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.”[1]

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 intial 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 arbtiration in Scotland Jubilee Scotland held a People's

1 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 arbtiration. 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 ommitted 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[2] 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.

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

SCOTLAND: A SEAT OF SOVEREIGN DEBT ARBITRATION

JUBILEE SCOTLAND
Campaigning to end global debt slavery

November 2012

ARBITRATION AND SOVEREIGN DEBT DISPUTES

Since the debt crisis of the 1980s the poorest countries in the world have been held back by debts, the servicing and amortisation of which has taken precedence over the funding of essential public services such as healthcare, combating infant mortality and the spread of HIV. Where these debts prevent meeting these and other Millennium Development Goals, it has been convincingly argued that they should be defined as unpayable.[1]

In 1998 and 2005 the Highly Indebted Poor Country (HIPC) and Multilateral Debt Relief Initiative (MDRI) pledged the one-off cancellation of the debts of 40 of these countries. But this remedy was in many ways merely a sticking plaster.

Firstly, HIPC status was determined by the Debt Sustainability Framework, an essentially limited framework based solely on a country's ability to pay debts without considering their other spending needs. This has meant that countries such as Bangladesh, where nearly half the population live below the poverty line, continue to be burdened by significant sovereign debts.[2]

Secondly, even for those countries that went through the HIPC process, no lasting structures have been left in place to prevent the build up or allow for the cancellation of further unpayable debt.

Ever since the early years of the Jubilee 2000 campaign of the 1990s, many debt-campaigning organisations have called for a Fair and Transparent Arbitration process - or FTA - which would allow for the cancellation of unpayable debts.[3] The European Network on Debt and Development (EURODAD) surveys the field thus:

"Since 1990, a number of different ideas have been tabled. Kunibert Raffer of the University of Vienna has proposed the internationalisation of Chapter 9 of the US bankruptcy code. Latin American economists, Alberto Acosta and Oscar Ugarteche have tabled the idea of a permanent 'Sovereign Debt Arbitration Tribunal' (TIADS) under the aegis of the United Nations. In 2001, the IMF's Anne Kreuger put forward the idea of a 'Sovereign Debt Restructuring Mechanism' (SDRM) to be administered by the IMF. Most recently, Christoph Paulus and Steven Kargman outlined their proposals for a Sovereign Debt Tribunal which should be empowered to examine not just cases of unsustainable debt but also the legitimacy of individual creditor claims."[4]

Meanwhile, EURODAD's own Charter on Responsible Financing argues the case that *"all loan documents should provide a provision for an independent and transparent arbitration procedure in case of repayment difficulties or dispute (at the request of borrower or lender)"*.[5]

What is common to this growing strand of literature, is the desire for a form of debt cancellation that:

1 Mandel, 2006: Debt Relief as if People Mattered, New Economics Foundation
2 Jubilee Scotland, 2010: A Tale of Two Countries
3 Kaiser, 2009: An International Insolvency Framework, Erlassjahr
4 EURODAD, 2009: A Fair and Transparent Debt Work-Out Procedure
5 EURODAD, 2008: EURODAD Charter on Responsible Financing

- enables the debtor to seek debt cancellation in a neutral forum, without simply pleading with their creditor;
- is an orderly work out that does not result in any creditors receiving undue preferential treatment; and
- does not violate the rule of law, allowing one of the parties to try their own case.[6]

"...the arduous search for a solution to the Greek crisis has at least shown us that, where a debtor looks likely to default, in the future instead of disorderly ad hoc solutions there needs to be an orderly, predictable procedure that also allows for fair burden sharing. That is why we, the German government, embedded the creation of such an international debt work-out mechanism as a goal in our Coalition Agreement." Gudrun Kopp, BMZ Secretary of State

(Meeting between German Government, academics, UN representatives, and civil society in the follow-up of the official debt workout seminar of the German Government, June 2011)

Arbitration is a process whereby two parties with a grievance can come before a neutral arbiter, receive a fair hearing, and have a binding decision made. Whilst it is predominantly used for - but not limited to - disputes between corporate entities, where it is seen as a cheaper and more efficient than court-based processes, it can play a role in a far wider range of disputes. Abtitration would give both debtor and creditor countires an equal say and fair hearing, allowing debt workout agreements to be made in a way that is just and which leads to long term solutions.

A ROLE FOR SCOTLAND

Scotland has cutting edge legislation in the form of the 2010 Arbitration (Scotland) Act, as well as the new Scottish Arbitration Centre, which have provided the foundations for Jubilee Scotland's groundbreaking Sovereign Debt Arbitration Rules[7].

Following the example of the Family Law Arbitration Group (Scotland)[8] and seeing opportunity in Scotland's strong arbitration structures, Jubilee Scotland sought to develop a framework within which sovereign debt disputes could be arbitrated here in Scotland. With the support of legal professionals, academics, and international debt experts, the Sovereign Debt Arbitration Rules were launched by Fiona Hyslop MSP, Cabinet Secretary for External and Cultural Affairs, in March 2012. The rules draw heavily on Scotland's existing Arbitration Act but feature new elements specifically targeted at sovereign debt arbitrations and overcoming the inadequacies of existing international provision in debt workout or cancellation processes.

Key principles of the Rules include:

- **the mandate to decide disputes on the basis of justice, fairness or equity including taking into account matters of sustainable development, the human rights of third-parties affected, and debtor states' ability to provide basic needs and services to its citizens**
- **provision for transparency and openness, to ensure that the benefits of decisions reached in Scotland have positive ramifications in the wider international campaign.**
- **practical considerations, including the creation of an appropriate Debt Arbitration Panel and a clear range of possible awards.**

The Rules therefore ensure these arbitrations take into account matters of sustainable

6 A particular concern as far as the International Monetary Fund is concerned; a concern strong enough to derail the IMF's proposal for a Sovereign Debt Restructuring Mechanism, which would have been operating under its own auspices, while adjudicating on debts to itself.

7 Jubilee Scotland , 2012: *Sovereign Debt Arbitration Rules, http://www.jubileescotland.org.uk/sites/default/files/SDAR.pdf*

8 FLAG(S) adapted the Scottish Arbitration Rules of the 2010 Arbitration (Scotland) Act for application in and the promotion of family law arbitration, http://www.flagscotland.com/flags-arbitration-rules

development, economic assessments, human rights and the protection of basic state obligations - these are things which are typically overlooked in current debt cancellation procedures. In doing so, the arbitration will in effect be able to conduct a debt audit which examines the nature of the debts in question, including their origins and the impact on the populations of the debtor countries.

Scotland thus possesses the legislation necessary to bring affected countries together in arbitration, and in launching the Sovereign Debt Arbitration Rules has made a positive step forward in moving the idea of debt arbitration into reality. It has therefore taken an international lead by demonstrating an appetite to find fair ways of coping with unpayable and unjust debt and promoting a public, legal and international discussion about the best way to cope with unpayable debt.

WHY WOULD CREDITORS ENTER INTO ARBITRATION?

Many creditors are badly served by existing systems. One of the most recent legal analyses of sovereign default concedes that:

"the main difference between corporate and sovereign debt is the lack of a straightforward legal mechanism to enforce payment of the latter. In the event of default, legal penalties or remedies do exist, but they are much more limited than at the corporate level."[9]

Reinforcing this, Jurgen Kaiser, Head of Policy at Erlassjahr, the German debt campaign, remarks that creditors:

"are perhaps in a strong position when it comes to inflicting pain or other sanctions against a debtor, but in a very weak one, when it comes to legally or otherwise enforcing payments…. So, participating in a fair process and defending his interests through such a process tends to be more attractive than continuing to sit on old paper, which will simply not be honoured."[10]

Jubilee Scotland believes, therefore, that creditor countries will view arbitration as preferable to a situation in which indebted countries simply default on their repayments with no clear resolution on when or how these debts will be paid.

Significantly, it is also not unknown for creditor governments to rule that they now consider previously supplied loans to poor countries to be unjust, nor for them to embrace attempts for developing ways for dealing with their existing unpayable debts. For example:

- In 2006, Norway cancelled $80 million of loans previously lent to a number of countries on the basis of legitimacy. Later, in 2009, the Norwegian Government issued a political declaration stating a commitment to working towards the creation of mechanisms to deal with illegitimate debts and abolish international debts.
- The Dutch Ministry of Finance has put forward a proposal supporting the use of the Permanent Court of Arbitration for hearing disputes related to international loans between sovereign debtors and bilateral lenders, multilateral bodies and private entities.[11]

The Rules have therefore been designed with these issues in mind in an attempt to minimise any further objections. For example, all arbitrations are to be conducted by multi-member panels in which creditors and debtor countries have equal power over appointments, reassuring both that there is no bias towards one or the other. Equally, these arbitrators are chosen from a specific Debt Arbitration Panel, a highly skilled and experienced group of arbitrators whose names are made publicly available and can be reviewed before entering into an agreement. Finally, provision is made for a number of possible outcomes or awards ranging from full cancellation of a debt to a freezing or reduction of interest rates, for example, and so both sides should see oportunities in arbitration for attractive alternatives to current debt arrangements.

9 Panizza, Sturzenegger, Zettelmeyer, 2009: 'The Economics and Law of Sovereign Debt Default', *Journal of Economic Literature*

10 Jurgen Kaiser, Head of Policy, Erlassjahr – personal communication

11 Examples from: A fair and transparent debt work-out procedure: 10 core civil society principles, EURODAD, December 2009.

SHOULD THIS NOT BE LEFT TO INTERNATIONAL ORGANISATIONS OR SOVEREIGN STATES?

It is not the objective of the campaign to make Scotland the centre of international debt arbitration. Any international debt court would need the legitimacy of an appropriate supra-national body such as the United Nations. This is the focus of the Europe-wide 'Defuse the Debt Crisis' campaign,[12] which works on an ongoing basis with UN bodies such as UNCTAD, and is also building an international lobbying effort focused on the G20 meeting in November 2011.

Nevertheless, while there is disagreement as to whether a standing international insolvency court would be the final end of such a global progress, there is little disagreement that the beginning point is different arbitration panels around the world. 'It is important to stress that an international Chapter 9 insolvency procedure would not at all need a new international organisation, nor a costly bureaucracy. Arbitration panels are temporary.'[13] The openness and transparency ensured in the rules means precedents will be set as an example for future arbitrations.

Equally, whilst not a sovereign state, Scotland is a significant polity which can punch above its weight by showing a concern for development issues as well as a creative approach to tackling them. The Scottish Government has pursued its own development policy and budget, which although small has been maximised through a focus on specific countries such as Malawi.[14] Crucially in this case Scotland *qua* nation would not be voicing its own opinion, but presenting itself as a seat where parties can receive a fair hearing.

The recently established Scottish Arbitration Centre supports the view that Scotland 'has a modern, innovative arbitration regime to rival any other' and has been set up, in part, 'to promote Scotland as a place to conduct international arbitration'.[15] The remit of the Scottish Arbitration Centre shows that there is already work underway to ensure Scotland receives due consideration internationally in decisions over where to seat arbitration cases. Scotland has the skills, legislation and political will to take on this role.

WILL SCOTLAND HAVE TO PAY?

Arbitration is traditionally less expensive than other legal mechanisms, as it tends to be quicker. Further, it creates major savings by allowing parties to finalise a long-term debt arrangement eliminating a need for ongoing, ad hoc debt restructuring or defaulting which can be costly too. Moreover, the costs would be defrayed by the parties participating in arbitration, as determined by the arbitration agreement and/or the tribunal's decision, and therefore not to the Scottish tax payer. Where Scotland is chosen as the geographic seat of arbitration by parties, as well as the legal seat, Scotland can also expect to benefit economically by welcoming parties to its cities.

CONCLUSION

There are no easy solutions to the tangle of sovereign debt, but there is a building consensus that existing debt-management has failed, and that a new, fairer mechanism is required to free countries from unpayable debt. Scotland has already begin the process of promoting itself as a seat of arbitration in cases of sovereign debt distress through its Sovereign Debt Arbitration Rules, and in doing so it is supporting this movement of international concern, while drawing attention to its own new cutting-edge arbitration framework.

www.jubileescotland.org.uk
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41 George IV Bridge, Edinburgh, EH1 1EL
Tel. 0131 225 4321

12 www.defusethedebtcrisis.org
13 AFRODAD, 2002: *Issue Paper, Fair and Transparent Arbitration on Debt*
14 Scottish Government, http://www.scotland.gov.uk/Topics/International/int-dev
15 Scottish Arbitration Centre, http://www.scottisharbitrationcentre.org/index.html

Sovereign Debt Arbitration Rules - Modifications

Limited Company No. 220549, Scottish Charity No. SCO31827
Website: www.jubileescotland.org.uk
Convenor: Rev. Elisabeth Cranfield

***New Rule: Application of these rules* D**

These rules apply where the parties agree to conduct the arbitration in accordance with the Debt Arbitration Rules.

***Rule 1 Commencement of arbitration* D**

1 (1) The arbitration begins when both parties have agreed in writing to arbitrate in accordance with the Sovereign Debt Arbitration Rules and the agreement is filed with the Scottish Arbitration Centre.

(2) Once a case has been filed, there is an automatic stay on loan enforcement.

***Rule 5 Number of arbitrators* D**

5 (1) The tribunal shall be composed of three arbitrators who are members of the Debt Arbitration Panel.

***Rule 6 Method of appointment* D**

6 (1) The tribunal shall be composed of:

(a) one member appointed by the applicant;

(b) one member appointed by the respondent;

(c) the other member appointed by agreement between the parties.

(2) Parties in the same interest shall appoint a member of the tribunal by agreement.

(3) The tribunal is deemed to have been constituted once all three arbitrators have been appointed.

(4) Any vacancy shall be filled in the manner prescribed for the initial appointment.

***Rule 26 Transparency* D**

26 (1) Arbitrations will be conducted according to principles of transparency and openness.

(2) The tribunal shall conduct hearings in public and it shall determine, in consultation with the disputing parties, the appropriate logistical arrangements. The tribunal shall make appropriate arrangements to protect confidential information from disclosure.

(3) Disclosure by the tribunal, any arbitrator or a party of information relating to the arbitration is not to be actionable as a breach of an obligation of confidence unless the disclosure regards information agreed upon by both parties and the tribunal as confidential.

(4) The tribunal and the parties must take reasonable steps to prevent unauthorised disclosure of confidential information by any third party involved in the conduct of the arbitration.

(5) The tribunal must, at the outset of the arbitration, inform the parties of the obligations which this rule imposes on them.

(6) “Information”, in relation to an arbitration, means any information relating to—

(a) the dispute,

(b) the arbitral proceedings,

(c) the award, or

(d) any civil proceedings relating to the arbitration in respect of which an order has been granted under section 15 of this Act, which is not, and has never been, in the public domain.

(7) Any disputing party may designate certain information as confidential information at the time it is first submitted to the tribunal. A disputing party must, at the same time as submitting the confidential information, submit a redacted version of the information which may be released to the public.

(8) The other disputing party may challenge the designation of certain information as confidential information. The tribunal will decide any challenge and determine whether information can be classified as confidential information.

Rule 34 Experts and Participation of non-disputing parties **D**

34 (1) The tribunal may obtain an expert opinion on any matter arising in the arbitration.

(2) The parties must be given a reasonable opportunity—

(a) to make representations about any written expert opinion, and

(b) to hear any oral expert opinion and to ask questions of the expert giving it.

(3) Non-disputing parties may apply to make a written submission as an *amicus curiae* to the tribunal on a matter within the scope of the arbitration.

(4) An application

(a) must be made within 60 days of the constitution of the tribunal.

(b) must be no longer than 2 pages, and

(c) must address the suitability of the non-disputing party to make a contribution to the arbitration.

(5) After consultation with the disputing parties, the tribunal may decide to approve the application of a non-disputing party to submit a written submission to the tribunal regarding a matter within the scope of the arbitration.

(6) The tribunal may specify the conditions of a written submission, including deadline for submission and length of submission.

(7) The participation of non-disputing parties is at the discretion of the tribunal which shall take into account the need not to cause inordinate delay in the arbitration process.

(8) Disputing parties must be given the opportunity to make comments on the submissions of non-disputing parties.

Rule 47 Rules applicable to the substance of the dispute **D**

47 (1) The tribunal is granted the power to, and must, decide the dispute *ex aequo et bono*, on the basis of general considerations of justice, fairness, equity, and law.

(2) When deciding the dispute, the tribunal must have regard to—

(a) the provisions of any contract relating to the substance of the dispute,

(b) the normal commercial or trade usage of any undefined terms in the provisions of any such contract,

(c) any established commercial or trade customs or practices relevant to the substance of the dispute,

(d) matters of sustainable development and economic assessments, human rights, and the protection of basic state obligations to meet the essential needs and services of its citizens, and

(e) any other matter which the parties agree is relevant in the circumstances.

Rule 49 Other remedies available to tribunal **D**

49 The tribunal's award may—

(a) be of a declaratory nature,

(b) order a party to do or refrain from doing something (including ordering the performance of a contractual obligation, that is maintaining an existing debt arrangement),

(c) order the rectification or reduction of any deed or other document (other than a decree of court). For example:

(i) a freezing or reduction of interest rates.

(ii) a restructuring of the debt arrangement covering the time over which the debt is to be repaid and/or the amount of debt that is to be repaid.

(iii) a total cancellation of the existing debt arrangement.

(iv) a change in the conditions attached to an existing loan, or

(d) incorporate an alternative award agreed upon by both parties.

Rule 57 Arbitration to end on last award or early settlement **D**

57 (1) An arbitration ends when the last award to be made in the arbitration is made (and no claim, including any claim for expenses or interest, is outstanding), or otherwise as the parties may agree.

(2) But this does not prevent the tribunal from ending the arbitration before then under rule 20(3) or 37(1).

(3) The parties may end the arbitration at any time by notifying the tribunal that they have settled the dispute.

(4) On the request of the parties, the tribunal may make an award reflecting the terms of the settlement and these rules (except for rule 51(2)(c) and Part 8) apply to such an award as they apply to any other award.

(5) The fact that the arbitration has ended does not affect the operation of these rules (in so far as they apply) in relation to matters connected with the arbitration.

Scottish Arbitration Rules – The modifications

A new Arbitration (Scotland) Act came into force in Scotland in 2010, drawing on best practice across the world to create a modern statutory framework for arbitrations, both national and international. Within the Act the Scottish Arbitration Rules which present the specific details of how arbitrations are to be conducted. Of the 84 rules, 48 are labeled *default* and as such are open to amendment. Seeing opportunity in Scotland's strong arbitration structures and following the example of the Family Law Arbitration Group (Scotland) (FLAG(S)) which amended the rules for use in family law disputes, Jubilee Scotland has developed new rules for sovereign debt arbitration, launched in March 2012 with the support of Fiona Hyslop MSP, Cabinet Secretary for Culture and External Affairs. In consultation with legal professionals, academics, and international debt experts, the bespoke Sovereign Debt Arbitration Rules form a guide for the conducting of arbitrations between creditor and debtor countries choosing to seat an arbitration in Scotland. The rules draw heavily on Scotland's existing Arbitration Act but feature new elements specifically targeted at sovereign debt arbitrations and overcoming the inadequacies of existing international provision in debt workout or cancellation processes.

Key innovations of the Sovereign Debt Arbitration Rules include:

- the mandate to decide disputes on the basis of **justice, fairness or equity** including taking into account matters of sustainable development, the human rights of third-parties affected, and debtor states' ability to provide basic needs and services to its citizens;
- provision for **transparency and openness**, to ensure that the benefits of decisions reached in Scotland have positive ramifications in the wider international campaign; and
- practical considerations, including the creation of an appropriate **Debt Arbitration Panel** and a clear **range of possible awards**.

This briefing accompanies the 'Sovereign Debt Arbitration Rules – Modifications'[1] and acts as a commentary for the key amendments to the original Scottish Arbitration Rules. The briefing is designed to be read alongside the Modifications.

The modifications

New Rule: ***Application of these rules*** **D**[2]

Both parties will agree to arbitrate under the Sovereign Debt Arbitration Rules as set out by Jubilee Scotland[3]. In this way they agree to an arbitration being conducted according to all the modifications featuring in the new rules. Whilst the amended rules necessarily remain *default* within the wider framework of the Scottish Arbitration Rules, and therefore open to further amendment by the parties, there is an expectation that in entering into an arbitration agreement under these rules parties sign up to all the modifications and will be unlikely to make additional changes.

Rule 1 ***Commencement of arbitration*** **D**

A key feature of the arbitration agreement proposed here is that there will be a stay on all debt repayments during the course of the arbitration[4].

1 Jubilee Scotland, 2012: *Sovereign Debt Arbitration Rules - Modifications* http://www.jubileescotland.org.uk/sites/default/files/SDARM.pdf

2 'D' – Used to denote default rules. ('M' – Used to denote mandatory rules.)

3 Jubilee Scotland, 2012: *Sovereign Debt Arbitration Rules* http://www.jubileescotland.org.uk/sites/default/files/SDAR.pdf

4 Kaiser, J, 2009: *An International Insolvency Framework - Why it is needed and what it could look like*; EURODAD, 2008: *EURODAD Charter on Responsible Financing*

***Rule 5 Number of arbitrators* D**
***Rule 6 Method of appointment* D**

Rules 5 and 6 refer to the creation of a Debt Arbitration Panel and use of multi-member tribunals. Given the nature of the types of disputes being arbitrated, the need to reassure both parties they will be treated equally and receive a fair hearing is crucial. The rules therefore state a tribunal must be made up of a multi-member panel with each side appointing their own arbitrator and so having representation. A third arbitrator is to be chosen by the body governing and administering the Debt Arbitration Panel to provide a neutral voice on the tribunal. Creating a specific group from which arbitrators will be chosen – the Debt Arbitration Panel – reflects the example set by FLAG(S) as well as established practice in supranational bodies, for example that of the International Centre for Settlement of Investment Disputes (ICSID). By adopting such an approach to arbitral appointment it is hoped that arbitrations here will: have neither creditor nor debtor dominated tribunals; provide prospective parties with greater certainty concerning likely procedures including information on who the possible arbitrators may be; support countries in finding skilled and experienced arbitrators in the field; and improve openness, transparency, and the accountability of arbitrators[5].

***Rule 26 Transparency* D**

'Sovereign debt negotiations must be public and the results and agreements made must also be public.'[6]

The major feature of Rule 26 is that all arbitrations will be held in public with the appropriate logistical arrangements being made in consultation with both the disputing parties. This is in stark contrast to traditional arbitrations in which the tribunal is typically held behind closed doors. The new rule instead ensures details of any resultant restructuring or refinancing will be released externally and in turn help set precedents for future debt workout procedures. The amended rule also makes sure however that the benefits of the decisions being made in Scotland or under Scotland's Arbitration Act can have positive ramifications in the wider international campaign, drawing attention to how debts have been accumulated and at what expense. It is hoped this will also promote future arbitrations by encouraging debtor countries to pursue a just resolution of their debt arrangements but equally lead to changes in behaviour amongst rich nations in their dealings with poorer countries. Finally, the arbitration must be transparent and open if fairness is to be guaranteed and the arbitral process, including the arbitrators, be held accountable.

Parties retain the option to keep some information confidential but this is *only* where there is agreement from both parties to do so. The tribunal will also take any necessary steps to prevent the unauthorised disclosure of information relating to any third parties participating in the proceedings.

***Rule 34 Experts and Participation of non-disputing parties* D**

This rule has been extended according to principles of *amicus curiae*[7] to allow for non-disputing parties, for example NGOs, to request permission to make a written submission to the tribunal regarding the debt being disputed.

***Rule 47 Rules applicable to the substance of the dispute* D**

Disputes are to be arbitrated with reference to *ex aequo et bono*, therefore on the basis of general considerations of justice, fairness, equity, and law. Arbitrators are therefore legislated to take into account matters of sustainable development, economic assessments, human rights, and the protection

[5] For more information see – Jubilee Scotland, 2013: *Sovereign debt arbitration in Scotland: creating a Debt Arbitration Panel*

[6] EURODAD, 2009: *A Fair and Transparent Debt Work-Out Procedure: 10 core civil society principles*

[7] Amicus curiae: someone who is not a party to a case who offers information that bears on the case but that has not been solicited by any of the parties to assist a court.

of basic state obligations, as well as the rule of law[8]. These are things typically overlooked in current debt cancellation procedures which more often than not adopt a purely economic view based solely on calculations of debt sustainability and without reference to the development context[9]. This was considered to be one of the major failings of the Highly Indebted Countries Initiative (HIPC) in 2005. Bangladesh is a case in point – it did not qualify for this debt relief despite the fact that nearly half of its population live below the poverty line[10]. The new rules seek to ensure the nature of the debts in question, including their origins, what they were for, and the impact on the debtor country populations, are not ignored. This is important because many of these debts are the result of irresponsible lending, being made to dictatorial regimes, relating to weaponry or environmentally unsound projects, going to countries which could evidently not repay them, and lacking in transparency. Equally, they are leaving many of the world's poorest nations locked in poverty with little prospect of development. Arbitration under these rules thus provides a forum for these issues to be raised and discussed. In this way it effectively allows for an independent audit of the debt to be conducted.

This is therefore one of the most important innovations of the bespoke rules in that it ensures all matters relating to a debt are taken into account when deciding on a new debt arrangement.

Rule 49 Other remedies available to tribunal **D**

The Rules outline a variety of possible remedies which the tribunal may 'award'. These may be of a declaratory nature, involve ordering a party to do or refrain from doing something (for example, maintaining an existing debt arrangement), or focus on specific parts of a debt arrangement (for example, order a freezing or reduction of interest rates, a restructuring of a debt arrangement, a change in conditions attached to an existing loan, or a total cancellation of a debt). There is also an option for the parties to agree upon an alternative remedy. The aim of this rule is to indicate the possible options and so provide prospective parties with an idea of what an outcome might entail. In Jubilee Scotland's consultation on these Rules this was consistently felt to be an important issue particularly for encouraging the participation of creditor states.

Rule 57 Arbitration to end on last award or early settlement **D**

The amendment to Rule 57 is simply a technical change and allows the parties to end the arbitration early prior to an award being made should they be in agreement to do so.

Summary

These modifications presented here have been designed to provide a framework for conducting sovereign debt arbitrations in Scotland within the Arbitration (Scotland) Act 2010. Importantly, they aim to overcome many of the criticisms leveled at existing mechanisms of debt workout. They make provision for a transparent and accountable process in which both debtor and creditor country have an equal voice and the decision as to the future of an existing debt arrangement is based not solely on law but on considerations of justice, fairness, and equity. With these modifications in place, foundations are now in place for bringing sovereign debt arbitration to Scotland.

[8] EURODAD, 2011: *Responsible Finance Charter*; EURODAD, 2009: *A Fair and Transparent Debt Work-out Procedure: 10 core civil society principles*

[9] AFRODAD, 2013: http://www.afrodad.org/?afrourl=Pages/Debt/External%20Debt/Fair%20and%20Transparent%20Arbitration

[10] Jubilee Scotland, 2010: Debt in 2010: A tale of two countries, http://www.jubileescotland.org.uk/assessing-hipc-mdri

Sovereign debt arbitration in Scotland: creating a Debt Arbitration Panel

Ever since the early years of the Jubilee 2000 campaign in the 1990s, many debt-campaigning organisations have called for a Fair and Transparent Arbitration process - or FTA - which would allow for the cancellation of unpayable debts.[1] EURODAD's own *Charter on Responsible Financing* argues the case that *'all loan documents should provide a provision for an independent and transparent arbitration procedure in case of repayment difficulties or dispute (at the request of borrower or lender)'*[2]. While there is debate as to whether a standing international insolvency court would be the final end of such a global progress, there is general consensus that the beginning point could be different arbitration panels around the world[3].

Scotland as a seat of international arbitration

- Within the United Kingdom and through the Scottish Parliament Scotland has devolved power over law and order which includes the ability to create its own legal institutions and structures.
- In 2010 the Scottish Parliament passed the Arbitration (Scotland) Act, drawing on the best features of international arbitral rules to introduce a modern statutory framework for national and international arbitrations to be held under Scots Law. The following year the Scottish Arbitration Centre was set up by the Scottish Government to be a focal point for promoting and conducting arbitrations in Scotland[4].
- The principal component of the Arbitration (Scotland) Act is the Scottish Arbitration Rules which present the specific details of how arbitrations will be conducted; 48 of the 84 rules are labeled *default* and as such are open to amendment.
- Since its inception, the Scottish Arbitration Rules have been amended for use in specific disputes, notably the Family Law Arbitration Group (Scotland)'s (FLAG(S)) arbitration rules for family dispute arbitrations[5].

Sovereign Debt Arbitration Rules

Following the example of FLAG(S), Jubilee Scotland has developed new rules for arbitration, launched in March 2012 with the support of Fiona Hyslop MSP, Cabinet Secretary for Culture and External Affairs. Working within the framework of the 2010 Arbitration (Scotland) Act, these bespoke rules have been presented as a guide for the conducting of arbitrations between creditor and debtor countries choosing to seat an arbitration in Scotland[6]. With no sovereign debts of its own – export credit remains a reserved issue administered by UK Export Finance for the whole of the UK – a particular advantage of seating an arbitration of this type in Scotland is its neutral position. It is neither a creditor nor debtor country in its own right. Key innovations of the Sovereign Debt Arbitration Rules include a mandate to decide disputes on the basis of **justice,**

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1 Kaiser, 2009: *An International Insolvency Framework*, Erlassjahr

2 EURODAD, 2008: *EURODAD Charter on Responsible Financing*

3 EURODAD, 2009: *A Fair and Transparent Debt Work-Out Procedure - 10 Core Civil Society Principles*; Jubilee Scotland, 2011: *Defuse the Debt Crisis*

4 http://www.scottisharbitrationcentre.org/

5 http://www.flagscotland.com/pdf/RULES_of_Arbitration_(Scotland).pdf

6 Jubilee Scotland, 2012: *Sovereign Debt Arbitration Rules*, http://www.jubileescotland.org.uk/sites/default/files/SDAR.pdf

fairness or equity and provision for **transparency and openness**[7]. In addition, the Rules call for the creation of a **Debt Arbitration Panel**, a group of arbitrators from which creditor and debtor parties will be able to select those who will sit on the arbitral tribunal. This briefing focuses on this third innovation, the Debt Arbitration Panel, and considers issues of how it might look and work in practice.

Rule 5 on the number of arbitrators states that 'the tribunal shall be composed of three arbitrators who are members of the Debt Arbitration Panel'. This rule remains 'default', that is it remains open to modification and amendment by agreement of the two parties and so will not necessarily be adopted in all arbitrations. The Arbitration (Scotland) Act dictates that it is a default rule and so Jubilee Scotland's bespoke amendment can only exist as a guide as to how an ideal arbitration will be conducted. It is nevertheless anticipated that in most cases, in agreeing to arbitrate under the Sovereign Debt Arbitration Rules parties are agreeing to all Jubilee Scotland's modifications[8] and so to referring to a Debt Arbitration Panel in the selection of arbitrators.

Importantly, how the Debt Arbitration Panel will be constituted is yet to be decided and so presents one of the main obstacles to holding an arbitration in Scotland under Jubilee Scotland's bespoke rules. This briefing therefore explores the role and creation of the Debt Arbitration Panel, outlining some of the options for pursuing this as well as potential challenges. It is aimed at a wide range of audiences including those working within international debt campaigning, academics, and legal experts, and presents two distinct panel models for consideration. The intention of this briefing is to gather feedback on the models, understand their strengths and weaknesses, and examine how they would work in practice as Jubilee Scotland seeks to move ever closer to making sovereign debt arbitration a reality.

Why a Debt Arbitration Panel?

- Neither creditor nor debtor dominated tribunals
- Greater certainty concerning procedures
- Support finding skilled and experienced arbitrators in the field
- Improved openness, transparency, and accountability of arbitrators

Given the contested nature of sovereign debt disputes, the need to reassure both parties they will be treated equally and receive a fair hearing is crucial. The rules also therefore state a tribunal must be made up of a **multi-member panel** with each side appointing their own arbitrator and so having representation. A third arbitrator is chosen by the body governing and administering the Debt Arbitration Panel to provide a neutral voice. This is in contrast to the original Scottish Arbitration Rules in which, unless specified otherwise, tribunals consist of a sole arbitrator. The Debt Arbitration Panel will therefore exist as a publicly available list of arbitrators certified to conduct sovereign debt arbitrations and from which the parties are each able to choose their own arbitrator.

Questions have been raised over the legitimacy of an approach in which parties are given a say in arbitral appointments. Some commentators, for example, express concerns party-appointed

[7] For more information see: Jubilee Scotland, 2012: *Sovereign Debt Arbitration Rules - Modifications,* http://www.jubileescotland.org.uk/sites/default/files/SDARM.pdf; Jubilee Scotland, 2012: *Scotland: a seat of sovereign debt arbitration.* http://jubileescotland.org.uk/node/204#attachments

[8] Jubilee Scotland, 2012: *Sovereign Debt Arbitration Rules: Modifications, http://www.jubileescotland.org.uk/sites/default/files/SDARM.pdf*

arbitrators on multi-member tribunals may come to act like 'non-neutral partisan arbitrators'[9]. With the inclusion of *ex aequo et bono* into the rules (where decisions are made on the basis of general considerations of justice, fairness, equity, and law), mitigating potential partisanship becomes increasingly important. Given the history of debt cancellation, where creditors have previously dominated, a multi-member tribunal however remains a necessity to prevent this by ensuring both sides have an equal voice, can have some confidence that their views will be taken seriously, and that the result is not the decision of one person. The inclusion of a third neutrally appointed arbitrator should also minimise the effects of possible bias.

Significantly, these concerns surrounding multi-member party-appointed tribunals moreover provide one of the key rationales for creating a dedicated Debt Arbitration Panel. The creation of such a panel is designed to minimise the risk of partisanship. By referring to an existing list of arbitrators - one which is made publicly available and to both sides - parties know who the potential arbitrators might be prior to any hearing. Subsequently concerns over the credibility of arbitrators can be minimised and uncertainty as to what the arbitration will actually look like reduced. Debtor countries can also feel reassured that, unlike existing processes, the arbitration will not be creditor-dominated and creditor countries equally need not fear a pro-debtor bias in which cancellation is inevitable. In theory, this should mitigate the possibilities of either party presenting opposition to entering into arbitrations.

The Panel also ensures both debtor and creditor feel confident when entering into an arbitration agreement that members of the tribunal possess the necessary skills, knowledge, experience, and legitimacy to preside over such an arbitration. In essence, they can be reassured that the arbitrators will not be selected at random or on the basis of politics. By sitting on the Debt Arbitration Panel, arbitrators are acknowledged as skilled and reliable practitioners. In this way the Panel also supports parties in finding an appropriate arbitrator with the relevant skills and expertise to represent their case within the arbitration. This is particularly important in avoiding imbalance within the arbitration process where developing countries are potentially lacking in jurisprudential resources[10]. By being on the Panel arbitrators are thus effectively on 'standby' with the potential for being approached at any time by parties to take on a sovereign debt arbitration.

The Scottish Arbitration Rules, on which Jubilee Scotland's Rules are based, make allowances for parties to challenge arbitral appointments, for example if the arbitrator is believed not to be impartial or independent, to have treated the parties unfairly, or not be in possession of a qualification required by the agreement of both parties[11]. By presenting parties with a pre-existing Panel from which they and the opposing party choose their arbitrators therefore a more practical benefit is offered too. It can potentially reduce the likelihood of objections being raised once an arbitration has commenced - parties know in advance who the potential arbitrators will be whilst all Panel members will be suitably qualified - and subsequent, potentially lengthy, challenge procedures being enacted and causing delays.

Finally, the greater openness and transparency of the Panel ensures arbitrators are held accountable for their conduct in past and future sovereign debt arbitrations. Any possible secrecy is removed. Arbitrators will not only be challenged by parties in cases of suspected partisanship but their actions will also be open to public scrutiny. Provision for independent reviews of cases

[9] Kapeliuk, 2012: *Collegial Games: Analyzing the Effect of Panel Composition on Outcome in Investment Arbitration*, The Review of Litigation

[10] Fritz and Hersel (2002): *Fair and transparent arbitration processes: a new road to resolve debt crises.* Berlin Working Group on Environment and Development.

[11] Arbitration Scotland Act, Schedule 1, Part 1, Rule 10.

and arbitral behaviours could further support this. As is found within arbitral panels of the International Centre for Settlement of Investment Disputes (ICSID)[12], arbitrators would serve time-limited terms which whilst renewable, would see renewal dependent on their conduct and demonstration of their continuing suitability for the Panel.

The benefits of a creating a Debt Arbitration Panel for arbitral appointments are therefore clear. A major challenge to moving forward with holding an arbitration under the Sovereign Debt Arbitration Rules however is the process by which a Debt Arbitration Panel would be created and maintained. Jubilee Scotland has devised two potential models for this. One follows the example of FLAGS and focuses on creating a small expert-led panel of arbitrators who themselves choose to get involved and become members. The second is more akin to structures already in place in a number of supranational organisations including the United Nations and ICSID in which countries are signatories of a treaty and subsequently nominate their own arbitral representatives. The following table sets out the key differences in the two proposed options and some of the pros and cons of each approach.

	Supranational Treaty-based Member-led Panel	**Small-scale Expert-led Panel**
Panel membership	Membership-based organisation. All parties wishing to be involved in sovereign debt arbitration must sign up and nominate a set number of arbitrators.	Expert-based organisation. Small group of expert arbitrators specialising in international trade law. Arbitrators selected by expressing interest and demonstrating competency to governing body (not nominated).
Number of arbitrators	Large number of possible arbitrators: - all parties have nominated own arbitrators (Panel neither creditor nor debtor dominated) - greater choice - less delay if objections - more options where preferred arbitrators unavailable BUT… - more work to administer - harder to hold arbitrators accountable (so many arbitrators that is hard to keep checks on all of them)	Small number of possible arbitrators: - greater potential for developing expertise - arbitrators more easily held accountable - supports greater consistency in agreements and settlements BUT… - less choice - possibly dominated by creditor countries where there are more developed legal communities - efforts needed to attract

[12] ICSID: CHAPTER I International Centre for Settlement of Investment Disputes, Section 4 The Panels – 'Article 15, 1: Panel members shall serve for renewable periods of six years'.

		arbitrators to the Panel
Organising and administering authority	Requires international treaty organisation such as UN or UNCITRAL to ratify treaty and administer the Panel. This body would then act as appointing authority for third arbitrator. Need to get UN and its members 'on side'. - No sovereign debt arrangements of its own so can be presented as neutral BUT… - Needs international support and campaigning to persuade countries to become involved	Requires Scottish Government to set up a body to organise and administer the Panel. This body, through Scotland's Arbitral Appointment Referee legislation, would then act as appointing authority for third arbitrator. - No sovereign debt arrangements of its own so can be presented as neutral BUT… - On-going development of - Scotland and potential inheritance of debts in instance of independence
Funding the Panel	Costs borne by all members. No conflict of interest in funding.	Costs borne by organising body (Scottish Government) and possibly external funders. Raises questions regarding possible conflict of interest.
Training and expertise	No specialist training provided - no potential for development of expertise - appointment criteria will vary across member states - more difficult to assess arbitrators' performances with lack of standardised expectations	Specialist training provided: - skills renewal throughout time serving on Panel (regardless of actual involvement in arbitration cases) - development of expertise - supports evaluation and assessment of arbitrators - standardised entry requirements for joining the Panel BUT… - Questions over who will deliver and fund training in this area.
Applicability	Applicability: - Only applies to states who are signed	Applicability: - Can be used by all countries with no long-term

	up members of the organisation and who have nominated arbitrators - Bilateral country-to-country arbitrations only	commitment - Can be used to cover both bilateral arbitrations and those involving supranational organisations

The two models explained

1) The Supranational Treaty-based Member-led Panel

One solution, forwarded by AFRODAD (African Forum and Network on Debt and Development), proposes a panel constituted within a treaty or supranational organisation, ideally with the involvement of the United Nations or more specifically one of its subsidiaries, for example the United Nations Commission on International Trade Law (UNCITRAL). AFRODAD suggests that 'each member state might be free to name one person. These nominees would then represent the roster from which creditors and debtors could choose their panel members'[13].

The major benefit of this model is that each member state, creditors and debtors alike, signed up to the organisation would be represented on the Debt Arbitration Panel. It is also a format which is established practice in international law. For example, the UN Convention on the Law of the Sea; 'every State Party shall be entitled to nominate four arbitrators […] The names of the persons so nominated shall constitute the list.'[14]. International Centre for Settlement of Investment Disputes (ICSID) rules similarly make provision for four nominated arbitrators per member state from which arbitrating parties can then choose[15]. As in the case of ICSID, while each member would nominate a given number of Panel members, they would need not be nationals of that country but simply affiliated with it in some way and/or happy to be a 'national' nomination of that state[16].

The preferred number of arbitrators nominated by each country is variable - AFRODAD suggest one per country whilst existing examples take the number up to four. The advantage of having more than one arbitrator per country is that it helps overcome cases of delay where an arbitrator is unable to take a case. Parties have a greater number of options from which to choose. Similarly, if and where a challenge is raised, there is simply a wider pool of arbitrators from which to make an alternative appointment.

Possible concerns regarding partisanship in arbitrator selection on the part of states entering into an arbitration can be overcome if, in accordance with existing UNCITRAL rules, nationals and representatives on the Debt Arbitration Panel of each party involved in a specific arbitration are excluded from being selected. Parties will clearly have to choose arbitrators external to their own Panel nominations should they enter into arbitration[17].

Under the ICSID Convention disputes must be between ICSID Contracting States (or companies or nationals from these states) and it would thus be unprecedented to create a Panel open for use by non-members as well as members. A weakness of this model is therefore that any international treaty-based or member-led Debt Arbitration Panel would only be applicable for arbitrations

[13] AFRODAD, 2006: *Implementing Fair Debt Arbitration: What needs to be done?* p15
[14] United Nations: Lists of conciliators and arbitrators nominated under article 2 of annexes V and VII to the Convention
[15] ICSID: CHAPTER I International Centre for Settlement of Investment Disputes, Section 4 The Panels
[16] ICSID: CHAPTER I International Centre for Settlement of Investment Disputes, Section 4 The Panels
[17] García-Bolívar, 2005: 'Comparing Arbitrator Standards Of Conduct In International Commercial And Investment Disputes', *Dispute Resolution Journal*, Vol 60:4.

between the member states represented in it. Non-member countries would be subsequently excluded from using the Sovereign Debt Arbitration Rules. There are several reasons why countries may prefer not to sign up. With administrative costs necessarily borne by member states in this type of Panel, and on an ongoing basis, states could be reluctant to join the organisation whilst others may feel in their current circumstances it is unnecessary. For instance, if a country has no outstanding debt issues which they would be willing to arbitrate, they may be unwilling to join. Similarly, expectations of a financial contribution could present a barrier to creditor countries joining who may feel their existing debt arrangements with other countries are legitimate and can be dealt with through current, creditor-dominated structures. There is thus no guarantee all countries would be covered by this design of Panel.

A further potential obstacle in pursuing this route is the requirement for the UN, or a similar supranational or multilateral body, to organise and ratify any membership treaty and then assume an ongoing role in establishing and administering the Panel. Whilst this would be largely an administrative function, principally acting to ensure each country has representation and that lists are kept up to date, there would be other occasional demands. For example, it would need to be an organisation trusted to act as appointing authority for the third tribunal member, to oversee any reviews of arbitral conduct, and be on hand to deal with any challenges throughout the arbitration process. As AFRODAD argue, 'the UN could act as the appointing authority if one side should fail to nominate its arbitrator(s) in time or if the nominees should fail to agree on the one further member to reach an odd number'[18]. With the Sovereign Debt Arbitration Rules being based first and foremost in Scots law, using them in their current form for an international treaty may prove difficult. Nevertheless, they could be used as a framework for this longer-term ambition with reference to the UNCITRAL Model Rules[19] and the New York Convention[20], for example.

2) The Small-scale Expert-led Panel

The Family Law Arbitration Group (Scotland) (FLAG(S)) whose bespoke family law arbitration amendments to the Scottish Arbitration Rules informed the development of the Sovereign Debt Arbitration Rules present an alternative approach to the constitution of a panel.

FLAG(S) has been developed by experts in arbitration and family law in Scotland to provide parties with a comprehensive list of arbitrators highly skilled in both areas. Parties then agree to 'appoint as Arbitrator, and by mutual agreement, a member of FLAGS' within the arbitration agreement[21]. Therefore Panel members are not nominated by members (i.e. the potential parties) but admitted by way of demonstrating their competencies in the field. This is already to some extent suggested within a model for a sovereign debt tribunal proposed by authors Christoph Paulus and Steven Kargman in which the UN Secretary General would select ten to twenty expert arbitrators from which a tribunal would be subsequently appointed[22].

In the FLAG(S) model training is provided to certify members are qualified to arbitrate such disputes whilst this also ensures ongoing support for skills development and renewal. This will aid in reviewing arbitrators' suitability for the Panel and making sure they are still sufficiently expert

[18] AFRODAD, 2006: *Implementing Fair Debt Arbitration: What needs to be done?* p16

[19] http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf

[20] http://www.newyorkconvention.org/

[21] Family Law Arbitration Group (Scotland), 2012: http://www.flagscotland.com/arbitration-clause

[22] Paulus and Kargman, 2008: Reforming the process of sovereign debt restructuring: A proposal for a sovereign debt tribunal. *Workshop on Debt, Finance and Emerging Issues in Financial Integration Financing for Development Office (FFD), DESA 8 and 9 April 2008, pp7-8*

in these types of cases. For the purposes of sovereign debt arbitrations, arbitrators would require skills in international trade and investment law and clearly experience of international arbitration. We might expect arbitrators to have some knowledge of or experience working in international development cases but this would not be essential.

Following this model would likely make for a smaller panel which is easier to administer but on the other hand does not necessarily make all parties feel fairly represented, nor will it offer as wide a choice of arbitrators. Mechanisms and safeguards would need to be put in place to ensure both creditor and debtor countries accept the neutrality of the Panel and so are not deterred from entering into arbitration by fears of a creditor/debtor country bias despite party-appointed arbitrators at the stage of forming the tribunal. Creditor countries are likely to be over-represented on the Panel given their better developed legal sectors. Nevertheless, a smaller Panel has greater potential for developing expertise through shared experiences because there is less anonymity between Panel members and cases, allowing arbitrators to learn from each arbitration conducted by the Panel. Furthermore, there is likely to be greater consistency in the rulings within each arbitration amongst a smaller and closer group of arbitrators[23].

A sovereign debt arbitration group, similar to FLAG(S) would need to be established to administer this and Scotland would be an ideal place for developing this model, not least because the Sovereign Debt Arbitration Rules are designed to fit into the Arbitration (Scotland) Act 2010 but also because Scotland holds no sovereign debt arrangements of its own. Discussions with the legal community in Scotland, the Chartered Institute for Arbitrators Scotland, and Scottish Arbitration Centre, as well as the Scottish Government could represent the start of this process. Additionally, under the Arbitration (Scotland) Act, eight neutral Arbitral Appointment Referees exist which could be chosen in this Panel model to act as the appointment authority for the third arbitrator[24].

Undoubtedly however, should Scotland gain independence, it will likely inherit some of the debts owed to the UK which may present a challenge to the international neutrality of any organisation which is created. Nevertheless, in guaranteeing the arbitrators on the Panel are international representatives rather than simply arbitrators from Scotland, potential objections to it being 'nationally organised' or a partisan body could be mitigated. This will also be important given the need to ensure a range of experience and skill across panel members since it is likely necessary to look beyond Scotland for this.

Possible obstacles to this model include questions of funding. An international membership-based organisation sees member countries contribute financially[25] but if the organisation is developed as a Scottish innovation, this responsibility will shift to the Scottish Government. The Scottish Government could seek funding from external bodies to support this yet this then raises questions as to *who* is funding the administration of the Panel and whether there is any conflict of interest. The legal practices of the Panel arbitrators might also be a possible source of funding as in the case of FLAG(S). In the long-term, an internationally run organisation, such as UNCITRAL, could take on this administrative role and assume financial responsibility for the Panel but this will necessarily form part of a larger campaign and the support of UN member states for this being incorporated into UNCITRAL's existing remit.

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[23] Ibid, p5

[24] The Arbitral Appointments Referee (Scotland) Order 2010, http://www.legislation.gov.uk/ssi/2010/196/pdfs/ssien_20100196_en.pdf; Scottish Arbitration Centre, http://www.scottisharbitrationcentre.org/index.php/arbitration/arbitration-appointment-referees

[25] http://www.un.org/en/hq/dm/budget.shtml

FUNDING SOVEREIGN DEBT ARBITRATION IN SCOTLAND

A key point to consider when thinking about the practical realities of sovereign debt arbitration and how it is to be conducted is the way in which it is to be financed. This is crucial not only for the countries who are parties to the arbitration and who must determine the contribution they anticipate making. It is also important for Scotland itself when considering the role it can play in the promotion of its own arbitration legislation and thinking about the ways it can support the process of sovereign debt arbitration. This briefing provides the answers to three key questions concerning both the cost of a single arbitration case as well as the administration of any institution through which it is organised and supported.

How is an individual arbitration case financed under Jubilee Scotland's Sovereign Debt Arbitration Rules?

The Arbitration (Scotland) Act 2010 details in the Scottish Arbitration Rules how any single arbitration being held under Scottish law is to be funded and all associated arbitration expenses covered[1]. Jubilee Scotland's Sovereign Debt Arbitration Rules[2] have been designed so as to maintain the Act's original stipulations on this matter. Here it is the responsibility of the parties to meet the majority of any costs accumulated during the course of the dispute resolution process. In effect, this means that each arbitration will be funded predominantly on a case-specific basis with only the parties which are involved being required to make significant financial contributions. Therefore despite being held under Scottish law the cost to the Scottish tax payer of each arbitration case will be minimal.

When thinking about the costs likely to be incurred by the parties, the Rules (both the original Scottish Arbitration Rules and Jubilee Scotland's bespoke Sovereign Debt Arbitration Rules) state clearly what is to be included in any 'arbitration expenses'. These are:

- *The fees and expenses of the arbitrator(s).*

  Within Jubilee Scotland's own Rules provision is made for a multi-member panel made up of three arbitrators. Such a clause is likely to increase the cost of the arbitration from one held under the original Arbitration Act in which a tribunal consists of a sole arbitrator. It is vital however that a multi-member panel is used in a sovereign debt arbitration, as stated by the bespoke Rules, to ensure both parties have a say in the appointment of at least one arbitrator and confidence in the neutrality of the third. This marks a departure from existing debt workout mechanisms which have been creditor-dominated. It is also key to implementing a fair and transparent system in which both parties feel fairly represented. The resultant fees and coverable expenses are to be agreed in advance between the parties and arbitrator(s).

- *Expenses incurred by the tribunal, including: the fees and expenses of any clerk, agent, or employee; the fees and expenses of any expert from whom the tribunal obtains an opinion; the expenses of meeting and hearing facilities; and any expenses incurred in determining recoverable arbitration expenses.*

  Under the Sovereign Debt Arbitration Rules parties are granted the opportunity to call upon expert witnesses. This is an important principle in making sure the tribunal is able to consider fully the origins and impact of the debts in question by drawing on specialist knowledge unique to each case. Therefore in addition to more practical costs related to the holding of an arbitration such as booking rooms and employing clerks, parties will also have to cover the expenses of any experts they choose to involve. As with the arbitrators, the fees and

[1] Arbitration (Scotland) Act 2010, Part 7 – Arbitration Expenses, http://www.legislation.gov.uk/asp/2010/1/pdfs/asp_20100001_en.pdf
[2] Jubilee Scotland, 2012: Sovereign Debt Arbitration Rules, http://jubileescotland.org.uk/arbitration/rulesconsultation

expenses of any third-party or expert are not set by legislation and instead agreed between them and the parties.

- *The parties' legal and other expenses*

- *The fees and expenses of any arbitral appointments referee and any third party to whom the parties give power in relation to the arbitration*

  An arbitral appointments referee is employed under the Arbitration Act to intervene where parties are unable to agree upon an arbitrator. It is not therefore guaranteed that they will always be called upon. In the case of the Sovereign Debt Arbitration Rules however, the third neutrally appointed arbitrator is to be chosen by an appointments referee. These costs will also therefore always need to be covered by the parties.

In all these instances, if at any point the parties to fail to agree with the relevant individuals on the amount they are to be paid, the Auditor of the Court of Session is legislated to intervene and determine the amount at which any fees or expenses should be set. Such a provision is important to ensure the quick resolution of any disagreements and, particularly significant in sovereign debt arbitrations, to ensure one party does not dominate through the ability to exert greater financial strength.

Parties are deemed to be severally liable for financing the payment of any fees and expenses listed above and thus their contributions are considered separately. Together with or independent of the arbitral award, the tribunal can decide how to allocate the proportion of parties' liability. For example, each party may be responsible for meeting some costs of the arbitration but separately so they are not necessarily borne equally by both sides. The contribution of each party can, for example, consider what is within their means to pay but also the nature of the final award and in whose favour it is made. As Brandon Malone, Chairman of the Board for the Scottish Arbitration Centre, states 'these fees will normally be awarded against the other side in the event of success'[3]. Parties entering into an arbitration can therefore feel confident that if they have a strong case and are likely to be successful they will not be liable for the majority of any expenses.

Until such an award is made or where the tribunal decides not to make an award of this nature, the parties must nevertheless be aware that they remain liable for an equal share of the fees and expenses and for their own legal and other expenses.

One concern regarding the way through which fees and expenses are to be covered is the expectation that debtor countries will have less money available to fund an arbitration. In turn they may shy away from pursuing this method of debt workout. Equally, creditor countries could be reluctant to enter into arbitration if they believe they will be required to meet the majority of any recoverable expenses (as well as their potential loss of income) if the final decision is made in favour of the debtor country.

It is nevertheless felt that the advantages of arbitration in cases of sovereign debt disputes outweigh the short-term costs involved in conducting the arbitration itself. On the part of debtor countries there is the possibility of their existing debts being restructured, re-negotiated, or even cancelled which would in turn free them up to pursue their own future public spending plans. On the part of the creditors, they are badly served by existing debt workout mechanisms which leave them facing the costs of ongoing restructuring or simply seeing the debt being defaulted on[4]. Thus meeting the costs of the arbitration in the short-term, even if they lose and are found facing a bill far in excess of a half share of the expenses, will be cheaper in the long-term than meeting the costs of repeated debt restructurings. It will bring an existing dispute to an end. Moreover, in being a typically quicker process than alternative dispute resolution mechanisms such as litigation, arbitration is viewed by many as being a more economical

[3] Malone, B, 2010: 'Arbitration: A Duty to Advise of the Benefits', http://www.ciarb.org/scotland/downloads/Arbitration%20Article%20for%20CIArb%20Website%20(7)%20Brandon%20Malone.doc

[4] Panizza, Sturzenegger, Zettelmeyer, 2009: 'The Economics and Law of Sovereign Debt Default', Journal of Economic Literature; Jurgen Kaiser, Head of Policy, Erlassjahr – personal communication; Jubilee Scotland, 2012: 'Scotland: A seat of sovereign debt arbitration' http://www.jubileescotland.org.uk/sites/default/files/Arbitration%20briefing%20Nov%202012.pdf

option; 'A straightforward arbitration with no right of appeal, will always be less expensive than years of litigation with multiple rights of appeal'[5]. It is consequently not anticipated that the costs expected to be borne by the parties will likely deter their pursuit of debt arbitration.

What role will Scotland have in financing sovereign debt arbitration?

Scotland's role in financing sovereign debt arbitration will be very much dependent on the type of model adopted in the creation of a debt arbitration panel. This panel is the place where arbitrators will be listed, accessed, and chosen from to sit on the tribunal. Jubilee Scotland's briefing 'Sovereign debt arbitration in Scotland: Creating a Debt Arbitration Panel' outlines two possible 'ideal' models in more detail, including the pros and cons of each[6]. One of the options is to have a small-scale expert-led panel. In this instance, there will be a need for bodies in Scotland, be it the Scottish Government, the Scottish legal sector, or both, to provide some financial backing for any administration of the panel, especially in its initial setting up. The model is based on the Family Law Arbitration Group Scotland (FLAGS). Membership of FLAGS is non-subscription but costs have been kept relatively low by it being a small-scale organisation through which arbitrators can be directly approached rather than accessed via FLAGS's own administration. The costs incurred are therefore largely only for initial start-up, maintaining a public list of member arbitrators, promotion, and one-off training events for panel members[7].

This funding could be provided by the Scottish Government, recognising that whilst this represents a cost to taxpayers there are additional economic benefits which come from attracting sovereign debt arbitrations to Scotland alongside the international precedent it would set[8]. It will also be largely Scottish lawyers involved, thus promoting their industry and seeing money being put back into the sector in the form of fees and expenses. This is similarly true of the Arbitral Appointments Referees. The Scottish Arbitration Centre or Chartered Institute of Arbitrators could also provide settings in which this would occur through the extension of their activities. It would be an opportunity for them to extend their membership, diversify their portfolios, and raise their profiles both for sovereign debt arbitration but also more traditional commercial arbitrations. Alternatively, as with FLAGS it may be that key figures and practices in the legal community who are interested in being members of the Debt Arbitration Panel will want to support the creation of a new body and take this on, using their own funds, potentially with Government support, to make this happen.

One way in which to recoup any costs which may be incurred in administering the panel over time, providing training opportunities, and promoting sovereign debt arbitration could be to charge a registration fee to be paid by parties. PRIME Finance Disputes based in the Netherlands runs a similar panel-based arbitration system to FLAGS and within its own governance structures requires parties to pay a registration fee for accessing its arbitrators and arbitrating under its bespoke arbitration rules[9]. Such a system would ensure the Government or any other agency funding the Panel would receive a return on any investment.

What role will the international community have in financing sovereign debt arbitration?

The alternative panel option is a for a supranational treaty-based member-led panel. In this scenario, the onus is no longer on Scotland to provide financial backing but on the international community more broadly. Adopting a similar approach to existing supranational organisations an international sovereign debt arbitration panel in which all member countries have nominated arbitrators would be funded by contributions from these member countries. As with the small expert-led panel this would be to cover

[5] Malone, B, 2010: 'Arbitration: A Duty to Advise of the Benefits', http://www.ciarb.org/scotland/downloads/Arbitration%20Article%20for%20CIArb%20Website%20(7)%20Brandon%20Malone.doc

[6] Jubilee Scotland, 2013: Sovereign Debt Arbitration in Scotland: Creating a Debt Arbitration Panel', http://www.jubileescotland.org.uk/content/scotland-seat-debt-arbitration#attachments

[7] http://www.journalonline.co.uk/Magazine/55-12/1009018.aspx#.UnutWCe3A_g

[8] http://www.scotland.gov.uk/News/Releases/2011/03/17120931

[9] PRIME Finance, 2012: Annex E – Schedule of Institutional Costs, http://www.primefinancedisputes.org/images/pdf/Schedule_of_institutional_costs.pdf

the costs of the ongoing administration of the arbitration panel rather than to subsidise any specific arbitration in itself. The International Court for Settlement of Investment Disputes, for example, which adopts a similar model of a list of nominated arbitrators receives funding from the World Bank, a body financed by contributions from members. Similarly, the United Nations Conference on Trade and Development (UNCTAD), the responsible lending and borrowing principles of which are referenced in the Sovereign Debt Arbitration Rules, adopts this approach. As a subsidiary of the United Nations it receives funding from countries first contributing to the UN budget, a portion of which is then allocated to UNCTAD[10]. One option therefore is for the Panel to act through an existing body, receiving its budget from members' existing contributions to that organisation.

Alternatively, the Debt Arbitration Panel could be initiated as a new and independent body with signatory countries paying a contribution directly to the administration of the Panel. Given the size of the Panel would be far larger than the smaller expert-led panel discussed above, administration costs would likely be higher with more arbitrators to organise and greater need for monitoring and assessment activities. However, split amongst such a large number of member countries, these could still be kept fairly low.

What's next?

Through this briefing, the Sovereign Debt Arbitration Rules, and its discussions of the possible options for a Debt Arbitration Panel, Jubilee Scotland has presented a workable vision for how debt justice through fair and transparent arbitration can be achieved in Scotland. It has presented policy makers, legal figures, and governments in Scotland and around the world with a range of ways in which this can happen and be financed. It is now the time for these ideas and frameworks to be debated amongst all these groups as well as with Jubilee Scotland's international debt movement sister organisations to decide how they are to be taken forward and implemented.

[10] http://unctad.org/en/Pages/About%20UNCTAD/Programme-Budget.aspx