How it could work

The alternative to the traditional debt relief processes for Zimbabwe - An illustration

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How it could work – The alternative to the traditional debt relief processes for Zimbabwe – an illustration

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I. Introduction

States can go bankrupt

For the last decade the Zimbabwean government has been in default on most of its debt currently estimated to be around 7 to 9 billion US Dollar[1]. It is not the first and will not be the last country in the world to default on external debt. Europe today shows that northern industrial countries can also become unable to meet all their debt service payments. Other more recent examples may include Cote d'Ivoire in February 2010 or Jamaica in 2010. Sovereign debt defaults have been normal phenomena for millennia[2]. Reasons for sovereign default vary, depending on the economic and taxation base of a country, on individual political and geographical circumstances, unproductive lending, on the occurrence of extraordinary events such as civil war and natural disasters, just to name a few. When the state is in effect insolvent it comes to find a solution to the actual problem that leads to default: the lack of capacity to repay outstanding debt and to financially uphold state obligations to the public.

"Money one cannot get, cannot be lost. Reducing phantom debts is simply an acknowledgment of facts. […] Deleting phantom debts simply means stopping to play the Emperor's New Clothes, acknowledging the naked economic truth."
Kunibert Raffer[3]

The ability of a sovereign to increase tax revenues, "printing new money" or decrease its expenditures is one of the reasons why state insolvency has not been addressed with the help of a proper mechanism that would in turn address the problem as such[4]. In economic theory, a state with its taxing authority has no limited financial capacity[5]. In theory the state can use all legal mechanisms to fulfil its obligations[6]. There is no established law that enables the state to demand the cancellation of debt obligations. In case it would declare insolvency it will be seen as "unwilling" to pay, not as "unable". That implies that a state is only then able to declare payment inability if there are no tax revenues to collect or if the population of the country is below an absolute minimum subsistence level[7]. This is associated with huge social and also economic costs. The Greek crisis proves that in effect there are actual and political limits to reducing expenditures and raising revenues. In the case of developing countries, it is not only the fact, that often a huge part of the population has to live below a defined poverty level, but that there are also not enough resources available to change that circumstance.

Actually, preserving a state's operability is utterly important, as the state constitutes the economic system, jurisdiction and is responsible for setting the parameters for the social welfare of the country. In the context of state indebtedness, this logic seems to be, however, set aside.
International politics has found another reason to not address state insolvency. The narrative of an entity as being "too big to fail" has often been used in western politics in the context of the global financial crisis in

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1 According to Jubilee Debt Campaign UK, the debt stock of Zimbabwe amounts to US$7 billion (*see: Jones, Tim (2011): "Uncovering Zimbabwe's Debt: the case for a democratic solution to the unjust debt burden", Jubilee Debt Campaign UK, p.5*), US$ 8,8 billion according to the African Development Bank and Fund (*Zimbabwe: Country Brief 2011 - 2013,* http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and- Operations/Zimbabwe%20Country%20Brief%20June%202011.pdf), according to the Zimbabwean debt network ZIMCODD US$ 9,1 billion*:* (http://www.zimcodd.org.zw/index.php?option=com_content&task=view&id=180).

2 See: Carmen M. Reinhart and Kenneth S. Rogoff (2009): "This Time is Different: Eight Centuries of Financial Folly", Princeton University Press, and David Graeber (2011): "Debt: The First 5000 Years", Melville House Publishing, Brooklyn.

3 Raffer, Kunibert (2001): "Solving Sovereign Debt Overhang by Internationalising Chapter 9 Procedures", *Arbeitspapier 35*, OeIIP (Oesterreichisches Institut fuer Internationale Politik/ Austrian Institute for International Affairs), Vienna as *Arbeitspapier 35* in June 2001 , http://www.druckversion.studien-von-zeitfragen.net/Working%20Paper%20Raffer%20on%20Chapter%209.htm#_ftnref1.

4 See Paulus, Christoph G. (2012): "A Resolvency Proceeding for Defaulting Sovereigns", in: „International Insolvency Law Review" 1/2012, Verlag H.C. Beck: Munich / Frakfurt am Main, p. 2.

5 The thesis of the unlimited sovereign financial capability is described in: Lewinski (2011): " Öffentlichrechtliche Insolvenz und Staatsbankrott – Rechtliche Bewältigung finanzieller Krisen der öffentlichen Hand", p. 248.

6 See: Priv.Dozent Dr. Stefan Ulrich Pieper: "Völkerrechtliche Aspekte der Einführung eines Insolvenzrechts für Staaten", Vortrag im Rahmen des Fachkongresses „Die Diskussion um ein Insolvenzrecht für Staaten", Münster 17. – 19.01.2001, , Berlin / Münster, 19.12.2011, vorläufige Fassung, p. 4.

7 See Paulus, Christoph G. (2012): "A Resolvency Proceeding for Defaulting Sovereigns", in: „International Insolvency Law Review" 1/2012, Verlag H.C. Beck: Munich / Frakfurt am Main, p. 2.

order to justify the socialisation of private bank liabilities. Politics believed that the insolvency of private banks would “endanger” the national and international financial system due to the systemic implications. Officials feared that even the discussion about indeed obvious facts would lead to a crisis of confidence at the irrational reacting financial markets and trigger (political) “unforeseen consequences”[8]. Permanent and internationally accepted mechanisms to quickly and efficiently solve a situation of debt distress have consequently not yet been developed and applied.

In the context of developing countries, one can find the HIPC and MDRI initiatives, the Debt Sustainability Framework of the IMF and negotiation fora such as the Paris Club[9]. But those instruments do not address state insolvency as recurring phenomena of national economies[10]. They moreover re-enforce the attitude, that sovereign overindebtedness is something exceptional: The HIPC and MDRI initiatives were designed as one-off mechanisms. The DSF implies that the recurrence can be prevented in the future by deterring debtor countries from excessive borrowing[11]. However, the opposite, such as reckless lending is responsible for a crisis to recur. Not having a good way of dealing with sovereign debt and a sovereign debt crisis, make sovereign debt crises likely to recur.

The case of Zimbabwe

The historical evolvement of the current debt situation in Zimbabwe goes back as far as the history of Rhodesia, the former state of Zimbabwe. However the presently unresolved insolvency situation emerged from the 1990s, when a combination of debt service and lack of new loans meant that Zimbabwe faced a lasting net outflow of resources from the country, with the consequence of default by 2000[12].

We've cited Prof. Kunibert Raffer in the beginning of this introduction, as he has introduced the concept of “phantom debt”. Phantom debt describes the circumstance that a solvency crisis cannot be solved by hoping for future economic wealth to pay it off[13]. That is reality in Zimbabwe. Zimbabwe is not illiquid, but has been insolvent for over a decade. That is why debts started to accumulate on paper. The longer the insolvency continues, the further the debts are pushed to ever more unrealistic levels beyond the country's economic capacity to repay. The debt stock of Zimbabwe is estimated to rise from around 9 bn US$ to 13 bn US$ in 2013 due to interest accumulation on arrears and principal[14]. Furthermore it is already long known that Zimbabwe does not have the economic capacity to pay off arrears and debt that is contractually due (see Chapter 1). Reductions to economically sustainable amounts appear ever costlier on paper as the share of phantom debts increases. Existing only on paper those debts nevertheless compromise the debtor's economic future and they allow creditors to exert pressure on Zimbabwe, by forcing the government to apply preferred options to solve the debt problem (see Box 1). Well, it is not for nothing that, at a company level, an insolvency delay is an offence in Germany and other jurisdictions.
The economic costs of Zimbabwe's unsustainable public external debt are high, since it influences the country's ability to secure external financing and the attraction of foreign direct investment. The lack of financial capacity has implications for the state’s general ability to serve its people. The country has been

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8 See Lewinski (2011): “Öffentlichrechtliche Insolvenz und Staatsbankrott – Rechtliche Bewältigung finanzieller Krisen der öffentlichen Hand“, p. 249, footnote 17. Conversations with the German Ministry of Finance in April 2010 mirrored that attitude.

9 For an intensive discussion on debt management in reference to Third World Debt see: Raffer, Kunibert (2010): “Debt Management for Development: Protection of the Poor and the Millenium Development Goals”, Cheltenham: Edward Elgar, Chapter 1 to 4, or: Teunissen, Jan Joost and Akkerman, Age (2004): “HIPC Debt Relief: Myths and Reality”, The Hague: Forum on Debt and Development (FONDAD), or: Kaiser Jürgen (2010): “Resolving Sovereign Debt Crises: Towards a Fair and Transparent International Insolvency Framework”, Friedrich-Ebert-Stiftung, Study within “Dialogue on Globalization”.

10 Kaiser Jürgen (2010): “Resolving Sovereign Debt Crises: Towards a Fair and Transparent International Insolvency Framework”, Friedrich-Ebert-Stiftung, Study within “Dialogue on Globalization”.

11 ibid., p. 9 .

12 See: Jones, Tim (2011): “Uncovering Zimbabwe‘s Debt: the case for a democratic solution to the unjust debt burden”, Jubilee Debt Campaign UK.

13 See: Raffer, Kunibert (2001): “Solving Sovereign Debt Overhang by Internationalising Chapter 9 Procedures”, *Arbeitspapier 35*, OeIIP (Oesterreichisches Institut fuer Internationale Politik/ Austrian Institute for International Affairs), Vienna as *Arbeitspapier 35* in June 2001 , http://www.druckversion.studien-von-zeitfragen.net/Working%20Paper%20Raffer%20on%20Chapter%209.htm#_ftnref1.

14 “Zim in US$10bn debt distress”, The Financial Gazette, Wednesday, 20th of July 2011, http://www.financialgazette.co.zw/companies-a-markets/9107-zim-in-us10bn-debt-distress.html

stuck in economic stagnation for almost two decades, escalating in 2008 when economic mismanagement resulted in the disastrous hyper-inflation period[15]. Consequently the country was marked with violence and poverty until the formation of the inclusive government in 2009. Zimbabwean Senator O.C. Gutu even called Zimbabwe a failed state, with a "*government",* that *"ceased to operate as a normal functional authority."*[16]

It is clear, that the reasons for Zimbabwe having been seen as a "failed state" are complex and cannot be reduced to the unsustainability of the debt burden of the country[17]. But "political oppression, economic chaos and social division springs rarely from nowhere", as Tim Jones, researcher of the Zimbabwean debt situation, puts it[18]. The indebtedness of the country that "balloon simultaneously with the escalation of poverty and destitution"[19] is closely linked with the "broken economy" and the "state of hopelessness and indeed, utter destitution, amongst the millions of ordinary Zimbabweans"[20].

The Zimbabwean civil society organisation Zimbabwe Coalition on Debt and Development (ZIMCODD) quantifies the "damage" of the already long-lasting insolvency of Zimbabwe in economic and social terms and calls for the fair, comprehensive and fast solution of the debt problem as being the most crucial step to come back to an economic and social development path:

> *„[...]the country requires up to 45 billion in the next 10 years to recover production to its pick levels of 1997 […]. […] between January and June 2010 the government of Zimbabwe paid US$1. 3 million in debt repayment to IMF at a time the ARV requirements were estimate to cost as much, civil servants are still earning below the poverty line, approximately 8 women are dying every day due to pregnancy related complications, more than 90% of the country's working age population is formally unemployed, certain districts are facing starvation, health delivery is still pathetic and physical infrastructure is in a state of decay among other things. […] In 2001 interest expenditure amounted to 1496% of the allocation to higher education"[21].*

An "early recognition of solvency as the root cause and the need for a final settlement are important for minimizing the damage"[22]. This does not only apply to the debtor country: naturally, creditors may expect to be better-off with a debtor that can demonstrate a healthy economy.

Timeliness is one of the most important principles of the concept of the fair and transparent arbitration process (FTAP) that is outlined in this paper. It seems a little late for timeliness in the case of Zimbabwe, having been in default for a decade so that two other principles are utterly important in the current situation of lasting, disorderly default: speed and efficiency.

Moreover, in domestic insolvency procedures, be it private or at the level of sovereign municipalities as in the USA, the principle is established that money to service a country's debts must not be raised by impairing

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15 Government economic mismanagement was characterized by funding its own deficit and that of public enterprises by printing money, for instance. See: Jones, Tim (2011): "Uncovering Zimbabwe's Debt: The case for a democratic solution to the unjust debt burden", Jubilee Debt Campaign, p. 34.

16 Senator Obert. C. Gutu of Gutu & Chikowero (2009): "ZIMBABWE'S ILLEGITIMATE AND ODIOUS DEBTS – A CASE FOR ARBITRATION", Senator O. C. Gutu at a Conference on Fair and Transparent Arbitration Mechanism on Illegitimate and Odious Debts; Johannesburg, South Africa; 30-31 March, 2009.

17 The argument of Zimbabwe Diaspora Development Interface in terms of such "costs" of a debt overhang are discussed in depth in : Zimbabwe Diaspora Development Interface (ZDDI) Discussion Paper at Seminar held at London Metropolitan University, 26.02.2010: "The HIPC initiative: A Debt relief option for Zimbabwe?" Abstract, p. 8 ff.

18 Jones, Tim (2011): "Uncovering Zimbabwe's Debt: The case for a democratic solution to the unjust debt burden", Jubilee Debt Campaign, p. 4.

19 Ibid.

20 Senator Obert. C. Gutu of Gutu & Chikowero, "ZIMBABWE'S ILLEGITIMATE AND ODIOUS DEBTS – A CASE FOR ARBITRATION", Senator O. C. Gutu at a Conference on Fair and Transparent Arbitration Mechanism on Illegitimate and Odious Debts; Johannesburg, South Africa; 30-31 March, 2009.

21 ZIMCODD (2010): "2011 National Budget Statement and Zimbabwe's Indebtedness", Policy Brief No 04/2010, http://www.zimcodd.org.zw/images/stories/reports/Zimcodd%20-%202011%20Budget%20and%20Zimbabwe.pdf.

22 Raffer, Kunibert, p. 14, cited from IBRD. World Debt Tables 1992 – 1993, Washington DC: IBRD, pp. 10 ff.

basic social services. That is the rule of debtor protection: the population of an indebted municipality is seen as a priority[23]. However, debtor protection as one element of an insolvency framework seems to be absent in the current sovereign debt debate and certainly in the debate regarding the resolution of the Zimbabwean debt crisis. Here, traditional debt relief options are brought forward from the international creditor community with an overwhelming emphasis on its right to be repaid.

BOX 1: Current options for debt resolution[24]

According to the Zimbabwean debt network ZIMCODD, there are currently four debt and arrears clearance options reported to be under consideration[25].

Besides the consideration of internal resource inflows and resource based debt restructuring, the most prominent options appear to be Paris Club debt restructuring and the Highly Indebted Poor Countries Initiative (HIPC). This is indicated by the strategies of the government of Zimbabwe. It prepared the Zimbabwe Accelerated Arrears Clearance, Debt, and Development Strategy (ZAADDS), largely with the aim to restore relations with its creditors, regaining investor confidence and a financial re-engagement with the international community[26].

This strategy is claimed to be a product of a national consensus-reach emerged from a consultative process among government officials of Zimbabwe, academics, regional CSOs such as AFRODAD and debt expert staff of multilateral institutions[27]. However, the “national consensus-reach” resulted in drawing upon established mechanisms for debt relief, meaning the standard Paris Club rules and the inclusion into the HIPC initiative[28].

Already in 2009 the government of Zimbabwe set up an economic recovery programme that is considered by debt experts as preparation for the entrance into the HIPC initiative[29]. The economic reforms outlined in the programme appear to conform to standard structural reforms by the IMF and World Bank that are conditional for HIPC countries in order to reach the decision point. Moreover, the implementation of an IMF supported programme is obligatory, when it comes to re-engage with bilateral creditors. The ZAADDS explicitly states that it is part of an economic reform agenda that may be demanded by the IFIs[30]. Without a track record of the “successful” implementation of macro-economic policies there will be no re-engagement with the international financial institutions[31]. Thus the government of Zimbabwe overwhelmingly emphasizes its successful track record in its strategy and promises to further go that way[32], not least with the formulation of a new economic recovery programme, the Zimbabwe Accelerated Re-engagement Economic Programme (ZAREP). This programme is scheduled to be in force for 18 to 24 months. Although it is called

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23 Prof. Kunibert Raffer describes that as an essential element of an International Insolvency Procedure: “Subsidies and transfers necessary to guarantee humane minimum standards (basic health services, primary education etc) to the poor must be maintained”, in: Raffer, Kunibert (2005): “Considerations for Designing Sovereign Insolvency Procedures”, electronic Law journals, Law, Social Justice & Global Development, Chapter 2, http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2005_1/raffer/#a2.

24 There have been intensive discussions about the different, internationally discussed options, so it should not be focus in this report. See: Zimbabwe Diaspora Development Interface (ZDDI) Discussion Paper at Seminar held at London Metropolitan University, *Friday 26th February 2010: “*The HIPC initiative: A Debt relief option for Zimbabwe?” http://www.zimdiasporainterface.org/index.php?option=com_phocadownload&view=category&download=2:debt-relief-options-for-zimbabwe&id=2:debt-relief&Itemid=66, or: Jones, Tim (2011): „Uncovering Zimbabwe’s Debt“, Jubilee Debt Campaign, or ZIMCODD (2010): “2011 National Budget Statement and Zimbabwe’s Indebtedness”, Policy Brief No 04/2010, http://www.zimcodd.org.zw/images/stories/reports/Zimcodd%20-%202011%20Budget%20and%20Zimbabwe.pdf.

25 Zimcodd (2010): “ZIMC HIPC Debate: ZIMCODD Takes the HIPC Debate to the People”, 11th of March 2010, http://www.zimcodd.org.zw/index.php?option=com_content&task=view&id=62.

26 See: Ministry of Finance Zimbabwe (2012): "Zimbabwe: ACCELERATED ARREARS CLEARANCE, DEBT AND DEVELOPMENT STRATEGY", Government of Zimbabwe, Harare, http://www.zimtreasury.org/downloads/939.pdf.

27 Ibid, p. xvii.

28 See for more information on standard Paris Club terms: http://vi.unctad.org/debt/debt/m3/Naples.htm#1

29 Email interview with debt expert Dakaryi Matanga from the 26th of April 2012.

30 See: Ministry of Finance Zimbabwe (2012): "Zimbabwe: ACCELERATED ARREARS CLEARANCE, DEBT AND DEVELOPMENT STRATEGY", Government of Zimbabwe, Harare, http://www.zimtreasury.org/downloads/939.pdf, p. xi .

31 Ibid.

32 See for instance: Ibid, p. xii, xiii, xvii, 14, 16, 19 and 25.

"internally driven", the (even indirect) powerful influence of creditors in the formulation of the strategy is obvious.[33]

Economic reforms in an environment that clearly is in need of reform are principally not a bad idea, depending on the nature of the reforms. But setting the successful implementation of prescribed structural reforms as the conditional key for arrears clearance and debt relief initiatives means mixing urgently needed debt relief and a naturally long-lasting reform process. The reforms however are based on the assumption that states do not go bankrupt and thus need an economic and fiscal adjustment path, such as wage cuts and privatisation that have possibly negative consequences for the population of the country.

It is debatable, if the consultative process with key stakeholders really reflects the participation of all creditors of Zimbabwe and the Zimbabwean population, as indicated in the Zimbabwean Arrears Clearance Strategy[34]. In the civil society of Zimbabwe, particularly the HIPC option has raised concerns, due to implied policy prescriptions by the international financial institutions and the promotion of creditor interests inherent to the mechanism, the length of the process and the lack of a moratorium with the consequence of further resource outflows from a bankrupt country.

However in order to be included in a traditional debt relief process at all, Zimbabwe has to clear its arrears to multilateral financial institutions beforehand. That is a standard precondition of the HIPC debt relief process– although it makes little sense in the case of Zimbabwe. In quantitative terms: 140 million US$ to the IMF, 807 million US$ to the World Bank, and 510 million US$ to the AfDB[35] have to be paid before any creditor is willing to talk about debt relief. For that, Zimbabwe will have to ask for bridge loans from development partners – or preferably grant financing of its arrears clearance operations, just as war-torn Liberia had to do between the end of its civil war and its admission to HIPC. Zimbabwe certainly does not have the capacity to pay off that amount out of its own resources. Selling off mining rights towards its mineral reserves to pay off arrears[36] can be a means to generate "internal resources". However the country will certainly have to pay high risk premia demanded by investors because of the high investment risk attached[37].

Secondly Zimbabwe will have to rely on loan financing in the future. In order to repay its future debt, it will need a productive base. Mortgaging one of the most promising productive bases of the economy does not seem fair to future generations. Refinancing unrecoverable loans anyway is not a very reasonable approach in a country with huge development and investment needs and is simply unjust towards other creditors.

Zimbabwe fundamentally lacks budget resources but shows large investment needs in economic, social and infrastructural development. For instance the government needs about US$10 billion alone to rehabilitate its collapsed infrastructure[38]. The above-mentioned approach implies the accumulation of new debt that is not used for these investment needs[39]. Financing (bridging loans) need to be assured for the time DURING or AFTER a debt relief process, to facilitate a fresh start

33 Ibid., p.1

34 See: ZIMCODD (2010): "2011 National Budget Statement and Zimbabwe's Indebtedness", Policy Brief No 04/2010, http://www.zimcodd.org.zw/images/stories/reports/Zimcodd%20-%202011%20Budget%20and%20Zimbabwe.pdf: "The decision to adopt the Zimbabwe Accelerated Arrears Clearance (ZAAC), Debt and Development Strategy (DDS) in its current form clearly disregards input from civil society. By so doing the government is risking compromising the credibility of its own otherwise noble consultative discussions. It appears at the end of the day that the CSOs participation in high level forums on debt was ceremonial. This may explain the muted pronouncements."

35 See Chapter XV of the Zimbabwe Accelerated Arrears Clearance, Debt and Development Strategy: "Arrears Clearance Process & Re-Engagement with the IFIs".

36 See: Zimbabwe Diaspora Development Interface (ZDDI) Discussion Paper at Seminar held at London Metropolitan University *Friday 26th February 2010: "*The HIPC initiative: A Debt relief option for Zimbabwe?"

37 Ibid.

38 "Zimbabwe mulls bond issue to revamp collapsed infrastructure", Friday, February 17, 2012, Provided by: APANEWS.

39 In case Zimbabwe is going to be included in the HIPC-initiative only the loans prior to 2004 will be included. See: IMF (2011): "Heavily Indebted Poor Countries (HIPC) Initiative and Multilateral Debt Relief Initiative (MDRI)-Status of Implementation and Proposals for the Future of the HIPC Initiative", http://www.imf.org/external/np/pp/eng/2011/110811.pdf.

for the country. These loans could be given an exempt creditor status by mutual consent of the parties[40] and could thus be excluded from the debt relief process.

The inflexible and standardized traditional debt relief approaches will most certainly be a recipe for an unreasonable delay of a quickly needed debt solution. The country is in strong need for fresh inflows towards reconstruction, particularly because it has practically no credit lines, no access to capital markets and is working on a cash budget. An unlocking of fresh financing is therefore crucial to pursue any future economic development path. This could hardly be reconciled by a mechanistic cut-off-date as it is set within the Paris Club approach or "a HIPC-style decree of some creditors against all the others"[41].

The alternative

With this paper, we suggest an alternative that has so far not been considered for Zimbabwe: a flexible arbitration process that encompasses a sufficient debt reduction through a fair sharing of losses among all parties aligning the country's total debts to its real capacity to pay.

The *comprehensive* treatment of all creditors in one single process and the inclusion of the population of the country through its right to be heard, are two elements to achieve a consensual situation among all parties. The *impartiality of assessment of the debtor's fiscal and economic situation* in contrast to standardized, creditor-dominated assessment processes is another. The most important element to ensure an acceptable and fair solution to both, creditors and debtor is the *impartiality in decision making*, since it sustainably addresses a fundamental conflict naturally existing between creditor and debtor:

> *"The basic function of any insolvency procedure is the resolution of a conflict between two fundamental legal principles. In a situation of overindebtedness the right of creditors to interest and repayments collides with the principle recognised generally […] by all civilised legal systems that no one must be forced to fulfil contracts if that leads to inhumane distress, endangers one's life or health, or violates human dignity."*[42]

The tragedy in current debt management of developing country indebtedness is that this conflict of two legitimate and legal claims is mostly carried out within a sphere of power imbalances in creditor-dominated processes[43], as the current strategy of the Zimbabwean government proves. Without an intermediary party that can mediate between parties that carry opposing interests, no fair outcome can be found. This fundamental risk will essentially affect those parties that do not have a voice in current debt relief processes – the population of the country as well as creditors, which tend to not be consulted by those fellow creditors who manage to drive the whole process.

The "submission" of the country under international lenders and policy-"advisors" through prescriptive policy demands in return for debt relief (as it would go within the above-mentioned traditional processes) could be avoided in the herewith proposed flexible process. And: neither sufficient debt relief nor the equal treatment of creditors and reform commitments by the government of Zimbabwe have to be abandoned for such a process[44].

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40 Kaiser Jürgen (2010): "Resolving Sovereign Debt Crises: Towards a Fair and Transparent International Insolvency Framework", Friedrich-Ebert-Stiftung, Study within "Dialogue on Globalization", p. 12.

41 Kaiser, Jürgen (2012): "A 'Debt Conference' for Zimbabwe: a few reflections on wording and an outline on process", unpublished internal paper erlassjahr.de, April 10th 2012.

42 Raffer, Kunibert (2001): "Solving Sovereign Debt Overhang by Internationalising Chapter 9 Procedures", *Arbeitspapier 35*, OeIIP (Oesterreichisches Institut fuer Internationale Politik/ Austrian Institute for International Affairs), Vienna as *Arbeitspapier 35* in June 2001 , http://www.druckversion.studien-von-zeitfragen.net/Working%20Paper%20Raffer%20on%20Chapter%209.htm.

43 See the detailed discussion on shortcomings of the current system in Kaiser Jürgen (2010): "Resolving Sovereign Debt Crises: Towards a Fair and Transparent International Insolvency Framework". In general the political influence of creditors to solutions of sovereign overindebtedness is a "typical proceed", see: International law association, The Hague Conference (2010): "State insolvency: options for the way forward", sovereign insolvency study group, p. 25.

44 Kaiser, Jürgen (2012): "A 'Debt Conference' for Zimbabwe: a few reflections on wording and an outline on process", unpublished internal paper erlassjahr.de, April 10th 2012.

In the pilot case of Zimbabwe, it is therefore “sufficient” that the parties share the notion that Zimbabwe is in debt distress and is not able to get out of this situation without debt relief. An arbitration process would therefore be driven by the aim to restore Zimbabwe's debt sustainability, and by the consensual notion that everybody will have to sacrifice something[45] to be fairly treated in the process.

The following illustration of how a flexible process as an alternative to the traditional debt relief processes could look like in Zimbabwe is based on a step-by-step guide developed by a German debt expert, working in the field of sovereign overindebtedness and international debt management for more than a decade. The step-by-step guide can be found in the publication “Resolving Sovereign Debt Crises: Towards a Fair and Transparent International Insolvency Framework” by Jürgen Kaiser from page 28, downloadable under: http://library.fes.de/pdf-files/iez/07497.pdf .

45 Ibid.

II. The steps of an alternative debt arbitration process – an illustration

Step 1: Declaration of Insolvency

The initiation of the process

The first step to the initiation of a negotiation procedure is the official declaration of the inability to fulfil debt service obligations because of an unsustainable debt burden. In international law, there are no established rules for a "declaration of sovereign insolvency". However, in the past, debt cancellations and restructurings have been an accepted practice. This is mirrored in the existence of creditor coordination fora for such negotiation purposes, such as the Paris and London Clubs.

Usually the unsustainability of public debt service indicates an insolvency situation. Debt-servicing problems in low-income countries are likely to arise when there are not sufficient new financing sources available for financing a country's primary deficit, and/or when the costs of servicing domestic debt become very high[46].

Also private debt obligations can mute from contingent to becoming manifest liabilities and thus bring the debt service to an unsustainable level, as it is evident from the global financial crisis beginning in 2008. However, Zimbabwe has already been in default for a decade, only partially servicing debt now and then. Zimbabwe therefore does not need to "declare" that it is not able to service debt. Due to the current lack of agreement with its creditors, Zimbabwe is forced to either stay in default or start servicing its debt which seems not possible at the moment. Zimbabwe lacks the resources to clear its arrears and for servicing outstanding debt obligations as has become clear from the ZAADDS. The crucial reason to start a FTAP is therefore to find a way to finally negotiate with creditors in such a way that an acceptable solution for all parties can be found.

By triggering a sovereign insolvency process Zimbabwe will therefore not only send a positive signal to its creditors as it demonstrates the will to eventually find a solution. Moreover, demonstrating the will to negotiate in front of an independent arbitration panel gives a positive sign to the international community that Zimbabwe desires to find a fair and efficient solution for all parties involved.

The stay of payments

For that, Zimbabwe will have to order a full stay of payments beforehand. Zimbabwe made a one-off payment of US$165 million to the IMF in 2005[47] despite of its ongoing default towards other creditors, in order to pave the way for re-engagement with the IMF. However, servicing debt obligations to one single creditor meant spending resources at the expense of a country's own financing and investment needs and also at the expense of other creditors that miss debt service payments as well. A stay of payments is a crucial part of the FTAP in order to ensure equal treatment of creditors and the prevention of a resource drain that might further damage the fiscal situation with spill over effects on the economy and the population. This argument also implies an interest on both– the debtor's and the other creditor's side – to bring the negotiation before an independent arbitration forum because that provides the option for a fair sharing of losses without any further delay.

The national constitution of Zimbabwe of December 1979 states that the President of Zimbabwe owns all executive power[48]. In September 2008, a coalition agreement was signed between president Mugabe and prime minister Tsvangirai. The latter was sworn in in February 2009. Tsvangirai also received the

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46 World Bank (2006): "How to do a Debt Sustainability Analysis for Low-Income Countries", http://siteresources.worldbank.org/INTDEBTDEPT/Resources/DSAGUIDE_EXT200610.pdf.

47 Jones, Tim (2011): "Uncovering Zimbabwe's Debt: the case for a democratic solution to the unjust debt burden", Jubilee Debt Campaign UK, p. 35.

48 "The executive authority of Zimbabwe shall vest in the President and, subject to the provisions of this Constitution, may be exercised by him directly or through the Cabinet, a Vice-President, a Minister or a Deputy Minister. [Subsection as amended by section 9 of Act 15 of 1990 - Amendment No. 10]", http://www.sokwanele.com/zimbabweconstitution/sections/262, and "Executive power lies with the President who exercises it directly or through members of the Cabinet", Constitution 1980, Article 31H. http://www.eisa.org.za/WEP/zim5.htm.

responsibility and executive authority for the finance ministry[49]. Thus he legally holds the executive authority in terms of financially relevant decisions[50]. Along with his finance minister Tendai Biti, he will be the person to decide to formally declare the country's insolvency and the stay of payments.

The definition of insolvency

The insolvency of a "municipality" (i.e. a body with governmental powers) under the US bankruptcy code is defined as the financial condition in which the municipality is generally not paying its debts as they become due at the time a Chapter 9 case is filed[51]. Alternatively, insolvency can be defined as the sovereign being unable to pay its debt. The distinction seems almost non-existent, but is important here. The US Bankruptcy Code does not define the “inability” and leaves it intentionally vaguely. Applying this principle, Zimbabwe does not need to demonstrate its inability to raise the revenues required to meet debt service. Zimbabwe does therefore not need to prove it has exhausted all other means, such as tax increases or other adjustment efforts in order to pay its creditors before it starts the process[52]. It is enough to demonstrate the tight cash or budget position[53].

This implies that the opening of the procedure will not be subject to the assessment of the reasons of insolvency. The arbitration panel is not concerned with the judgment of the performance of the government on fiscal policies, but has to validate (on the basis of evidence) that the government of Zimbabwe is not able to service its debts obligations at the point of time it declares its inability.

There may be other approaches to the validation of a country’s “insolvency”: According to the debt sustainability approach of the international financial institutions (IMF and World Bank), the debtor is in debt distress when it starts accumulating payment arrears to its creditors, thus is not able to service its obligations without rescheduling and/or accumulation of arrears. This approach demands adjustments, such as cutting public sector wage bills within an IMF programme. However, the debt sustainability approach of World Bank and IMF is a creditor-dominated approach and thus subject to a conflict of interests[54].

The person in charge, the finance minister in consultation with relevant departments such as the Debt Management Office, assesses the overall economic and fiscal situation and prepares evidence for the unsustainability of the debt situation. This will be the basis to start negotiations with the involved creditors.

Box 2: The evidence of the unsustainable debt and fiscal situation

1. The debt burden and continuous default situation

The most convincing evidence of a sovereign insolvency is the country’s protracted default. At the time of the initiation of the arbitration process, Zimbabwe will be in a situation where the debt burden is too high to be reduced through orderly repayment.

Through the years, capitalised arrears increased the debt stock of Zimbabwe, as shown in the following table55:

49 Wilsterer, Raoul (2009): Mugabe vereidigt Tsvangirai: Hoffnung auf Ende der Krise in Simbabwe wächst”, working group “Friedensforschung” (peace research), http://www.ag-friedensforschung.de/regionen/Simbabwe/regierung.html.

50 See responsibilities of the Prime Minister of Zimbabwe: http://www.zimbabweprimeminister.org/index.php?option=com_content&view=article&id=62&Itemid=93.

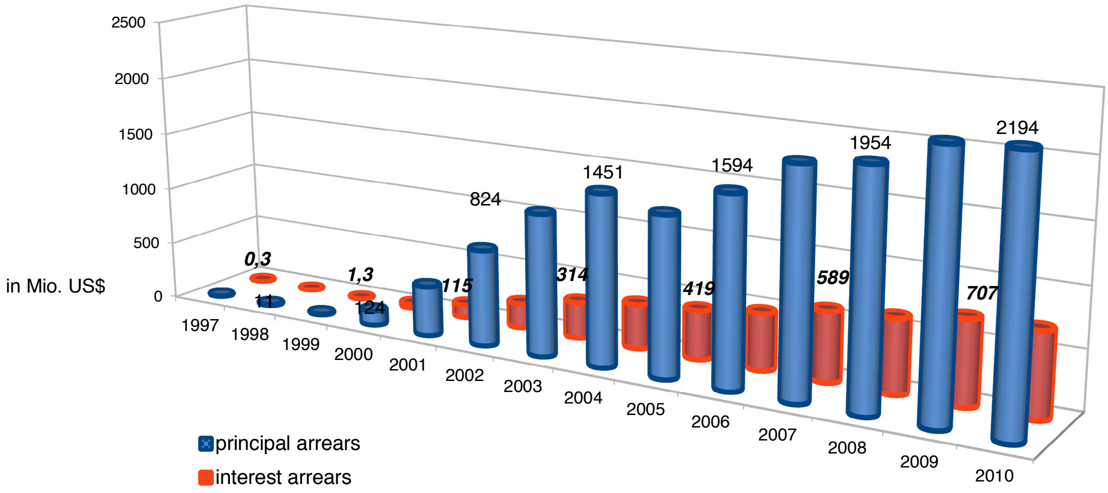
51 Kupetz, David S. (1995): “municipal debt adjustment under the bankruptcy code”, the urban lawyer, Vol. 27 No. 3 p. 541.

52 Ibid., p. 542.

53 Ibid., footnote 36.

54 Northover, Henry (2003): AN ALTERNATIVE APPROACH TO DEBT CANCELLATION AND NEW BORROWING FOR AFRICA, Dakar, Senegal, CAFOD, p. 9., or Policy and Operations Evaluation Department (2003): "Results of International Debt relief: 1990 - 1999", Nr. 292, Ministry of Foreign Affairs, p. 6, http://www.oecd.org/dataoecd/5/52/35149431.pdf.

55 Global Development Finance http://databank.worldbank.org



The shrinking of Zimbabwe's economy has co-incided with an increasing debt stock since the 1980s. Already in the 1980s debt service was around a gigantic 30 percents of exports, causing resource and foreign exchange outflows out of the country[56].

2. Debt sustainability assessments of the IMF and World Bank as proof to phantom debt situation

The government of Zimbabwe can also refer to the assessment of the IMF and World Bank. Their public debt sustainability analysis suggests that Zimbabwe's overall debt is unsustainable in light of the current size and evolution of the debt stock[57]. The IMF declared Zimbabwe to be in debt distress in 2011, which is a clear classification of an insolvency situation[58]. According to IMF estimations, total external arrears as of end 2010 are around US$ 6 billion, of which US$ 3.6 billion are principal arrears. IMF experts project, that the arrears on external debt are going to increase steadily from currently US$6 billion to US$7.5 billion in 2013 and US$ 9 billion in 2016. Equally, the external debt stock is projected to increase from an estimated 8.8 billion US Dollar in 2010 to US$11 billion in 2013 and US$13 billion in 2016[59]. The underlying assumption for these projections is an unresolved situation of current arrears. The consequence of that situation is that new debt service payments that come due will consequently fall into arrears as well. Due to the large size of arrears, it is assumed that future debt service will not be sustainable[60]. The IMF assumes that Zimbabwe is not going to generate sizeable primary surpluses under these scenarios which are however necessary to achieve public debt sustainability.

Thus it is confirmed by the analysis of the IMF that Zimbabwe faces a debt stock situation with debts that can never be repaid but at best only be rolled over by new loans because they are beyond any sustainability level. The IMF experts therefore seem to assume that Zimbabwe will not be able to solve its debt problem by simply improving its economic capacity. The only feasible option to restore debt sustainability is considered to be substantial debt relief[61].

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56 Jones, Tim (2011): "Uncovering Zimbabwe's Debt: the case for a democratic solution to the unjust debt burden", Jubilee Debt Campaign UK, p. 17.

57 IMF and IDA (2011): "Zimbabwe: Joint IMF/World Bank Debt Sustainability Analysis", Country Report 11/135, p. 4.

58 IMF (2011): "Zimbabwe: 2011 Article IV Consultation – Staff Report. Country Report No. 11/135", pt. 34, p. 23.

59 Ibid., p. 27.

60 IMF and IDA (2011): "Zimbabwe: Joint IMF/World Bank Debt Sustainability Analysis", Country Report 11/135, p. 5.

61 Ibid., p. 49.

3. Debt Sustainability assessment of other external experts

The assessment of the IMF does not include a domestic debt sustainability. Zimbabwe used to be widely dependent on international official and commercial financial support since independence due to the limited ability of domestic resource mobilization. The default of Zimbabwe on its payments obligations since 2000 and the accumulation of arrears resulted in the withdrawal of traditional external donors. Zimbabwe had to rely much more on domestic borrowing to access liquidity, with the result of an increasing domestic debt stock in addition to existing external obligations. In terms of fiscal debt sustainability, it is therefore not enough to just assess the external debt path. The sustainability of total government debt including external and domestic debt is important at this point. Therefore, the domestic debt sustainability approach by the Macroeconomic and Financial Management Institute of Eastern and Southern Africa (MEFMI) can be drawn upon, that was used by the Zimbabwean government to assess the domestic debt path of Zimbabwe[62]. It concludes that the domestic debt path is unsustainable. If no solution is going to be found, the value of debt would explode over time at a rate faster than the country's capacity to service it. The approach suggests the need for strong adjustments to avoid this, such as tax increases and decreases in spending.

4. Triggering of export credit insurances

The calling in of official export credit agencies in case of the state's inability to repay private debts[63] provides further evidence of an unsustainable debt situation. That is the case in Zimbabwe with particular reference to German exports[64] and the UK’s in the 1990s.

5. The external and fiscal position of Zimbabwe

Tendai Biti can additionally point to its precarious external and fiscal position. For instance, Zimbabwe's gross international reserve position amounts to less than 4 months of imports of goods and services in 2010 and is projected to remain in that low level due to constraints on external inflows[65]. That means that the government of Zimbabwe does not have a fiscal buffer that ensures the continuity of government operations under a shock situation, for instance a current account shock[66]. The current account deficit amounts to 23,2 % of GDP by 2010.[67]

The fiscal position shows a similar precarious situation: The government of Zimbabwe shows a budget deficit of US$203 million in 2010. The overall balance is projected to remain in large deficits in the near future with a worsening tendency[68]. The government furthermore owes around US$1.4 billion to the Reserve Bank of Zimbabwe that undertook several quasi-fiscal activities for the government. The government has yet to acknowledge and take over these debts[69], thus these are not even included in the balance yet.

Already in the middle of 2011, the government budget faced unfunded expenditure pressures of about $445 million which was 5 percent of GDP[70].

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62 Ministry of Finance Zimbabwe: Domestic Debt Sustainability Analysis for Zimbabwe - 1980 to 2007, http://www.zimtreasury.org/zdsa-1980-2007.cfm, Chapter 6.1.1 Domestic Debt sustainability

63 More information: The Hague Conference Sovereign insolvency study group (2010): “State insolvency: options for the way forward”, International law association, p. 8.

64 The German export credit insurance „Euler Hermes“ reported to a request of erlassjahr.de on the 29th of July 2011 that there were compensatory payments because of a default of the government of Zimbabwe on export credits between the year 2000 and 2010. However, Euler Hermes refused to disclose any details or payment amounts.

65 African Development Bank and African Development Fund (2011): “Zimbabwe: Country Brief 2011 – 2013”, http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/Zimbabwe%20Country%20Brief%20June%202011.pdf .

66 IMF (2011): "Zimbabwe 2011 ARTICLE IV CONSULTATION", IMF Country Report No. 11/135, p. 35 f.

67 Ibid., Table 1.

68 Ibid. Table 3, p. 29.

69 Reserve Bank of Zimbabwe, Governor's statement of RBZ debt, 31st of October 2011, pt. 2.4

70 Ministry of Finance Zimbabwe (2011): “Economic Update and Outlook”, http://www.zimtreasury.org/news-detail.cfm?News=882.

Notification of parties involved

Mr. Biti has to do the following in order to officially declare the debt moratorium:

- Publish a notification on the website of the finance ministry and other relevant ministry department websites,
- inform all multilateral creditors individually,
- ask the Paris Club to convey the message to all its members,
- address all creditors, that are not members of the Paris Club individually,
- use a broad media statement in international media as a means to inform private creditors, the whole international community and the Zimbabwean public. Especially the latter is crucial for gaining legitimacy and preparing the public for participation in the process.

The African Development Bank can function as an additional actor to support this process since it is the coordinating institution for creditor discussions in terms of the debt situation of Zimbabwe. We assume that there is no operational secretariat installed in the near future which would in theory function as supportive actor in technical terms at the beginning of the procedure. An actor such as the AfDB, as creditor coordination forum of the various creditor groups, can contribute to a smooth beginning of the procedure.

What about creditors that could not be identified? Through the public notification it is intended to inform the broader public of the planned insolvency procedure. Creditors to Zimbabwe will be urged to participate or register their claims with the panel, once it has become operational – in case they do not, they risk to find there claims invalidated upon completion of the process. Thus creditors have an incentive to participate. In general, private creditors, of all types,[71] do not seem to hold much Zimbabwean debt.[72]. Zimbabwe therefore does only face a minor collective action problem. The challenge in Zimbabwe consists in the identification of claims due to a lack of data. However, given the strong incentive for creditors to have their claims registered there is a high probability of a near total identification of claims.

An FTAP secretariat?

A secretariat can be installed for facilitating a sovereign insolvency procedure, for instance in terms of the notification of creditors. Although there is no permanent, international secretariat for the facilitation of sovereign debt arbitration yet, it would be useful to establish such an interposed institution as a technical secretariat at the early stage for even this pilot case. This institution could then develop into a fully-fledged international body for future sovereign insolvency. Its main goal should be to enhance the process by building trust between the parties through its neutrality. It should include the following features:

- Technical capacity
- Absence of any conflict of interest
- Trusted by debtor and creditors alike

In the present Zimbabwean case, its functions would be:

- handling the financial part of the insolvency process. It could for instance manage a fiduciary account at which the government of Zimbabwe deposits token payments. Those token payments would be used for payments to creditors according to the award.
- The institution could also handle the financing of the process, by raising funds through development partners and through functioning as a fiduciary account.

A UN institution could take this role such as UNDP or UN-ECA. The African Development Bank may also have technical capacity but functions as a creditor to Zimbabwe.

71 Pension funds, insurance funds, diverse companies, residents, holder of credit default swaps, etc.

72 However there is an amount (US$0.4 billion) of private debt that could not be specified till now, see Jones, Tim (2011): “Uncovering Zimbabwe‘s Debt: the case for a democratic solution to the unjust debt burden”, Jubilee Debt Campaign UK, p. 38.

Step 2: Friends group

The finance or prime minister will secure political and if possible financial support by building a group of relevant supporters. We want to call this group “the friend's group” for illustrative purposes.

The purpose of the “friends group”

The first and most prominent role of this group would be to coordinate the creditor side and facilitate a political climate that enhances the ready participation of creditors in the arbitration process. One task of the friend's group is therefore to increase the acceptance of a fair and transparent arbitration process among the creditor community as whole or among individual creditors that appear to be unwilling to participate. That equally refers to the participation in the process beforehand and the compliance with the award. This task could, for instance, be strengthened by the “friend's” own status as creditor. In financial terms, the friends groups can contribute to financing individual parts of the process (see chapter about costs).

The possible constitution of a politically and financially supporting friends group

Creditors

The prime minister contacts individual creditors whom he assumes to be politically supportive towards the restoration of debt sustainability, even at the price of a loss of some of their own claims. Currently, Zimbabwe has been in default on most of its loans for a decade. Reasons for hesitation in terms of the support of a comprehensive debt workout may therefore possibly not lay in the fear of income loss. Moreover bona-fide creditors have an interest in supporting an efficient and orderly process due to the guarantee that losses are being shared equally and that a comprehensive, collective representation is ensured, as it is not in the current debt management system[73].

Supportive creditor governments can either be countries with whom Zimbabwe has particularly friendly relations or that committed themselves to the idea of an independent and permanent arbitration mechanism.

Promising candidates for the friends group are countries that committed themselves towards the implementation of a fair and transparent arbitration process as an alternative to existing mechanisms and thus have an interest in the support due to their duty of being accountable to their own citizens.

Currently there are three such countries. These countries are presently Germany, Argentina and Norway.

The current coalition agreement of Germany of 2009 for the coalition period of 2009 till 2013 in the part of development cooperation states:

“We also advocate the implementation of an international insolvency code”[74].

The Swiss lower chamber of parliament has formally requested a proposal for a sovereign insolvency framework from the government in December 2011.

Norway declared in 2007 within its “Soria Moria Declaration on International Policy” that it *“will support the work to set up an international debt settlement court that will hear matters concerning illegitimate debt”*[75].

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73 See: Michael E. Murphy (2001): “The case for an international bankruptcy court.” The comprehensive collective representation is – in current sovereign debt management- not solved. In current debt management mechanisms, individual creditors still have an incentive to holdout or not even participate in the process, since there is no regulation or mechanism in place that mediates between the conflicting self-interests of creditors. A collective action problem describes this “*incentive to act in their own perceived self-interest, which can result in collectively suboptimal outcomes. Thus, if one creditor holds out for full repayment during restructuring negotiations, or decides not to participate in them at all and instead files suit in court against the debtor, this may end up reducing the ultimate payment to each creditor.”* Palley, Thomas I. (2003): “Sovereign Debt Restructuring Proposals: A Comparative Look”, Justice and the World Economy (200 – 2003), http://www.carnegiecouncil.org/resources/journal/17_2/roundtable/1022.html.

74 “Growth. Education. Unity. The Coalition Agreement between the CDU, CDU and FDP for the 17th legislative period”, http://www.cdu.de/doc/pdfc/091215-koalitionsvertrag-2009-2013-englisch.pdf, p. 183.

75 “The Soria Moria Declaration on International Policy. Chapter 2: International Policy”, http://www.regjeringen.no/en/dep/smk/documents/Reports-and-action-plans/rapporter/2005/The-Soria-Moria-Declaration-on-Internati.html?id=438515

Norway is furthermore involved in Zimbabwe through committed church organisations such as Norwegian Church Aid and Norwegian's People Aid.

The existing Friends of Zimbabwe Group

The above mentioned countries are furthermore "engaged" through their membership in the informal "Friends of Zimbabwe Group"[76] along with other donor countries and Zimbabwe-related institutions. Although this group only exists thanks to the motivation of its individual members without any secretariat, own funding resources or political weight[77], the group serves as a kind of network for Zimbabwe-committed individuals that are on the other hand also representatives of their governments or institutions and in this role very well capable to act.

It may be helpful particularly because of its members: the group's structure combines a large number of politically relevant actors (if taken as individual actors) interested in Zimbabwe; from multilateral organisations, donor countries to large NGOs and companies. The individuals meet annually on a more or less regular basis to discuss political and economic issues in Zimbabwe in order to support democratic reform, economic recovery and the provision of basic services[78].

As an example: In 2010, the members of the group provided an amount USD 587 million in assistance in terms of humanitarian assistance to development projects.[79] Financings have been discussed in the group and were raised through individual financing channels in the countries and institutions. Furthermore, the group regularly publishes public statements and recommendations on Zimbabwe. Beyond this it has clearly stated objectives towards supporting economic and democratic progress in Zimbabwe.

That leaves room for the definition of activities this group could undertake. For instance: In December 2010 and June 2011, the last two meetings held, the Friends of Zimbabwe Group publicly stated that it is committed to support the Zimbabwean people through support for reform and recovery and enhancing transparency, explicitly stating that it commits to support Zimbabwe on its path towards democracy and respect of human rights[80].

Supporting a fair and transparent arbitration process on debt would fall well under this commitment, especially in terms of the call to enhancing the protection of fundamental rights in Zimbabwe.

The FoZ-Group has the potential to serve as the friends group during the envisaged debt arbitration process. The FoZ members, which have a commitment towards an FTAP process should trigger the project and function as its core group. It can also help to build a similar assistance fund such as the ZIM Fund, to help finance the process[81].

The African Development Bank

Another reason for the FoZ-group to be relevant in terms of building up a friends group is the participation of The African Development Bank (AfDB) in this forum. The AfDB as a multilateral creditor engaged in Africa can be a key actor due to its identity as southern multilateral institution. Thus the bank in its outward

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76 According to media statements, the Friends of Zimbabwe includes currently the United States, Australia, Canada, Denmark, Finland, France, Germany, Ireland, Italy, Japan, Netherlands, New Zealand, Norway, Spain, Sweden, Switzerland, the United Kingdom, the European Commission, the European Union, the International Monetary Fund, the World Bank, the African Development Bank, and the United Nations, see: http://www.voanews.com/english/news/04dec09-zimbabwe-budget-78513827.html . The group has no secretariat, own funding resources, boards of members or similar and only meets on the initiative of one of the group individuals.

77 Interview with by Axel Saurer, employee of the foreign affairs department of the German government, on the 15th of March 2012.

78 Australian Embassy Zimbabwe, http://www.zimbabwe.embassy.gov.au/hare/1.html, European Union External Action Service, http://eeas.europa.eu/zimbabwe/docs/20110629_friends_zimbabwe_en.pdf

79 Ibid.

80 "Collectively, we stand ready to broaden our support as the country moves further down the path of democracy and respect for human rights". http://eeas.europa.eu/zimbabwe/docs/20110629_friends_zimbabwe_en.pdf. http://ukinzimbabwe.fco.gov.uk/en/about-us/working-with-zimbabwe1/uk-zimbabwe-relations/statements-meetings-speeches/copenhagen-statement

81 See: http://www.afdb.org/en/topics-and-sectors/initiatives-partnerships/zimbabwe-multi-donor-trust-fund/ or: http://zimbabwe.um.dk/en/danida-en/multi-donor-funds/ .

appearance occurs less “western-dominated” than other multilateral financial institutions such as World Bank or the International Monetary Fund. Furthermore, the AfDB is leading the process for creditors of reconciling the figures on how much debt Zimbabwe owes and to whom. The AfDB could thus not only provide technical assistance but also political support to the process and the debtor, due to its closeness to the creditors and the debtor alike.

SADC

The possible reluctance of southern countries to approach western governments for support in fear of interference in their internal affairs needs to be considered to avoid tensions. The inclusion of one of the leaders of countries included in the South African Development Committee (SADC) can be promising.

SADC as a non-Zimbabwean but regional southern African body can function as the initiator of the friends group approaching the three western proactive governments for financial and political support. SADC has been involved in political facilitations in Zimbabwe, not least as facilitator and mediator during the “Global Political Agreement” (GPA) process between 2007 and 2009 with the task to facilitate a political climate that reduced the levels of pre-election violence in the run-up to the 2008 elections. South African president Zuma is still engaged as SADC facilitator on Zimbabwe in terms of monitoring the efforts agreed upon after the completion of the GPA and in pressuring for the timely and full implementation of the agreed reforms within the GPA[82]. Tendai Biti sends a bilateral request to SADC for the election of an Africa leader of one of the SADC countries.

By the way, this involvement can be of institutional interest for SADC, since it is planned to institutionalize and broaden their mediation services in the region[83]. Zimbabwe's debt as well as the (difficult) political reform process is problems of high international visibility and a smooth process facilitated by SADC can help strengthen their position as a relevant mediator in the SADC area.

SADC can be further relevant in terms of political pressure on the debtor country to comply with the panel's final award.

Privates, eminent persons

Private lenders who intend to maintain their long-term engagement in the country or eminent, internationally highly recognized persons, such as Kofi Annan, who promoted the idea of a fair and transparent sovereign debt workout in the year 2000,[84] can be generally considered as well. In principle, the broader and more diverse this supportive group is, the better this is for a smooth negotiation process.

However: the compliance with the overall principle of an FTAP

It is particularly important that the finance minister does not seek the support of individual countries by promising better individual treatment, as this would contradict the principle of equal treatment, which is essential for a bona fide negotiation process[85]. In any case, the assignment of haircuts to individual creditors is always in the hands of the arbitration panel. The prospect of compliance with this principle can be enhanced by the friends group construction as mentioned above: the more actors are going to be involved in the group the stronger individuals will feel accountable to other members of the group; creating a kind of

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82 See: “Summit recalled past SADC decisions on the implementation of the GPA and noted with disappointment insufficient progress thereof and expressed its impatience in the delay of the implementation of the GPA.” http://www.sadc.int/index/browse/page/858

83 See: Dzinesa, Gwinyayi A., Zambara, Webster: “SADC’s role in Zimbabwe: Guarantor of deadlock or democracy?”, http://www.osisa.org/sites/default/files/sup_files/SADC%27s%20Role%20in%20Zimbabwe.pdf
The SADC Organ on Politics, Defence and Security Cooperation is in the process of setting up a Mediation Unit, whose mandate will be to deal with conflicts within and among member states.

84 Annan, Kofi (2000) "Freedom from Want", in: *We, the People, The Role of the United Nations in the 21st Century*, New York: UN 2000, p. 38.

85 Kaiser Jürgen (2010): “Resolving Sovereign Debt Crises: Towards a Fair and Transparent International Insolvency Framework”, Friedrich-Ebert-Stiftung, Study within “Dialogue on Globalization”.

positive pressure towards compliance because of so many “eyes” being aware of the process.

Step 3: Nomination of arbitrators and procedural rules

Having secured the support of the friends group, the arbitration panel will be established. International arbitration as a tool to resolve economic or financial conflicts in the international sphere is nothing new and has also been recognized as being necessary in the field of debt disputes, as proven by the mere existence of the Permanent Court of Arbitration[86] (PCA). Thus there are established mechanisms and institutions the parties could look at to manage this step.

At the beginning of the procedure, the Zimbabwean government and its creditors can agree on a framework of rules that the arbitration proceedings should follow[87]. That refers to aspects such as the timeframe for submitting evidence and expertise or the mode of hearings[88]. The parties can draw on already existing sets of arbitration rules as they are for instance provided by the Permanent Court of Arbitration (PCA), by the International Centre for the Settlement of Investment Disputes (ICSID) or by the United Nations Centre for International Trade Law (UNCITRAL). However, a full-scale legal framework is not necessary in order to establish a debt arbitration proceeding with the purpose to achieve a quick and enforceable solution. Decision-making will be done by majority decision of the panel. Generally, a strong, trustworthy and strictly impartial leadership of the process is essential to come to an acceptable and fair solution for all parties[89]. The "election" of the panel representatives is therefore a crucial part in the process.

The finance minister needs to nominate his members of the arbitration panel. As is usual in international law in terms of international dispute settlement, each party nominates the same number of persons, who in turn elect another person to achieve an uneven number. Thus any odd number of arbitrators will do. However, it is not advisable to have a high number of representatives. In general the total number of the arbitrators depends on the creditor's side, since the number of creditors is most certainly higher than the number of the debtor (which is naturally one), thus more people have to be represented. It can, for instance, be argued, that each creditor group may be allowed to choose one representative.

It is possible that the secretariat instruct an institution to represent the creditors view in case no representative can be found for a particular group such as private creditors. In this case, Zimbabwe could place an order to the International Institute of Finance (IIF) to name an arbitrator who represents the view of private debtors. Theoretically the IIF could now deny its inclusion. But the example of Greece in 2011 shows that this is not necessarily the case. Multilateral institutions could name their own representative or the Paris Club and the most important multilateral creditor (Worldbank, IMF, AfDB) reach consensus on a person. The AfDB could function here as representative as well, being engaged in the country as creditor coordination forum anyway. The Zimbabwean finance minister is in charge of clarifying whether the multilateral institutions wish to identify their own candidate.

It is within the discretion of the finance minister of Zimbabwe to decide on the necessary qualifications for "his" representatives. It is not possible to define the exact criteria as a guide for the finance minister. He could for example try to find personalities that

- have a commitment for the debtor country
- have diplomatic skills to be able to work towards a sustainable and effective solution for all parties involved
- have skills in the subject matter and mediation.

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86 For further information see: http://www.pca-cpa.org/ . Article 53 of the 1907 Convention for the Pacific Settlement of International Disputes (one of the PCA's "founding Conventions") expressly refers to the competence of arbitral tribunals at the PCA the settlement of sovereign debt disputes (Email interview with Dirk Pulkowski, Legal Counsel of the PCA, 29th February 2012). Completed dispute settlements refer for instance to loan agreement between Costa Rica and Italy in 1998: http://untreaty.un.org/cod/riaa/cases/vol_XXV/21-82.pdf

87 Fritz, Thomas and Hersel, Philipp (2002): "Fair and Transparent Arbitration Processes. A new road to resolve debt crises", Discussion paper, Berlin Working Group on Environment and Development (BLUE 21), Misereor, http://www.blue21.de/PDF/FTAP_englisch.pdf p. 28.

88 See PCA Rules in terms of dispute settlement between two states: http://www.pca-cpa.org/upload/files/2STATENG.pdf, or see: AFRODAD (2002): "the efficacy of establishing an international arbitration court for debt", technical paper, p. 28.

89 See: Kaiser, Jürgen (2012): "A 'Debt Conference' for Zimbabwe: a few reflections on wording and an outline on process", unpublished internal paper erlassjahr.de, April 10th 2012.

Generally, Mr. Tendai Biti face the difficult task to name his number of adequate arbitrators in whom he fully trusts but who are in no way dependent on him or have any professional or contractual relationship with him. It is not upon us to name people here. This decision has to be made by the parties themselves.

The creditors may have the incentive to curb the whole process by tactically delaying their choice or by naming uncooperative persons. But there are not many arguments in favour of this option: bona-fide creditors have as much an interest in getting their books clean as has the debtor in restoring its relation to creditors and its debt sustainability.

The second and more realistic option is that the creditors agree to this process, likely after the intervention of the friends group and also name one or two candidates joining the arbitration panel.

The neutral arbitrator that is elected by the arbitrators by consensus has to be completely unrelated to the parties. In terms of the above-mentioned necessity of a strong and trustworthy impartial leadership of the process, a type of equally competent as politically heavy-weight personalities is required. The membership of the UN Commission on the World Financial Crisis could provide inspiration for the election of such a person[90].

The neutrality may be assured by the mode of choice: the arbitrators chosen by the Zimbabwean government and by the creditors have to elect the arbitrator by consensus. They will most certainly not agree to an arbitrator that is related or biased towards the counter party.

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90 See: Kaiser, Jürgen (2012): "A 'Debt Conference' for Zimbabwe: a few reflections on wording and an outline on process", unpublished internal paper erlassjahr.de, April 10th 2012.

Step 4: Financing the procedural costs

As the arbitration process in Zimbabwe would be a pioneering case, there are no data to rely on when talking about procedural costs. We have to look at similar procedures to narrow down the amount of money we are talking about. Generally, the following costs may arise:

- opening and maintenance of the technical secretariat, in case one is established,
- flights of the panellists and all stakeholders involved,
- lease for conference rooms,
- accommodation for all participants in the process,
- office equipment,
- labour costs for supporting staff and – if necessary, arbitrators,
- the purchase of external expertise, for example for the assessment of the debt sustainability (see Chapter 7)
- Organization of public hearings
- The purchase of external expertise and technical assistance in the context of the verification exercise.

At least the latter is already under way in Zimbabwe, so that these costs should not come due during the arbitration procedure.

Due to similar process flows, comparable costs may arise within a World Trade Organisation (WTO) dispute settlement procedure or dispute settlement processes facilitated by the International Centre for the Settlement of Disputes (ICSID). These examples may give a hint concerning the overall costs, since the expenses should be similar to those listed above, except of the last three points that are specific for our proposed debt arbitration.

Again it is difficult to quantify the costs but according to Richard Senti, a former WTO panelist, it may amount to 60.000-300.000 Euro in general.[91] This amount covers the "operational" costs of the procedure listed above and ensures the realization of the whole dispute settlement. According to Prof. Kunibert Raffer, the amount estimated for a WTO dispute settlement may equate to the procedural costs arising in conjunction with a fair and transparent arbitration process (FTAP), whose elements inform our proposal here.[92]

ICSID is considered to be one of the leading international arbitration institutions devoted to investor-state dispute settlement. It calculates for instance costs for conciliators, arbitrators and ad hoc committee members of US$ 3.000 per day per person.[93] Following this example, the costs listed above seem to cover at least the highest possible costs of an FTAP and make clear that it should not be a huge amount of money that is needed for the realization of an FTAP.

These examples make clear that we do not talk about tremendous amounts of money needed to realize an arbitration process. Quite the contrary, one should not calculate more than 500.000-1.000.000 Euros generally which is already generously presumed. These sums are not at all significant for Zimbabwe compared to the debt burden. Moreover, other debt restructuring mechanisms are not free of charge either. In comparison to the potential costs of continuous default and consequently being cut off from external financing, the costs of the procedure are certainly trivial.

In order to quantify the costs of the organization of public hearings (see Chapter 8) we refer to the successful national consultation process in Bolivia in the context of the poverty reduction strategy formulation and the HIPC process by 2000. We favour the implementation of a similar process as it has been achieved in Bolivia, which would include preparation meetings for CSOs to participate in regional meetings, the regional meetings themselves that would inform a national forum and the national forum as a final step. Various issues need to be considered in terms of costs although this list is not exhaustive: the facilities needed for

91 Interview with Prof. Richard Senti, former WTO panelist, via E-Mail , 10th of January 2012.

92 Interview with Kunibert Raffer via E-Mail, 06th of February 2012.

93 International Centre for settlement of investment disputes, Schedule of fees (Effective January 1, 2012): "[…] US$ 3000 per day of meetings and other work performed in connection with the proceedings as well as subsistence allowances and reimbursement of travel expenses".

the hearings, moderation, external and independent observers of the processes, the design and delivery of working and final documents, perhaps travel and accommodation expenses, just to name a few.

In Bolivia, the whole consultation process, be it information workshops for participating CSOs or the forum processes including the "departmental" forum processes in all districts and the national consultation forum afterwards had cost around 120.000 US$[94]. There are lots of possibilities to finance such a process, if considered early enough. Between the insolvency declaration of the finance ministry and the public hearing there will be enough time to prepare, especially because Zimbabwe has a well-developed civil society that strongly desires to participate in political processes (see Chapter 8). Possible funding options could be church organizations in different countries such as Germany or Norway where partners of civil society organizations in Zimbabwe could apply for grants. The United Nations Development Programme could moreover finance the process as it did in Bolivia in 2000[95].

In contrast to an UNCITRAL procedure or a court proceeding, the arbitration process does not name a winner or loser at the end who could be obliged to pay the costs. Thus, the question of distributing the costs still has to be discussed. In the case of Zimbabwe, there are different financing options for procedural costs. First, the "friends group" could fill in. In Step 2 we identified potential "members" of a friends group for Zimbabwe consisting for example of financially strong states such as Germany, Switzerland or Norway. For them, the interest to successfully restructure Zimbabwe's debt should exceed the financial strain of the process. Friendly African states such as Nigeria[96] or Botswana[97] could also help out and administer to bear the costs. A good reason for them to actively participate in the cost-sharing process could be that Zimbabwe would gain more freedom of action after the conclusion of the process in all areas which might be fruitful for inter-African economic cooperation.

Secondly, regional institutions could have an interest in quickly restructuring Zimbabwe's debt for the prosperity of the whole region. The Southern African Development Community (SADC) for instance, aiming at promoting sustainable and equitable economic well-being could be willing to fund part of the costs for the sake of its own vision.

Thirdly – and this is the option, we would favour – Zimbabwe itself could bear the costs. As we have seen, the costs are not high and do not bear the risk of hampering the process. Thus, we suggest that Zimbabwe itself plays a key role at this stage of the FTAP and funds the process, through an institution that handles a fiduciary account. It could either pay the costs from its own resources (if available) or it could approach the friends group and ask for their support. It would furthermore send a strong positive signal of good will to the creditors. In order to support Zimbabwe the parties involved could also agree on a limit of, let us assume one million US$ that Zimbabwe should carry on its own and in the unlikely case that higher costs arise, these could be equally shared between the parties.

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94 Tokarski, Irene (2006): "Kirche und Partizipation in Bolivien. Die Option für die Armen der bolivianischen Kirche im Partizipationsprozess zur Armutsreduzierungsstrategie PRSP", Reihe: Theologie und Praxis, Bd. 30, LIT Verlag, p. 170.

95 Ibid., p. 185.

96 Daily Trust, 13 July 2011: Zimbabwe: Debt Management - Zimbabwe Officials Tour Country, http://allafrica.com/stories/201107131204.html

97 The Herald, 10February 2012: Zimbabwe: We Must Support Each Other in Difficult Times - Botswana Defence Chief, http://allafrica.com/stories/201202100234.html

Step 5: The arbitration panel starts its work

It needs to be agreed upon where the arbitration panel wants to sit. Most likely that will be the capital of Zimbabwe, not least because of public hearings and the associated participation of the population which will be difficult to organize anywhere else. Although it is of course possible to choose another venue, such as in a capital of a friend's group country, it is crucial to ensure "round tables" for the parties, including civil society where positions can be equally and publicly debated. The choice of venue needs to be guided by these considerations.

Step 6: verification of claims / panel work

The panel will have to verify the external and domestic debt of Zimbabwe at this stage. All claims have to be verified loan-by-loan at the beginning of the process, which is a normal first step in domestic insolvency procedures as well[98] and is also undertaken by the Paris Club prior to debt restructuring negotiations with sovereigns.

The verification of claims procedure would include assessing whether legal procedures have been followed, for instance in case the loan required authorization by parliament, and whether the loan agreement had been signed by people authorized to do so according to the debtors country's law at the time of signing[99]. A loan agreement would therefore be deemed illegal when the signatory was not authorized to sign or the process has otherwise been violated. Failure to follow legal procedures makes the contract void, which would imply that the loan in question would have to be repaid, however without any contractual interest, as far as circumstances allow. Creditors are obliged to make sure that such procedures have been followed before the loan has been agreed upon. Gross failure to do so may lead to a partial or even total loss of their claim.

At this stage, the verification of claims procedure has already been prepared by the Debt Management Office (DMO) of Zimbabwe. According to the head of the Zimbabwean DMO, Andrew Bvumbe, a debt data reconciliation currently takes place at time of this writing and should be completed by time of publication of this paper with technical support of UNCTAD and its Debt Management and Financial Analysis System as well as MEFMI[100].

Domestic debt is controversial between the DMO (affiliated to the Ministry of Finance) and the Central Bank. The DMO states, that they do not have any domestic debt in their books[101]. However, the central bank of Zimbabwe states an amount of US$ 1.1 billion is owed by the state to the RBZ[102]. The governor of the Reserve Bank of Zimbabwe (RBZ) claims that public domestic debt relates to activities of the RBZ in mobilizing foreign currency for the Zimbabwean government during the hyperinflation period, due to the government being cut-off from foreign financing[103]. According to the Reserve Bank statement, figures are verified and the audit process is well documented. However, the government of Zimbabwe has not acknowledged those debts as public liabilities. Therefore, for the time being, the RBZ has to be treated as a creditor to Zimbabwe.

Besides the disclosure of all claims through the verification process, the debtor has to specify for what the claims have been meant for and for what they have been used in the end. An important aspect at this stage is the opportunity for the parties to question individual claims. For that, the debtor countries' citizens are able to participate in this qualitative verification of claims.

This stage of the panel's work allows for input of the country's citizen.

Illegitimacy of debt

One possibility for the population to question a claim is the classification of debt as “illegitimate” or “odious" - *that is, debts for which lenders could have reasonably been aware were being incurred by internationally*

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98 See Raffer, Kunibert (1993): “What's Good for the United States Must be Good for the World: Advocating an International Chapter 9 Insolvency”, http://homepage.univie.ac.at/kunibert.raffer/kreisky.pdf.

99 Raffer, Kunibert (2007): “ODIOUS, ILLEGITIMATE, ILLEGAL, OR LEGAL DEBTS—WHAT DIFFERENCE DOES IT MAKE FOR INTERNATIONAL CHAPTER 9 DEBT ARBITRATION?”, http://www.law.duke.edu/journals/lcp.

100 A third mission of UNCTAD has been undertaken in March 2012; Response of Andrew Bvumbe, head of DMO, to a request by erlassjahr on 24th of January 2012. Also see: Zimbabwe Accelerated Arrears Clearance, Debt and Development Strategy, p. 12.

101 See: Response of Andrew Bvumbe, head of DMO, to a request by erlassjahr on 24th of January 2012.

102 Statement of the governor of the RBZ on the RBZ debt on 31st of October 2011.

103 According to the budget statement of the RBZ of 2011, it was authorized by the finance ministry to borrow for the government amounts from 750 million US $ (annually, 2004 – 2006) to 1.5 billion US$ (annually 2007 – 2009), see page 3.

unrecognized regimes to finance expenditures that were not for the benefit of the people"[104] .

There are lots of different ideas, terms and debates referring to illegitimate debts, developed throughout the years in the NGO and academic sectors. However there is no generally-accepted, legally-binding standard[105] that defines the declaration of a claim as odious and the subsequent cancellation of such a claim. However, there is also no law that excludes room for adjustment:

> *The international law obligation to repay debt has never been accepted as absolute, and has frequently been limited or qualified by a range of equitable considerations, some of which may be regrouped under the concept of 'odiousness.'*[106]

Thus, the decision for or against the cancellation of a claim due to illegitimacy is entirely in the hands of the panel and will most certainly be based on the validity of evidence, documentation and argumentation of the case brought up by the parties and the citizens[107].

In civil society, the ZIMCODD and member organisations such as the Congress of Trade Unions (ZCTU), National Students Union (ZINASU) and the Zimbabwe Human Rights Association (ZimRights) all called for an official debt audit to investigate whether the loans that Zimbabwe has to repay benefited the people or not or if they even inflicted damage upon the people[108].
During an FTAP all claims which have been technically verified by both sides at the beginning of the process will be treated as valid – until either of the parties, or a stakeholder, most likely from civil society, will question its validity. This questioning will logically relate to individual loans or perhaps to a certain financing package or a category of loans, which share certain characteristics. It is most unlikely that the entirety of a country's debt stock can meaningfully be considered as illegitimate.

Just to give an example:

From 1986 to 1990 Zimbabwe imported military vehicles and military air planes from Spanish companies. At the end of the 1990s, more non-specified vehicles followed. To enable the Zimbabwean government to undertake these operations, the Spanish government lent Zimbabwe an equivalent of €17 million. Spain claims that Zimbabwe still owes €19 million in total from these loans[109]. The concessional loans for the specified vehicles as being for the military sector make up around 9 million[110].

Spanish NGO activists stated:

> *"I think that selling military vehicles and military airplains as ODA is by itself a case of irresponsible lending and of illegitimate debt, without any need for further evidence, even when*

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104 Generally accepted description of odious debts, defined by Alexander Sack, taken from: Palley, Thomas I. (2003): "Justice and the World Economy: Sovereign Debt Restructuring Proposals: A Comparative Look", Ethics & International Affairs, Volume 17.2, http://www.carnegiecouncil.org/resources/journal/17_2/roundtable/1022.html

105 Some academics argue that there are various, mostly political reasons, why a legally binding definition, that would offer a "doctrine", cannot be found: *"We believe that a principle of public international law concerning odious debts does not have, nor is it likely to achieve, the consensus necessary for it to claim the title of 'doctrine', or the degree of clarity necessary for it to be of much use in invalidating purportedly odious loans without simultaneously discouraging many legitimate cross-border financings." Buchheit, Lee C., Gulati, Mitu G., Thompson, Robert B. (2007): "The dilemma of odious debts", Duke Law Journal, Vol. 56, Number 5, p. 26.* http://www.law.duke.edu/shell/cite.pl?56+Duke+L.+J.+1201#H2N1. However, the decision of the panel in the end is binding and that counts.

106 Howse, Robert (2007): The Concept of Odious Debt in Public International Law, UNCTAD Discussion Paper, No. 185, http://r0.unctad.org/dmfas/docs/DMconf07_papers/Howse.pdf p. 24.

107 See Raffer, Kunibert (1993): What's Good for the United States Must be Good for the World: Advocating an International Chapter 9 Insolvency", http://homepage.univie.ac.at/kunibert.raffer/kreisky.pdf.

108 See: Jones Tim (2011): Uncovering Zimbabwe's debt: The case for a democratic solution to the unjust debt buden, London: Jubilee Debt Campaign, p. 45; to download: http://www.jubileedebtcampaign.org.uk/Uncovering3720Zimbabwe3727s3720debt373A3720The3720case3720for3720a3720democratic3720solution3720to3720the3720unjust3720debt3720burden+7370.twl.

109 Information from the Spanish government via Observatorio de la Deuda en la Globalizacion, see: Jones Tim (2011): Uncovering Zimbabwe's debt: The case for a democratic solution to the unjust debt buden, London: Jubilee Debt Campaign, p. 13.

110 9.404.961,96 Euro, according to the research of the network "Obersvatori del Deute en la Globalització".

it was not used directly to harm people (what other use can you give to military airplaines?), it was definitely not use to promote development ... "[111]*.*

The argument that export loans claimed as ODA, that involve military equipment may not be regarded as responsible is right, since it is not allowed to finance war weapons with ODA. The party could cast doubt on the legality of the whole transaction. The consequence would certainly be to reverse the whole agreement. However, accurate information are missing at this point. In case the party argues for the illegitimacy of the claims, the party needs profound evidence (and an initial suspicion), that ODA loans in fact were not used for the benefit of the Zimbabwean people. This is explained below in more detail. At least in Spain, no media coverage or public debate that could function as evidence could be found. Furthermore the Spanish government does not undertake evaluations of the developmental impacts of their ODA-loans[112].

Although there are no definitions that have been internationally agreed upon, there are broadly accepted, within the academic discourse popular concepts, to which the panel could refer for orientation[113].
Usually, reference is given to the odious debt doctrine of Alexander Nahum Sack[114], a Russian legal theorist, who founded the doctrine of odious debts in 1927. According to Sack, a claim is odious and thus do not have to be repaid if ALL of three conditions are fulfilled[115]:

- The loan has been taken and used without the agreement of the affected population. In the academic sphere that is called "absence of consent". The affected party has to prove, that the agreement was not the result of constitutionally due process, for instance.
- The individual loan did not bring any positive effects to the affected population ("lack of benefit")[116.]
- The creditor must not have acted in good faith, which spells, he must have been aware of the above mentioned circumstances of the deal ("creditor awareness"). According to Prof. Christoph Paulus, there are several standards that may be employed for measuring 'awareness'. He especially refers to domestic law that provides a sufficiently broad definition of 'awareness'[117]. In case of Zimbabwe it means that the creditors were aware at the time of the loan agreement that the ZANU-PF-Regime was going to finance human rights violations or similarly harmful activities.

In terms of the creditor awareness, it could, for instance, be argued, that a creditor that provided a particular loan to the ZANU-PF-regime after the declaration of international sanctions against the Mugabe regime in early 2000[118] has been aware that loans may not be used for the benefit of the population. However it still has to be proven (for instance through a detailed documentation of human rights organisations, documentation of the affected people, media documentation in the creditor country etc.) that the proceeds of the loan have been used for particular traceable activities. In addition, the decision whether the presented evidence is sufficient to justify the cancellation of the particular claim is still entirely in the hands of the panel.

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111 The response of Iolanda Fresnillo, debt expert of the network "Obersvatori del Deute en la Globalització" to an email request of erlassjahr.de in terms of any public discussion or reports about the use of the spanish exports to Zimbabwe on the 5th of March 2012.

112 Ibid.

113 Prof. Christoph Paulus, academic of the Humboldt University Berlin in Germany and sovereign insolvency expert to the question if a legal basis for odious debt is generally possible: *"A comprehensive answer to this question is impossible as long as there is (1) no established doctrine of "odious debts" and – even more importantly – (2) no specific court or tribunal with the jurisdiction to decide claims brought against odious debts"* **.** Paulus, Christoph G. (2007): The Concept of "Odious Debts": A Historical Survey, UNCTAD Conference Background Paper, http://r0.unctad.org/dmfas/docs/DMconf07_papers/paulus.pdf. Also see: Prof. Dr. Christoph G. Paulus (2005): „Stellen ‚Odious Debts' eine Rechtsfigur dar?", in: Wertpapiermitteilungen. Zeitschrift für Wirtschafts- und Bankrecht, Nr. 2, 15. Januar 2005, p. 53-60.

114 Sack, A. (1927): « Les effets de transformations des États sur leur dettes publiques et autres obligations financières.

115 For a detailed discussion of the three following principles and their application, see: http://www.odiousdebts.org/odiousdebts/publications/Advancing_the_Odious_Debt_Doctrine.pdf

116 Alexander Sac's "successor", the director of the Centre for International Sustainable Development Law Ashfaq Khalfan and his employees Jeff King and Bryan Thomas further specify this argument: firstly, the money **is spent against** the interests of the state (which will exclude loans that were contracted against the interests of the state but spent in the benefit of the population in the end), and secondly, the debt **is contracted against** the interests of the state (that will exclude loans, that were contracted for the benefit of a state and with general consent, but subsequently spent on items that are in fact of no benefit to the population). Khalfan, Ashfaq, King, Jeff and Thomas, Bryan (2003): Advancing the Odious Debt Doctrine, CISDL Working Paper, http://www.odiousdebts.org/odiousdebts/publications/Advancing_the_Odious_Debt_Doctrine.pdf.

117 See: Paulus, Christoph G. (2007): The Concept of "Odious Debts": A Historical Survey, UNCTAD Conference Background Paper, http://r0.unctad.org/dmfas/docs/DMconf07_papers/paulus.pdf.

118 See: BBC UK (2012): "Zimbabwe Profile", http://www.bbc.co.uk/news/world-africa-14113618 .

Since the formulation of the odious debt doctrine by Alexander Sack, the debate around odious debts has continuously developed and changes in international law occurred, such as the formulation of the Vienna Convention on the Law of Treaties or the Universal Declaration of Human Rights.
Another concept broadly acknowledged in international law is a possible questioning of a loan contract on the basis of the violation of the "peremptory norm" / the ius cogens provisions"[119]. That is a principle in international law, accepted by the international community of states as a norm from which no derogation is ever permitted and which is grounded in the Vienna Convention on the Law of Treaties[120].

Thus,

> "*debts contracted contrary to the major interest, right of survival, or independence of the successor State, or debts contracted in violation of the peremptory norm of international law would be odious debts"*[121]

There is no particular guidance or a "list" that offers provisions of what may qualify as ius cogens norms. A current consensus what ius cogens include seems to be: outlawing of wars of aggression and crime against humanity, prohibition of torture, the right to self-determination. There is however no consensus if the protection of human rights is included in ius cogens[122].

In using this concept, it has to be proven that the individual loan was used to violate one of the peremptory norms. Only then, the loan contract can be classified as void.

With this particular concept, the verification of a constitutional proper loan contraction is therefore irrelevant.

Both concepts in principle refer to debt that was contracted by a predecessor regime and questioned by a successor regime. The important argument made here is, that this successor regime should not be burdened by odious actions of the old regime. But does it apply to Zimbabwe? Antje Queck describes the debate about the problematic application of those concepts to "regime changes", that are subject to the legal principle of "pacta sunt servanda" - Loan agreements must be kept. Only states, not governments are subject to public international law. However, various experts call for the application of the principles also for regime changes since state succession is a quite unusual event. Moreover, the distinction between regime change and state successions seems to be blurred nowadays.[123].

Beside either of the two comprehensive concepts of debt illegitimacy, there is another approach towards identifying creditor responsibility for a loan-induced damage that could lead to the invalidity of the loan under question.

Gross Negligence

The british civil society organisation Jubilee Debt Campaign, that conducted a comprehensive analysis of the current Zimbabwean debt stock, found grave deficiencies in project lending of multilateral creditors such as the World Bank and the International Monetary Fund (IMF) to the Zimbabwean government in the 1980s and 1990s[124]. In the report, it is revealed that IFI financing in various cases did not bring the promised impact but negative outcomes in the end. Tim Jones found in some cases a casual relationship between the economic

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119 The correspondent of the international law commission, Mohammed Bedjaoui, is responsible for the suggestion: Bedjaoui, Mohammed, Succession of States in Respect of Matters Other Than Treaties (Report), *Yearbook of the International Law Commission*, 1977, vol. II, Part 1, p. 45, available at: http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1977_v2_p1_e.pdf.

120 Under Article 53 of the Vienna Convention on the Law of Treaties, any treaty that conflicts with a peremptory norm is void.

121 See: Paulus, Christoph G. (2007): The Concept of "Odious Debts": A Historical Survey, UNCTAD Conference Background Paper, http://r0.unctad.org/dmfas/docs/DMconf07_papers/paulus.pdf.

122 Michalowski, Sabine (2007): "Unconstitutional Regimes and the Validity of Sovereign Debt – A Legal Perspective", University of Sussex, UK, Hampshire: Ashgate Publishing Limited, p. 73.

123 See: Queck, Antje (2008): Was sind illegitime Schulden? Von der Odious-Debts-Doktrin zum Ius-Cogens-Ansatz und wieder zurück, in Handbuch Illegitime Schulden 2, herausgegeben von der Arbeitsgruppe Illegitime Schulden bei erlassjahr.de, p. 12.

124 See: Jones Tim (2011): Uncovering Zimbabwe's debt: The case for a democratic solution to the unjust debt buden, London: Jubilee Debt Campaign, p. 14 ff. ; to download: http://www.jubileedebtcampaign.org.uk/Uncovering3720Zimbabwe3727s3720debt373A3720The3720case3720for3720a3720democratic3720solution3720to3720the3720unjust3720debt3720burden+7370.twl.

impact of structural adjustment and unsatisfying project outcomes.

However, the party questioning the claim has to prove that some form of negligence or irresponsible behaviour existed. Prof. Kunibert Raffer points out:

> *“Naturally, the mere occurrence of damage or errors would not be sufficient to receive compensation. […] It would have to be shown that the IFI did not act with appropriate care or that it failed to observe the professional standards that are applicable to comparable services. […] Risks arising from events beyond the parties’ control would remain with the client. A conscientiously planned and executed project that goes wrong would not give rise to compensation.”*[125]

The party that questions the claim has therefore to prove, that the project was not carefully planned and executed and that the creditor did not comply with professional standards when planning the project.

Another argument is that the multilateral organizations are not only creditors, they also undertake activities as consultants in the context of financing agreements to developing countries. In this case, Prof. Kunibert Raffer demonstrates that the IMF and the World Bank can be financially held to account for damage done, since this is established in their statutes[126].

On this basis, JDC has identified some financing agreements that could be challenged by the public or by the debtor government. Two shall be briefly presented here:

- US$150 million still outstanding that is related to Structural Adjustment Programmes and “drought loans”: At the beginning of the 1990s Zimbabwe was hit by a severe drought[127]. The country was still obliged to export 0.6 million tons of maize in 1990-91 in order to meet targets for exports that were inherent to the structural adjustment programme policies of the IMF. 1.9 million tons of maize had to be imported to cover the food deficit deriving from the drought. The World Bank provided loans (no grants) directly in response to the drought, made up of US$120 million between 1992 and 1995. Around half the funds were used to import food, with the World Bank estimating the total foreign exchange cost was over US$450 million[128]. Without exporting the 0.6 million tons of maize, Zimbabwe would have saved US$ 200 million in foreign exchange. The disparity in imports costs and export income and the lower market power enforced by the measures are responsible for this. Tim Jones estimates a US$150 million still outstanding that refer to drought loans in this context[129].

- Inappropriate health care loans: *“The World Bank responded to the devastating AIDS crisis by giving loans of US$50 million from 1993. Just as with drought, giving loans rather than grants to deal with a crisis such as AIDS is economically inappropriate. The World Bank evaluation of the project ignores any discussion of the economic suitability of a loan, simply saying economic and financial rates of return were 'not calculated for the project'.* [...]*Yet we estimate this project still makes up US$55 million of Zimbabwe’s debt.”*[130]

Since the World Bank functioned not only as lender but also as project consultant, it has to be held accountable for mistakes that occurred due to its advice; the same way consultants would be liable to pay

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125 Response of Prof. Kunibert Raffer to a request by erlassjahr.de on the 19th of March 2012. Reference is given to: Raffer (2004): “International Financial Institutions and Financial Accountability”, Ethics & International Affairs 18(2), pp.61ff; or in the online version p. 73, http://www.cceia.org/resources/journal/18_2/articles/5019.html .

126 See: Raffer, Kunibert (2008): The Bretton Woods Institutions and the Rule of Law: An Urgent Good Governance Issue, Economic and Political Weekly XLIII(38), pp. 49Ff, accessible at http://homepage.univie.ac.at/Kunibert.Raffer/KR-acc.pdf.

127 According to the research of Tim Jones, Jubilee Debt Campaign: *“Maize production fell 25 per cent in 1990-91 and a further 33 per cent in 1991-92.”,* Jones Tim (2011): Uncovering Zimbabwe's debt: The case for a democratic solution to the unjust debt buden, London: Jubilee Debt Campaign, p. 19.

128 See: World Bank. (1995). Zimbabwe: Emergency drought recovery and mitigation project. Implementation completion report. 20/12/95. In: Jones Tim (2011): Uncovering Zimbabwe's debt: The case for a democratic solution to the unjust debt buden, London: Jubilee Debt Campaign.

129 Jones Tim (2011): Uncovering Zimbabwe's debt: The case for a democratic solution to the unjust debt buden, London: Jubilee Debt Campaign, p. 23.

130 Ibid., p. 25.

damage compensation according to Prof. Kunibert Raffer[131]. Zimbabwe can ask for compensation in front of the panel by arguing inappropriate project preparation (for instance to leave out the assessment whether the project brings enough financial return in order to repay the loan), and irresponsible behavior of the World Bank representatives:

> *"Loans in response to a sudden shock like a drought hold no prospect of creating the revenue to repay them. The loans helped Zimbabwe pay for immediate needs such as importing food; they were not given to be invested in an activity which would produce a return to repay the loan. The impact of the early 1980s drought was to leave Zimbabwe with loans to be repaid, but no means with which to repay them."*[132]

Zimbabwe could argue for gross negligence, proving evidence on causality and fault of the consultants. The panel would have to decide if gross negligence is to be found in the evidence, brought forward to the panel. The loans are, however, not directly canceled in case, where gross negligence is found. A title for damage compensation will be given and with this a counterclaim of the debtor country would exist. According to law expert Kunibert Raffer, the difference between the obligations of both parties could just be settled, in an offset[133]

131 See Raffer, Kunibert as a reply to an email request of erlassjahr.de: "The international public sector must become financially accountable for their own errors in the same way consultants are liable to pay damage compensation if/when negligence on their part causes damage or OECD-governments are if they create damages by negligence or violating laws."

132 Jones Tim (2011): Uncovering Zimbabwe's debt: The case for a democratic solution to the unjust debt buden, London: Jubilee Debt Campaign, p. 13.

133 See Raffer, Kunibert as a reply to an email request of erlassjahr.de, referring to an unpublished conference presentation in 2008.

Step 7: A sustainable debt level and the repayment plan

In the next steps, the arbitration panel is going to assess the ability of Zimbabwe to pay its debt service as scheduled and the amount of debt relief needed to achieve a situation of debt sustainability. In general it is referred to the following when speaking of debt sustainability[134]:

- The country is able to roll over repayments at acceptable rates and does not have to recur to the capitalization of interest
- The government of Zimbabwe does therefore not "opt" for debt repudiation
- There are no external and domestic debt service arrears
- Future debt service does not lead to unsustainable tax rates[135].

We furthermore apply the principle of debtor protection (see below) and include another parameter:

- The government of Zimbabwe is able to meet basic human needs and does not have to use resources for that to service debt.

The finance ministry along with its Debt Management Office and other relevant departments such as the Ministry of Economic Planning and Investment Promotion suggests a sustainable debt level to the panel[136].

Alternatively the parliament is going to undertake this task. It will also outline plans of how the freed resources are used for development purposes. Both together will propose a repayment plan that demonstrates the feasible commitments of the Zimbabwean government to the investment of freed-up resources according to the MDG goals[137].

The finance ministry or the parliament will further demonstrate to the international creditor community the country's commitment to pursue sound macro-economic policies and strengthen public debt management. The achieved stabilization of the economy after the hyper-inflation period can function as a positive argument for that. This is needed in order to create trust among the creditor and donor community to legitimate cancellations and attract new financing.

The Zimbabwean Ministry of Economic Planning and Investment Promotion has set up a Medium Term Plan for the period 2011 to 2015[138]. Along with the already mentioned ZAADDS, both plans could provide inspiration for the repayment plan. However the repayment plan has to clearly demonstrate how social expenditures are targeted, with resources for these expenditures that need to be exempt from debt service[139]. The finance ministry or parliament on behalf of the government of Zimbabwe therefore demonstrates to the panel with which means they want to meet remaining and future debt service obligations after the completion of the process.

The panel will first have to do the following steps to gain a position independent from the debtor's view:

- The assessment of the debtor's economic position

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134 C.M. Deredza (2005): Domestic Debt Sustainability: Issues, Definitions, Measurement Approaches and the way forward, Macroeconomic and Financial Management Institute of Eastern and Southern Africa (MEFMI).

135 To the latter: When invested loans do not create adequate repayment capacity, the difference is assumed to be made up through tax increases. However, the panel has to assess how much is feasible to not compromise future economic development of the country. MEFMI for instance stated in its domestic debt sustainability analysis that tax rates of Zimbabwe are already high so that more tax increases are not justified (http://www.zimtreasury.org/zdsa-1980-2007.cfm).

136 According to Chapter 9 of the Bankruptcy Code of the United States, the debtor has the right to suggest a repayment plan and the debt relief level.

137 Kaiser Jürgen (2010): "Resolving Sovereign Debt Crises: Towards a Fair and Transparent International Insolvency Framework", Friedrich-Ebert-Stiftung, Study within "Dialogue on Globalization", p. 30.

138 Republic of Zimbabwe (2011): Zimbabwe Medium Term Plan 2011 – 2015: "Towards sustainable inclusive growth, human centred development, transformation and poverty reduction", Ministry of Economic Plsnning & Investment Promotion (MEPIP), http://www.zimottawa.com/files/pdf/Zimbabwe_MidTermPlan-2011-2015.pdf.

139 Raffer, Kunibert (1993): "What's Good for the United States Must be Good for the World: Advocating an International Chapter 9 Insolvency", http://homepage.univie.ac.at/kunibert.raffer/kreisky.pdf

- A portfolio review of domestic and external debt to analyse its evolution over time and provide a snapshot of the current situation[140]
- A debt sustainability assessment.

For that, the panel has to hire an impartial institution or person with technical expertise to conduct a debt sustainability analysis, independent from the parties' view[141].

External Institutions for undertaking a debt sustainability analysis

The finance minister or the Debt Management Office of Zimbabwe can suggest an institution with which they have had a good working relationship, such as UNCTAD or MEFMI. Both undertook missions to Zimbabwe in order to technically support the debt reconciliation exercise. However, the final decision depends upon the arbitration panel.

The panel can choose, for instance, institutions that are internationally recognized for their expertise, such as the following:

The United Conference on Trade and Development (UNCTAD) provides with its **"Debt Management and Financial Analysis System" (DMFAS)** technical cooperation and advisory services in the area of debt management and could be able to help in debt data validation, statistics and debt analysis. DMFAS could provide technical advice as well as software for the panel to undertake a debt sustainability analysis.

The **United Nations Development Programme** (UNDP) is the global development network of the United Nations (UN), operating in 177 countries and thus having deep and comprehensive country-specific knowledge. The UNDP will most certainly not have the capacities for carrying out a debt sustainability analysis itself, but it will be capable to support the constitution and financing of a qualified working group in order to carry out a debt sustainability analysis. The UNDP recently did just that in Jamaica, playing a central role in the context of the Jamaica Debt Exchange[142].

Non-for-profit organisations can provide technical assistance such as **Debt Relief International** (DRI)[143] as part of the Development Finance International Group. It is one of the HIPC Capacity Building Programme implementing partners and especially functions as the technical office of the programme. DRI mostly provides technical training in debt management for officials in developing countries that were to go through the multilateral Heavily Indebted Countries Initiative. DRI also coordinated the political statements of HIPC finance ministers along conferences of World Bank and IMF. Particularly this more political stance of the organization would make it an attractive partner in a process that would clearly go beyond the implementation of existing procedures.

The **Macroeconomic and Financial Management Institute of Eastern and Southern Africa** (MEFMI)[144] is a regional institute with currently 13 member countries, including Zimbabwe. MEFMI works in the areas of macro-economic management, financial sector management and sovereign debt management. Target institutions that are consulted and trained are the ministries of finance, the ministries of economic development and planning and central banks, but also other public institutions that are connected with these mentioned institutions. MEFMI develops frameworks and methodologies for the mentioned management areas and has particular expertise in the field of domestic debt analysis.

Also **private consultants** and **academic institutions** would be an option: the University of Oxford for

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140 Johnson, Alison (2001): Key Issues for Analysing Domestic Debt Sustainability, Publication No. 5, Debt Relief International, p. 4.

141 There are various manuals how to conduct a debt sustainability analysis, although it is not advisable to conduct such an analysis without experienced experts (z.B. http://siteresources.worldbank.org/INTDEBTDEPT/Resources/DSAGUIDE_EXT200610.pdf)

142 They organized an independent attorney to advise the government of Jamaica with financial support of the "Poverty Thematic Trust Fund" which led to the design and implementation of the final Jamaica Debt Exchange (JDX), See: http://www.jm.undp.org/node/386

143 About Debt Relief International: http://www.hipc-cbp.org/index.php?option=com_content&task=view&id=24&Itemid=3.

144 http://www.mefmipcis.org/secretariat//index.php?option=com_content&task=category&sectionid=9&id=18&Itemid=26

instance commissioned an analytical framework for debt sustainability in 2005 for an UNCTAD project named „Capacity Building for Debt Sustainability in Developing countries“[145].

These are just a few suggestions to give a hint on existing possibilities for externally carried out debt sustainability analyses. However, the arbitration panel ONLY purchases an external service, with the debt sustainability assessment informing the discussion on necessary debt relief and providing a position for the panel that is independent from the debtor's or creditor's view. The interpretation of the analysis and its results is entirely in the responsibility and decision-making power of the panel. That also includes the final decision on any debt sustainability level. In current debt management, creditors undertake debt sustainability analyses, at the same time deciding about its interpretation and consequences.

In this paper, it is not upon us to undertake a detailed debt sustainability assessment to calculate a level of debt relief to achieve debt sustainability, not even for illustrative purposes. That will certainly not match reality at this stage and would not suit the promotion of an independent assessment by an individual arbitration panel. Various approaches to a debt sustainability assessment could be taken, numerous people and organisations wrote on that topic. In the following we would therefore like to present some orientations on the spectrum that exists.

The spectrum of debt sustainability approaches – the human development approach and the principle of debtor protection

One extreme of the approaches' spectrum is informed by parameters of human development. Their starting point would be the amount of investment required towards a sustainable development of the country and only deriving from that what is the affordable level of debt service:

> *A human development approach to debt sustainability holds that human development imperatives should take precedence over debt payments. As a consequence, developing countries should be able to set aside as much fiscal revenues as is needed to reach these goals and only then pay the remnant as debt service or debt stock*[146]*.*

That goes along with what we have called "debtor protection"[147]. A system that prioritizes the well-being of the population of a debtor country over repayment of creditors and thus provides debtor protection[148] is also introduced in the US Chapter 9 Insolvency Code, one existing law context that informs the FTAP debate. Raffer states:

> *"A municipality is not expected to stop providing basic social services essential to the health, safety and welfare of its inhabitants in order to pay its creditors. The US Supreme Court rejected the idea that a city has unlimited taxing power stating that a city cannot be taken over and operated for the benefit of its creditors. Tax increases that would depress the standard of living of the municipality's population below the minimum guaranteed to private debtors are clearly illegal."*[149]

The arbitration panel has to estimate a realistic tax income of the government and the range of foreign exchange earnings of the national economy and estimate how much is available from those resources to maintain vital services such as administration, police, infrastructure, water, sanitation, and the guaranteeing of basic human needs, such as education and health services[150]. Only after these expenses for necessary

145 FitzGerald, Valpy (2005): An Analytical Framework for Debt Sustainability and Development (First Draft), University of Oxford, Paper commissioned for the UNCTAD Project "Capacity Building for Debt Sustainability in Developing Countries".

146 http://www.cidse.org/uploadedFiles/Publications/Publication_repository/cidse_policy_paper_DSF_apr06_EN.pdf, p. 2

147 Raffer, Kunibert (2001): "Solving Sovereign Debt Overhang by Internationalising Chapter 9 Procedures", *Arbeitspapier 35*, OeIIP (Oesterreichisches Institut fuer Internationale Politik/ Austrian Institute for International Affairs), Vienna as *Arbeitspapier 35* in June 2001 , http://www.druckversion.studien-von-zeitfragen.net/Working%20Paper%20Raffer%20on%20Chapter%209.htm#_ftnref1.

148 Debtor protecton is, in our case, the protection of government spending that is needed to achieve basic human development needs. Ibid.

149 Raffer, Kunibert (1993): What's Good for the United States Must be Good for the World: Advocating an International Chapter 9 Insolvency", http://homepage.univie.ac.at/kunibert.raffer/kreisky.pdf, p. 4.

150 Ibid, p. 12, taken from: Northover H, Joyner K, & Woodward D (1998) *A Human Development Approach to Debt Sustainability Analysis for the World's Poor* (London: CAFOD).

state functions have been deducted from the gross income envelope, can the remaining resources be used for debt service. A fiscally sustainable debt level is in this regard calculated by estimating the realistic amount of revenue that a government can be expected to raise without increasing poverty or compromising future development[151].

The panel therefore has to define the “basic minimum” that needs to be contained, so that the inhabitants of the country, especially the most vulnerable, do not suffer from a lack of fiscal resources that were used to finance debt service. The MDG are an internationally agreed variable for poverty reduction. The government of Zimbabwe particularly refers to achieving the MDG objectives in its Accelerated Arrears Clearance, Debt and Development Strategy when speaking of the resolution of the debt overhang, also referring to its Medium Term Plan 2011 till 2015 (MTP)[152]. The panel could therefore also use the MTP targets and the needed budgetary resources in the MTP as reference.

Let us assume that the panel has commissioned one of the external institutions with a debt sustainability assessment. This independent institution will apply a human development approach to debt sustainability.

Technically the process could then balance normal debt service obligation with the human rights considerations outlined above through applying the following criteria, developed by Steven Mandell of the New Economic Foundation[153].

The calculation is based on the following assumptions on what “realistic revenue” means:

- It is not reasonable to levy tax on income that is below a defined poverty level. Thus in order to find the national income that is “really taxable”, the institution reduces the income of the country’s people living below the poverty line from the overall national income.
- Taxation on incomes above this level should not exceed 25 % in order to not distort economic development
- The needed resources for meeting the populations’ basic human development needs are put aside before servicing debt from government revenues
- Only a limited amount of remaining revenue is dedicated towards debt service to leave a buffer for other essential government expenditure.

The following methodology to calculate a sustainable debt level for Zimbabwe is used:

- Deduction of the income of the population living below or at a poverty line of US$ 2 a day and US$ 3 a day from national income to have the taxable income
- Calculation of maximum feasible government revenue (to be derived from this income by taxation at 25 % and adding the portion of grants that may be available for providing essential services. This is calculated by using OECD estimates, that not more than 50 % of grants are actually available for such purposes)
- From that, deduction of minimal necessary health, education and other social expenditures and a minimal pension set at the poverty line of US$ 3 a day. Deduction of a further sum of 10 % of GDP for other essential expenditures
- From the residual revenue, scenarios of a 40 %, 30 % and 20 % allocation to debt service were calculated.

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151 See: Mandell, Stephen (2006): Debt Relief as if people mattered – A rights-based approach to debt sustainability, the new economics foundation, Rethinking international finance 1, p. 4.

152 Ministry of Finance, Government of Zimbabwe (2012): “Zimbabwe Accelerated Arrears Clearance, Debt and Development Strategy”, http://www.zimtreasury.org/downloads/939.pdf .

153 To illustrate the application of a human development or bottom-up approach we would like to refer to the popular human development approach to debt sustainability of Steven Mandell from the New Economics Foundation. He discussed the sensibility of using a human rights based approach in length and developed an own methodology: Mandell, Stephen (2006): Debt Relief as if people mattered – A rights-based approach to debt sustainability, the new economics foundation, Rethinking international finance 1.

Result of an independent, human-development-based debt sustainability analysis

Due to strong data restrictions for recent years such as 2010 and 2011, we will hereby present the result of the calculation of Steven Mandell in 2006 whose methodology we have just described[154]. This should suit illustrative purposes since the debt stock more than doubled until 2012[155][1]. We therefore assume that the result of the debt sustainability assessment will be quite certainly the same: a 100 % debt cancellation in any of the three revenue scenarios that Mandell offered[156]:

Cancellation needed on the basis of an ethical poverty level of $3 a day for Zimbabwe

NPV of PPG debt	Debt relief based on $3 a day poverty line and 20 % feasible revenue available for debt service		Debt relief based on $3 a day poverty line and 30 % feasible revenue available for debt service		Debt relief based on $3 a day poverty line and 40 % feasible revenue available for debt service	
$M	extent of debt relief required ($M)	relief as percent of debt	extent of debt relief required ($M)	relief as percent of debt	extent of debt relief required ($M)	relief as percent of debt
3,494	**3,494**	**100**	**3,494**	**100**	**3,494**	**100**

Although Steven Mandell comes with a (perhaps too) restrictive methodology to the quite mechanistic conclusion that no debt for developing countries is sustainable[157], it reflects the result of an independent debt sustainability analysis in case the human development approach has been chosen by the panel: Zimbabwe would need a 100 % debt cancellation.

The other extreme: the Debt Sustainability Framework of the IMF

The other extreme is the common way of applying predefined sustainability thresholds for standard economic indicators.

There are different approaches to it, albeit the most established approach in terms of developing country's debt is the Debt Sustainability Framework (DSF) of the IMF and the World Bank[158].

154 See for detailed methodology Mandell, Stephen (2006): "Debt Relief as if people mattered – A rights-based approach to debt sustainability", the new economics foundation, Rethinking international finance 1, p. 14 f. and annex 2 and 3 on p. 23 and 24.

155 The Human Development Report of 2011 is completed but not publicly accessible yet: http://www.undp.org.zw/news/186-2011-human-development-report-formally-launched-in-zimbabwe?3a1ed061a28f8a5e62fd4865066ea7fa=2151fa5b4ed7c451c342434cd792a682

156 It is referred to the results of Mandell 2006, Annex 4, p. 25 f., the result of Zimbabwe can be found on p. 29. Mandell describes the reason of the choice for an application of a $3 poverty line as follows: *"In a ground-breaking article in Third World Quarterly, Peter Edward argues that the poverty lines used by the World Bank ($1 and $2 a day in purchasing power parity terms at 1985 prices) are arbitrary. If we are to argue from a moral point of view about the need for poverty reduction, we need to have a measure of poverty which has some moral grounding. While acknowledging that poverty is multidimensional, he argues that a reasonable proxy for well-being is life expectancy at birth. He then demonstrates that there is strong correlation between the latter and per capita income. There is also a distinct and striking kink in the line of best fit correlating the two which suggests that beyond a certain level of income there is very little increase in life expectancy. He argues that this point should be an ethical poverty line. Depending on the precise form of equation, this kink point (equivalent to about 70 years) varies between an income level of $2.7 and $3.9 per day. He concludes that $3 is a good figure on which to base further work",* p. 13.

157 Stephen Mandell found that the whole region sub-Saharan Africa actually would have needed a 75 % cancellation and his overall conclusion is that developing countries in need of debt cancellation should all meet their external financing needs with grants because they cannot afford to service any more loans at all. That is a logic conclusion, but does not match reality: in terms of decreasing aid budgets and rare availability of grants, countries like Zimbabwe have to meet future financing needs most certainly with loans. The issue that he therefore raises is the question of responsible future lending and the warranty that new loans are being invested in productive projects to develop the domestic production base to get away from external financing. The arbitration panel does not have any direct influence on the distribution of grants and on the conditions of future financing, thus the calculation exercise's conclusion of Mandell is not helpful in our context.

158 The DSF is not meant as a retrospective tool to inform a decision on debt relief, as it was the case with the HIPC initiative. It is much more a tool to assess how much debt is sustainable to inform borrowing and lending decisions. The IFIs have three different categories of thresholds that define how much debt a country can carry, referring to the governance of a country. The World Bank relies on the DSF to determine the share of grants and loans in its assistance to low-income countries. Other donors use the analyses to inform their own financing decisions. It is not an unproblematic concept: For instance, the Debt Sustainability Analyses (DSA) only takes

The following table shall provide an overview of the most popular threshold discussions in terms of debt sustainability. The relevant thresholds for Zimbabwe in the context of the DSF are marked in green. Since Zimbabwe is an economically weak state with weak governance, the most conservative thresholds apply.

The discussion of debt sustainability thresholds – an overview

	Public debt /GDP	EDT /GDP	EDT/XGS	TDS/XGS
Members of the European Union and industrial countries	*Maastricht convergence criteria:* 60% *Advanced Economies:* 80-192% (*IMF: Modernizng the DSF; August 2011, pt.17)*			
Emerging Markets / MICs	35-77% *(IMF: Modernizng the DSF; august 2011, pt.17)*	Above 30-35%, the risk of a credit event rises significantly. *(R/R p.25)*		
LICs		30% / 40% / 50% NPV; *(DSF (Review 2009))*	150% (NPV) HIPC 100% / 150% / 200% NPV; *(DSF (Review 2009))*	15% / 20% / 25% *(DSF (Review 2009))*
Other groups	60% *(Eastern Carribean Currency Union)*			
All countries	170-180% of GDP *(Ostry et alia (2010))*	40% a useful benchmark without implying that higher debt necessarily implies a crisis. *(IMF 2002: Assessing Sustainability)*		5% *benchmark of erlassjahr.de, referring to the debt relief agreement in 1953 for Germany.*

Definitions:

The "maximum sustainable debt level" is the level beyond which a debt distress event is likely or inevitable. IMF: Modernizing the Framework for Fiscal Policy and Debt Sustainability Analysis; August 5, 2011, pt. 17

LIC-DSA indicative debt burden thresholds and risk ratings are based only on external public and publicly guaranteed debt. *IMF/IDA: Staff guidance note on the Application of the Joint Bank-Fund DS Framework for LICs; Jan. 22nd 2010. fn.9*

The panel will use the thresholds only as an orientation. It for instance conducts a public debt sustainability analysis (which includes the analysis of domestic debt sustainability) on the basis of the 30 % threshold. It will then assess if a higher relief is necessary when assessed in terms of the whole external debt stock (public and publicly guaranteed and private) relative to the performance of the export sector.

The result is shown in the following table (referring to the most recent and comprehensive data of the International Monetary Fund)[159]:

the external DSA into account when undertaking a risk rating, not a domestic and public debt sustainability analysis which is however necessary to understand the real budgetary burden of debt. Worse is the partiality: the analysis is undertaken by a creditor and it is therefore not ensured that the chosen parameters that inform the analysis are always realistic. It moreover seems that they are in favour of the creditor, see for instance: erlassjahr.de (2005): "Der Bock als Gärtner: Zur Rolle von IWF und Weltbank als Gutachter im Entschuldungsprozess", http://www.erlassjahr.de/die-schuldenkrise/schuldenmanagement/iwf/der-bock-als-gaertner.html.

159 Although the mentioned threshold in the table refer to EXTERNAL DEBT in particular, most of the public debt stock refers to external debt. Only a slight share is foreign-currency-dominated but domestic.

	Public debt (domestic and public and publicly guaranteed external debt) to GDP: 30 % threshold	External debt (private external and public and publicly guaranteed external debt) to annual exports: 100 % threshold	Debt Service to annual exports: 15 % threshold
Actual debt ratio: end of 2009-data	123,40%	431,50%	26,60%
Necessary reduction of respective debt stock / debt service in percentage points	93,40%	331,50%	11,6 %
Reduction in percent	75,7 %	77,0 %	43,6 %

Compared to the result of the human development approach of 100 % debt cancellation, the picture looks a bit different here, having a reduction of only around 75 %.

However, it is not unproblematic to use the indicative debt burden thresholds and apply a mechanistic debt stock reduction[160]. For instance, the thresholds do not refer to the whole debt stock but only to external public and publicly guaranteed debt[161]. That means that public domestic debt and private non-guaranteed external and domestic debt are not included in this standardized approach. The evaluation of only parts of the total debt stock does not capture the real fiscal burden on the government budget.

It is therefore argued here that the fiscal sustainability (the budgetary burden that will determine available public resources for poverty reduction and development investments) needs to be equally considered to external sustainability although the IMF and World Bank favor the latter. Moreover, the definition of the indicators is problematic as well: the IMF and World Bank derived the thresholds through considering debt indicators at the moment when a country undertook only one out of three measures to deal with a critical debt situation:

- running into arreas
- asking the IMF for exceptional financing
- rescheduling in the Paris Club.

We briefly explored that in Chapter 1. Before a government is going to ask the IMF for money or is forced to stop debt service payments, it is most certainly going to cut expenditures and use other, for investments or social welfare important resources to pay debt service due. That implies that the conditions for economic distortion and social stagnation as a consequence of debt distress are certainly much earlier set than the IMF defines[162]. In a case such as Zimbabwe where the economy and social situation is “on the brink” the haircut may therefore need to be deeper than is indicated by these thresholds.

This approach therefore does not take into account the principle of debtor protection that has been introduced above and may therefore not be feasible in the proposed form.

Intermediate Approaches

In between these two “extremes” are approaches with slightly varying connotations, such as the BOTOS-approach[163] (BOTOS stands for “Board of Trustees on Sustainability”). It modifies the above mentioned DSF by starting from a human development perspective when defining the point of time when debt becomes

160 However, it needs to be mentioned, that under HIPC for instance, room for adaption was offered and that debt relief was calculated of the net present value of the current debt stock, thus the cancellation took into account future payment obligations. Therefore the application of standardized thresholds is not entirely mechanistic.

161 IMF/IDA (2010): “Staff guidance note on the Application of the Joint Bank-Fund DS Framework for LICs”, fn.9.

162 erlassjahr.de (2006): “Schulden müssen tragbar sein! Handbuch Schuldentragfähigkeit“, p. 19 f.

163 Bunte, Jonas, Gloede, Oliver, Trautfetter, Christoph (2004): “The BOTOS-Approach – An Alternative Approach for Calculating and Achieving a Sustainable Debt Level of HIPC-Countries”, discussion paper of the university of Bayreuth, Initiative WiSoTrEn at the University of Bayreuth, Germany.

unsustainable. The approach takes the above describes critical governments measures such as cuts into social services into account when defining necessary interventions into current service payments.[164]. Such actions usually run ahead of debt crises, indicating a situation of a lack of capacity to service debt. The MDGs as a reference are used, since they indicate how a sustainable economic and social environment should ideally look like, ensuring that debt sustainability is possible at all[165]. This approach takes therefore debtor protection into account.

However, the BOTOS-approach does not consider needed resources that are not related to the MDG[166] – but there are essential non-MDG-related expenditures that need to be taken into account when talking of financial needs, such as basic investments in infrastructure.

The panel needs to treat each debt sustainability approach with a critical eye, being aware of the view to “sustainability” and the underlying definitions of the parameters within the different approaches. For this, transparency on parameters, definitions and the assessment process are absolutely essential. They need to be discussed among the panelists as well as the parties during public hearings.

Which debt sustainability approach is to be used is upon the panel to decide. The essential factor here is the realistic calculation of the needed debt relief that must be deep enough to be a fresh and sustainable start for the economy, including considerations of debtor protection. That is also important for future financing: according to Prof. Kunibert Raffer, too “small reductions expose debtors to relatively small external shocks and are likely to impair their capacity to honour remaining obligations”[167]. New investors will most certainly be reluctant to invest in a country, where they expect a new crisis and adjustments to arise due to insufficient debt sustainability restoration.

What the panel has to do next[168]:

1. *Assessing the proposal for a sustainable debt level and repayment plan of the Zimbabwean authorities.*

Having secured its own position independent from the debtor’s view through the external debt sustainability assessment, the panel will assess the suggestions of the finance ministry.

2. *Accept the proposal or refuse the proposal and propose a modification of the plan, being informed by the external debt sustainability analysis*

The panel can then accept or refuse the suggested debt level as the basis for a debt restructuring. In the latter case the panel will decide on adaptations and make the adjusted version subject of discussions with other stakeholders in the form of public hearings. Reasons for adjustment may include:

- The plan does not appear feasible in terms of expected revenue collection or budget targets. The government of Zimbabwe would for instance have to demonstrate how it wants to improve expenditure management to ensure that expenditures are kept within the forecasted revenue level, especially because it does not seem feasible to further increase taxes.[169]
- The plan does not sufficiently demonstrate that the freed resources will be spent for achieving

164 Ibid.

165 The methodology: They calculate the financial needs of a country by comparing the resources available to a country (fiscal revenue including grants minus debt service) to the resources required to achieve the MDGs (S. 7). The ratio of available resources and the essential needs is then calculated over the course of former years. In case a downward slope of available resources or in terms of the accomplishment of the MDG is recognized a debt distress situation is defined. The thresholds of the standard economic indicators of the IMF and World Bank above which debt is deemed to be unsustainable are then calculated on that basis.

166 Bunte, Jonas, Gloede, Oliver, Trautfetter, Christoph (2004): “The BOTOS-Approach – An Alternative Approach for Calculating and Achieving a Sustainable Debt Level of HIPC-Countries”, discussion paper of the university of Bayreuth, Initiative WiSoTrEn at the University of Bayreuth, Germany, p. 8.

167 Ibid.

168 The following logic is informed by the Chapter 9 US Bankruptcy Code: “Chapter 9 –Adjustment of debts of a municipality”, Legal Information Institute, http://www4.law.cornell.edu/uscode/11/ch9.html.

169 Mukoki, Paul G.V.: “Domestic Debt Sustainability Analysis for Zimbabwe – 1980 to 2007”, Ministry of Finance Zimbabwe, http://zimtreasury.org/zdsa-1980-2007.cfm.

internationally agreed poverty reduction targets.

The panel will have to decide on instruments and elements of the cancellation, for instance if a debt stock or a debt service reduction is going to be undertaken[170] and if loans are cancelled completely or simply rescheduled. For that, the panel will take into account the evidence on the debtor's economic and budget position and the independent debt sustainability analysis and will reasonably estimate the debt service capacity in the near and medium terms.

The panel will furthermore take into account market perceptions of different risks and how the debt relief operations will affect new funding of and the dialogue with donors.

In terms of debtor protection, the panel has to assess the fiscal impacts of the chosen operations: for instance the panel can estimate the amount of savings that are provided by the debt relief or debt restructuring operation and assess if these savings are sufficient to meet social investment needs[171]. A sustainable start for the economy therefore implies a cut that goes beyond removing phantom debts in order to provide a meaningful reduction[172]. However this should not lead to a total debt cancellation. It will increase the willingness of creditors to comply with the proposals of the panel if they feel fairly treated. It is upon the panel to argue for fairness by demonstrating that the government of Zimbabwe is not able to service more debt than it is proposed in the repayment plan: "Fairness depends on whether the amount to be received by bondholders is all they can reasonably expect in the circumstances"[173]. The "circumstances" include a minimum standard of resources for state operations and social expenses that needs to be guaranteed and is exempt from debt service.

The panel needs to define a cut-off-date. By that, it will consider that loans that were used to clear arrears are also included in the debt relief process. These loans were not used for productive investments and will therefore not bring any return, but they will have to be serviced nevertheless. However, it may be sensible to exclude loans that were given shortly before or during the arbitration process to enhance the restoration of creditworthiness of Zimbabwe. The exclusion of these "new" loans will create confidence to the new creditors that would have taken on a greater risk in giving loans in these unresolved circumstances and would also give a strong signal to other new investors.

Furthermore, the panel will make sure that debt relief or rescheduling is not conditional upon the implementation of measures. The pressure on Zimbabwe to comply with the agreed repayment plan will moreover result from the country's need to access new financing.

3. *Discuss the plan with creditors and provide opportunity for the population of Zimbabwe as stakeholders to be heard (see Chapter 8)*

The panel will at this point also consider the creditors' views and, if appropriate, their financial positions. Only if the consequences of the cancellation of claims for the stability and existence of the individual creditor are also considered, only then can an acceptable solution for all parties be found. A principle of domestic insolvency procedures could for instance be applied by the panel: minor creditors can be exempted from debt restructuring which is a common practice within the Paris Club (also called the "de minimis creditors" or "de minimis clause"[174]). The panel could define a limit of, for instance US$ 1 million. Loans falling under this limit have to be serviced in any case.

Through public hearings the civil society of Zimbabwe will have the opportunity to make their concerns and ideas known to the panel. They can provide evidence through data, statistics and self-conducted studies in

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170 Johnson, Alison (2001): Key Issues for Analysing Domestic Debt Sustainability, Publication No. 5, Debt Relief International, p. 11 and 22.

171 Ibid., p. 12

172 Raffer, Kunibert (2001): "Solving Sovereign Debt Overhang by Internationalising Chapter 9 Procedures", *Arbeitspapier 35*, OeIIP (Oesterreichisches Institut fuer Internationale Politik/ Austrian Institute for International Affairs), Vienna, http://www.druckversion.studien-von-zeitfragen.net/Working%20Paper%20Raffer%20on%20Chapter%209.htm.

173 Ibid., p. 31.

174 See for explanation: http://stats.oecd.org/glossary/detail.asp?ID=5915.

their specific area of interest.

Concerns of the represented population may include:

- The fear of local entrepreneurs of a credit crunch in terms of the relationship between national banks and external creditors[175].
- The fear of civil society organizations in terms of financial shortfalls in their working areas because of decreased or not sufficiently restored public resources.
- The concern of illegitimate debts voiced by affected groups of the population or national or international human rights organizations, that have evidence of "odious debts" cases and that call for the cancellation of these claims (see above)
- Concerns of how the released public funds after debt relief are to be spent (as in the case of Bolivia[176] in terms of the desire for social control mechanisms).

Their demands can include, as shown by a survey of Zimbabwean partners of the German Christian aid organization for child rights[177]:

- With the view to future generations Zimbabwe's natural resources shall not be permanently mortgaged. Mortgaging the resources as one way to clear arrears will be "mortgaging the future" of coming generations and not solve the debt problem because it does only free money in the short run.

4. *Consider the stakeholder's voices and the creditor's reactions and work out a final proposal which is then deemed to be consensual.*

The most likely choice will be a significant reduction of principal and interest when taking into account the above mentioned considerations. The reduction will certainly be somewhere in between the 100 percent debt cancellation suggested by Stevenx Mandell and the rather standardized result when having applied the approach of IMF and World Bank. Zimbabwe fundamentally lacks budget resources and will not be able to service arrears without the risk of accumulating new arrears. The panel can therefore additionally clarify how to deal with remaining debt service after a debt reduction has been agreed upon.

It can for instance stretch the repayment time horizon by setting a limit to annual debt servicing. The panel would have to look at the amount (principal and interest) of remaining obligations and then estimate the annual capital inflows and the growth in exports. It then applies an agreed debt service ratio (see threshold table above) of, for instance 10 or 15 % of annual exports to calculate the amount that would have to be repaid annually. It could then be agreed upon that this calculated sum is the annual maximum that the government of Zimbabwe would have to service and then from that calculated the time horizon that is needed to fully service the remaining obligations[178].

Another way to ensure that economic sustainability is not endangered through remaining obligations is to agree on a kind of "surplus clause": The panel could agree that it is crucial that Zimbabwe is able to generate trade surpluses sufficient to cover any payment obligations. The consequence would be that Zimbabwe only pays debt service if there are trade surpluses. In case there is a trade deficit, Zimbabwe cannot be forced to pay debt service by using existing currency reserves[179].

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175 Kaiser Jürgen (2010): "Resolving Sovereign Debt Crises: Towards a Fair and Transparent International Insolvency Framework", Friedrich-Ebert-Stiftung, Study within "Dialogue on Globalization", p. 31.

176 Krekeler, Georg and Tokarski, Irene (2001): "Länderbeispiel Bolivien", in: Misereor e.V., Brot für die Welt, Evengelischer Entwicklungsdienst e.V. (2001): "Entschuldung und Armutsbekämpfung: Chancen und Grenzen zivilgesellschaftlicher Beteiligung", Länderstudien und Fachgespräch, Druck + Verlag Mainz, Aachen, p. 18 f.

177 This results were summarized from a survey, undertaken by Frank Mischo in 2011, debt expert of the child rights and aid organization Kindernothilfe.

178 This approach was proposed by H.J. Abs in the context of the Indonesian debt accord. See: Hoffert, Alexandra (2001): "The 1970 Indonesian Debt Accord", Discussion Paper No. 05-01, Faculty of economics, Ruhr-University Bochum, p. 9 f.

179 This was a mechanism used within the London Agreement on German External Debts, also known as the London Debt Agreement which was a debt relief treaty between Germany and its various creditors after the second world war. The feature of the treaty, that the debtor can halt debt service payments when a trade deficit exists was meant to ensure, that the given debt relief **really** supported Germany to become a full and capable member of the world economy again. See for more information: Guinnane, Timothy W. (2004): "Financial Vergangenheitsbewältigung: The 1953 London Debt Agreement", Yale University, Economic Growth Center, http://www.econ.yale.edu/growth_pdf/cdp880.pdf.

Although the time horizon may be longer than without such a regulation, creditors would at least receive some repayments without much compromising the economic and social development of Zimbabwe.

Besides the debtor's realistic capacity to pay debt service, the panel has to consider the creditor's views in terms of its financial position. The creditors may have concerns in terms of the consequences of the cancellation of claims for their own stability and existence. Other concerns may refer to the individual elements and instruments of debt relief; if, for instance, a rescheduling of claims has been decided, creditors may have differing opinions on repayment periods, date of payments and the amount of reduction of interest payments.

Step 8: Public Hearings

The right of all stakeholders that are affected by decisions of the panel, to be heard can be “organized” through public hearings. Stakeholders to be considered include:

- Government on the local level
- Civil society and non-governmental organisations, representing the population of the country
- Private sector actors
- Members of parliament

The concerns of the population of the country may certainly be highly diverse. In December 2011 a debt expert from a large Christian organisation for child rights and aid (“Kindernothilfe”) conducted a survey with Zimbabwean partner organisations concerning the debt issue. In general, this survey made clear that the civil society in Zimbabwe is well-informed about the heavy debt burden; it understands the consequences of the lack of external financing and the importance of regaining relations with donors. They are also informed about the ongoing debate about a solution and claim their right to be involved in this process[180].

Depending on their capacity, civil society organizations already take part in the debt debate, despite the difficult political situation in Zimbabwe. An example is the call of civil-society in Zimbabwe as well as sympathising international debt relief campaigns for a national debt audit in Zimbabwe[181]. A debt audit may be a good first step to hold the government to account by revealing the origins of public debt. However, a debt audit on its own is not a solution to the debt situation. It provides no more than transparency on claims. Ideally the people's audit is a step independent from the "official" arbitration process, with the results of the audit channelled into the official process through the hearings that are presented in this chapter.

An arbitration process with a public hearing will provide the opportunity to attract the attention of powerful actors, as wished from the organizations during the survey. The arbitration panel will ensure that all concerns of the various stakeholders are considered within the process when they are brought to the panel. The exertion of the right of political participation is at least for the time of the arbitration process principally ensured. However, an essential pre-condition for the involvement of the civil society into the process is that the civil society is organized and has basic institutional structures that can be relied on to realize a hearing procedure.

Civil society representatives may include:

CSOs that work with self help groups that are spread all over the country.

With the help of international partners, such as the Christian aid organization “Kindernothilfe” and their numerous partners in Zimbabwe, self help groups can be supported in organizing themselves systematically. Kindernothilfe for instance suggests, that self help groups in communities build up “Cluster Level Associations” (CLA) consisting of members of self help groups to participate in regional meetings (see below)[182]. For issues of national relevance, such as the participation at a national forum (see below) federations from those Cluster Level Associations can be built that would consist of members of each CLA.
Networks, representing diverse national CSOs and groups that have particular subject competence

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180 The survey included eight questions, seven of them had a direct link to the debt issue. All eight partner organisations were interviewed and three responded in a detailed way. These were the child rights organization *Justice for Children Trust (JCT)* who focusses on legal support, child protection programmes, medical treatment, education and self help groups. The second is the youth organisation *Ntengwe* concentrating on self help groups, poverty reduction as well as advocacy and advisory service for cluster level associations. The third is the women’s rights organization *Jekesa Pfungwa Volingqondo* (JPV) who counts about 10.000 members organized in self help groups. Together, the responding organisations reach about 80.000 people with their work in Zimbabwe and thus give a representative valuation of the current situation.

181 See: “ZIMCODD to intensify calls for debt audit”, The Zimbabwean, 30.09.2010, http://www.thezimbabwean.co.uk/business/industry/34581/zimcodd-to-intensify-calls-for-debt-audit.html, or: “Zimbabweans call for debt audit”, 14th of July 2009, http://www.jubileedebtcampaign.org.uk/Zimbabweans3720call3720for3720debt3720audit+4931.twl, or: “ACT NOW: Support Debt Justice for Zimbabwe”, Jubilee Debt Campaign UK Campaign 2012, http://www.jubileedebtcampaign.org.uk/ACT3720NOW373A3720Support3720Debt3720Justice3720for3720Zimbabwe+7536.twl.

182 For more information about the self help group approach see Kindernothilfe (2011): “The Self Help Approach: A people’s movement for the well-being of their children” http://www.kindernothilfe.de/multimedia/KNH/Downloads/Material/Selbsthilfegruppen_engl_JAN+2011.pdf

In general such a participatory process needs competent and leading stakeholders that ensure that the views of the diverse stakeholders from civil society are included. Linking a public hearing in Zimbabwe with networks that provide subject competence and represent diverse CSOs at the same time is a good option.

The Zimbabwe Coalition on Debt and Development (ZIMCODD) is such a network[183]. ZIMCODD already initiated various public debates on debt sustainability measures and furthermore provides capacity building in the field of public finances for grassroots[184]. Such networks do not only focus on specific thematic issues such as debt, but also link these to social development.

The membership in trans-regional networks is a further element of coherence and representation. ZIMCODD for example is affiliated to Africa Jubilee South (AJS), the Zimbabwe Social Forum (ZSF), the African Forum and Network on Debt and Development (AFRODAD) and the Southern Africa Peoples' Solidarity Network (SAPSN). Particularly AFRODAD is based in Harare and thus is able to competently voice civil society concerns during hearings. Those networks have a broad membership basis and are able to provide subject competence through significant experience and intelligence.

However networks and organizations that work specifically on issues that are affected by outcomes of the arbitration process such as health and education need to be included as well. An example is the Women of Zimbabwe Arize (WOZA) that counts a countrywide membership of over 75.000 women and men. Trust and mobility of the people are already existent in such established and broad-based networks. *Justice for Children Trust (JCT)* and *Jekesa Pfungwa Vodingqondo (JPV)* are members of the *Zimbabwe Debt Coalition (ZIMCODD) a*nd actively engaged for a debt relief within this coalition. The partner organisations want to participate in political analysis and advocacy issues for example through monitoring and regulation. They build up capacity to involve the marginalised population in this process and to better represent their interests. Additionally, they mobilise representatives of vulnerable and marginalised groups to participate in the public debate[185].

The existence of political dialogue mechanisms to connect all stakeholders is necessary and has to be organized by the panel.[186] In urban areas the panel would "just book a hall", get police clearance in terms of the public order legislation and then convene a public meeting. According to Zimbabwean debt experts, these are common in Zimbabwe[187].

However, it has already been stated, that it is necessary to involve all parts of society in the process to create a legitimate, consensual and effective process. Some people in Zimbabwe may not have the ability to meaningfully engage in thematic discussions, political processes or technical debates, for instance in rural areas. It is therefore necessary to enable the civil society to provide meaningful input to the debt restructuring process and to articulate political positions for Zimbabwe's future.

There are a few successful examples from other countries how that may look like. One example is the Uganda Participatory Poverty Assessment Project (UPPAP) which aimed at bringing the voice of the poor in national and district planning for poverty reduction.[188] It was a unique partnership between the Ministry of Finance, Planning and Economic Development, nine pilot district authorities, civil society organizations (NGOs, CBOs and academic institutions) as well as donors.

The Participatory Poverty Assessment is a qualitative data instrument, which samples individuals from all parts of society, i.e. from the very poor up to those emerging from poverty in order to bring together different perspectives on one issue. In the case of Uganda, the assessment was implemented by the external civil

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183 See for more information: http://www.zimcodd.org.zw.

184 ZIMCODD does this in line with its economic literacy programme for grassroots entitled Civic Participation in Economic Development (CPED). http://www.zimcodd.org.zw/index.php?option=com_content&task=view&id=62

185 This was expressed during the survey, conducted by the German chuch aid organization "Kindernothilfe".

186 Walter Eberlei: Stakeholder Participation in Poverty Reduction, in: Walter Eberlei (Ed.): INEF Report 86/2007, Stakeholder Participation in poverty Reduction, p.7.

187 Interview with Dakaray Matanga, debt expert of AFRODAD, by E-Mail on the 22nd of June 2012.

188 Bird, Bella/ Kakande, Margaret (2001): The Uganda Participatory Poverty Assessment Process, in: Norton, Andy et. al. (2001): a rough guide to PPAs - Participatory Poverty Assessmen, An introduction to theory and practice, p 45-57. http://info.worldbank.org/etools/docs/library/238411/ppa.pdf

society organization Oxfam GB.[189] It identified nine research institutions and local NGOs which it invited to join the Technical Committee and carry out the participatory research. In order to get a multi-faceted view on the poverty situation 24 rural and 12 urban sites in the poorest districts were selected as sample. Up to three rural communities and at least one urban community were chosen in each district. Oxfam then conducted focus group discussions, case studies and key informant interviews. The whole process has been seen as a great success and good example to learn from when aiming at implementing a highly participatory process.[190] Thus, it can give methodological hints for a public hearing in Zimbabwe on the debt issue. The panel could choose an implementing organization, which will channel the results of the assessment into the public hearing process.

When focusing on the civil society of Zimbabwe, another example of public participation can be helpful: the HIPC case of Bolivia and the "Foro Jubileo 2000" process, one of the most successful civil society - led PRSP processes in the history of HIPC.

Jubileo Bolivia, a broad civil society association organized "round tables" for civil society discussions to inform the PRSP process, led by the Bolivian Catholic Church[191]. Nine regional "foros jubileo 2000" were held, one "round table" for each regional district ("departamentos") that independently discussed about the subject areas that they found as being important such as structural adjustment, health and education in rural and urban areas[192]. Beforehand, regional preparation meetings were held. Participation was open to all civil society groups and organizations, with the exception of individuals that could not be represented by civil society organizations and member of parties and the government. Each departmental forum took the recommendations of the regional preparation meetings into account and discussed in established working groups on the decided subject areas to pass a final catalogue. These "catalogues" informed the working groups in a final national forum that analyzed and discussed the results of the regional fora. In total more than 800 organizations participated.

Structure of the civil-society led forum process in Bolivia in 2000 ("Foro Jubileo 2000")[193]*:*

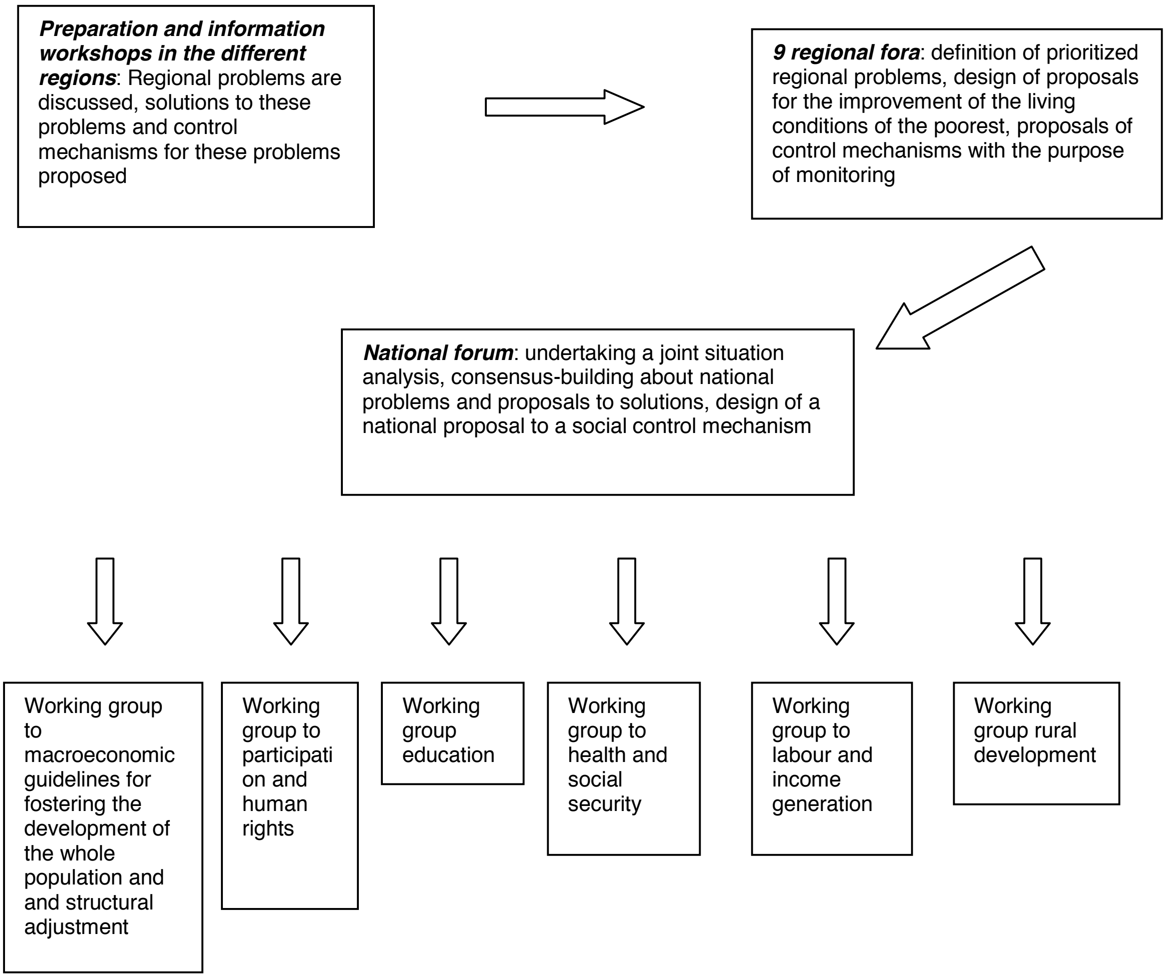
189 For methodological information about the UPPAP see also: *Participatory Poverty* Diagnostics, Tools and Practices, p. 266 ff., http://siteresources.worldbank.org/INTEMPOWERMENT/Resources/486312-1098123240580/tool20.pdf

190 Walter Eberlei: Stakeholder Participation in Poverty Reduction, in: Walter Eberlei (Ed.): INEF Report 86/2007, Stakeholder Participation in poverty Reduction, p.7.

191 See information on Bolivia and HIPC II on: http://www.bistum-hildesheim.de/bho/dcms/sites/bistum/gesellschaft/weltkirche/bolivienpartnerschaft/boliviennetzwerk/chronik.html.

192 Tokarski, Irene (2006): „Kirche und Partizipation in Bolivien – Die Option für die Armen der bolivianischen Kirche im Partizipationsprozess zur Armutsreduzierungsstrategie PRSP", Berlin: LIT Verlag Münster, p. 174 f.

193 Tokarski, Irene (2006): „Kirche und Partizipation in Bolivien – Die Option für die Armen der bolivianischen Kirche im Partizipationsprozess zur Armutsreduzierungsstrategie PRSP", Berlin: LIT Verlag Münster, p. 176.



Such a structure could be implemented in Zimbabwe as well, with the focus on concerns associated with the debt problem that shall be brought to the panel, using a national forum as a public hearing structure that informs the panel in Harare and regional meetings in the capitals of the eight provinces and two cities with provincial status that inform in turn the national forum.

However, the case of Bolivia was clearly led by a highly capable and trusted church in Bolivia that also functioned as “public representative” for the fora. In Zimbabwe, a stakeholder that can mediate between the various social groups and whose credibility will ensure integration would be helpful for a smooth process. The panel has to ensure that regional experts of already mentioned and reputable civil society organizations for instance and/or independent international organizations such as amnesty international organize and observe the processes. The friends group could provide support here with funding or even suggesting regional experts with subject competence. Norwegian Church Aid could be such a supportive actor.

Moreover, technical skills are required for participation processes.[194] All people involved need a basic understanding of the rules of the participatory processes, political negotiation processes and of course background information on the central theme. The background information needs to be prepared according to the level of knowledge of the people involved in the process, which means to choose the right participatory methodology. In Zimbabwe this can be linked with traditional court- and meeting systems to include the poor part of the population as well. This system or cultural feature of the importance of “debate” among African people is called “Dare” in Zimbabwe (in “Shona”), in other languages, such as Zulu or Ndebele it is called “Indaba”. This “system” of how to debate important matters within a certain community has been successfully used by various institutions to convene large meetings at community level. The most recent example are meetings under the outreach process to gather peoples' views for the new constitution[195]. Other examples in rural areas include the civil society network ZIMCODD that convened meetings at village level to connect

194 Walter Eberlei: Stakeholder Participation in Poverty Reduction, in: Walter Eberlei (Ed.): INEF Report 86/2007, Stakeholder Participation in poverty Reduction, p.9.

195 Interview with Dakaray Matanga, debt expert of AFRODAD, by E-Mail on the 22nd of June 2012.

with small scale cotton growers. According to ZIMCODD, such meetings are more successful if they have the blessing and participation of local traditional leaders. The use of theatre and music can be a successful means to break down complex issues for poor communities in rural areas.

There is no blueprint approach for that. How a public hearing will be organized and who is going to participate as representative will certainly be a procedural “decision”.

Parliamentary involvement in participatory processes is seen as a significant problem and successful examples are hard to find[196]. It is clear that keeping the members of the parliament informed about ongoing debt restructuring processes is not enough. Quite the contrary, the parliament should fulfill its function of political oversight, lawmaking and representation of the population. But how can this be ensured in Zimbabwe? According to Section 50 of the constitution of Zimbabwe, the parliament “[...] shall make laws for the peace, order and good government of Zimbabwe”[197]. To fulfill this task, it is necessary to systematically involve members of the parliament on all levels of the participation process. Consultation rounds, standing committees or all-party meetings on the debt issues could be useful instruments. Workshops for members of the parliament could serve as the necessary empowerment for their participation. One way of encouraging parliament to participate at the process is their involvement in setting up a repayment plan on behalf of the state[198] which is then assessed by the panel and given to discussion to other stakeholders. The participation of civil society in the discussions is one key condition for the panel to accept the repayment plan.

196 Walter Eberlei: “Stakeholder Participation in Poverty Reduction”, in: Walter Eberlei (Ed.): INEF Report 86/2007, Stakeholder Participation in poverty Reduction, p.8.

197 Constitution Select Committee (COPAC) Zimbabwe: Parliament of Zimbabwe, http://www.copac.org.zw/home/parlaiment-of-zimbabwe.html

198 This is proposed by the Law School of the University of Pennsylvania (David A. Skeel Jr. (2011): “State Bankruptcy from the Ground Up” NELLCO Legal Scholarship Repository, p. 15 ff.

III. Concluding remarks

This paper has aimed at illustrating how a flexible, fair and transparent debt workout could look like for the particular country case Zimbabwe, considering steps that the debtor government and a future arbitration panel would need to take in order to find a fair and transparent solution for all parties involved. The illustrated steps were our suggestions, mainly based on features from existing academic proposals on ad-hoc debt arbitration processes, in particular the proposal for a Fair and Transparent Arbitration Process (FTAP). This goes back to the Austrian economist Kunibert Raffer[199]. The FTAP proposal draws on elements of already existing insolvency schemes (the Chapter 9 of the US Insolvency Code which regulates insolvencies of municipalities, to be precise) whose elements are aligned to the particular situation of soverein debtors.

Other major proposals call for the establishment of an international insolvency court which is a more formalized and legalized procedure[200].

Wordings, especially within the international NGO sphere, for mechanisms to address state insolvency significantly differ.

Although existing proposals may differ in significant details such as ad-hoc or formalized nature of the process and details in implementation, it is however important that the essential principles such as impartiality in decision making, impartiality in assessment of debtor's situation and the comprehensive treatment of all creditors are guiding and inherent in those proposed concepts.

An overview of major proposals for further exploration is given in: Kaiser Jürgen (2010): "Resolving Sovereign Debt Crises: Towards a Fair and Transparent International Insolvency Framework", Friedrich-Ebert-Stiftung, Study within "Dialogue on Globalization", accessible via http://library.fes.de/pdf-files/iez/07497.pdf.

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199 Raffer, Kunibert (1993): "What's Good for the United States Must Be Good for the World. Advocating International Chapter 9 Insolvency", in From Cancún to Vienna. International Development in a New World, ed. Bruno Kreisky Forum for International Dialogue. Vienna, 64-74.

200 See for instance: the proposal of an International Board of Arbitration for Sovereign Debt (Acosta, A. and O. Ugarteche (2003): "A favor de un tribunal internacional de arbitraje de deuda soberana", http://www.latindadd.org), or the proposal for establishing a sovereign debt tribunal under the auspices of the United Nations (Kargman, S.T. and Paulus, C. (2008): "Reforming the Process of Sovereign Debt Restructuring: A Proposal for a Sovereign Debt Tribunal", UNDESA. April 8/9).