discussions and advance their own proposals or interpret, as well as to transmit, each party's proposals to the other.

Mediation may be performed by organisations, by states or by individuals. And cannot be forced on the parties to an international dispute, but only takes place if they consent.

Conciliation

Conciliation has been defined as: *"A method for the settlement of international disputes of any nature according to which a Commission set up by the Parties, either on a permanent basis or an ad hoc basis to deal with a dispute, proceeds to the impartial examination of the dispute and attempts to define the terms of a settlement susceptible of being accepted by them or of affording the Parties, with a view to its settlement, such aid as they may have requested."*[10]

If mediation is essentially an extension of negotiation, conciliation puts third party intervention on a formal legal footing and institutionalises it in a way comparable, but not identical, to inquiry or arbitration. Fact finding exercise that is the essence of inquiry may or may not be an important element in conciliation, while the search for terms susceptible of being accepted by the parties, but not binding or them, provides a sharp contrast with arbitration and a reminder of the link between conciliation and mediation. All conciliation commissions have the

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[5] ICJ Rep. 1962, 319 at 328.

[9] See J.G. Merrills, International Dispute Settlement, 2nd Edition, Cambridge PP1 to 79 for the subjects of negotiation, mediation, conciliation

[10] The quotation is from Article 1 of the Regulations on the Procedure of International Conciliation adopted by the Institute of International Law in1961. See (1961) 49 (ii) Annuaire pp.385-91.

same functions: to investigate the dispute and to suggest the terms of a possible settlement.

Advantages and disadvantages of Arbitration

The main advantages of arbitration include choice of Arbiters by the Parties, choice of procedure (potentially non-adversarial), neutrality of the arbitrator and enforceability of award at International Law[6]

While for commercial disputes, the practice has shown that arbitrations can often be difficult, lengthy and costly, with most difficulties however, arising when parties fail to agree on matters necessary to begin the process of dispute resolution such as rules or procedures, venue(s) and language of hearings, one would expect that for the Debt issues which is a development issue we could expect less of such a problem. A Treaty may however be necessary to set ground for the parties to submit to arbitration processes.

Arbitration in international Law

Arbitration has a long history in International Law and is a well-established means of resolving disputes between states[7] and nationals of a state with another state[8]. Collier and Lowe, in a general discussion of the history of Arbitration in International Law state that: "Arbitration *(can be* ed.) was seen as a move away from the power-based system of negotiated settlements towards a more principled system."[9]

International Conventions on Arbitration

The majority of International Conventions on Arbitration deal with the international recognition of agreements to arbitrate and the recognition and enforcement of foreign arbitral awards. The *1923 Geneva Protocol* and the *1927 Geneva Convention* laid the foundation for the widely accepted *1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, (the NY Convention).

In the NY Convention contracting States agree to recognise and enforce arbitral awards made in other contracting States. Some states agree to do so only on the basis of reciprocity. The Convention further details the grounds on which recognition and enforcement of foreign awards can be refused.[10] On the whole the Convention provides a legal framework that would uphold arbitrations on Debt.

126 states have acceded to the NY Convention

[6] See discussion of NY Convention and Enforceability at pg 5 below
[7] See for example the Economic Community of West African States Community Court of Justice
[8] The Iran-US Claims Tribunal provides an interesting example of this latter form.
[9] Collier and Lowe; The Settlement of Disputes in International Law, p.g. 33
[10] Ref: NY Convention; Article V

Existing Arbitral Institutions

Current arbitrations are largely commercial in nature involving trade, commerce, private sector loan agreements and investments. Aside the various arbitrations institutions at the national level, there are the International Centre for the Settlement of Investment Disputes (ICSID), the International Chamber of Commerce International Court of Arbitration and the United Nations Commission on International Trade Law (UNCITRAL).

Loan agreements involving state parties are usually perceived as transactions of a commercial nature, although particular difficulties arising from the sovereign immunity of states and the existing economic and political environment would appear to have prevented a more widespread use of the commercial arbitral mechanism to resolve Debt problems. The most relevant instrument which could handle arbitrations on the Debt problems as not being purely commercial in nature is the Permanent Court of Arbitration (PCA)

The mandate of the UNCITRAL and the ICSID could be expanded to cover Debt. However, the ICSID would have to be independent of the World Bank since the Bank is a lender and will most likely be a party to arbitration on multilateral debt.

The Permanent Court of Arbitration (PCA)[11]:

The Permanent Court of Arbitration (PCA), which resides in The Hague, was created by the 1899 and 1907 Hague Peace Conference[12]. The PCA acts as a registry for arbitral tribunals created *ad hoc* for specific disputes and maintains a panel of persons, nominated by contracting states, from which states may choose arbitrators to adjudicate their disputes. States must accede to the PCA conventions to access its facilities.

In 1962 the PCA began to accept disputes between States and 'non-State' organisations or individuals. In 1996 the PCA adopted a set of "Optional Rules" based on the UNCITRAL Arbitration Rules[13]. The PCA thus has rules in relation to arbitrating disputes between states (to carter for bilateral debt issues), between state and international organisations (to carter for multilateral Debt e.g. World Bank and IMF), between two parties of which only one is a state (this would carter for private debt, public guaranteed debts, stolen money.).

The rules governing arbitration between two parties of which only one is s state would allow for civil society to take up a case for arbitration at the PCA.

An appropriate framework for the resolution of Debt should be an organisation established by Treaty, convention or General Assembly Resolution. The treaty or convention establishing the organisation should deal with issues of

[11] see elaboration on PCA in AFRODAD: The efficacy of establishing and International Arbitration Court on Debt
[12] The PCA Conventions can be viewed at http://pca-cpa.org/BD/
[13] The PCA “Optional Rules” can be viewed at http://pca-cpa.org/BD/

sovereignty and the waiver of sovereignty and may deal with the *locus standi* of parties and groups of affected persons to approach the tribunal.

The organisation should also operate under well-defined rules, have a small administrative secretariat to assist in the administration of arbitrations according to it's rules, and act as a decisive authority where parties cannot agree (on issues such as venue, appointment of arbitrators, etc) The PCA is a good example of an organisation having all of these characteristics.

The UNCITRAL Model Law

The United Nations Commission on International Trade Law (UNCITRAL) drafted a "Model Law on International Commercial Arbitration", completed in 1985[14]. The aim of the Model Law was to harmonise national legislation on arbitration. Features of the Model Law include the protection of party autonomy, the upholding of the principles of natural justice in the conduct of 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.[15]

UNCITRAL does additionally provide training and technical assistance to states that includes (a) information activities aimed at promoting understanding of international commercial law conventions, model laws, and other legal texts; (b) assistance to Member States with commercial law reform and adoption of UNCITRAL texts; and (c) assistance to chambers of commerce and professional associations with the use of UNCITRAL non-legislative texts as models for preparing their own rules or with the direct use of those texts by their members."[16]

As in the case of PCA, the UNICTRAL could prove to be a good framework for arbitration on Debt if its mandate were expanded to include Debt. **Alternatively the UN could establish a United Nations Commission on Debt based on the same model as UNICTRAL**.

(The UNCITRAL Notes on Organising Arbitral Proceedings[17] provide a useful guide to the considerations in arranging arbitrations. The UNCITRAL Rules and Rules of existing institutions, for example the PCA "Optional" Rules are also useful reference materials.)

The International Centre for the Settlement of Investment Disputes (ICSID)

The International Centre for the Settlement of Investment Disputes (ICSID) was established by the 1966 Washington Convention on the Settlement of

[14] The Model Law text can be viewed at http://www.uncitral.org/english/texts/arbitration/ml-arb.htm

[15] As of 14th August 2001. See Status of Texts links at http://www.uncitral.org/en-index.htm

[16] http://www.uncitral.org/en-index.htm

[17] Available through http://www.uncitral.org/en-index.htm

Investment Disputes between States and Nationals of Other States[18], to provide a dispute resolution mechanism separate from the national laws of states for disputes between States and non-State entities. The ICSID Convention is widely used and has been ratified by 120 State Parties.

As already noted above, extending the Debt arbitration to this Centre would have to be conditioned on the Centre being independent of the World Bank because it is a lender and is also very close to other lenders[19] and therefore its neutrality would be suspect[20] and may lead to reluctance by Debtors to submit to arbitrations administered or organised by such organisation.

Whilst the neutrality of ICSID for example may be in doubt, parties to disputes have the comfort of some degree of neutrality of process as in most cases they may select their own arbitrator or arbitrators. ICSID provides that where the parties cannot agree on an arbitrator each side proposes an arbitrator, with the two arbitrators then agreeing on a third[21].

Arbitration Centres

Many 'arbitration centres' have been established around the world (including African countries) concentrating on promoting the resolution of commercial disputes by arbitration. Typically these centres are 'not-for-profit' organisations that facilitate the training of arbitrators and maintain a database of arbitrators for suggestion to parties. The centres may additionally provide services in support of arbitrations underway, arranging venues, recording and transcription of hearings, translators and performing other general administrative and secretarial tasks.

These arbitration centres represent a local skills base consisting of a nucleus of trained and experienced arbitrators. Not only can arbitration centres be a source of arbitral experts but also, by virtue of their experience in hosting arbitrations, provide a skills base in the hosting and facilitation of the arbitral process. Where appropriate this opens the possibility of the successful use of many Debtor states as venues for the conduct of an international arbitration.

On agreement between the parties an arbitration can be hosted in any suitable place and some arbitration hearings are held in several locations, for example with parties holding agreed preliminary meetings in the territory of one party and the final hearing in the territory of another. Where parties are physically located in different jurisdictions this may have the effect of splitting the cost and inconvenience of travel and accommodation in a foreign territory between the parties. Debtor states should be encouraged to investigate such options and where appropriate negotiates to achieve them.

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[18] The full text of the ICSID Convention and applicable Rules may be viewed at http://www.worldbank.org/icsid/basicdoc/9.htm

[19] In the ICSID example closeness is to the World Bank

[20] See for example the views held by the Ecumenical Association for Economic Justice; http://www.ecej.org/ffd%20tribunal.htm

[21] See the discussion of ICSID above at pgs 7 - 10

The use of existing institutions by "developing" states

Return and Hunter note that "It takes time, and it costs money, to conduct a major international commercial arbitration, whether or not one of the parties is a state. Hearing and conference rooms have to be hired; and often it will prove necessary to appoint a secretary or registrar to assist the tribunal in it's work, together with translators, stenographers and so on. At the PCA, rooms for hearings and the services of the Bureau are provided to parties for a nominal charge. This is an obvious attraction. It is surprising that more use is not made of these facilities"[22]

As the authors further note: "The only requirement for recourse to the expertise of the Bureau, and the excellent and prestigious facilities of the Peace Palace, is that the state concerned should be, or become, a party to either the Hague Convention of 1899 or that of 1907." [23]

The Secretary General of the United Nations Kofi A. Annan, in a forward to a collection of PCA documents said: "I encourage States, international organizations and private parties to make greater use of the Court's services, which also include fact-finding and conciliation; such recourse would help ease the workload of the International Court of Justice and fill gaps concerning arbitrations involving private parties and international organizations. I also urge States, which have not ratified the Hague Conventions to do so. Developing countries, in particular, could well find the flexible instruments of dispute resolution to be an invaluable asset." [24]
Before an informed decision on whether to use the existing PCA, or other, framework can be made detailed information with regards to the disputes anticipated and consultations with relevant governments and the PCA itself will be required.

Andrew Okekeifere notes that historically: "Many Third World countries have been deeply distrustful of arbitration for the settlement of international disputes … bias against developing countries was perceived in the attitude and awards of international arbitrators."[25]

In more recent times however there has been a trend towards the use of arbitration, as arbitration laws and infrastructures are established in the developing countries and a local skills base has developed. As Okekeifere states more recently: "…there has been a steady progress towards a warm embrace of international and domestic arbitration … most of the Third World states have established a sophisticated legal infrastructures for the governance and conduct of arbitration."[26]

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[22] Redfurn and Hunter, Law and Practice of International Commercial Arbitration, 2nd Ed.; pg 46
[23] ibid
[24] Available at http://www.lawschool.cornell.edu/library/pca/bdemain.htm
[25] Enhancing the Implementation of Economic Projects in the Third World Through Arbitration; A I Okekeifere; Journal of the Chartered Institute of Arbitrators; August 2001; pg 240 at 242
[26] Ibid, pg 244.

Despite this trend towards the use of arbitration, many developing states tend not to use arbitrators and legal representatives that are 'home grown' to resolve their disputes. Since the PCA allows for the parties to choose the arbittors, Debtor countries will need to be encouraged to use their domestic skills at the PCA.

Sovereign Immunity and Arbitration

At international law sovereign states possess a degree of immunity from private tribunals or the 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 not have the authority to determine the dispute.

Whether sovereign immunity is total or partial is a matter of some debate. Some authors promote the doctrine of Restrictive Immunity, which simply stated is that states, when conducting affairs of a private law nature or *jure gestitonis*, should be treated as the natural subjects of private law. However as Brownlie notes:
"It is far from easy to state the current legal position in terms of customary or general international law. Recent writers emphasise that there is a trend in the practice of states towards the restrictive doctrine of immunity but avoid firm and precise prescriptions as to the present state of the law." [27] What is clear is that "Voluntary submission to jurisdiction does not extend to measures of execution" [28]

Waiver of immunity could be on a case-by-case basis or by means of a blanket waiver in respect of disputes resulting from foreign debt. For the avoidance of doubt it is advisable that the waiver in either case be explicit, some national courts will not imply waiver from general circumstances[29] and it is possible, although unlikely, that an arbitral tribunal might take the same approach[30].

States should carefully weigh up the consequences of doing so and states desirous of maintaining as much immunity as possible should be careful to restrictively word any such waiver. A 'blanket' waiver could be achieved in a treaty or declaration[31] but should likewise be carefully worded and considered. Due to the broad nature of disputes possible in Debt situations a blanket waiver will be considered advisable.

***Locus standi* of 'debt affected peoples'**

Civil Society organisations (CSOs) are eager to see peoples affected by debt to have the basic right, *locus standi*, to bring cases before an arbitration tribunal[32].

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[27] Brownlie, pg. 332-3.
[28] ibid, pg. 343
[29] For example in the United Kingdom, see *Kahan v Pakistan Federation* (1951) KB 1003
[30] This would defeat the object of submission to arbitration for the parties to the dispute.
[31] An example is the 1972 *European Convention on State Immunity*, which waives the immunity of contracting states in the courts of other contracting states in limited circumstances.
[32] Ref: AFRODAD Terms of Reference, Expert Opinion on International Arbitration Mechanisms on Foreign Debt, August 2001

The effects of a loan may be relevant when assessing it's worth and hardship caused by a debt may lend moral force to the argument to cancel or forgive the debt but does not create a legal relationship between lenders and citizens of debtor states, except possibly as these citizens are represented by their governments in agreements with lenders. Thus conventional wisdom has it that 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[33].

Furthermore it is anticipated that debtor states themselves may wish to guard their right, and the privileges that go with this right, to represent their citizens on the international plane. It is not inconceivable that a grouping of affected people may make a submission or take a case to a tribunal in conflict with the wishes of the debtor state in which they are citizens. If a grouping of affected people is sufficiently small and unrepresentative of general feeling within the debtor state, or if due to the cost of appearing before the tribunal only those peoples with significant economic means are able to do so, minority views and concerns might conceivably be given disproportionate weight. Consultations may need to be conducted with debtor governments to ascertain what their view on this issue is likely to be.

It is also considered most unlikely that any lending institution would voluntarily submit to a process where persons, groups of persons or organisations that are not a party to the lenders agreement with the borrower could challenge the validity of the relevant agreement. Accordingly the achievement of the right of *locus standi* for affected peoples to appear in Debt arbitrations, except as they already have through their democratically elected governments may prove to be difficult under the current situation.

The other side of the coin to this argument however is that although civil society is not party to loan agreements, they are nevertheless 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 enshrined in the United Nations Charter as well as the Arusha Charter on Popular Participation (The African Charter, 1990 which promotes people centred development) the people affected by the Debt problems have the fundamental right to be heard and may therefore bring forth cases for arbitration. In this respect they have the right to do so under the Permanent Court of Arbitration rules governing arbitration between two parties of which only one is a state.

Validity of Debts

The jurisdiction of an arbitral tribunal need not be limited to deciding on strictly legal principles, but can also consider principles of human rights, justice and equity.

[33] See the discussion of justiciable disputes at pgs 15 - 16

It is conceivable that disputes over validity could arise from questions of the gross negligence of the lender or false representations made by the lender or it's agents and issues such as disagreements over the calculation of interest, amounts of repayments, etc. Typically loan agreements often contain clauses that exclude liability for the lender and its agents. As a matter of policy governments should not accept broad exclusion of liability clauses, which unfairly benefit lenders.

In many jurisdictions, however, exclusion of one's own liability is not permitted in cases of extreme or gross negligence. Research should be conducted to determine what portion of Africa's debt is governed by such laws and is challengeable on the grounds of the gross negligence of the lender.

It is useful to quote at length from the UNITAR, Resource Centre Training Package:
"Developing countries rely on external expertise because they lack the technical know-how and assistance to plan infrastructure policies and to implement projects. Consequently, developing countries should not bear the burden of that bad planning and bad implementation performed by external sources. Consultants should not be paid and must be held liable for insufficient studies, which lead to wasteful projects and cause prejudice to the country. Contractors who fail to perform should also be held liable; financial institutions are not exempt from liabilities. Sectoral comparative law studies indicate that modern civil and commercial law has broadened contractual obligations in complex business transactions beyond the strict delivery of goods, performance of services, or payment of money to include dissemination of professional information, exchange of motivated opinions, discovery of special risks, and instructions and consultations, especially if one party is less knowledgeable than the other and therefore must trust the other's superior skills. Neglecting these accessory obligations may be considered a breach of contract, which entitles the other party to damages and discharges it from obligations. These tendencies exist in purely commercial transactions and should be all the more applicable if the lender is an official donor with the statutory obligation to finance and assist in the execution of development projects."[34]

Illegitimate and Odious Debts:
Illegitimacy of debt is based on the following principles[35]:

* Debts contracted by dictatorships or repressive regimes, and used to strengthen the hold of these regimes, are illegitimate, for instance the apartheid caused debt inherited by South Africa. (an established legal principle as discussed above).

* A debt contracted by corrupt governments, which was stolen by leaders and senior public officials, is illegitimate. This has also been referred to as stolen wealth (for instance the late President Mobutu of Zaire)

[34] UNITAR, Resource Centre, Debt and Financial Management (Legal Aspects) Training Package.
[35] Ann-Louise Colgan," Africa's Debt", Africa Action Paper, July 2001, *http://www.globalpolicy.org/socecon/ffd/debt/2001/0723africa.htm*

* Debts contracted and used for improperly designed projects and programs are illegitimate. There is a heavy responsibility on creditors here, particularly on the World Bank for its failed development projects. (The so-called white elephant projects, etc.) and on the IMF for failure of their prescriptions.

* Debts that swelled because of high interest rates and other conditions imposed by creditor governments and banks are illegitimate. This perspective 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 illegitimate. This is more often termed "immoral debt" As the late Julius Nyerere said, "must we starve our children to pay our debts"?

* All debts owed by the South to the North can be considered illegitimate. As Jubilee South maintains that the countries of the South are in fact creditors of an historical, social and ecological debt which Northern countries refuse to recognize.

Stolen wealth:
The return of money stolen to a State

Nothing precludes the submission of a dispute to arbitration involving the return of money stolen or obtained through corruption by officials or former officials of a State to that State. Should an a appropriate arbitration framework for the resolution of Debt be identified or established it may be that this framework will also be well suited to the resolution of such 'stolen money' disputes.

An investigation or survey of debt to assess the laws governing debt and the statutory and other obligations of lenders and to determine the consequent portion of 'illegitimate' debt by a neutral organisation may be appropriate. In this respect the UN, or an agency of the UN, or even an intergovernmental body like the African Union, might play a useful role. It will be important for any neutral investigative body, and particularly important for the UN to be seen to be investigating fairly without preconceptions or prejudice. It is likely that not all states will be comfortable with UN involvement and it may be necessary for debtor states wishing a detailed survey to commission their own survey and submit their debts to a survey conducted by a private organisation or their own legal experts.

An advantage of such a survey would be that debtor states would be better informed about loan agreements that might be successfully challenged. Should debtor states show a willingness to proceed to challenge loan agreements using arbitration at the very least this would give debtor states a stronger position to negotiate from in their drive for debt reduction and cancellation.

Implications of arbitrating on debt

Success or failure before an arbitral tribunal will naturally depend a variety of factors. The strength or weakness of the cases presented and the basis on which it is decided are of obvious importance to an assessment of the likely outcome.

Arbitrations do not usually use a precedent system. Should there be no precedent system it is not anticipated that a failure in any one case would necessarily prejudice the success of any further cases on the same grounds.

Establishment of an International Arbitration Court:

The unique problems of debt call for establishment of a special court. Many arbitral institutions in the world do not restrict their modes of settling disputes to one mode. They employ methods and processes, which are appropriate for each particular dispute. It would not be appropriate to enhance current mechanisms such as the Paris Club by introducing arbitration panels to hear possible disputes between Debtors and Creditors because such a club which is in fact a cartel can still intimidate Debtors under the guise of debt negotiation. The imbalances in bargaining power between the Creditors and Debtors calls for the establishment of a neutral and impartial arbitral institution.

The establishment of a unique arbitral institution to deal with the problem of debt is further justified by the fact that similar institutions have been set up before to deal with unique problems. Some of these similar institutions which we may emulate are *The International Centre for Settlement of Investment Disputes (ICSID)* and *The Permanent Court of Arbitration already noted above.*

It is desirable that the proposed Court be set up under the United Nations and by International Treaty. Members of the United Nations in Article 3 of the United Nations Charter have agreed to *"settle their international disputes by peaceful means in such a manner that international peace and security, and justice are not endangered".* Again a General Assembly Resolution of 1970, after quoting Article 2 (3), of the UN Charter proclaim that:

"States shall accordingly 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 proposed Court under the auspices of the United Nations, would be the most logical step. In this regard, many Conventions relating to arbitration have been enacted under the auspices of the United Nations. Some

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[19] General Assembly Declaration on principles of International Law Concerning Friendly Relations and Cooperation among states in accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), October 24, 1970. The resolution was adopted by the General Assembly without a vote. See also J.G. Merrills, International Dispute Settlement, 2nd Ed. Cambridge (Supra), at P2

examples are: 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 Organising Arbitral Proceedings (14-06-1996),

International Treaty should establish the Court. Which is basically an agreement between parties on the international scene. The term "treaty" itself is the one most used in the context of international agreements but there are a variety of names that can be, and sometimes are, used to express the same concept, such as protocol, act, charter, covenant, pact and concordat.

Structure of the Court

The Court could be composed of not more than five arbitrators from both the Debtor and Creditor sides with an independent arbitrator to ensure impartiality. This kind of composition has been used in other arbitral tribunals. However, such a court could also maintain a panel of arbitrators from which parties can choose. It would have a secretariat to provide the necessary organisational support. Existing facilities such as courtrooms, library, and consultation rooms belonging to the Permanent Court of Arbitration in The Hague could be accessed. etc.

Stay of Proceedings

It is a common feature of court and arbitral proceedings for parties to apply for stay of proceedings pending disposal of arbitral proceedings. Under this power, repayment of particular disputed loans could be frozen, stayed or suspended until the Court makes a decision. This power may be vested in the court by treaty and the Rules of the court. The idea is to maintain the status quo until an action is disposed of.

The Question of a Global Debt Treaty

After the Second World War and the founding to the Federal Republic of Germany, the latter found itself with such a burden of debts, variously disputed in detail that they stood in the way of establishing normal commercial relations in the international field. The German debts comprised liability under the Treaty of Versailles (as modified by the Dawes and Young Plans); World War II liabilities towards victors and other states; debts due on bonds issued by Germany and private debts from the period prior to the two World Wars.

As a result of the work of the Tripartite Commission on German debts (established in 1951) and the London Debt Conference of 1952, and further negotiations at Government level, the London Agreement on German External Debts was concluded on 27 February 1953.

Pursuant to the London Debt Agreement various arbitral tribunals were established with mandates to deal with German debts owed to foreign countries. The Mixed Graeco-German Arbitral Tribunal dealt with Greek debt

claims against Germany; the Mixed German-American Commission was also mandated to handle claims made by Americans against Germany.

These arbitral tribunals determined claims and disputes relating to Germany's foreign debts as and when these arose between Germany and any of its creditors. Thus in Greece v. Federal Republic of Germany the issue to be determined by the arbitral tribunal was whether given the London Agreement Greece and Germany were under an obligation to negotiate concerning the dispute as to whether in terms of the "inclusive amounts" principles laid down in the Dawes Plan and replaced by the Young Plan, Germany was liable to make certain payments to Greece on account of awards made by the Mixed Graeco-German Arbitration Tribunal; and if so to what end the obligation to negotiate was to be understood.

The underlying rationale of both the London Debt Conference and the establishment of the various arbitral bodies to deal with questions relating to German foreign debt were to restore the credit worthiness of the heavily indebted German Republic as an economic partner to the European Allied Powers and the United States of America. The ascertainment of Germany's total debt was necessary so that a redemption schedule could be worked out which Germany could adhere to without endangering its economy and its currency. Thus, more than merely settling disputes, the various tribunals established under the London Debt Agreement also functioned as fact finding bodies.

The approach adopted by the victors after the two world wars regarding German foreign debts and the rationale therefore can be adopted *mutatis mutandis* in respect of the foreign debts of countries in the developing world. The process of consultations that culminated in the London Debt Conference, and the outcomes of the conference itself are definitely useful and can be modified and adopted for third world debt. An intergovernmental conference on third world debt may result in the adoption of a **Multilateral Agreement on Indebted States** (MAIS) that could serve as the framework agreement for working out country-specific solutions to the debt problem. Unlike the HIPC Initiative this will be more broad-based and the terms and conditions of debt relief or cancellation/forgiveness would not be imposed upon developing countries by international financial institutions.

Arbitral tribunals established pursuant to the MAIS should also be vested with broad powers to investigate and determine questions of fact and law relating to debts contracted by third world countries, the impact of debt servicing on economic performance (especially its impact on the country'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. Such tribunals should also have power to decide maters relating to the conditions under which the debt was contracted so as to determine whether there are any vitiating factors – duress, undue influence and violation of public policy- that may occasion the discharge of the indebted country from its debt obligations.

Implications on long-term global governance and the role of the UN

Establishing the Court of arbitration under United Nations auspices has several advantages. That approach will confer immediately on the court a higher level of acceptability or legitimacy than will probably be the case without the support of the United Nations. Also, the U. N. has a pool of resources, human, financial and logistical, that the court can immediately rely upon to commence operations. These resources may be difficult to mobilize outside the framework of the U.N. system. Lastly, it is definitely true that the U.N. has a better institutional memory of the history, magnitude and developmental implications of southern indebtedness than any other organization in the world and this would be useful in the dispute resolution process.

Should the UN become involved in assisting States resolve Debt by arbitration it should be especially careful to avoid being perceived as being partisan to either borrowers or lenders. It is conceivable that the UN or a suitable agency of the UN might play the role of mediator in Debt issues, or provide official mediators to assist parties to resolve the Debt crisis, before submission to the costly and risky process of arbitration is necessary. This may have the effect of enhancing the image and role played by the UN between states.

One course of action for the UN would be a UN sponsored assessment of debt and its implications. Such an assessment could be followed with technical advice and assistance to states on both sides of the debt divide. However, depending on the outcome of the assessment or assessments this may be a difficult role for the UN to play and still maintain its perceived neutrality. An alienation of either lenders or debtors would impinge negatively on the UN and should be carefully guarded against. For that reason, an arbitration Court could be set up on the basis of a Treaty[36].

The other option would be for African Union, in the case of Africa, to take up the assessment as well as speak, so to say, on behalf of the African nations.

The "Moral hazard' dilemma

The United Nations framework is important for making a breakthrough in working towards a Treaty and its ratification. In view of the fact that the Creditors have been reluctant to have an International Conference on Debt the Third World countries, with the assistance of progressive countries and the Secretary General of the united nations will have to work towards such Treaty or treaties dealing with the Debt of sovereign states and/or the issue of corruption. A convention dealing with monies stolen by corrupt State officials could similarly deal with the principles applying to the tracking and return of such monies.

State parties to any such Convention or Treaty could agree to submit any future dispute arising from matters covered by the Convention or Treaty to binding

[36] as suggested in AFRODAD; the Efficacy of establishing an International Arbitration Court.

arbitration, to be conducted with reference to the principles detailed in the Convention or Treaty and under the auspices of an identified and suitable arbitral organisation, such as the PCA. A General Assembly Resolution on these issues may find support and aid in the general success of any such treaty or convention.

However extensive research into existing international law and surveys of State opinion on such a Resolution, Convention or Treaty would naturally be necessary and would be best conducted by the UN itself; in particular by the International Law Commission (ILC) of the UN.

Implications of the Arbitration Mechanism for Development Cooperation

Permitting heavily indebted States to avoid payment of debts, or forgiving a debts or portion of a debts on a large scale raises the 'moral hazard' for lenders that their debtors will not view any debt as repayable and will begin large scale repudiations. Equally, a moral hazard for borrowers comes into play with reckless, illegitimate, invalid and irresponsible lending which results in unpayable debt. Both of these undermine the viability of the international financial system and should therefore be eliminated as part of the new international financial architecture.

The challenge of the debt of States on the basis of legal and other principles such as equity and human rights, through the arbitration mechanism will play a role in reshaping the relationship between lender and borrower states and the civil society will benefit from improved outcomes of loan resources.

A well-conceived and well-designed dispute settlement mechanism certainly harbours the potential for improved development cooperation between developed and developing countries. In the view of some policymakers from developing countries, development assistance means little in the face of debts that virtually 'strangulate' the economies of developing countries. A mechanism of dispute settlement that can ensure that debt is not an obstacle to economic development is certain to improve the relations of developed and developing countries in the development process. Thus a dispute settlement mechanism established with broad support from both creditor- and debtor-countries could drastically improve north-south development cooperation.

Inclusion of arbitration clauses in loan agreements

It is suggested that debtor states push for the inclusion of appropriate arbitration clauses in future loan agreements. Should an appropriate arbitration framework be identified or engineered such a clause should make reference to the framework. The clause may make reference to a staged dispute resolution procedure starting with negotiation and proceeding to mediation and arbitration as necessary. However as what is appropriate may vary specific legal advice should be taken in each instance. The Arbitration Centres in the countries may be in a position to assist, or to suggest experts who can assist, parties in this regard.

CONCLUSION:

The real question that remains is what mechanism should be established. This should be a subject of further discussion and will be pursued with the United Nations. Our current position is that there should be established an International Arbitration mechanism on Debt. A Court is long overdue but use of existing institutions could be acceptable if this would tackle the specific and unique aspects of the Debt crisis.