

## Sovereign debt arbitration and Scotland



Many countries across the globe continue to be burdened by unpayable and unjust debts. These act to have devastating impacts on the life chances of millions of people. Governments struggle to meet the costs of essential public services and build vital infrastructure for economic development since much of their income is diverted into the accounts of creditor countries and supranational organisations in the form of loan repayments. Significantly, many of these debts are the result of irresponsible lending. Loans are frequently made to dictatorial regimes where there exists evidence of corruption and citizen oppression. They are also given to support the build up of arms and the pursuit of environmentally unsound projects. There is a lack of transparency and more often than not loans are given to countries which lenders know will be unable to repay them, all in order to maximise profits.

There have been notable successes in bringing about the cancellation of unjust and unpayable debts, for example the Heavily Indebted Poor Countries (HIPC) initiative which saw 40 of the world's poorest countries receive debt relief in 2005. Crucially however, the problems surrounding unjust debts remain. Many countries were not eligible for HIPC whilst debts have continued to accumulate even in those afforded debt relief. Moreover, no lasting mechanisms have been put in place through which new and existing debt arrangements can be disputed, restructured, and/or cancelled. The approach taken under previous debt restructuring and cancellation programmes have also been 'top-down', creditor countries granting debt relief with little input from the countries affected or consideration given to the nature of the debt itself.

It is for this reason that solutions are being sought which permit fair and transparent debt workout, processes which involve both debtor and creditor countries and provide lasting solutions. Arbitration offers one such opportunity and it has been a focus of Jubilee Scotland to explore how this might happen and in particular what role Scotland can play here. This pack presents a collection of the work done on this campaign so far and which has resulted in the Scottish Government making an explicit commitment in the white paper, 'Scotland's Future', to pursuing the idea of sovereign debt arbitration. Published on the 26th November 2013 it stated that:

*"The Scottish Government will give careful consideration to the question of "unjust" debts; will work to ensure that Scottish export policies do not create new unjust debts; and support moves to establish Scotland as an international centre for debt arbitration."*<sup>1</sup>

The White Paper is the vision of the Scottish National Party-led Scottish Government for an independent Scotland. A referendum will be held on the 18th September 2014. In the case of a 'yes' vote a series of discussions and negotiations will take place within Scotland and between Scotland and the UK Government using the White Paper as a blueprint. The 24th March 2016 has been set as the date for completion of this process and in this scenario will be the point at which Scotland becomes a fully independent state.

Throughout this campaign, Jubilee Scotland has talked with academics, legal experts in arbitration, civil servants, politicians, and campaigners in the international campaign for debt justice. Through this we have been able to develop a workable framework through which Scotland can play an active role in promoting the opportunities arbitration can offer for resolving sovereign debt crisis.

In this pack

### 1. *Scotland: a seat of Sovereign Debt Arbitration* (November 2012)

In this briefing the case is made for why arbitration offers a good alternative to existing debt workout mechanisms and what role Scotland might be able to play here. It introduces the existing arbitration legislation in Scotland including the Arbitration (Scotland) Act 2010 which has provided the foundations for developing this campaign. It also answers some initial questions regarding the feasibility of arbitration in sovereign debt disputes and why Scotland in particular is well placed to lead the way internationally in making this a reality.

As part of the process of promoting sovereign debt arbitration in Scotland Jubilee Scotland held a People's

<sup>1</sup> <http://www.scotland.gov.uk/Publications/2013/11/9348/0>

Debt Tribunal in October 2011 at the Scottish Parliament. This was chaired by John Campbell QC, former President of the Chartered Institute of Arbitrators, and was sponsored by Sarah Boyack MSP. The event included input from Lidy Nacpil (International Coordinator of Jubilee South), Dr Rowan Cruft (University of Stirling), and Dr Robert Mochrie (Heriot-Watt University) with a related article by John Campbell QC featuring in the legal supplement of The Scotsman newspaper. In addition a motion was tabled in the Scottish Parliament by Patrick Harvie MSP (May 2011) supporting Jubilee Scotland's campaign for debt arbitration. This received 41 signatures from across a variety of parties.

2.

*Sovereign Debt Arbitration Rules (Modifications) (March 2012)*

*Scottish Arbitration Rules - the modifications (May 2013)*

The Arbitration (Scotland) Act 2010 contains within it 84 Scottish Arbitration Rules designed to govern any arbitration held under the act and for which Scotland is the seat of the arbitration. These rules are divided into mandatory rules - those which cannot be removed or altered - and default rules which can be changed or omitted with agreement from both parties. Following the example of the Family Law Arbitration Group (Scotland) (FLAG(S)) who have taken advantage of the default rules to develop a set of bespoke rules covering family law disputes, Jubilee Scotland has developed its own Sovereign Debt Arbitration Rules. These have been designed to ensure principles of fairness and transparency are guaranteed, to encourage both debtors and creditors to enter into arbitration, and to permit the origins and impacts of debts to be considered in discussions. The first document here presents the modifications Jubilee Scotland has made to the original Scottish Arbitration Rules whilst the second provides a commentary outlining why these have been made. A complete version of the Sovereign Debt Arbitration Rules (including all 84 rules) can be accessed via the Jubilee Scotland website<sup>2</sup> to provide context.

The rules were launched in March 2012 by the Cabinet Secretary for Culture and External Affairs, Fiona Hyslop MSP at the Scottish Arbitration Centre. The Rules were also shared as part of a Jubilee Scotland presentation to the Scottish Parliament's Cross-Party Group on International Development in January 2012 attended by Sarah Boyack MSP and Patrick Harvie MSP.

3.

*Sovereign debt arbitration in Scotland: creating a Debt Arbitration Panel (May 2013)*

*Funding sovereign debt arbitration in Scotland (November 2013)*

The final two briefings in this pack relate to two key and interrelated issues regarding the practicalities of holding an arbitration of the proposed nature in Scotland. A particular innovation in the Sovereign Debt Arbitration Rules is the creation of a Debt Arbitration Panel. This is to be a list of named arbitrators from which parties can choose who is to sit on the tribunal. The benefits are that both parties are aware in advance of the potential arbitrators, there is greater transparency across cases, and more potential for developing expertise in this field. Jubilee Scotland has developed two possible options for a Panel, one which is small, membership-based, and expert-led (similar to FLAG(S) in Scotland) and another modelled more closely on existing supranational arbitration panels in which all countries within an organisation nominate national representatives as arbitrators. The briefing presents in more detail how these would operate as well as the advantages but also challenges associated with each.

The second briefing builds on discussions of the Debt Arbitration Panel and answers three main questions relating to arbitral expenses and Scotland's possible contribution. These cover: a) the cost of an individual arbitration; b) the cost of administering a small expert-led panel; and c) the cost to Scotland of involvement in a supranational arbitration panel. Specific figures are not given yet an overview of where expenses might be incurred and liability fall presents some of the issues which the Scottish Government and other international governments may wish to consider when thinking about promoting sovereign debt arbitration.

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2 <http://www.jubileescotland.org.uk/arbitration/rulesconsultation>