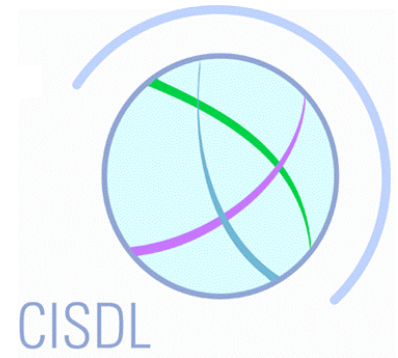


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CISDL WORKING PAPER:

Advancing the Odious Debt Doctrine (Executive Summary)

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Chapter One: The Odious Debt Doctrine Under International Law: Definition, Evidence and Issues Concerning Application (Jeff King)

I. Introduction

This Chapter is concerned with three distinct projects: (1) defining the doctrine as it has been presented in the literature thus far; (2) examining the support for the doctrine under international law; and (3) examining problematic aspects of applying the doctrine under legal settings, and proposed solutions thereto. This executive summary is intended to provide the reader with an introduction to the main discussions under each section, and to provide a background to the research as well as further suggestions for improving it. Throughout it should be recalled that applying the doctrine in a legal manner requires that it be defined precisely. Doing so may result in a more restrictive definition than some activists may wish rightfully to adopt. Finally, one may wish to skim through the table of contents of the paper before or while reading this summary.

The odious debt claim involves two assertions: (1) a *definitional claim* that ‘odious debts’ exist under certain conditions, and (2) a *legal claim* that ‘odious debts’ are not enforceable against the alleged debtor state under international law.

II. Definition of Odious Debt

As we are concerned with making a legal argument, the very definition of the doctrine is tailored to suit the requirements of a judicially enforceable claim. The activist may well want to adopt a less restrictive definition, but would be advised to keep the comprehensive one offered when considering legal avenues. In defining the doctrine, I have read all of the relevant accessible legal literature on the doctrine, and synthesized the relevant comments such that the views of each of the authors are taken into account. Therefore, the definition is not my own, but rather a synthesis of existing ‘legally recognizable’¹ opinions. That investigation yields the following conclusion:

‘Odious debts are those contracted against the interests of the population of a state, without its consent and with the full awareness of the creditor.’

This requires three conditions:

1. *Absence of Consent*: The population must not have consented to the transaction in question. This is so because it is unlikely that the law would forbid a person from willingly entering into a contract that is detrimental to him or her. With dictatorial regimes this requirement presents few problems, while with democratic ones it could pose one. That issue is considered in Section IV.
2. *Absence of Benefit*: According to the applicable writings, there must be absence of benefit to the population in two ways: (1) in the purpose of the transaction and (2) in fact. The purpose requirement refers to the fact that creditors should not be punished for good faith loans that were misspent by corrupt governments, and the

¹ By ‘legally recognizable’ I mean that the sources are the kinds that may be cited before tribunals. There is an informal hierarchy of such sources, which roughly amounts to (1) treaties, (2) state practice, (3) judicial decisions, (4) writings of recognized publicists, namely, those writing recognized legal texts or in recognized academic journals, and (5) the general principles of law common to many nations.

fact requirement refers to the principle that populations that benefit in fact from bad faith loans are still required to repay them (unjust enrichment).

3. *Creditor Awareness*: This requirement stipulates that the creditor must be aware of the absence of consent and benefit. There are several standards that may be employed for measuring 'awareness', and luckily domestic law provides a sufficiently broad definition of 'awareness' to capture those creditors that shut their eyes to the obvious. That issue is discussed in Section IV.

A. Types of Odious Debts

Three types of odious debts have been identified by the authors:

1. *Hostile Debts*: debts that are actively aggressive against the interests of a population (e.g. conquest, colonisation, war, suppressing secessionist attempts).
2. *War Debts*: debts contracted by a state for the purpose of funding a war, which it eventually loses. The victor is not considered obliged to repay.
3. *Third-World Debts Not in the Interests of the Population*: This title refers to the new category of debts that were neither hostile nor war debts, but were simply harmful burdens assumed by a state but for which the population received no benefit. It is this category with which we are primarily concerned.

III. Evidence Under International Law

A. Type of Claim

The first point to note is that one should not claim that odious debts are illegal under international law. Such a claim would imply that states are legally bound to annul these debts, and that those governments that repaid them in the past were breaking the law when doing so. Rather, one should argue that odious debts are unenforceable under international law. That is, the doctrine of odious debt carves out a qualification to the generally accepted rule of repayment. It is in the form of the following statement: 'IF the government had contracted a debt under the following conditions, THEN it is not obliged to repay it.' Legal shorthand for this is that the debt is unenforceable under international law. Practically, this means trying to show that in cases of odious debts, there is no settled international law requiring repayment.

B. Categories of Recognised Sources of International Law

International law recognises the following sources:

Treaties: There is little support for the doctrine under treaties. The doctrine was considered for inclusion in an important Convention on state succession (i.e. when a state's sovereignty is passed from one entity/government to another), but was ultimately rejected. This is a double-edged sword: on the one hand, it shows that the doctrine was accepted widely enough to make it into a draft, while on the other it was determinedly struck from the final Convention. Another problem is that the adopted Convention was itself highly unpopular, and still does not have the number of ratifications required to bring it into force.

Customary International Law: A quick skim over the table of contents of this section indicates eleven examples in which state practice seems to support directly or indirectly the doctrine of odious debts. It is important to note that there are at least two missing examples, namely, the Ethiopian and Iranian cases of debt repudiation. The latter is a particularly direct contemporary application of the doctrine, and would probably be well supportive of the doctrine. Not all of the examples are without difficulties, however. In several of them, I wrestle with issues that might be deemed fatal to finding them supportive. In order to evaluate their weight as evidence, it will be necessary to consult international lawyers with extensive experience in litigation.

Another issue dealt with under this category is the question of whether states that *have* repaid their ‘odious debts’, did so because they felt obliged by law, or rather because they were too concerned about the fallout of not doing so. If it were the latter, then the *opinio juris* would not accompany repayment and the existence of a settled rule of repayment in those cases can be challenged.

Judicial Decisions and Writings of International Law Experts: This section of the paper is brief because the views of the authors and arbitrators have generally been taken into account in defining odious debt. I propose to categorize them to some extent, so that the potential plaintiff cites the correct source for a particular point.

Regarding judicial decisions, the Federal Court of Argentina recently declared that part of the former regime’s debts were odious for the population. That decision should be obtained and reviewed (perhaps translated). Also, one may note that the book, “Odious Debts” by Patricia Adams is not listed. The reason for this is that her book does not purport to be a declaration of the state of law, but rather a description of dictators’ debts that conform with Sack’s doctrine. The book therefore does not appear to add weight to the doctrine’s legal status.

General Principles of Law: Here I consider the legal doctrines of unjust enrichment and abuse of rights. Unjust enrichment is the claim that one cannot receive a benefit at another’s expense without conferring a reciprocal benefit. The doctrine of abuse of rights stipulates that one cannot exercise one’s rights in an excessive and unreasonable manner, such that it harms the rights of another. Both doctrines have a settled history in domestic law and international law, but the extent to which they are applicable to cases of odious debts may be questioned. I suggest that they are better viewed as supplementary arguments upon which less emphasis should be placed. (It is implicit in this claim that a tribunal may find it quite far-fetched to try to justify the odious debts doctrine on these bases).

Another argument that is far more convincing, however, is the law of domestic agency. Domestic law contains provisions that govern the way in which one person can create legal obligations for another. This arrangement is similar in international law, where the government creates legally binding obligations for the state, the latter of which includes its population. Agency law is useful in that the very power of making binding commitments for another is considered to carry with it the special responsibility of acting in the interests of that person. This is known as a fiduciary obligation under the common law, and has its equivalent under the civil law. A fiduciary obligation is an obligation that exists when one person has the legal obligation to act for the benefit of another. Classic relationships include doctors and patients, lawyers and clients, corporations and shareholders and principals and agents.

Even more promising in this respect is that under domestic law, a third party can be held liable for assisting an agent in the breach of his obligations toward his principal. So if a bank were to knowingly assist an executive defraud a corporation, that bank can be held liable for the losses of the principal. The law requires that the third party ‘know’ of the breach of obligation, and thus defines ‘knowledge’ for this

purpose. This definition includes actual awareness and wilfully shutting ones' eyes to the obvious. This domestic law analogy is probably the single most convincing argument in favour of odious debt that we have yet come across, and the section should be read carefully notwithstanding the admittedly difficult legal nature of the material.

IV. Problematic Aspects and Proposed Solutions

Here I attempt to pre-empt what I view as the chief arguments that will be offered in response to the legal claim. The opponent may argue that even if the foregoing were true, the doctrine would be impossible to apply in practice because of problems assessing consent, benefit and awareness, and because of the cardinal importance of the difference between state succession and government succession. The conclusions may be summarized briefly as follows:

Absence of Consent: Once the absence of benefit to the population has been proved, the burden shifts to the creditor to prove that there was in fact consent to the transaction in question.

Absence of Benefit:

Purpose: Five categories of loans for specific 'odious' reasons are given. In cases where the loans are for no particular reason at all, the question turns to the nature of the regime. Where it is dictatorial or quasi-dictatorial, it is presumptively without benefit to the population. Where democratic or quasi-democratic, the reverse presumption operates.

Fact: The debtor state bears the burden for establishing absence of benefit. Four categories of disbursements are given as prima facie cases of spending that is not in the interests of the population. Where the loaned funds were applied to general government revenue, the government budgets for the respective years must be classified according to spending on (1) oppressive, (2) neutral and (3) beneficial institutions. The issues of the indeterminacy of this procedure and absence of governmental records are addressed.

Creditor Awareness: Three standards are borrowed from the common law of Canada and the United Kingdom: (i) actual knowledge; (ii) wilfully shutting one's eyes to the obvious; and (iii) wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make.

Conclusion

Altogether, the paper is long and somewhat technical, as it aims to be suitable for academic legal writing. It is meant to define and support the doctrine in a sufficiently legal way, and will likely be a better reference paper than an inspiring description of the doctrine. Nonetheless, it is sincerely hoped that this research will assist you to advocate the doctrine in support of the unjustly indebted countries to which it applies.

The analysis contained in Chapter I indicates that the doctrine of odious debt can be clearly defined, has a fair bit of support under the traditional categories of international law, and can be modified to withstand *prima facie* theoretical objections. The results are almost surprising. Upon hearing of the doctrine, anyone familiar with public international law is likely to be virtually certain that the doctrine could never be

applied in practice. However, after examining the state practice, general principles of law and writings and judicial decisions, it seems that there is much more material available to make such an argument than one would initially think. If nothing else, I hope that this paper has succeeded in establishing that there are *legally* persuasive arguments in favour of the morally compelling doctrine of odious debt.

Chapter Two: Sites and Strategic Legal Options for Addressing Illegitimate Debt (Ashfaq Khalfan)

Introduction

This Chapter outlines various legal avenues open to civil society organizations and Southern states for advancing the odious debt campaign and the campaign against debts that violate economic and social rights. It assesses the value of each of these approaches. One should note at the outset that one must separately address the debts of Southern states owed to other states, to international financial institutions (IFIs) and to private banks located in other countries. Each of these categories of creditors raise different issues in relation to the possibilities for redress.

The paper analyses the relationship of political efforts and their relationship to legal approaches. It then examines a variety of judicial approaches to address odious debt issues. Finally, it addresses the utility of addressing illegitimate debt through the prism of economic and social rights and of using the UN Committee on Economic, Social and Cultural Rights (CESR). This summary lists the main issues and some of the conclusions reached.

I. Political Approaches

It is theoretically possible for debtor states to unilaterally and collectively cancel illegitimate debts. The main obstacle to such action is the ability of creditor states and organizations to suspend foreign aid and lending. This danger may be mitigated in two ways. First, the assessment of odious and other illegitimate debt must be seen to be fair and to follow consistent principles. Second, it is necessary that there be a high degree of international acceptance of the odious debt doctrine among most Southern states and at least some Northern states.

It is suggested in this paper that the decision of an influential judicial body in favour of the odious debt doctrine may have influence beyond its jurisdiction so as to legitimize the general application of the doctrine. Such a decision could have a significant effect on the bargaining dynamic between creditor and debtor states, possibly leading to debt write-downs. In addition, by increasing the prospect of further repudiations, it could create an incentive for the creation of an international tribunal to assess illegitimate debt claims. Finally, by setting out the parameters of acceptable policy, such a decision would facilitate efforts by Southern states to develop common stances on this issue.

In this Chapter, I examine the ways in which civil society groups may play a role in generating and popularizing principles that influence the understanding and development of international law. An example can be taken from the civil society effort to declare the use or threat of use of nuclear weapons as illegal, using popular tribunals, mass mobilization and eventually taking the case to the International Court of Justice.

II. Judicial Approaches

This Chapter demonstrates that there are many possible sites for litigation. This situation should be seen as an opportunity for advocates of debt cancellation. It is necessary to identify the best venues in which to create precedents that will lead to the resolution of disputes in political fora and to potentially stimulate the creation of an international tribunal on this issue. In selecting the first test case(s), the following questions should be considered:

- 1). The possible risks involved in terms of economic retaliation against the plaintiff and the effect of a negative decision,
- 2). The procedural rules which limit certain disputes to certain fora, and
- 3). The extent to which a particular jurisdiction will be favourable to the odious debt doctrine.

The dispute resolution body that may be approached in relation to a particular dispute will depend on the nature of the lender – whether it is a state, an international financial institution (IFI) or a private institution – and also on whether the loan agreement includes a choice of forum clause (such clauses attempt to specify which court can decide this issue).

An important related issue will be which body of law will be applied – this may be international law or the domestic law of any state. This issue is important since there is more known support for the doctrine in international law than in domestic law. However, as noted in Chapter One by Jeff King, some doctrines that are common to most domestic laws show promise in supporting the odious debts doctrine. There is therefore a significant need for more research on the treatment of odious debt by the domestic laws of a number of key states.

A. The International Court of Justice

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

Another advantage of the ICJ is that it can provide an Advisory Opinion. This decision would not be binding in itself, but would provide legitimacy to the odious debt doctrine, thereby allowing it to be applied to individual situations. An Advisory Opinion can be framed in general terms, thereby entailing less risk on the part of any one debtor state and allowing the Court to address the validity of the doctrine itself, rather than any one particular dispute.

Recourse to the Court is limited. The states involved must normally consent to the ICJ jurisdiction. The exceptions are where all the states before the court have accepted in advance the ‘compulsory jurisdiction’ of the ICJ, or where a treaty between them specifies recourse to the ICJ. There are four strategic options that civil society can attempt to utilize (not in order of preference):

‘Sweetheart’ Litigation: A creditor state, whether developed or developing, could be approached to allow a case to proceed against it, so as to set a precedent. This is most

realistic in situations where the debts were lent by a previous regime within the creditor state (loans by states such as South Africa or Brazil would be appropriate where these have not yet been cancelled). However, this option on its own may affect the international credit rating of the debtor. This approach may be combined with option (iv) below.

Advisory Opinion requested by General Assembly: This is probably the most desirable option. However, it would require the support of a majority of states in the General Assembly (UNGA), who choose to vote on the issue. This would require the active support of roughly 60 states. The campaign against nuclear weapons succeeded in gaining such a UNGA request, mainly by cultivating certain key states as allies and by originally raising the issue within a political body that was insulated from diplomatic pressure of nuclear states.

The debt cancellation movement should consider using bodies such as the Non-Aligned Movement and the G-77 for this purpose. Although many Southern governments will not be comfortable about the conditionality that necessarily accompanies the odious debt doctrine, this may be mitigated by emphasizing the doctrine's potential application to the apartheid debts of South Africa.

Advisory Opinion requested by U.N. Agency: UN bodies such as the FAO, ILO, WHO, UNESCO, the World Bank and IMF and ECOSOC have the ability to request an advisory opinion. By virtue of their institutional ethos, some bodies may be more willing than the General Assembly to make a request. It should be noted, however, that the UNDP and UNCTAD are not empowered to make such a request. However, the ICJ will only entertain such a request if it determines that the issue falls within the scope of the agency's duties. The World Health Organisation's request to the ICJ for an Advisory Opinion on the legality of nuclear weapons was rejected on this basis. However, it must be noted that the commencement of the campaign in the WHO created a momentum that convinced the General Assembly to make a successful request to the ICJ.

Joint Suit by a Group of States Against One Creditor State: This approach has the advantage of minimizing the risk taken by any one state. However, with a large number of states, each of the parties will need to have recognized the compulsory jurisdiction of the ICJ. Failing this, the consent of the creditor to the case is required. This will normally only be possible in a hostile context if some of the debtor states are large middle-income countries that can make credible threats of repudiation.

Barring unusual circumstances, only states can be parties to an ICJ case. ICJ cases will be judged under international law. A small proportion of inter-state loan contracts may specify that the case will be decided under the laws of a domestic state. It is an open question as to whether the odious nature of a contract allows a choice of law (or a choice of forum) clause in a contract to be struck down. Such situations are best avoided in the first test cases.

B. Arbitration

This type of dispute resolution will be the norm in contracts with International Financial Institutions (IFIs). It is also possible in contracts with states or private bodies. Arbitration always rests on the consent of both parties, expressed in the contract or at the time of the dispute. The advantage of such tribunals is that they are faster, are less public (thereby reducing somewhat the exposure of the debtor to retaliation) and are low-risk – that is to say, a negative judgment rendered here would not be as much of

a setback as a negative ICJ judgment. An arbitral venue may be used so as to indicate a way forward and to shed light on useful arguments for a future case.

The disadvantage is that both parties have more control over the choice of the arbitrators. This is less important for World Bank contracts where each party names one arbitrator, and these two arbitrators select the third arbitrator. In the absence of consensus, the third member of the court is nominated by the President of the ICJ, or the U.N. Secretary General. The creditor therefore cannot screen out certain arbitrators from the Tribunal.

Arbitration tribunals are less likely than the ICJ to adopt non-status quo decisions, but more likely do so than domestic courts, since loan contracts do not normally provide for appeals to arbitration. The law that is applied in arbitration is normally international law, where there is no choice of law clause specifying a domestic law.

C. Domestic Courts

The domestic courts and the laws of creditor states are selected in the majority of contracts with Southern debtors. New York and England are the most common jurisdictions selected. Some loan contracts may specify litigation within the debtor state. However, the ratification of a debt repudiation within such a court is unlikely to carry much weight among creditor nations and is best avoided. Nevertheless, debt litigation within debtor states, such as seen in 2000 in Argentina, may be useful for the purpose of identifying odious debt and putting pressure on a state to take action on it.

The primary question for debtor states with odious debts is to determine what the likely decision of the courts of that jurisdiction is likely to be. This should include firstly a determination of what the domestic laws treatment of odious debt is likely to be. Second, the extent to which international law is incorporated into the domestic law is relevant. Jurisdictions such as the U.S. and U.K. are less open to such incorporation than nations such as Italy. Should a court recognize odious debt doctrines, some states can legislate to exclude such determinations. Third, the general attitude of the courts of a jurisdiction should be considered. New York case law, for example, indicates that the courts self-consciously refer to the importance of maintaining New York as a centre of lending and that this requires them to safeguard the sanctity of contracts.

It may be possible for a debtor state to avoid its case being heard in an inhospitable forum in spite of a choice of forum and law clause. In order to do this, it will have to find another forum that has a reasonable relationship to the contract and which is willing to overturn the terms of the contract either on public policy grounds, the fraud of the creditor or on the basis that the choice of forum or law clause in an odious loan is itself 'odious.' Some jurisdictions, such as England, will refuse to hear cases where England was chosen as jurisdiction so as to avoid mandatory rules of public order in another forum. However, it should be noted that such defences are exceptional.

Another possibility is for a debtor state to assert doctrines of sovereign immunity, act of state and comity, all of which refer to the principle that courts of one state cannot judge the acts of another state. In the US, and in most Northern states, such doctrines are often not interpreted to apply to loan contracts, which are seen as commercial rather than state acts. However, sovereign immunity is relevant at the time of seizure of assets. It would not be advisable for debtor states to rely on these defences on their own, since this would harm international confidence in its ability to meet its legal commitments. However, such defences may be used so as to force the dispute to a more neutral forum, including international tribunals.

Civil society organizations have a major role to play in using the courts of debtor states to force debtor governments into action, including as litigants where the procedural rules permit. They may also mobilize support and resources for cases internationally and in creditor states. They may be able to submit *amicus curiae* briefs to such courts. However, on procedural grounds, it is unlikely that they will be able to themselves bring such cases to international and creditor courts.

III. Treaty Monitoring Bodies: The Committee on Economic, Social and Cultural Rights (CESR)

The Committee on Economic, Social and Cultural Rights asks for a report from states that are party to the International Covenant on Economic, Social and Cultural Rights (ICESCR) every 5 years on the measures that they have taken to implement the Covenant. The Committee has tended to actively solicit parallel reports from civil society organisations from the country in question and to hear their oral opinions. It would be useful for the debt relief movement to engage this process and make representations indicating whether a lender country's debt collection policies for specific countries undermines or reverses progress towards the realisation of economic, social and cultural rights in such debtor countries. Such efforts would assist in the collection of useful data on this issue and it can be expected that the report of the CESCR will receive significant coverage in the media.

The CESCR has previously commented on the possible need for debt relief initiatives so as to protect economic, social and cultural rights in developing states. The Covenant lays an obligation on states to engage in international cooperation to the maximum of their available resources. This does not necessarily translate into a concrete obligation to give aid. However, in certain circumstances, it may be possible to identify an obligation on a creditor to cancel debt where to not do so would necessarily lead to severe setbacks to the realisation of basic economic and social rights in a debtor state. If this issue was brought to its attention, the CESCR could encourage the state whose performance it is reviewing to cancel certain debts and may even term the failure to do so a violation of the Covenant.

Conclusion

This essay demonstrates that there exist a large number of strategic options for the debt cancellation movement to pursue a legal approach, in judicial, political and human rights treaty bodies. Careful analysis will be required before selecting any of the judicial fora. For a large number of debts, this choice will be limited for procedural reasons and due to the terms of the contract. However, this is of lesser concern given that positive determinations on odious debt are only required in some of these fora in relation to some contracts. Once the odious debt doctrine has greater legitimacy and acceptance, there are likely to be more negotiated settlements and possibly a specialized international tribunal.

The odious debt and economic and social rights approaches must be seen as parallel, but complementary, since they have different justifications, often address different debts and will have different effects. Both approaches should be pursued simultaneously.

Chapter Three: The Odious Debt Doctrine and International Public Policy: Assessing the Options (Bryan Thomas)

Introduction

This essay examines the applicability of the doctrine of odious debts to LDC debt of the 1970s and early 1980s. The essay is divided into two parts. Part one focuses on private lending from commercial banks; part two focuses on lending from International Financial Institutions (IFIs). The paper has two aims:

1. To examine the doctrine of odious debts from the point of view of international public policy;
2. To provide a preliminary assessment of the viability of applying the doctrine of odious debts to LDC debts from the period of 1971-1982.

On the first question, it is argued that the doctrine, if made a fixture of international law, might help to avert future debt crises. On the second, it is suggested that attempts to invoke the doctrine will face considerable legal obstacles, which may or may not be surmountable.

I. Private Lending: Past, Present and Future

Debt crises are nothing new. For centuries, sovereigns have over-borrowed, private lenders have over-loaned, and crises have arisen as a result. What *is* new, in the modern era, is that lenders are now far better equipped to ensure that their loans are used for legitimate purposes. As such, lenders can now be held to a higher standard of responsibility for their actions. The doctrine of odious debts requires that lenders be subjectively aware of the odious end-uses of their loans. This requirement is more easily met in the modern era than in past centuries.

According to the conventional explanation, the 1970s surge in lending to developing countries was triggered by a dramatic surge in oil prices. OPEC nations deposited their newfound riches into commercial bank accounts, and commercial banks subsequently loaned these funds to developing countries. In time, predictions of developing country economic growth were disappointed and lenders backed out, prompting the 1982 debt crisis. This explanation is controversial, however.

Commercial banks drastically over-extended themselves throughout this period. Often, it seems, commercial banks turned a blind eye to obvious corruption. Local bank officers (within borrower countries) were held to a low standard of accountability, and so tended to rubber-stamp loans, comfortable that their careers would have advanced by the time any problems arose. Senior bank officials were pleased to extend loans: substantial front end fees were often paid by lenders, and the value of the loan appeared as an asset on the banks' current balance sheets.

Commercial lenders from this period no doubt expected that their loan contracts were legally enforceable. The doctrine of sovereign immunity – the immunity of states from the jurisdiction of the courts of other states – has steadily eroded over the course of the past century, and moreover, most of the loan contracts from the period in question contained explicit waivers of sovereign immunity. Still, commercial lenders for the most part have chosen not to sue on developing country

debt, for fear that doing so would only drive Southern states into a bunker mentality, making matters worse for lenders.

There is a serious concern that the doctrine of odious debts, even if successfully invoked to cancel the debt of the 1970s, would cause more problems than it solves. The concern is that any country invoking the doctrine will be punished by international financial markets. However, there is a risk of overstating this point. First, Southern countries frequently pay out more to service their debts than they borrow on international financial markets, so they may be wise (from a strictly economic perspective) to simply repudiate their debts unilaterally and endure the 'punishment.' Second, successful invocation of the doctrine of odious debts is not equivalent to unilateral repudiation. Legitimate creditors need only fear the latter.

Any attempt to invoke the doctrine of odious debts is seriously complicated by the emergence of debt restructuring agreements and secondary markets for debt.

Restructuring agreements were entered into consensually by developing country governments and private lenders. These agreements consolidated outstanding loans, and typically contained *cross-default clauses* and *sharing clauses*. Briefly, *cross-default clauses* stipulate that a default vis-à-vis any single creditor (party to the restructuring agreement) constitutes a default vis-à-vis *all* creditors. *Sharing clauses* stipulate that payments made from the debtor to any single creditor be shared (on a pro-rated basis) with all creditors. In effect, creditors had their legal interests consolidated by restructuring agreements. Debtors were likewise consolidated by these agreements. Typically, private and public debtors would participate, and a nation's debt would be rolled into one (lengthy) new contract.

Obviously, these restructuring agreements complicate matters from the perspective of the doctrine of odious debts: odious and non-odious debts may now be rolled together. Tracking which loans (of any given country) were odious will be extremely difficult.

Restructuring agreements had the effect of making Southern debt fungible: one lender's \$100 of debt from, say, Mexico is worth as much (i.e., involves the same risks) as any other lender's \$100 of Mexican debt. As a result, a speculative secondary market in developing country debt emerged in the 1980s. This also complicates things from the point of view of the doctrine of odious debts. It appears that the legal mechanism by which debts are sold on the secondary market may have the effect of extinguishing the original loan contract and creating a new one in its stead. Thus, it may be that those original odious debt contracts from the 1970s are now extinguished, replaced by new (potentially non-odious) ones. This is a complicated legal matter that may present substantial difficulties for those attempting to invoke the doctrine. Where debts have been converted into bonds - which is common - these difficulties become even more substantial.

II. International Financial Institutions (IFIs)

It is plain that IFIs possess juridical personality, and so may be brought before the courts by countries wanting to invoke the doctrine of odious debts. IFI loan agreements, however, stipulate that disputes be resolved by an International Arbitration Tribunal (See Section B. 2 of Chapter II).

The World Bank is composed of five sub-groups: *The International Bank for Reconstruction and Development (IBRD)*; *The International Development Agency (IDA)*; *The International Finance Corporation (IFC)*; *The Multilateral Investment Guarantee Agency (MIGA)*; *International Centre for Investment Dispute Settlement (ICSID)*. The IBRD is the most important, from the point of view of Southern state borrowing. The World Bank is the single largest creditor, accounting for 1/7th of developing country debt.

World Bank lending is and has always been, from a legal perspective, carefully monitored and orchestrated. Nevertheless, World Bank officials, in recent years, have conceded that in the latter part of the 20th Century, officials with the Bank turned a blind eye to corruption. There is little doubt that some portion of developing country debt contracted with the World Bank is odious.

Because World Bank officials were often well aware of the end-uses of their loans, subjective awareness of odious lending may be relatively easy to establish. World Bank officials have, in recent years, essentially confessed that much of the post-war lending was odious. Furthermore, World Bank loans have not been sold on the secondary market, so the forensic problems involved in applying the odious debt doctrine to private lending may be less acute with IFI lending. Indeed, World Bank loans may offer a promising test-case for the resurrection of the doctrine of odious debts.

Loans from the other major IFI, the IMF, offer a far less promising target for the doctrine of odious debts. IMF loans are intended to serve a strictly macroeconomic function—i.e., to correct balance of trade problems—and so IMF officials had less direct involvement in the end uses of loans. Creditor's subjective awareness (of odious end-uses) may therefore be difficult to establish. However, IMF lending forms a far smaller proportion of debt owed to the IFIs.