Document No. 2

The Case of Africa South of the Sahara

Recommendations of Participants

UNITAR European Office: Two years of experience in the field of external debt management

Table of Contents

Published in GENEVA
March 1992

PREFACE

UNITAR's training programme in debt management has provided training with special emphasis on the legal aspects in the least developed countries (LDCs) of sub-Saharan Africa. A range of training programmes, seminars and workshops were implemented to sensitize and/or train senior officers, middle-level managers, law professors and lawyers in the legal aspects of debt management in both East and West Africa. In light of recent developments, as of 1992, UNITAR's European Office will receive financial assistance from the Division for Global and Inter-regional Programmes (DGIP) of the United Nations Development Programme (UNDP). These funds will be in addition to those provided by the Swiss Directorate for Development Cooperation. They will be used to develop training activities in Southern Africa and in Asia and the Pacific.

Recommendations were generated as a concrete output for each of the seminars and workshops. These recommendations were made by the trainees, to the attention of their respective national authorities. These recommendations are not official and do not necessarily reflect the views of UNITAR or any other body of the United Nations system.

This document is the second in a series of papers due to be printed and circulated at various intervals, whenever deemed useful. It is neither the intention nor the task of UNITAR to publish general studies about various aspects of the external debt and debt management. The main role of the Institute is training. However, some well targeted and short texts will be produced, which should be of interest not only to the participants and resource persons, but also to decision-makers working in the field of development, whether on a national or on an international level.

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UNITAR/EADB AWARENESS SEMINAR FOR SENIOR OFFICERS ON EXTERNAL DEBT MANAGEMENT

Dar es Salaam, TANZANIA 15 to 17 January 1990

RECOMMENDATIONS

The Participants in the Seminar,

§ Having noted that their meeting was in the nature of an awareness seminar in the course of which the following issues:

(a) External debt and the development process;

(b) Debt management: Policies and techniques;

(c) External debt, public finance and the balance of payments;

(d) Debt re-organization;

(e) Personnel policies;

(f) Legal aspects;

were dealt with;

§ Having developed a consensus regarding Tanzanian training needs and institutional changes in the field of debt management;

§ Having agreed that the satisfaction of these training needs and the implementation of these institutional changes would contribute to more efficient management of Tanzania's external debt with concurrent substantial savings in the debt service;

recommend the following:

1. DEBT OFFICE: Exchange of External Debt information and consultations should be qualitatively and quantitatively improved between debtor entities and bodies responsible for the recording, monitoring and payment of external obligations. To this end, the establishment of a high-level body such as a National Debt Office is recommended, to formulate and coordinate debt management policies and strategies as well as set up rules and procedures for effective control of all foreign borrowings. (For example, calculations made for a sub-Saharan African country have pointed to potential savings from skilled debt management of at least 1% of the debt outstanding and disbursed or 20% of the annual debt service).

2. EXCHANGE RISK: The massive depreciation of the Shilling since 1986 has compounded the debt burden especially for non-exporting enterprises whose products sell at government-controlled prices. Where the prices are controlled, the burden should be shared with the Government.

3. LEGAL FRAMEWORK: Government domestic and foreign borrowing in Tanzania is governed by the Government Loans, Guarantees and Grants Act of 1974 whose Part II Section 3 sets annual target limits with regard to both local and foreign loan service costs. To date, this provision continues to be ignored. The legal framework on debt management should be reviewed and adhered to.

4. TRAINING: With regard to training of available human resources, the priority areas appear to be the following:

   (a) Further development of skills in collecting, compiling and disseminating data required by decision-makers;

   (b) Improved mastery in the use of information systems and computer software;

   (c) Familiarization with loan operations;

   (d) Further training in financial analysis with a view to measuring the impact of debt levels on overall macroeconomic performance and the performance of individual enterprises;

   (e) Familiarization with new, not yet applied debt management techniques: debt rescheduling, debt relief, debt reduction and transformation, cash management and evaluation of risks caused by variations in earnings and exchange rates;

   (f) Development of awareness among borrowing entities of the importance and relevance of taking the legal aspects and advice more fully into consideration in negotiations.

In considering expanded training programmes, due consideration should be given to target groups too often neglected in implementing programmes, namely commercial banks and their parastatal clients. In the formulation and implementation of these programmes, Tanzania could collaborate with existing national and sub-regional institutions of higher learning.

Another consideration should be that the acquisition of additional skills should be accompanied by commensurate increase hi remuneration to prevent further brain drain out of those entities where those skills are most needed to reduce costs in debt management.

South-South Co-operation with other countries in the same region or in other regions should be encouraged through exchange of information and experience in negotiation and debt portfolio management.

UNITAR, jointly with the East African Development Bank (EADB) and multilateral agencies of the United Nations system, should be called upon to finance elements of the proposed training, together with other multilateral and bilateral development agencies.

UNITAR/EADB SUB-REGIONAL TRAINING SEMINAR ON LEGAL ASPECTS OF EXTERNAL DEBT MANAGEMENT

(Nairobi, KENYA) 19 February - 02 March 1990

RECOMMENDATIONS

1. THE ROLE OF THE LAWYER IN DEBT MANAGEMENT

In order to achieve successful debt management, the lawyer should be involved in an effective and efficient manner. Decision-makers must realize that the lawyer forms an integral part in the debt management process and, as a consequence thereof, he/she must be involved at the initial stages of each loan negotiation. This deserves to be emphasized, as the role of the lawyer is usually confined to signing loan agreements within a very short time notice. Consequently, he/she will not be in a position to thoroughly examine the legal provisions contained in loan agreements, which seldom are beneficiary to the borrower.

Although, legal analysis may take time and may be generally considered by economists and financial analysts as a source of delay as far as the signing of loan documents is concerned, it is essential to the improvement of loan agreements. In this endeavor, therefore, the lawyer has a very important role to play, which can be summarized in terms of the following three levels:

(a) Improving legal provisions generally contained in loan agreements;

(b) Reviewing prevailing international financial laws and rules, and elaborate new legal principles; as well as, on a concerted basis,

(c) Moving towards the elaboration of a Standard Debtors' Loan Agreement and General Conditions as the basis of negotiations, in order to counter the Creditors Standard Loan Conditions.

(a) Improvement of the Legal Provisions of a Loan Agreement

In addition to the attached recommendations regarding five major legal clauses, i.e. (1) conditions precedent and covenants, (2) applicable law, (3) financial obligations, (4) default clauses, as well as (5) clauses impinging on the debtors' sovereignty, the following needs to be asserted.

In order for the lawyer to be in a position to effectively enhance the above mentioned recommendations, his role must be strengthened and recognized by all involved governmental entities. In effect, the lawyer should be viewed as an available resource person whose role is complementary to that of the economist and financial analyst, and therefore not be brought into negotiations at the last instance when a decision has already been taken. Faced with a. fait accompli his contribution can only be minimal. If lawyers are involved from the beginning of negotiations, unfavourable terms and conditions that result, for example, in an impingement of sovereignty, could be avoided. Furthermore, the early participation of lawyers could contribute to more balanced and equitable discussions between borrowers and lenders, as the latter tend to include a lawyer in their team at the outset of negotiations.

It is therefore suggested that, each Government Ministry has its own in-house legal department, staffed with senior lawyers, of which one or two should belong to the decision-making group. The ministerial lawyers must be involved from the conception of the project to its end, and liaise with the Attorney General's Chambers, which, in turn, should play a consultancy role.

The role of the lawyer should be extended to daily, concrete follow-up of each project financed through external loans. In that way, he will be in a position to assess whether or not both parties are subscribing to their obligations and gain first-hand knowledge and practical experience on terms and conditions that can protect debtors from real-life situations. By way of example, if a supplier does not fulfill his commercial obligations, a clause should provide for the revision of the debtor's reimbursement obligations.

Finally, given the need to keep a register of all signed loan agreements, it is suggested that the Attorney General's Chambers be utilized for this task, for two reasons. First, most if not all, loan agreements go through the Attorney General's Chambers for legal opinion, and second, disputes arising out of loan agreements would need his participation.

(b) Review of Prevailing International Financial Laws and Rules, and Elaboration of New Legal Principles

Legal activities are essential at the national, regional and international levels through appropriate fora and organizations, such as National Bar Associations, Law Societies, Faculties, etc., where the debt issue should be articulated. Once awareness is raised in these various fora, legal innovations can begin to reflect, for instance, more equitable international financial rules, which, until now, are mainly the product of the major lending institutions. The recommendations on the five above mentioned clauses constitute a first attempt towards legal innovation.

Along these lines, on the regional and international levels, lawyers should start reflecting jointly on possible amendments to the multilateral credit agencies of which they are members and thus entitled to a say in this respect. The amendments in question regard mainly the Standard Loan provisions as well as the General Conditions governing loans. Such changes should be brought about through the African representatives in, for example, the World Bank, so that these matters are brought to the attention of the Board. This should particularly be the case within the African Development Bank as well as Regional Development Banks, given their vocation to promote African development.

The passiveness of African debtor lawyers and negotiators must end, particularly as they have never really advocated changes in this field.

(c) Elaboration of Common Guidelines to Debtors

Two main efforts must be undertaken in this direction, namely;

a) to draft an International Charter of Debtors Rights, based on a thorough comparative study of national legislations regarding the protection of individual and corporate debtors,

b) to draft Standard Loan documents reflecting equitable obligations shared both by creditors and debtors alike.

In order to achieve these goals, there should be unity among debtors, which implies sharing of information on the magnitude of the debt problem and experience on the legal conditions in Loan Agreements. Internal mechanisms are also essential in order to minimize the high degree of failure that has characterized projects in the past, as the blame is not only due to the harsh terms imposed by the lenders. By way of example, compliance with the national loan approval procedures must be ensured on the one hand, as well as a possible revision of these in order to limit the number of entities entitled to incur external debt, on the other hand.

Conclusion:

In order to help achieve these goals, various forms of training activities need to be undertaken. In effect, to be an efficient member of the Debt Management Team, lawyers must understand the context within which they operate, such as the political, social, economic and cultural context of their working environment. Not only must lawyers be well trained in domestic law, but also in international law. They should also be familiar with the major national systems. There is thus a great need for continuous training of lawyers through workshops, seminars and short courses at both the regional and inter-regional levels. This can be achieved by establishing a Debt Management Institute in one of the three EADB Member Countries, and by introducing the topic of debt management -legal aspects- in the curriculum of law faculties.

2. "CONDITIONS PRECEDENT AND COVENANTS"

A. Definition

1. **Condition Precedent:** "Condition Precedent" clauses in Loan Agreements lay down factors and/or events which determine the effectiveness of the Agreement. These are of two types: a) conditions precedent to the effectiveness of the Agreement, and b) conditions precedent to disbursement. Both types of conditions must be fulfilled before the loan can be utilized. By way of example, a condition precedent can consist of an undertaking by the Borrower to give a tax exemption at a given time.

2. **Covenants:** Covenant Clauses, on the other hand, stipulate what the parties undertake to do or avoid from doing, in the process of performing the agreement after it has become effective. These unilateral promises by the Borrower cover different areas, such as financial or administrative matters.

B. Pitfalls

Conditions precedent are costly as they delay the entry into force of the loan agreement, in particular those whose implementation require long procedures. Typically, these are often contained in World Bank and African Development Bank Loan Agreements, and General Conditions applicable to these loans.

Covenants on the other hand, if not observed because of the difficulty of their performance, can result into the repudiation of the agreement, which obviously constitutes one of the worst consequences which need to be avoided.

C. Guidelines for Negotiations

A thorough examination of conditions precedent and covenants (hereinafter Clauses) must be undertaken in order to;

(a) analyze the compatibility of the Clause with government policy,

(b) distinguish the negotiable clauses from the non-negotiable ones,

(c) identify those which can be implemented without delay,

(d) reduce the scope of the clauses formulated too broadly and determine specifically and concretely the obligations in question,

(e) consider whether a particular clause can be traded off as a bargaining tool or simply be excluded from the agreement.

3. LAW APPLICABLE IN INTERNATIONAL LOAN AGREEMENTS

A. Subject and Nature

The following issues are very important features of loan agreements: (a) law to be applied in respect of loans procured from external sources - be they multilateral lending agencies, donor organizations within sovereign states or commercial banks, as well as of (b) jurisdictional matters.

Every agreement must be governed by a particular law or a set of laws for purposes of determining its (a) validity, (b) formation, (c) execution, and (d) interpretation. Although it is not mandatory as a matter of principle to state this in the agreement, in practice negotiators and drafters expressly set it out in the agreement to facilitate the resolution of disputes or controversies which would otherwise be protracted and difficult to resolve in the absence of a clause to that effect.

In order to avoid uncertainties, confusion and unnecessary expenses etc., it is always prudent for the counsels to the parties to ensure the inclusion into the agreement of clauses on applicable law and jurisdiction. There is no single and uniform heading or drafting style for these clauses . In some cases it is referred to as (1) "Applicable Law and Jurisdiction", (2) "Applicable Law and Place of Jurisdiction", (3) "Law Jurisdiction and Waiver", (4) "Enforceability," etc.

B. Pitfalls and Recommendations

(1) Where parties to a loan agreement omit to set out the law to be applied or the institutions to which disputes or controversies are to be submitted, separate negotiations will have to be undertaken. If the negotiations fail, the institutions with jurisdiction over the subject matter are faced with the onerous task of determining the intentions of the parties as embodied in the agreement.

The general position of judicial or arbitral courts in many Common Law countries is that where the intention of the parties cannot be ascertained, the court would unilaterally choose the system of law with which the agreement is most closely connected, by applying various presumptions such as the law of the place where the agreement is concluded, or the law of the place of performance.

(2) Parties to a loan agreement have a number of alternatives available. Depending on leverages, negotiating abilities and the source of financing, it is possible to choose either the law (a) of the lender, (b) of the borrower, or that of (c) a third country. General principles of public international law may also be applicable. However, counsel for the borrower must exercise care and proper judgment in choosing the law and forum, as practice has shown that lenders prefer to choose either their municipal law or one or several legal systems and forums with which the borrower may not be conversant. Moreover, this may lead to further and unnecessary costs being incurred by the Borrower, as he may require legal advice by national law firms in case of dispute.

(3) Along these lines, if a loan agreement is drafted in both English and a language not understood by the Borrower, the English version should prevail in case of conflict.

(4) Regarding the possibility to insulate the agreement from changes in the Borrower State, adversely affecting the lender's rights or interests, counsel for the Borrower should be able to assure the Lender that even where the law and forum chosen is that of the Borrower State, the waiver of immunity clause is sufficient as it complements the choice of law and jurisdiction clauses.

C. Guidelines for negotiations

It is always advisable and it is a good negotiating stance to inquire from the Lender the reason for chosing a particular law or legal system. In case there are several laws chosen by the Lender, the Borrower should propose his own laws and courts in an attempt to reach a win-win position. This could spark off proposals from the Lender until they are settled on a legal system and forum in which they both have confidence and trust.

In the case of the three EADB Member States, the choice of English law and the submission to English Courts presents a number of advantages, particularly when the Lender, other than English, wishes his law to be applicable.

1. Firstly, the three countries are familiar with the English System of law and well versed in English;

2. Secondly, English law is predictable on various crucial commercial issues;

3. Thirdly, London being a prestigious international financial centre, there is no valid reason for the Lenders to object to the applicability of English Law.

Finally, in order to show possible innovations, the case of Loan Agreements under the Kuwait Fund deserves to be mentioned. In case of arbitration, the arbitrator is to apply, among others, the principles common under the current laws of the Borrower and the State of Kuwait.

4. FINANCIAL OBLIGATIONS

A. Definition and Nature

Although not legal by character, the financial clauses have been, to some extent, subject to examination. The clauses pertain mainly to interest rates, commitment fees, repayment obligations, prepayments and penalty fees.

B. Pitfalls and Recommendations

In addition to a recommendation of a very general nature, consisting in an attempt to reduce all costs of the loan - including interest rates and penalty fees, the following have been proposed:

(a) Interest rates: The borrower must carefully choose between fixed and floating interest rates, to the extent that the market conditions enable the possibility of such a choice. Furthermore, if a Lender states that the loan that he proposes to the Borrower is of a soft nature, the latter should refuse an interest rate linked to LIBOR, given its commercial nature. Regarding the computation in the calculation of yearly interest, it must definitely be based on 365 days and not 360 days as some agreements tend to do. The five-day difference results in an unnecessary incremental cost to the Borrower.

(b) Repayment obligations: In this regard, the Borrower should try to negotiate as long a repayment period as possible. He should particularly assess the time that will elapse until the project to be financed will generate funds, enabling him to meet his reimbursement requirements. Furthermore, similar to some major Latin American debtors, a clause providing for the Lender to signal to the Borrower when payment is due, five days in advance, should be included as this considerably assists the debt management team in performing their daily work.

(c) Penalty Clauses: The above mentioned proposal would also help avoid the payment of unnecessary penalty fees.

(d) Prepayment Clauses: As prepayment usually is not in the interest of the Lender, the loan agreements often provide for a long notice on the part of the Borrower, at least 30 days, and, in some cases, up to 6 months. Furthermore, some agreements will consider the Borrower's request for voluntary prepayment as irrevocable. In light of these imposed conditions, the Borrower must successfully negotiate: (a) a short prepayment notice, not longer than 30 days, and (b) its revocable character.

5. DEFAULT CLAUSES

A. Definition and Nature The default clause is a principal clause contained in loan agreements. It examines all covenants and gives the Lender the right to : a) Terminate the agreement and/or; b) Accelerate the loan by requiring the Borrower to render all amounts due.

The events of default and the conditions that constitute default are usually listed in the loan agreement, heavily and widely drafted in favour of the creditors. The main events usually cover:

(a) Failure to pay sums due on principal and interest;

(b) Failure to comply with specified provisions of the loan agreement;

(c) Breach of warranty or representation;

(d) A cross-default clause which protects all Creditors in the case where the Borrower fails to meet his obligations towards one of them, that he will be considered in default towards all others. The justification of this clause lies in the strong concern among the Lenders not to be discriminated between each other by the debtor.

B. Pitfalls for the Borrower

(a) One of the main negative consequences for the Borrower to be in default, is the cost factor, as he will usually be required to pay interest on delayed payments, which amounts to payment of interest on interest.

(b) Default clauses are often very generally drafted and cover such wide events of default, that may not always be predictable to the Borrower.

(c) In the specific case of Export Credits the Borrower is considered to be in default if he does not meet his financial obligations as specified in the loan agreement, even though this *de jure* default has been caused by a failure on the part of the supplier to provide material necessary for a given commercial project.

(d) The cross-default clause leads to additional costs to the Borrower as penalty fees will be multiplied. Furthermore, the creditors may take an act of acceleration by requiring all sums due.

(e) Finally, it should be noted that while the loan agreements contain long provisions regarding events of default for the Borrower, no such clause is included on the Lender side. This absence reflects an unbalanced situation, where the parties to the agreement are not on equal level.

C. Negotiation Guidelines and Recommendations

(a) As a basic rule, given the general terms in which default clauses are drafted, the Borrower must reduce the events of defaults as much as possible and clearly specify these events as to cover concrete and predictable situations.

(b) In order to avoid unnecessary defaults, the Borrower should require a clause whereby the Lender gives prior notice to any disbursements (see Recommendations for Financial Obligations).

(c) A reasonable grace period should be given to the Borrower in case of default.

(d) Use should be made of the materiality test in order to determine whether or not a breach should amount to default. In other words, only a fundamental breach, going into the core of the Agreement should lead to default.

(e) Ensure that all unilateral decision or action which the Lenders are entitled to, are reasonable and proportionate to the breach.

(f) In the specific case of Export Credits, the Borrower should not bear the financial responsibility when the supplier fails to meet his obligations towards the Borrower under the Supply Contract. A clause providing for revision of the Borrower's financial obligations towards the Lender - in a separate loan agreement - should be included, and thus ensure a link between these two agreements.

(g) The cross-default clause should, to the greatest extent possible, be narrowed to manageable proportions by excluding local indebtedness as opposed to external indebtedness. It should exclude the indebtedness of governmental entities and their respective defaults. Finally, a threshold, i.e. a ceiling under which no event of default can be operative, should be negotiated.

UNITAR/EADB NATIONAL FOLLOW-UP WORKSHOP ON LEGAL ASPECTS OF EXTERNAL DEBT MANAGEMENT

Dar es Salaam, TANZANIA 08 July - 12 July 1991

RECOMMENDATIONS

This workshop which had as its objective the introduction of lawyers to the intricacies of international financing especially aspects relating to debt management concentrated on the following sub-themes: International Arbitration, Principles of Budgetary Law and the Restructuring of Sovereign Debts.

1. INTERNATIONAL ARBITRATION

The international arbitral process can be a useful tool for the resolution of disputes in the area of international commercial transactions. It seeks to avoid the technicalities and complexities of subjecting parties to national jurisdictions and therefore also assists in the enforcement process. Consequently, Governments are enjoined as a matter of priority, to take steps to accede to the necessary international treaties and conventions that would make it possible for them and their nationals to take advantage of the facilities of these international arbitral institutions. Similarly, private sector organizations are urged to join such international bodies which offer facilities for the settlement of international commercial disputes at a non-governmental level.

Governments and their agencies are called upon to employ the process of arbitration more often when they contest the validity of certain transactions or pursue their rights/claims in respect of projects that have been poorly conceived/executed by international agencies, lending institutions or multinational corporations. Through an active pursuit of rights/claims in international arbitral tribunals, governments are able to reduce their debt burden. A high proportion of their debt stocks can be attributed to projects that have been poorly conceived or executed by these international donor agencies for which they should be partly held responsible.

It has been observed that the prospect of successful arbitration (or any dispute resolution method) is determined not only by the amount of work that goes into advocacy once a dispute has arisen, but also by the amount of preparatory work and expertise employed right from the time an agreement is being drawn. Consequently,

(a) domestic parties to any international agreement should involve lawyers in the negotiation of drafting of such agreements right from inception, and the practice of calling lawyers in as fire fighters when the project is in trouble or litigation/arbitration has commenced should be discontinued,

(b) lawyers on their part, should be very careful in the negotiation and drafting of agreements especially the arbitration and related clauses or applicable laws and venue, so as to imaginatively avoid future costly complications, disappointments and frustrations.

2. PRINCIPLES OF BUDGETARY LAW

The time has come when African Governments should pursue compensation from the North (i.e. Europe and North America) for the devastation and exploitation of African human and natural resources in the last three centuries as these have immensely contributed to the current imbalance In international trade and investment with the resultant deficits and debts of African countries.

Governments must respect the principles of budgetary law of appropriation not to engage in borrowing without constitutional authorization in due deference to the separation of powers in a particular state.

Although the traditional functions of government are the maintenance of law and order, protection of the territorial integrity of the State through secured borders, maintenance of services that cannot be operated individually or through private enterprise, modern governance also calls for the involvement of the Government in the provision of goods and services which act as a catalyst to development, in order to avoid unnecessary pressures on a nation's balance of payment. Such services should be financed through normal government revenues such as taxes, duties and charges where Governments must resort to borrowing. This should be met as far as possible from internal resources.

As far as possible, external borrowing to finance public projects should be restricted to projects that have the capacity to generate foreign exchange earnings or conserve foreign exchange for the country.

However, in light of historical developments, and on a common evaluation at both national and international levels, certain expenditures are deemed indispensable for the development of a given society which cannot be met by revenues. The international community has to agree that these expenses have to be financed through injections of external financing that are not to be reimbursed.

Governments are called upon to establish an independent agency which would coordinate all external borrowings by both the public and private sectors of the economy with a view to ensuring that external borrowings are resorted to only for those projects which meet with national development priorities and for which local (domestic) financing is not available. Consequently, such an agency should be vested with powers to authorize all external borrowings in line with national priorities and make regulations setting the criteria to be employed for granting such approval.

In the pursuit of national economic development objectives, the procurement of loans for projects should take into account the socio-economic, cultural and human rights of the people.

It has been observed that a majority of projects initiated, funded and executed in African countries through the assistance of multilateral financial/monetary institutions such as the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (IBRD) failed largely because of the rigid ideological approach to economic development issues by functionaries of these institutions. Thus it has been observed that most functionaries of these institutions come from certain geographical areas of the world or have had their educational qualifications and training from clearly identifiable institutions in a few member states of these bodies. The dynamics of modern economic development call for an integrated approach rather than an exclusionary one to economic theories and policies through the involvement and (harmonization) of various schools of thought and also through diversified representation in these bodies. Towards this end, there is a need for urgent democratization of the recruitment of staff in these institutions to the extent that their technocrats and field officers should reflect the various geographical regions as well as a diversified educational background.

3. RESCHEDULING OF EXTERNAL DEBT

Debt rescheduling or restructuring per se is not and cannot be a solution to the debt problem as it merely postpones and in most cases increases the debt service burden of African States. Consequently, there is need for the adoption of more realistic solutions to the problem. In this regard it must be recognized that a greater percentage of the debts were incurred on projects which never worked, nor could pay or be expected to pay for themselves; for which both the debtor countries and the creditors must accept responsibility. Consequently, African Governments are called upon to collectively pursue the subject of debt cancellation and actively explore the possibility of compensation for some of these non-performing projects, or "white elephants."

The importance of knowledge and information in any undertaking cannot be over emphasized. Consequently, there is an urgent need for African states to establish national State banks or debt management units.

The world community is growing smaller every day and people with common problems or objectives are coming together more often for the common good. It is in this light that African countries are called upon to establish a consultative forum through which they can share experiences on their debt and economic development issues, exchange information on their dealings with the creditors and work out common strategies for the resolution of their debt problems.

While recent initiatives by creditor countries, especially the Trinidad Options, are welcome, it is obvious that they will fundamentally alter the existing disequilibrium in the world economy. Consequently, greater efforts should be made by these creditor countries to evolve better options along the lines earlier suggested in these recommendations. Furthermore, the Creditor Banks which are yet to respond positively to the dynamics of the debt crisis, are urged not to view the debt situation purely from the creditor/debtor relationship perspective but as a problem of development and a sharing of responsibilities.

UNITAR/EADB NATIONAL FOLLOW-UP WORKSHOP ON LEGAL ASPECTS OF EXTERNAL DEBT MANAGEMENT

Nairobi, KENYA 08 July - 12 July 1991

RECOMMENDATIONS

Among the specific topics discussed at the Workshop were:

A. Debt Rescheduling through the Paris Club;
B. Loan Negotiations and Arbitration Clauses;
C. Sovereign Debt and Budgetary Laws.

After the week-long deliberations, the workshop participants made the following recommendations:

1. There is a need for open discussion during negotiations leading to the procurement of a loan. This is necessary whether the debt to be incurred is sovereign or a private-sector debt. In order that legal issues are adequately handled, lawyers must be involved in negotiations for loans right from the beginning.

2. There is a need to train the managers themselves so that they might appreciate the crucial role of the lawyer in debt management issues. Such training should address heads of parastatals and senior officers in government departments as well as Permanent Secretaries.

3. There is a need to develop cadres of lawyers in government and parastatal entities specializing in the area of debt management. Once such lawyers are sufficiently specialized and trained, the significance of their role should be emphasized.

4. It was noted that Kenya has a committee on debt management in the Ministry of Finance. The participants commended this move and recommended that this committee be expanded to cover most parastatals.

5. The Attorney-General's Chambers need to be expanded so as to accommodate the large amount of increasingly complex negotiations. Other government departments also should be encouraged to employ the services of lawyers. Such a move would allow for specialization.

6. The participants also urged the government to set up an Inter-Ministerial Committee comprising lawyers and non-lawyers which would have the task of reviewing debt problems periodically.

7. Whenever regional seminars are held, UNITAR should try to involve people from other regions as much as possible. It was thought that two participants from each region would suffice.

8. Because of the biased nature of most of the loan agreements imposed by the lending countries, the participants recommended the formation of a task force in each ministry to study all past loan agreements with a view to identifying those with unfair clauses so that the government or the parastatals could seek to terminate such agreements.

9. During the discussion, it became apparent that parastatals are subjected to forced borrowing through the purchase of treasury bills. The participants were of the view that the government must honour its obligations and pay upon maturity of such bills. The workshop also recommended that local borrowing should be conducted under normal market conditions and within the established legal and financial rules.

10. If there are to be future seminars, participation should not be restricted to lawyers. Some non-lawyers from relevant ministries should be invited to broaden the perspective on debt management. They should be considered as resource persons.

11. Each country must set its priorities in terms of the needs of that country. After priorities are set, there should be an assessment of how these priorities are to be met. If they cannot be financed locally, the government should seek to have them financed through "compensatory financing" from donor countries.

12. The Kenyan Government should take immediate steps to negotiate debt relief.

If these issues were adequately dealt with, the participants believed that this would greatly help resolve many debt management problems in the country.

SUB-REGIONAL AWARENESS /TRAINING SEMINAR ON LEGAL ASPECTS OF EXTERNAL DEBT MANAGEMENT

Accra, GHANA 07 October - 16 October 1991

RECOMMENDATIONS

I. MAIN ECONOMIC AND LEGAL ISSUES

1. A Common African Front (CAP) towards the debt crisis should be formed.

2. Borrowers should not underestimate their bargaining power.

3. The Borrower should not be afraid to canvass novel international legal principles in support of its position.

4. Borrowers should insist on the removal of discriminatory and double-standard approaches by the North in dealings with the South as opposed to its approaches in dealing with other parties in the North. There should be a fair application of general principles of law to all parties.

5. Lawyers should, in the negotiation and drafting of loan agreements, concern themselves with the distribution of risks and benefits arising under the loan agreements.

6. Borrowers should learn to distinguish clearly between concessional aid and grants so as to avoid compounding the debt crisis over a period of time.

7. The study of macro and micro economics should be made an integral and compulsory aspect of undergraduate study by Lawyers in Africa, to enable them to understand the economic implications and basis of legal provisions in international development agreements.

8. Lawyers in specialized institutions and parastatals such as post and telecommunications, power generation, shipping, aviation, etc. should be given in-service training, and should be involved in all aspects of the operations of their institutions, in order to enable them to have a clear and full understanding of the scientific and economic basis of their operations, so as to enhance their ability in the negotiation of loans.

9. Courts and legal personnel should be equipped and trained to handle international commercial transactions.

10. Efforts should be geared towards the setting up of an Afrodollar Market. This is desirable to reverse the trend of flow of excess SSA funds to Europe which then come back as Eurodollar loans.

II. PARTIES TO AGREEMENT

11. While the lender will wish to use a number of standard operational clauses under the many headings usually found in loan agreements, the borrower is advised to consider each clause separately in relation to its real needs.

12. The borrower should put a cap on legal fees and other expenses because these escalate the cost of loans.

13. The borrower should endeavour to negotiate a comfortable grace period and written notice in order to give itself leeway to adjust in case of any difficulty in meeting its obligations.

14. Lawyers should be involved at an early stage in the negotiation loan agreement. They should study warranties, ascertain that they are correct and should not assume that warranties are standard form and need not be negotiated.

15. Wherever possible, it is better to clearly define the applicable law rather than adopt general principles of law, since this may create a conflict in an agreement e.g. between a Western bank an Islamic State which operates under Islamic Law.

16. Borrowers should not accept clauses which are contrary to over-riding principles of public policy in their country.

17. Where the borrower can prove sufficiently the stability of its legal system with adequate safeguards to protect the lender, it should negotiate that the laws of its country will be the governing law of the contract.

18. In view of the fact that the two most prominent laws in commercial bank lending are the laws of New York and the United Kingdom, lawyers from borrowing countries are advised to familiarize themselves with these laws.

19. In the event that the lender has to enforce against the borrower, the agreement should be restricted to the assets of the particular agency which is the defendant and not to other assets of the state within the lender's jurisdiction.

20. Borrowers should negotiate covenants which ensure the continued existence of the lender to fulfill its obligations under the loan agreements, especially in agreements where there is a long disbursement period.

21. The borrower's lawyer should not hesitate to qualify draft letters of opinion sent to him by the lenders as such letters are subject to negotiation like the loan agreement itself.

III. LOAN AND GUARANTEE APPROVAL PROCEDURE

22. Sovereign borrowers should have clear-cut and comprehensive loan/guarantee approval procedures.

23. The procedure should be based on the principles of efficiency, expeditiousness and minimum cost of project financing and implementation.

24. Procedures should be established under law which would expressly provide that non-compliance with the procedures would render the agreement in question not valid and not binding on the government.

25. In order to allow the borrower time to reflect on the draft text, credit agreements should never be signed immediately after negotiation.

26. Governments should not introduce policies of privatization if they are not prepared to guarantee private loans.

27. There should be compulsory public registration of all foreign exchange credit agreements (both public and private).

IV. DEFAULT CLAUSES

28. The harshness of default clauses should be attenuated by adding notice/grace periods and including materiality tests to the events which trigger off the default.

29. The impact of cross-default clauses should be limited by (i) requiring that only a formal declaration of default under the extraneous contract would trigger off the cross default clause and (ii) limiting the default to external indebtedness only.

30. The power to decide whether default has occurred and the course of action to take, should not be given solely to the agent bank but should be shared with the majority of the banks. Majority here should be numerical majority of the banks which must also have at least a 75 per cent exposure.

V. FORCE MAJEURE

31. Borrowers should protect themselves against clauses which relieve the lender of its obligations to continue with the disbursement under the contract in the event of it becoming illegal under the laws of the lender country. This could be done by providing that the lender should in such a case seek funding from other jurisdictions to honour its obligations by, for example, directing another bank to pay.

32. Borrowers should resist the inclusion of increased cost clauses which protect the lender against future cost increases to the lenders in providing the funds, since on the Euromarket the movement of LIBOR takes care of this and there is no reason why the borrower should bear unanticipated increases in costs occasioned by activities in the lender's country.

VI. EXPORT CREDIT

33. Availability of export credit or "soft" finance should not lead to economically unviable projects being undertaken.

34. Possibility of repayment of export credits must be examined independent of the projects under investigation. So that "good" projects do not lead into a debt trap if there is insufficient foreign exchange in the economy.

35. Export credit finance should be subject to international competitive bidding.

36. Borrowers should carefully assess the value of technology being imported in order to avoid obsolete technology being dumped on them.

VII. CO-FINANCING

37. It is observed that a co-finance agreement can turn out to be more expensive because of the nationality requirement contained in all procurement guidelines of export credit agencies where goods from a creditor country are more expensive. Consequently, it is recommended that African countries first seek and obtain international biddings on a project before arranging for co-financing.

38. Efforts should be made by African borrowing countries to ensure an equitable distribution of benefits to them under the procurement guidelines of CO-financing agreements.

VIII. JURISDICTION/ARBITRATION

39. Borrowers should have the right to apply to any jurisdiction for remedy and jurisdiction clauses should be drafted on the basis of mutuality and reciprocity.

40. Third World countries should endeavour to strengthen and avail themselves of regional arbitration centres by negotiating for arbitration clauses which appoint such centres.

41. Lawyers should know and understand the rules and procedures of the arbitration they choose to apply through arbitration clauses.

IX. GENERAL

42. UNITAR should arrange internship or exchange programmes for debt managers and allied professionals from LDCs with relevant organizations in developed countries.

43. Borrowers should monitor closely movements of interest rates and other currencies in the Euromoney market.

44. Borrowers should negotiate that the agent bank also act as a trustee in favour of the borrower in situations in which the agent bank holds excess funds from the agreement.

45. Borrowers should budget for the maintenance of infrastructure in every sector of the national economy in order to avoid unnecessary external borrowing.

46. In negotiating floating interest rates, borrowers are advised to negotiate for a ceiling just as the lenders impose a bottom line.

UNITAR/EADB NATIONAL FOLLOW-UP WORKSHOP ON LEGAL ASPECTS OF EXTERNAL DEBT MANAGEMENT

Kampala, UGANDA 20 January - 24 January 1992

RECOMMENDATIONS

The participants in the workshop adopted the following recommendations for consideration by the entities and persons concerned:

1. There is an urgent need to upgrade the teaching of the Legal Aspects of Debt Management at the Law Faculty. This may be done by way of introducing a fully fledged course in International Economic Law. In this regard, UNITAR's support through their database centre in the form of materials, journals, the reproduction of a catalogue and the updating of current trends in the area would be most appreciated.

2. UNITAR should fund local research into the question of Uganda's specific debt problems, in a bid to generate greater awareness and expertise about the issue.

3. UNITAR should consider ways of funding {through the Faculty of Law, for example) regular, local workshops.

4. It is necessary to develop a cadre of knowledgeable people in the field of debt management, and in this respect, those who have attended UNITAR workshops should be kept informed of debt management issues and other related seminars and similar activities.

CONCLUSION

Many of the developing countries have large debts, relative to their economies, which have become a constraint on development. The world community is now launched on a new phase of the response to the debt problem. Measures available to reduce the debt burden will be expanded as new recommendations and proposals are taken up in various fora.

Many of the issues covered in this document are ones which have been and continue to be priority concerns for the respective governments. These issues might seem uncomplicated at the beginning, but become quite complex if viewed from a regional perspective. This is why there is also a need for a wider discussion and explanation of how some of these recommendations could eventually be implemented.

The recommendations contained in this document have been spontaneously put forward by participants to UNITAR's seminars and workshops. They express concern of government officers dealing concretely with legal issues of debt management. They might not have a universal value or impact, but presumably reflect, mutatis mutandis, similar worries among lawyers in other developing regions of the world. They will serve as a set of guidelines to UNITAR for the coming surveys of training needs and assessments of results obtained so far.

Moreover, this document is being circulated with a view to pointing out what those concerned in the field of debt management think and believe needs to be done.

Publications of this sort will also help create greater awareness among the concerned parties at all levels and at least give them an idea as to what problems they are faced with and how to approach such problems.

About UNITAR

UNITAR is an autonomous body within the United Nations which was established in 1965 to enhance the effectiveness of the UN through appropriate training and research. UNITAR's programmes in the legal aspects of debt, financial management and negotiation are among a wide range of training activities in the field of social and economic development and international affairs carried out, generally, at the request of governments, multilateral organizations, and development cooperation agencies. UNITAR also carries out results-oriented research, in particular research on and for training, and develops pedagogical materials including distance learning training packages.

UNITAR's **Training and Capacity Building Programmes in the Legal Aspects of Debt, Financial Management and Negotiation** are conducted for the benefit of over 35 partner countries mainly from sub-Saharan Africa and Vietnam. These programmes aim at meeting the priority training needs of senior and middle-level government officials through a wide range of seminars, workshops, and training of trainers workshops. In parallel to training activities, the programme also assists in strengthening local capacities of governmental and academic institutions through distance learning training packages, up-to-date publications as well as networking activities.

During 2001, the programme will focus on :

- Training government officials through short-duration regional seminars and workshops on various aspects of debt, financial management and negotiation;
- Developing On-line Training Courses (in parallel with its traditional regional training) with a view to tapping a wider audience and reducing cost of training per participant;
- Strengthening existing ties with regional training centres and offering joint courses with partners in the field;
- Creating awareness among senior government officials of the importance of the legal aspects in the borrowing process and of putting together a multidisciplinary team for loan management and public administration;
- Providing in-depth training and skills development for accountants, economists, financial experts and lawyers coming from government ministries and departments involved in negotiation, financial management and public administration; and
- Developing and disseminating training packages and 'best practice' materials directly related to the practicalities of legal aspects of debt and financial management, with a view to strengthening existing human resources and institutional capacities at the national level.

A description of UNITAR's latest activities and training programmes in the area of debt and financial management is available on its website at: www.unitar.org/dfm.

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