Establishment of a Debt Tribunal

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AFRODAD

African Forum and Network on Debt and Development

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About AFRODAD

AFRODAD Vision

AFRODAD aspires for an equitable and sustainable development process leading to a prosperous Africa.

AFRODAD Mission

To secure policies that will redress the African debt crisis based on a human rights value system.

AFRODAD Objectives include the following:

1 To enhance efficient and effective management and use of resources by African governments;

2 To secure a paradigm shift in the international socio-economic and political world order to a development process that addresses the needs and aspirations of the majority of the people in the world.

3 To facilitate dialogue between civil society and governments on issues related to Debt and development in Africa and elsewhere.

From the vision and the mission statements and from our objectives, it is clear that the Debt crisis, apart from being a political, economic and structural issue, has an intrinsic link to human rights. This forms the guiding philosophy for our work on Debt and the need to have African external debts cancelled for poverty eradication and attainment of social and economic justice. Furthermore, the principle of equity must of necessity apply and in this regard, responsibility of creditors and debtors in the debt crisis should be acknowledged and assumed by the parties. When this is not done, it is a reflection of failure of governance mechanisms at the global level that protect the interests of the weaker nations. The Transparent Arbitration mechanism proposed by AFRODAD as one way of dealing with the debt crisis finds a fundamental basis in this respect.

AFRODAD aspires for an African and global society that is just (equal access to and fair distribution of resources), respects human rights and promotes popular participation as a fundamental right of citizens (Arusha Declaration of 1980). In this light, African society should have the space in the global development arena to generate its own solutions, uphold good values that ensure that its development process is owned and driven by its people and not dominated by markets/profits and international financial institutions.

AFRODAD is governed by a Board of seven people from the five regions of Africa, namely East, Central, West, Southern and the North. The Board meets twice a year. The Secretariat, based in Harare, Zimbabwe, has a staff compliment of Seven programme and five support staff.

List of Abbreviations

AFRODAD	African Forum and Network on Debt and Development
IMF	International monetary fund
DC	Developing countries
IFI	International Financial Institutions
IMF	International Monetary Fund
HIPC	Heavily Indebted Poor Countries
LDCI	Least Developed Countries
PRSP	Poverty Reduction Strategy Paper
OAU	Organization of African Union
SAP	Structural Adjustment Programme
UN	United Nations
UNCTAD	United Nations Conference for Trade and Development
UNCITRAL	United Nations Commission on International Law
WB	World Bank

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Preface

Debt cancellation and setting the African continent on the part to development remains crucial on the global agenda. Nowhere is debt cancellation needed more than in Africa. Debt has continued to tear down schools, hospitals and clinics, its effects have been more devastating than war itself. Debt in Africa has undermined development strategies, eroded the capacity of the states to respond adequately to the social services needs of its people.

The current decision-making process, in which creditors play the role of plaintiff, judge and jury, needs urgent revision. The Monterrey Consensus and the Millennium Development Goal 8 rightly encourage 'exploring innovative mechanisms to comprehensively address problems of developing countries, including middle-income countries and countries with economies in transition'.

Despite many debt relief initiatives that have been given, the 2005 G8 Gleneagles Multilateral Debt Relief Initiative being the latest, a sustainable solution to Africa's debt crisis is elusive. This piece of work provides a timely historical trace of the initiatives that have been put forward in the past and why they have failed to be the panacea. It looks into what a fair and transparent arbitration process can do in resolving the African Debt crisis. Above all, it points out the rationale for and what arbitration in the case of the Debt question means. It clearly spells out the role of the international community in Africa's debt question - the United Nations, the African Union and regional economic communities/blocs. It argues among other things that an appropriate debt arbitration mechanism could also help to lessen dependence on the IMF.

We do hope that this piece of work will be read by all those who are concerned with Africa and its future, and its policy recommendations are highly relevant to all the world's progressive minds. By distributing this publication we hope to spark public debate about the most effective mechanism for handling the debt crisis in Africa.

Charles Mutasa
Executive Director, AFRODAD

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1.0 Introduction

Out of the world population of approximately six million people, the International Monetary Fund (IMF) estimates that about 86% live in the developing countries.[1] Some 2.8 billion people are estimated to be living on less than $2 a day; of these, 1.2 billion survive on less than $1 a day.[2] Yet, even these figures given by the World Bank and the IMF are unrealiable.[3] A study by the United Nations Conference for Trade and Development (UNCTAD) of Sub-Saharan African countries showed that the figures provided by these two institutions considerably underestimated the true numbers of the poor.[4] In addition, the annual income of the richest 1% of the world's population is equivalent to that of the poorest 57% of the planet.[5] Furthermore, the income of the richest 5% of people in the world, is 114 times higher than that of the poorest 5%.[6] In the final analysis and this is fundamental, the main problem is the oppression of one part of humankind (not exclusively located in the South) by another much smaller in number, but much more powerful.[7] This state of affairs is largely a result of the phenomenon of the world debt. The succeeding section will therefore consider the nature of this debt.

1.1 Nature of Debt

The total debt of a country is composed of internal debt (contracted within the country, for example a national bank and external debt (contracted with an outside creditor).[8] The focus of this study is on external debt. External debt involves mechanisms which can result in a real economic colonization.[9] The external debt of the Developing Countries (DC's) can be broken into public external debt and private external debt.[10] The former is contracted by public bodies - the state, local authorities or public companies - or by private bodies whose debt is guaranteed by the state.[11] The external public debt can be broken down into three parts depending on the nature of the creditors,[12] namely, multilateral, bilateral and private. The multilateral part is that lent by a multilateral institution such as the World Bank or the IMF.[13] The bilateral part is lent by another state; and the private part is lent by a private institution such as a bank or comes from financial markets.[14]

1.2 Signaficance of External Debt

The external debt is significant in international economic relations of states because the International Financial Institutions (IFIs) never cease to demand the repayment of the external debt. They place it as a priority in their pursuit of dialogue with the governments of indebted countries.[15]

Yet, the debt in the DC's has become far too great for their fragile economies and has crashed all attempts at development.[16] According to Kofi Annan, Secretary General of the United Nations (UN), in 2001, debt servicing took up an average of 38% of the budgets of Sub Saharan countries.[17] In any event, if governments follow the directives of the IMF, World Bank and other creditors, they have no choice but to institute strict budgetary austerity measures.[18] That means reducing public spending to a minimum in areas such as education, health, maintenance of infrastructure and reducing public investments in projects that generate employment as well as in housing and research and culture.[19] The debt problem is exarcebated by the fact that governments have to procure US dollars or other hard currency in which the colossal debt repayments must be made. To do this, priority is given to exports: the accelerated exploitation of natural resources (minerals, oil, gas etc) and the frantic development of cash crops (coffee, cocoa, cotton, tea, groundnuts, sugar, etc).[20] The debt mechanism enables the international financial institutions, the states of the North and the multinationals to take control of the economies of the DC's and to lay hands on their resources and wealth to the detriment of the local populations.[21] It is a new form of colonization regulated by the implementation of the structural adjustment policies.[22]

Decisions concerning the South are not made by the South, but in Washington (in the US Treasury, or at the head offices of the world Bank or the IMF), in Paris (at the head office of the Paris Club, the Group of creditors of the North or at the London Club), which represents the big banks of the North and does not always hold its meetings in London.[23] In 2001, the total amount repaid by the DCs to service their debts came to $382 billion.[24] These costly repayments deprive the DCs of precious resources to combat poverty efficiently.[25] It is clear that debt is the main obstacle to the fulfillment of basic human needs.[26]

1.3 Origins Of The Debt

The origins of debt can be traced to the period after the Second World War. After the second world war, the United States drew up the Marshall Plan for the reconstruction of Europe.[27] The United States massively invested in Europe. Consequently, in the 1960's European banks were flooded with dollars known as Eurodollars. The European Banks then began making loans on very favourable terms to the countries of the South which wanted to finance their development; especially the newly independent African States and the Latin American Countries.[28] From 1973, the increase in oil prices (known as the oil crisis) brought in comfortable revenues to the oil producing countries which in turn placed them in western banks.[29]

The Banks in turn offered to lend the "petrol dollars" to the countries of the South, with the incentive of low rates of interest.[30] All these loans from private banks constitute the private part of the external public debt of the DCs.[31] The northern states in 1973 - 1975, following the oil crisis, underwent their first general recession since the second world war.[32] It was hard to find takers for goods manufactured in the North because of the slump and the beginning of mass unemployment.[33] The rich countries then decided to endow the South with buying power so that they would buy goods from the North.[34] This was the reason for loans from state to state being often in the form of export credits or tied to aid.[35] This is how the bilateral part of the external debt was constituted.[36]

The third actor in the process of indebtness, is the World Bank. This institution founded in 1944 at Bretton Woods along with the IMF, considerably increased its loans to the Third World between 1968 and 1973.[37] It enticed the countries of the South to borrow massively to finance the modernization of their export apparatus and to draw them tightly into the world market.[38] These loans constituted the multilateral part of the external public debt.[39] Until the end of the 1970's, indebtedness remained sustainable for countries of the South because interest rates were low and the loans enabled them to produce more, to export more and thus to earn hard currency to pay the debt and interest.[40]

1.4 Debt Crisis

The situation changed drastically in 1980 - 1981, due to the very high interest rates imposed on the world by the United States and British governments on the one hand and the fall in the prices of raw materials on the other.[41] Since 1980, the external debt of the DCs has continued to rise: $600 billion in 1980; $1 450 billion in 1990 $2 150 in 1995; and about $2 450 billion in 2001. In response, IMF intervened on behalf of the governments of the rich countries. It made loans to enable the countries in crisis to manage to continue repaying their debts.[42] To give them continued access to world capital the IMF was in charge of setting up "bail out loans".[43] The loan was made to a country with payment difficulties on condition the money borrowed is used to repay the banks and the private creditors.[44]

Caught up in the debt spiral, the DCs often have no other alternatives other than to take out new loans to repay the previous ones.[45]

The IMF accepts to make further disbursements on condition that a country concerned agrees to follow the economic policy it dictates. These are the IMF conditionalities that are laid down in Structural Adjustment Programmes (SAPs). As a result of the SAPs, the borrower states are now under the control of the IMF and its ultra - liberal experts.[46] Thus, the rich countries' reaction to the debt crisis of 1980 - 1982, was to entrust the IMF and the World Bank with the task of imposing strict financial discipline on indebted countries.

This was based on two important tools: projects and Structural Adjustment Programmes (SAPs).[47] The projects chosen were those which integrated them in the global market to serve the interests of the multinationals of the North.[48] The SAP'S also known as the "Washington Consensus," place emphasis on statistics instead of the human aspect. They have had and are still having terrible consequences for the populations of the South.[49]

1.5 The Paris Club

The Paris Club is the name given to the group formed by nineteen creditor states (Western Europe, Canada, USA, Japan, Australia, and Russia), which meet about once a month at the French Ministry to make sure the indebted states keep up their repayments on the bilateral external debt.[50] These sessions, called "negotiations," always deal with countries one at a time under the attentive eye of the multilateral institutions.[51] In official terms the club's role is to negotiate the right solutions with countries in difficulty.[52] In reality the objective of the Paris Club is clear: to bring the maximum amount of money into the coffers of the creditor states of the North and prevent the debtor states from deferring payments, suspending them or worse still, canceling them. The Paris Club is not a development agency, but mainly a debt recovery agency.[53] The Paris Club has neither legal existence nor statutes.[54]

In other words, the Paris Club which conducts all the analyses and negotiations and implores the creditor countries to make decisions with grave consequences for the debtor countries who stand before them, does not actually exist.[55] Yet the club plays a fundamental role in allowing the states of the North to present a united front for debt recovery, while each debtor country is necessarily isolated.[56] As a Judge in its own case, the Paris Club is anything but democratic on the inside and opaque from the outside.[57] The club's logic is perfectly clear: It is part of the policy of debt management imposed by the IMF and the World Bank.[58] A country can only go before the Paris Club to ask to have its debt rescheduled only after it has signed an agreement with the IMF.[59] Clearly, the Paris Club negotiates only with countries that are already under the IMF's thumb.[60]

1.6 Debt Reduction Initiatives

Creditors do not usually cancel debts.[61] Since the G7 Summit in Toronto in 1988, the debt crisis has been recognized as a structural problem. The rich states have tried to reschedule debt payments, postpone deadlines, and effected meager reduction measures. Theses measures, however, have invariably proved insufficient and inappropriate, leaving the debt problem intact.[62] As for the multilateral part, the IMF and world Bank statutes, forbid them to cancel debts.[63]

This provides a handy justification for systematic refusal. Until 1996, only bilateral and private debt reductions were discussed.[64] Over the years and the G7 summits, the percentage to be reduced has had to be revised upwards, since it was still not sufficient to enable the countries concerned to escape from the spiral of postponed payments.[65] The percentage originally fixed at 33% in Toronto in 1988, was raised to 50% in London in 1991, then to 67% in Naples in 1994.66 Substantial reductions have however been reserved mostly for strategic allies.

1.6.1 Heavily Indebted Poor Countries (HIPC)

The heavily indebted poor countries (HIPC) initiative launched at the G7 summit in Lyon in 1996 and consolidated at that of Cologne in September 1999, is aimed at reducing the debts of poor heavily indebted countries. However, it concerns only a small number of very poor countries, 42 out of 165 DCs and its aim goes no further than to make external debt sustainable.[67] Compared to previous debt reduction initiatives, for the first time, this one concerns all the creditors even the multilateral institutions.[68] To benefit from debt reduction within the HIPC Initiative framework, a country, must go through numerous demanding stages that all take inordinately long time.[69]

First of all, countries expecting to qualify must, according to the IMF, "be indebted to an intolerable degree," and "establish positive antecedents on implementing reforms and good economic policies through programmes supported by the World Bank and the IMF.[70] A country concerned must first sign an agreement with the IMF whereby for three years, it will carry out an economic policy approved by Washington.[71] This policy is based on drawing up a Poverty Reduction Strategy Paper (PRSP).[72] This document which takes sometime to produce, plays an interim role to begin with.[73] It presents the economic situation of the country and has to give a detailed list of privatizations and economic deregulation measures that can generate resources to repay the debt.[74] It also has to set out how funds resulting from debt reduction will be used particularly to combat poverty.[75] Officially the PRSP, is to be drawn up within a vast process of democratic participation in collaboration with local civil society.[76] At the end of the three year period, the IMF and the World Bank establishes whether the policy adopted by the country is sufficient to enable it repay its debt.[77] The criterion for determining whether the debt is unsustainable is the ratio between the present value of the debt and the annual amount of the export revenue.[78] If the ratio exceeds 150%, the debt is judged unsustainable.[79] In this case the country has reached the decision point and declared to qualify for the HIPC initiative.[80]

A country that successfully reaches the decision point must then pursue implementation of policies approved by the IMF and draw up a final PRSP.[81] This can take between one and three years, determined by completion of the document and the satisfactory setting up of the key reforms agreed with the IMF.[82] These key reforms correspond in fact to reinforcement of the SAP's of the 1980's and 1990's, renamed PRSP for the circumstance.[83] Then comes the completion point and the country's bilateral debt stock is then cancelled in accordance with the Terms of Cologne.[84]

1.6.2 Limitations Of HIPC

Firstly, the aim of the HIPC Initiative is not to free development for the HIPCs, but merely to render the debts sustainable. Secondly, the initiative concerns only a few countries, and thirdly, to benefit, a country must not only be very poor, but also very heavily indebted. For example, although Nigeria is very heavily indebted, it is nevertheless an oil producing country and is therefore not considered poor enough to qualify. Conversely, Haiti one of the poorest countries on the planet is not considered indebted heavily enough to qualify.

2.0 Demands for the Establishment of an International Arbitration Court on Debt

A fundamental weakness to the debt crisis is that the creditors dominate the decision making process, regarding its resolution.[85] Debt relief initiatives have been designed by creditors to safeguard their interests.[86] There is a lack of global governance to protect the interests of the weaker debtors.[87] A Fair and Transparent Arbitration mechanism is therefore necessary to resolve the power imbalance between the creditors and the debtors.[88] The imbalance in bargaining power between the creditors and debtors calls for the establishment of a neutral and impartial arbitral institution.[89] Various declarations[90] have been made on the subject of debt relief initiatives. The issues that emerge from the declarations are as follows:[91]

(a) the current framework of debt repayment is an unjustifiable instrument of control and power imbalance in favour of the rich creditor countries;

(b) amounts repaid for the loans, already far exceed amounts borrowed;

(c) the International Financial Institutions (IMF and the World Bank) are not accountable, transparent and democratic;

(d) ordinary citizens should be involved in loan transactions; parliaments should approve the loans and there should be transparent disclosure of information associated with the debt burden;

(e) structural adjustment programmes which continue today under the PRSP and PRGF have brought untold misery to the people;

(f) impact of debt manifests itself in denial of health, education, and social services;

(g) unpayable debt, which debt cannot be serviced without placing burden on impoverished people;

(h) Debt in real terms has already been paid;

(i) Debt for improperly designed policies and projects;

(j) Odious debt and debt incurred by repressive regimes;

(k) Illegitimate debt;

(l) Conditions for debt cancellation are unacceptable;

(m) Debt relief proposals by creditors offer too little too late and to few countries;

(n) Debt relief proposals are designed to ensure that debtor countries repay their loans and borrow more;

(o) No mechanism exists where debtor countries can appeal against creditor decisions;

(p) The current international financial system does not serve human beings; it should be transformed to be based on justice, equity and solidarity;

(q) Conditionalities to get loans to repay debt cause a deepening spiral of indebtedness;

(r) domination of the North over the South has exacerbated the levels of poverty, human suffering and debt bondage;

(s) there must be 100% debt cancellation;

(t) debt should be repudiated in the absence of failure to secure 100% debt cancellation; and

(u) disengagement from the international forces which continue to chain the people of the poor indebted countries.

In 2001, AFRODAD brought together a group of lawyers to provide ground for the establishment of an International Court of Arbitration on Debt. The case for the establishment of an Arbitration Court on Debt was premised on the following grounds:[92]

(a) There is a dispute around the debt crisis: debtors and creditors have different opinions, approaches, views on the debt crisis, as well as perceptions on the underlying causes of the crisis and therefore how it should be resolved. The two positions are essentially not reconcilable as exhibited by the fact that hitherto all debt relief mechanisms have been designed by the creditors and debtors do not see such solutions as having been designed to meet their development needs.

(b) There is a conflict between the creditors and debtors around the debt crisis. It is a low intensity conflict that is exhibited only through frustrations especially on the part of the debtors. It is manifested by the obvious power imbalance in which the rich creditor nations and the international financial institutions have the financial muscle to leverage their power and decision making and imposition of a development paradigm. This conflict has a potential to boil over. Such conflict undermines the nature of international relations.

(c) Arbitration is one of the last stages in the conflict resolution process being preceded principally by negotiations and mediation. In the case of the debt crisis, there has been many negotiations under the Paris Club, the London Club and consultative meetings to mention but a few. There have also been various debt relief initiatives including the Brandly Plan, Toronto and enhanced Toronto-Naples Terms, HIPC and enhanced HIPC, all of which have failed to secure exit out of the debt crisis.

    The United Nations has over the last 20 years now mediated in the debt crisis by providing the place and framework for negotiations to find a solution to the debt crisis: these include UN - NADF, LDCI, II, and III, conferences and others; the last one being the UN Financing for Development High Level Meeting in Monterrey, Mexico in 2002, where the issue of debt and the need for solutions have featured. Mediation processes have obviously failed to yield results.

(d) Civil society and civil society organizations gave a deadline of December 31, 2000, for the call for 100% unconditional debt cancellation to be fulfilled. Having been ignored it became inevitable that the anticipated strategy of Arbitration be implemented.

2.1 Categorisation Of Debt

Debt may be categorized as odious, illegitimate, or premised on policy advice. These categories will be considered.

2.1.1 Odious Debt

Odious debt is debt assumed by one regime and which cannot be passed on to another for objectionable reasons.[93]

2.1.2 Illegitimate Debt

Broadly, illegitimate debt is one which satisfies one of the following conditions:[94]

(i) is against the law or the Constitution;

(ii) is unfair, improper or objectionable

(iii) infringes people's rights; and

(iv) undermines sovereignty

The most important aspect of illegitimacy is that a court or tribunal can determine that a contract is void or unenforceable or can be repudiated for public interest reasons.[95] The following are examples of illegitimate debt:[96]

(i) accumulated interest and recapitalized interest and arrears as a result of debt rescheduling;

(ii) debt stock from devaluations and privatizations;

(iii) projectts which involved creditors in design and have exaggerated the expected rates of return just to get the loans moving can be considered illegitimate, especially if finally they are abandoned and do not benefit the people; and

(iv) projects that have simply failed, but governments have to continue repaying loans.

2.1.3 Policy Advice Cases

There are numerous cases of wrong policy advice by the IMF, the World Bank and even the European Union.[97]

3.0 Juridical Nature Of Arbitration

What is the legal nature of arbitration? As a private, non-national system of dispute settlement, is it subject to legal regulation? If so, to what legal order; a national law (which)? An international law or a mixture of the two? Alternatively, is arbitration, as a creation of the parties, subject only to their regulation (party autonomy)? In short, how does arbitration fit, if at all, into a clearly defined system of state justice.[98] Four theories have been suggested with respect to the Juridical nature of arbitration. These are contractual, mixed or hybrid and autonomous theories. No one view point has received universal support in theory or in practice.[99]

3.1 Jurisdictional

The Jurisdictional theory is based on the quasi-Judicial role of the arbitrator as an alternative to the local judge and with the acceptance of the local law.[100] The Jurisdictional theory is summarized as follows: it follows that the arbitrator like the judge, draws his power and authority from the local law, hence the arbitrator is considered to closely resemble a judge.[101] The only difference between a judge and an arbitrator is that the former derives his nomination and authority from the sovereign, whilst the latter derives his authority from the sovereign, but his nomination is a matter for the parties.[102]

3.2 Contractual Theory

The second theory emphasizes that arbitration has a contractual character.[103] It has its origins in and depends for its existence and continuity on the parties' agreement.[104] The supporters of this theory deny the primacy or control of the state in arbitration and argue that the very essence of arbitration is that it is created by the will and consent of the parties.[105] The real basis for the contractual theory is the fact that the whole arbitration process is based on contractual arrangements.[106] The origin of every arbitration is contract.[107]

3.3 Mixed or Hybrid Theory

The fundamental points of the contractual theory, i.e. "the contractual award" and "the role of arbitrators as parties' representatives or proxies were subject to fundamental criticism".[108] In spite of their apparent diametrically opposing views, the Jurisdictional and contractual theories can be reconciled.[109] Arbitration requires and depends upon elements from both the Jurisdictional and contractual view points.[110] It contains elements of both private and public law.[111] It is not surprising that a compromise theory claiming arbitration to have a mixed or hybrid character should have been developed.[112]

3.4 The Autonomous (Sui Juris) Theory

The most recently developed theory presumes that arbitration evolves in an emancipated regime and hence is of an autonomous character.[113] It was originally developed in 1965 by Rubellin Devichi.[114] She argued that the character of arbitration could in fact and in law be determined by looking at its use and purpose.[115] In this light, arbitration cannot be classified as purely contractual or Jurisdictional: equally it is not an institution mixte.[116] The autonomous theory looks to arbitration per se, what it does, what it aims to do, how and why it functions in the way it does.[117]

It recognizes that the relevant laws have developed to help facilitate the smooth working of arbitration.[118] Arbitration cannot work in context of ideologies established in the context of private international law; it does not need to fit in internationalist or nationalist positivist views.[119] Thus, the autonomous theory is an enlightened development of the mixed theory.[120] However, it has the added dimension of being in tune with the modern forms of non-national, transnational, and delocalized arbitration as it does not attach too much value to the seat of arbitration and its law.[121]

2.5 Advantages Of Arbitration

The following are some of the principal advantages of arbitration.[122]

3.5.1 A Single Neutral Procedure

Parties can agree to resolve their disputes in a single forum, thereby avoiding the expense and complexity of multi-jurisdictional litigation.

3.5.2 Neutrality

Arbitration can be neutral to the law, language and institutional culture of the parties and thus avoid any home court advantage that one of the parties may enjoy in the context of court litigation, where familiarity with the applicable law and local processes can offer significant strategic advantages.

3.5.3 Expertise

The parties select arbitrations who have special expertise in the legal, technical or business area relevant to the resolution of their dispute.

3.5.4 Confidentiality

The parties can keep the proceedings and any results confidential. This allows the focus to be kept on the merits of the dispute.

3.5.5 Finality Of Awards

While court decisions can generally be contested through one or more rounds of litigation, arbitral awards are not normally subject to appeal.

3.6 International Commercial Arbitration

The sources of a branch of the law as rich and varied as international commercial Arbitration could not be anything but multiple. The following are the principal multilateral conventions governing international commercial arbitration stated in chronological order:[123]

(a) the Geneva Protocol on Arbitration clauses, 123 (Geneva Protocol on Arbitration Clauses, Geneva September 24, 1923)

(b) the Geneva Convention on the Execution of Foreign Arbitral Awards 1927 (Geneva Convention on the Execution of Foreign Arbitral Awards Geneva September 26, 1927)

(c) the Bustawante Code Convention on Private Law (signed at Havana February 20, 1928, 86 L.N. T.S. 246 No. 1950 (1929) (3 bis)

(d) the Inter Arab Convention on the Enforcement of Judgments and Awards entered into by the states belonging to the Arab League, (Convention on the Enforcement of Judgments and Awards, entered into by the States of the Arab League, September 14, 1952).

(e) the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York 1958. (Convention on the Recognition and Enforcement of Foreign Arbitral Awards New York June 10 1958).

(f) the European Convention on International Commercial Arbitration Geneva (1961) supplemented by the Agreement relating to the application of the European Convention on International Commercial Arbitration Paris December 17, 1962.

(g) the Convention on the Settlement of Investment Disputes between States and Nationals of other states, Washington, 1965. (Convention on the Settlement of Investment Disputes between States and Nationals of other States, Washington, March 18, 1965).

(h) the Convention on the Settlement through Arbitration of Civil Law Disputes Resulting from Economic, Scientific and Technical Co-operation Moscow, 1972. (Convention on the settlement through Arbitration of Civil Law Disputes Resulting from Economic, Scientific and Technical Co-operation, Moscow May 26, 1972.

(i) the Inter American Convention on International Commercial Arbitration, Panama, 1975. (Inter American Convention on International Commercial Arbitration Panama, January 30, 1975, in Year Book Commercial Arbitration III 1978, 15)

(j) the UNCITRAL Arbitration rules (Adopted by the General Assembly on December 15, 1976).

(k) the Convention on Investments of Arab Capital, 1980 (Convention on Investments of Arab Capital, Amman, November 27, 1980).

(l) the Convention for Juridical Co-operation between States belonging to the Arab League, Riyadh, 1983 (Convention for Juridical Co-operation Between States Belonging to the Arab League Riyadh, April 4 , 1983).

(m) The Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law June 21, 1985 (Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade on June 21, 1985).

(n) The Convention on Commercial Arbitration 1987 (April 14, 1987) ; and

(o) The Port Louis Convention, October 17, 1993. (which inter alia created the Organization Harmonization dudroit de affaires OHADA)

These conventions mainly apply to contractual disputes.[124] For instance, the Geneva Protocol 1923 concerns arbitration agreements and clauses by which parties to a contract may resolve their disputes[125], the Geneva Convention 1961, concerns disputes arising from international trade; and the Washington Conventions deals with investment disputes.[126] However, not all conventions are limited in that way.[127] The New York Convention, for example, applies to disputes arising out of legal relationship contractual or not and the UNCITRAL model law is for disputes which originate in respect of a defined legal relationship contractual or not.[128] It must be recognized that these conventions are mainly designed to serve as instruments for settling disputes arising from international trade.[129]

3.6.1 Main Features Of International Commercial Arbitration

Arbitration is a private mechanism, but does not take place in a legal vacuum. Typically, different systems of law interact, most notably the law governing the substance of the dispute, the law governing the arbitration process itself and the law governing the arbitration agreement.

3.6.2 Law Applicable to the Substance of the Dispute

In general parties are free to choose for themselves the law applicable to the substance of the dispute. When parties fail to agree on choice of substantative law, it may be resolved by conflict of laws or private international law.

3.6.3 Law Applicable To The Procedure Of The Arbitration

The law applicable to the arbitration (lex arbitri or arbitral law) is the law that governs the procedural framework. Subject to such arbitral law, parties are free to designate a set of rules governing the conduct of the arbitration. The law applicable to the arbitration is usually the law of the chosen place of an arbitration. Thus, in determining the place of an arbitration, the parties select the arbitral law. The arbitral law need not be the same as the law applicable to the substance of the dispute.

3.6.4 Law Applicable To The Arbitration Agreement

The validity of the arbitration agreement is normally governed by the law applicable to the contract of which it forms part or more generally the law applicable to the substance of the dispute.

3.6.5 Institutional or Ad Hoc

Arbitration can be institutional or Ad Hoc. In Ad Hoc Arbitration, the parties and after its appointment, the tribunal, administer the proceedings themselves. This requires sufficient co-operation among the parties, as well as considerable experience on the part of the parties and the tribunal. When problems arise in an Ad Hoc arbitration, for example, in initiating the arbitration or in dealing with challenges to arbitrators, the parties may require the assistance of a national court of Justice at the place of arbitration. In institutional arbitration the arbitral institution provides a procedural and administrative framework for initiating and conducting the arbitration. Typically, the administering institution provides:

(a) a tested set of procedural rules;

(b) access to qualified arbitrators; and

(c) an administrative and supervisory infrastructure.

Thus with institutional arbitration, the parties and the tribunal can focus their time and energy on resolving the dispute and lessen the burden of dealing with procedural concerns and administrative arrangements.

4.0 International Public Law Arbitration

In ancient times and also in the middle ages, arbitration was used to resolve international public law disputes even at a time the notion of international public law was different from today, when it is seen as statutory provisions directed only to the state.[130] Even later, disputes between states were referred to a head of state (the Pope, an Emperor, or a King).[131] Amongst sovereigns acting as arbitrators one can name Louis XI of France, the Czar of Russia and the Pope.[132] The concept of inter-state dispute has been the subject of long studies by international public scholars.[133] The typical method for forming general rules in the international community (customs) has not been applied to produce arbitration rules and procedures valid for the inter state community.[134] Arbitral proceedings must consequently take their rules from the other main source of international rules i.e. the conventions.[135]

According to the definition in the Hague Convention (1907) for the Pacific Settlement of Disputes, international arbitration has for its object the settlement of disputes between states by judges of their own choice and on the basis of respect of law.[136] Recourse to arbitration implies an engagement to submit in good faith to the award.[137] There are two essential requirements for international public law arbitration: the proceedings must be based on the consent of the parties, including the appointment of the arbitrators and parties must accept that the arbitrators' decision is binding.[138] The requirement for the consent of the parties distinguishes arbitration from court jurisdiction, while the binding nature of the award distinguishes arbitration from other dispute resolution proceedings, the result of which is not binding, such as good offices, enquiries, and mediation, and which in the absence of a commitment by the different states simply aim at facilitating friendly settlement of the dispute by providing the litigants with more information so that they can move easily reach agreement.[139]

4.1 The Permanent Court of Arbitration

At the end of the last century there were no general rules, even if formed with the consent of the parties, on the formation of international public law arbitral tribunals and no standard rule for arbitrators applicable to a series of disputes.[140]

The rules were drawn up during the First Peace Conference in the Hague (1899) during which a convention for the Pacific Settlement of International Disputes was drafted.[141] This was reviewed during the Second Conference in 1907.[142] The multilateral conventions governing international public law arbitration are thus the Hague Conventions (1899) and (1907), which formed the Permanent Court of Arbitration.[143] However, this is not as the name suggests, a permanent court with authority to take direct action, but merely an institution which aims at facilitating recourse to arbitration in the event of International disputes.[144] An international bureau has been formed for this purpose, controlled by a permanent administrative body, with a list of potential arbitrators appointed to decide a specific dispute.[145] Under this convention, the contracting states are not obliged to submit their disputes to the court, but confine themselves to declaring it is desirable that disputes related to the interpretation or application of international treaties be referred to arbitration, when circumstances allow it.[146] In the period between 1920 and 1995, the Permanent Court of Arbitration was referred 17 cases.[147] While recourse to the Permanent Court of Arbitration was limited, mixed tribunals appointed subsequent to the peace treaty of Versailles gave rise to a great number of cases dealing with damages claimed by the winning states.[148]

The Franco-German Tribunal heard above 20 000 cases, the Anglo-German and the German-Italian tribunals heard each around 10,000 cases.[149] While the period 1850 - 1930 was very active in inter state arbitration, after that, a decline was registered apart from some boundary disputes.[150]

4.2 The International Court Of Justice

The duty to submit international disputes to peaceful resolution appears for the first time in the Covenant of the League of Nations of 1919.[151] The covenant provided that if there should arise between states any dispute likely to lead to a rupture, states will submit the matter either to arbitration or Judicial settlement or to enquiry by the council.[152] The International Court of Justice is the main judicial body of the United Nations and it is linked to the program of friendly settlement of disputes imposed by the United Nations on their member states.[153] Even if its jurisdiction depends each time on the willingness of the parties to submit to it both the International Court of Justice and the Permanent Court of Arbitration were considered as true international courts of justices and not as arbitral tribunals.[154] It is submitted that as the states are free to choose whether to submit a specific dispute to the international Court of Justice, the latter might be considered as a public law arbitral body.[155] It could then be concluded that both courts are arbitral bodies whether they sit permanently or temporarily.[156]

4.3 Main Features Of Internatonal Public Law Arbitration

That fact that international public law arbitration has been practiced for more than one century makes it possible to identify its main features.[157] Arbitration may take place before an ad hoc body or a permanent tribunal.[158] The ad hoc body is formed after the dispute arises by agreement between the parties, known as a submission agreement, which states the nature of the dispute and the composition of the court.[159] However, the submission agreement rarely states the exact rules of international law to be followed by the arbitrator.[160] Permanent arbitral tribunals are formed, by consent of the parties to decide disputes which may arise between them.[161] Some of the agreements contain detailed rules on the formation of the tribunal, its Jurisdiction and the procedures to be followed, in which case they are frequently referred to as primary arbitration agreements.[162] Other agreements contain an arbitral clause for the settlement by arbitration of certain disputes which could arise between the parties and in particular all those which might damage the friendly relationship between them.[163] In general, it can be said that there are two different types of international public law arbitration agreements; on the one hand, those which merely express an intention subsequently to refer a dispute to arbitration and, on the other hand, those which refer a dispute to arbitration and provide for the enforcement of the award by legal means.[164]

The United Nations Commission on International Trade Law which takes care of the codification of International law has been trying since its first meeting in 1950 to draft a convention which could serve in general as an arbitration agreement.[165] It has not managed to produce a convention, but the General Assembly of the United Nations did approve its Model Rules on Arbitral procedure in 1958, which also have a role in international practice and which inspired the 1985 UNCITRAL model law.[166]

4.4 Establishment Of An International Debt Arbitraion Tribunal.

It is incontrovertible that the debt crisis is the function of not only governance, but also the imbalance in the power relations between the creditors of the North on one hand and the debtors of the South on the other hand. In order to address and redress this deficit there is need to establish an international Debt Arbitration Tribunal. In making this recommendation there is need to clarify certain conceptual issues. In the first place, there is need to draw a distinction between the nature of legal disputes and political disputes.

It is stated that there is a legal dispute when the reason is of legal nature and when even if the claim is not grounded or its grounds are not of a legal nature, the defence to the claim is based on legal grounds.[167]

Kelsen states the point succinctly when he observes that legal disputes are those in which at least one of the parties bases its position on legal grounds. Political disputes exist when the state does not base its claim on the law or on its rights, but on criterion of a different nature such as principles of Justice, of fairness or advisability and so on.[168] Thus, political disputes consist in conflicting claims which are frequently not based on legal rights. It is important to draw this distinction because typically in case of arbitration a dispute is settled by an arbitral body by interpreting existing rules. In any event, the debt problem is not a pure and simple legal problem, because development and not pure commerce, is the underlying agenda in bilateral and multilateral financing.

It has been noted that the external debt of a country can be subdivided into public external debt and private external debt. The external public debt can be broken down in turn into three parts, namely, the multilateral, bilateral and private. The multilateral is that lent by multilateral institutions such as the World Bank and the IMF. The bilateral part is lent by another state and the private part is lent by a private institution, such as a bank or comes from financial markets. It has also been demonstrated that at international level, arbitration can be subdivided into international commercial arbitration and international public law arbitration.

It is submitted that debt contracted from multilateral institutions and bilateral relations should be amenable to international public law arbitration. Whereas loans contracted from private financial markets should be amenable to international Commercial Arbitration, unless they are guaranteed by a state. The proposed tribunal should address the issues of debt between the group of creditors and the group of debtors. Currently, the debt problem is addressed in a lopsided fashion. The Paris Club, a united group of 19 creditors of the North, "negotiates" with a limited number of countries of the South, under debt reduction measures (HIPC) and under the watchful eye of the multilateral institutions. To this extent, the tribunal should not take a conventional arbitration process.

When considering the various theories of arbitration it was shown - through the autonomous sui juris theory - that arbitration cannot work in the context of ideologies established in the context of private international law or internationalist or positivist-nationalist views.

The scope of the jurisdiction of arbitral tribunals when not stated in the arbitration agreement frequently gives rise to disputes.[169] Generally, states take care to specify that their commitment to submit matters to arbitration does not apply to disputes which concern their vital interests or their independence.[170] However, there have been situations in which matters of purely political nature have been referred to arbitration. In this context, three possible broad areas are proposed for submission to the tribunal. Namely, odious debt, illegitimate debt and debt premised on policy advice. The definitions of these categories of debts have been considered in the context of this study.

The study has observed that the sources of international commercial arbitration are multiple and are principally to be found in conventions governing International Commercial Arbitration. These conventions mainly apply to contractual disputes and are designed for settling disputes arising from international trade. The study has highlighted the basic features of international commercial Arbitration. International law has not produced arbitration rules and procedures valid for the inter state community. Arbitral proceedings consequently take their rules from the other main source of international rules i.e. the conventions. In designing the tribunal there is therefore need to draw elements of both private and public law. However, it is important to note that there are two essential requirements for international public law arbitration: the proceedings must be based on the consent of the parties, including the appointment of the arbitrators' and parties must accept that the arbitrators decision is binding.

The requirement for the consent of the parties distinguishes arbitration from Court Jurisdiction.

4.6.0 Implementing the Arbitration Process

The United Nations is a political body and for political reasons is best suited to deal with the debt crisis. The question that is required to be asked and answered is whether ad hoc panels or a specialized institution should be formed under the aegis of the UN. A specialized institution is preferred. The function of the specialized institution would be to:

(a) assist the parties to submit existing disputes to the International Debt Arbitration Tribunal;

(b) provide procedural rules;

(c) assist in the selection of arbitrators;

(d) liase with the parties and neutrals to ensure optimal case communication and procedural efficiency;

(e) monitor the procedures so as to expedite the progress of the arbitration;

(f) administer the financial aspects of the proceedings; and

(g) provide support services including hearing rooms, party retiring rooms, recording equip ment, interpretation and secretarial assistance.

4.6.1 Appointment Of Arbitrators

Given the broad authority of arbitrators, the choice and appointment of the tribunal is probably the single most determinative step in the arbitration. On one hand, parties should therefore be able to exert as much influence as possible on the establishment of the tribunal. On the other hand, the appointment process should not give an uncooperative party the opportunity to obstruct the arbitration proceedings. The rules on appointment should strike a balance between efficiency and party autonomy. The Arbitral process relies heavily on the professional integrity of the arbitrators. Each arbitrator is required to be impartial and independent. Both standards are related and aim to ensure that the dispute is decided objectively on the basis of the arguments and evidence submitted. Independence means that the arbitrator has no relationship with a party, financial or otherwise that might influence his or her assessment of the dispute. Impartiality requires absence of bias in favour of or against any of the parties or in relation to the issues in dispute.

4.6.2 Procedural Steps In The Arbitral Process

The following steps are proposed to be taken in the arbitration:

(i) an arbitration may be commenced by the Claimant state submitting to the secretariat of the tribunal a request for arbitration.

(ii) the request for arbitration should contain summary details concerning the dispute, including the names and communication details of the parties and their representatives, a brief description of the dispute, the relief sought and any requests relating to the appointment of the tribunal.

(iii) the statement of claim must be filed within 30 days of the Constitution of the Tribunal and the statement of Defence must be filed within 30 days of the receipt of the Statement Claim;

(iv) soon after the tribunal has been established, the tribunal will hold preparatory discussions on inter alia, case schedule, hearing dates, evidence and confidentiality stipulations;

(v) if a party requests or by tribunal discretion, a hearing may be held for the presentation of evidence by witnesses and experts and for oral argument;

(vi) if no hearing is held, the proceedings are conducted on the basis of submitted documents and other materials;

(vii) when the tribunal is satisfied that the parties have had adequate opportunity to present submissions and evidence, it will declare the proceedings closed. This should happen within nine months of either the delivery of the statement of defence or the establishment of the tribunal whichever occurs later;

(viii) the final award should be delivered by the tribunal within three months of the closure of the proceedings; and

(ix) the award should become effective and binding on the parties as from the date it is communicated by the Tribunal.

4.6.3.0 Steps Required to be Taken by AFRODAD

In order for AFRODAD to work towards the establishment of an International Debt Arbitration Tribunal, there are certain measures and strategies that require to be undertaken. The following measures and strategies are recommended:

4.6.3.1 National Level

At the national level, there is need to raise the level of awareness of the public, political parties, civil society and sundry stakeholders, about the debt crisis and its ramifications on development. One of the central strategies in this respect, should be to review and revise the legal framework for contracting both internal and external debt. The discretion vested in the executive branch of government to contract debt, should not only be circumscribed, but should also be subjected to parliamentary scrutiny, and approval.

4.6.3.2 The African Union

In 1981, the OAU adopted the African Charter on Human and Peoples Rights. Unlike the other regional Organizations, the OAU adopted an integrated approach to human rights. To this end, the preamble pays particular attention to the right to development. The preamble also notes that civil and political rights cannot be dissociated from economic, social and cultural rights. It is therefore recommended that the African Union should be lobbied and persuaded to place on its development agenda the need to establish an International Debt Arbitration Tribunal to adjudicate the debt crisis.

4.6.3.3 The United Nations

The United Nations Commission on International Trade Law (UNCTRAL) is responsible for the codification of international law. Since 1950, it has been trying to draft a convention which could serve in general as an arbitration agreement. Although it has not succeeded, the General Assembly of the United Nations did approve its Model Rules on Arbitral Procedure in 1958, which are of international claim and eventually inspired the 1985 UNCITRAL Model Law. The Commission could therefore be lobbied to consider providing a forum and extending technical assistance in the proposed establishment of the International Debt Arbitration Tribunal.

4.6.3.4 Strenthening Network On Debt And Development

Currently, AFRODAD collaborates with several non-governmental organizations on issues relating to debt and development. It is recommended that AFRODAD, in concert with its sundry collaborators should develop a common agenda aimed at the establishment of an International Debt Arbitration Tribunal.

5.0 CONCLUSION

There is need for the establishment for an institutional framework to deal with the debt crisis. However, it is important to stress that Arbitration is based essentially on the consent of the parties. Thus, resolution of the debt crisis in the context of arbitration is largely dependant on the political will of the creditor nations as a group.

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