

measures, including further cancellation or reduction of debt and debt service related to official debt, and to take more urgent measures as regards the remaining commercial debt owed by the developing countries;

6. *Welcomes* the write-off by certain donors of a significant part of the bilateral official debt and calls upon the multilateral financial institutions to consider additional appropriate new measures for substantial relief of the debt of low-income countries;

7. *Urges* the commercial banks to extend initiatives to overcome the commercial debt problems of the least developed countries and of low and middle-income developing countries;

8. *Directs* the Secretariat to continue to update the study in the light of new initiatives and measures with special reference to international economic environment.

(iii) Secretariat Brief Debt Burden of Developing Countries: An Overview of Recent Developments.

Background

In the last two decades external debt burden of many developing countries has increased significantly. This has resulted in negative economic growth affecting vitally the overall development process. Remedial measures to limit the economic impact of this problem have so far not been very successful. Instead, some of these remedial measures have had an impact which could be termed as negative. In view of these shortcomings, debtors and creditors have been attempting to outline new measures to overcome this problem. Importantly, to minimize the growing adverse impact of increasing burden of debt, efforts at different levels have been made to find suitable and durable solutions. In view of these efforts, it is said that the fears of the international financial system collapsing because of the debt crises of developing countries have subsided.¹

The major portion of the debt of African countries is represented by their long-term borrowings from International Monetary Fund. The remaining 10 percent is short-term debt. Further, an important feature of the African debt is that over 96 percent of the long-term debt was either publicly contracted or publicly guaranteed and is thus sovereign debt. The major share of the Asian developing countries burden of debt, however, constitutes short-term and unofficial debt.

HISTORICAL PERSPECTIVES:

Although the roots of the debt crisis could be traced to rising expectation for rapid economic growth mainly in the countries of Asia, Africa and Latin America, the tentacles of the problem lie further in the past of colonial times, especially in Africa.² A study prepared by the ECA notes—"typical of most colonial empires, practically all aspects of Africa's economic activity were exclusively oriented towards serving the needs of colonial powers. Therefore, all the physical infrastructure, communications, banking and other related facilities in Africa were geared to facilitate the exploitation of its natural and human resources for the benefit of the colonial masters. Africa was purposely made dependent on the production of primary products to feed the hunger for raw materials from the factories and industries of the colonial powers. The development of African

1. *The African Debt Problem: Financial Shackles to Africa's Development Process* (Economic Commission for Africa: 1993, E/ECA/TRADE/93/5).

2. *Ibid.*, p.3.

industry was actively discouraged as competition with the centres was to be avoided."³ During 1960s and 1970s when majority of the Afro-Asian countries became independent, devastated by colonial exploitation, they had no capital to fuel the rapid economic growth that they hoped for.⁴ Foreign investors who came to these newly independent nations did business on terms favourable to them, such as full ownership of equity, generous tax concessions and non-restricted repatriation of profits. All these incentives, however, failed to attract requisite amount of foreign investment in substantial quantity. Therefore, the majority of the developing countries had little option left but to borrow to finance development and growth.⁵

The newly-independent Asian and African countries had to face in the decade of 1970s two major setbacks. Firstly there were marked rises in the prices of oil which resulted in resorting to heavy external borrowing in many poor countries. Secondly, there was a decline in the prices of primary commodities which affected the debt repayment capacity of the debtor countries. And there were other factors which affected the stable administrative and economic set up in many of these countries. These factors concerned civil wars, government delerictions, natural calamities such as drought, desertification and population explosion.

After the crisis of repayment faced by Mexico in 1982, a spate of rescheduling began at the behest of the creditors.⁶

Few recent developments have altogether, though partially, given a different, but practical dimensions to the burden of debt. These dimensions which have enhanced the debt burden of developing countries concern excessive arms purchases and military spending. Significantly, the defense expenditure of the developing countries increased more than six fold from 1960 to 1985 as a result of the political and military insecurity.⁷ The impact of certain events in the Persian Gulf and the consequent military deployments had affected oil prices, interest rates, labour migration, workers' remittances and financial systems all over the

3. Ibid.

4. *Foreign Direct Investment and Industrial Restructuring in Mexico: Government Policy, Corporate Strategies and Regional Integration*, United Nations, 1992 ST/CTC/SER.A/13. Also see: Yacob-Haile Mariam, "Legal and other Justifications for Writing off the Debts of the Poor Third World Countries: The Case of Africa, South of the Sahara", *Journal of World Trade*, 1990, p.56.

5. Daniel H. Cole, "Debt Equity Conversions, Debt-for-Nature Swaps, and the Continuing World Debt Crisis", *Columbia Journal of Transnational Law*, Vol. 30, 1992, p.57. Also see: Yacob-Haile Mariam and Berhanis Mengistu, "Public Enterprises and the Privatisation Thesis in the Third World", *Third World Quarterly*, October 1988, pp. 1565-1587.

6. For details see: Enrique Castro Tapia, "Mexico's Debt Restructuring" *Columbia Journal of Transnational Law*, Vol. 23 no. 1, 1984: Also see—*Foreign Direct Investment and Industrial Restructuring in Mexico*, n.7

7. *External Debt Crises and Development: Note by the Secretary-General*, A/45/380, p.7.

world.⁸ It should be noted that the abnormal increase in the external debt of the developing countries resulted from the lack of a set of internationally agreed rules for monetary and fiscal policies and bank supervision. In such a vacuum, borrowing took forms that were especially risky for a developing country.

DEBT RELIEF: THE GREAT CHALLENGE

Realising the growing adverse impact of increasing burden of debt, efforts at different levels have been made to find suitable solutions. Declarations have been made by both debtor and creditor countries at international fora, focussing the attention mainly on the alleviation of debt burden. The General Assembly in its resolution (46/148) entitled "International Debt Crisis and Development: enhanced international cooperation towards a durable solution to the external debt problems of developing countries", noted with appreciation institutional efforts to reduce the debt burden, such as Toronto terms, Trinidad and Tobago terms, the Netherlands Initiatives, the French Initiatives, the Houston terms and the Enterprises for the American Initiative.⁹ The Special Session of the UN General Assembly on "International Economic Co-operation and Development" held from 16 to 28 April 1990 reiterated its commitment to find ".....a durable and broad solution of the external debt problems of the debtor developing countries".¹⁰

At the Tokyo summit Meeting of the Seven lending industrialized countries held in 1993 a reference was made in the final declaration to the problem of debt burden. The tenth Non-Aligned Summit held in Jakarta (Indonesia) in September 1992 had referred in its final declaration to the difficulties created by the mounting debt burden for developing countries.¹¹ The United Nations Conference on Environment and Development (UNCED) held in Rio de Janeiro (Brazil) noted in the Agenda 21 "that it is important to achieve durable solutions to the debt problems of low and middle income developing countries in order to provide them with the needed means for sustainable development." Further, it also outlined the possible remedies, such as, mobilization of higher levels of foreign direct investment and technology transfers; new ways of generating new public and private financial resources to be explored which *inter alia* would include: (a) various forms of debt relief, apart from official or Paris Club debt, including greater use of debt swaps'; (b) the use of economic and fiscal incentives and

8. Ibid. The external debt of developing countries according to the estimates of the Bretton Woods Institutions reached the figure of \$1200 billion. The flow of payments for interests and amortizations has increased from \$90 billion in 1980 to an estimated \$175 billion in 1990.

9. For a brief discussion on each of these initiatives see: *Debt Burden of Developing Countries: Guidelines for Rescheduling*, Doc. No. AALCC/XXXII/KAMPALA/93/15, p.13.

10. Declaration adopted by the UN General Assembly at its Special Session on International Economic Cooperation and Development on 1 May 1990.

11. *Times of India*, 16 September 1992.

mechanisms; (c) the feasibility of tradeable permits; (d) new schemes for fund raising and voluntary contributions through private channels; (e) the reallocation of resources presently committed to military purposes.¹²

The root of the problem, according to the available information, lies in the functioning of the global economy itself. There were, however, some important positive developments also. According to an UNCTAD Report, a notable factor is the successful completion of adjustment measures by a number of Asian and African countries and their ability to raise domestic savings and investment.¹³ The present recession and stagnation in global trade is also significant. Successful completion of Uruguay Round of Multilateral Trade Negotiations would be of immense importance to majority of the developing countries.¹⁴ These negotiations were supposed to be completed in December 1990. Due to a continued deadlock between the United States and European Community over the issue of farm subsidies, these negotiations have yet to reach any conclusion. Due to this stalemate, the position of developing countries in international trade and finance has substantially weakened further, widening the gap between developing and the developed countries.

A. Debt Reduction Strategies:

Three distinct phases of debt reduction strategies have been identified:¹⁵ (a) Until late 1985 emphasis was placed on market solutions and financial engineering to ease debt restructuring; (b) from late 1985 to March 1989, the strategy consisted in the provision of financial resources to highly indebted countries with a view to facilitating their growth and structural adjustment and thus reducing the burden of debt (this is popularly known as the "Baker Plan" named after the former United States Secretary of the State) (c) since 1989, the focus is on debt reduction.¹⁶ The debt reduction and interest relief became part of international policy towards commercial bank debt with the launching of the new international debt strategy, informally known as the "Brady Plan", after the Secretary of the Treasury of the United States who proposed it in 1989. This initiative is centered on voluntary, market-based debt and debt-service reduction with the support of the multilateral financial institutions and other official creditors. The extension

12. *Report of the United Nations Conference on Environment and Development: Note by the Secretary-General*, C-69 INF-2, 17 August 1992. Also see: GA Resolution 47/198, 22 December 1992; *Notes and Comments on some Selected Items on the Agenda of the Forty-eighth Session of the General Assembly of the United Nations* Doc. No. AALCC/UNGA/XLVIII/93/1.

13. *The Least Developed Countries Report 1992*, UNCTAD Sales No. E. 93. II.D.3.

14. *Ibid.*, p.99.

15. *External Debt Crisis and Development: Note by the U.N. Secretary-General*, 8 October 1990, A/45/380. p.18.

16. For details regarding "Baker and Brady Plans" See: *UNIDO, External Debt and Industrial Development*. UNIDO/IDB/7/19.

of loans and rescheduling of repayments were also elements of the strategy. Debt relief was negotiated on a case-by-case basis with governments whose economic policies were approved by the World Bank and the IMF. The "Brady Plan" strategies dominated commercial bank debt negotiations in 1990; agreements were reached with Costa Rica, Mexico, Morocco, the Philippines, Uruguay and Venezuela.

At national level, countries have been employing various techniques for reducing the debt burden, such as (a) debt-to-equity swaps; and (b) Debt-to-Debt conversion. Debt swaps could be considered as a market-based "voluntary debt reduction" by the commercial banks, through a variety of techniques and instruments.

Some governments, for example, have devised schemes whereby foreign corporations interested in investing in the country, can buy outstanding loans at a discount on the secondary market and cash them in with the Central Bank for local currency. The equity to be swapped for the debt are the equities of state-owned enterprises, known in Africa generally as *parasatals* and which are almost invariably bankrupt. Further, it is suggested that the debt service operations could be linked to the prices of raw materials exported by debtor countries. Under such a mechanism, it is argued, the debtor countries' ability to pay would not be affected by unfavourable fluctuations in the terms of trade in world markets.¹⁷

Debt rescheduling remains an important element in all the initiatives. Factors ranging from balance-of-payments difficulties to managing their own internal resources may result in mounting arrears of debt and its non-repayment in accordance with the scheduled terms and conditions. It also invokes "the payments of principal and/or interest falling due in a specified interval being deferred for payment on a new schedule".¹⁸

B. Debt Management

Debt Management constitutes an important element in the scheme of debt reduction strategies. It requires a capacity to monitor and manage a country's debt comprehensively and efficiently. For an effective debt management strategy, following components have been identified.¹⁹ (a) a well-defined legal and institutional framework to monitor the contracting of loans, their utilization and repayment; (b) the administrative arrangements for the management; (c) facilities

17. "External Debt Crisis and Development", n.18, p.25.

18. Alexis Rieffel: "The Paris Club, 1978-1983", *Columbia Journal of Transnational Law*, Vol. 23, no.1, 1984 pp.83-104; For detailed discussion on "Rescheduling See: *Debt Burden of Developing Countries: Guidelines for Rescheduling*, Doc. No. AALCC/XXXII/Kampala/93/5. p.17.

19. UNITAR: Nihal Kappagoda, "Requirements for Effective Debt Management, 1993, p.16.

for the storage, retrieval and analysis of debt data, either by a manual system or by computer software; (d) the organisational arrangements for debt management which involves the creation and staffing of a Debt Management Office in an appropriate location; and (e) training in aspects of debt management that are relevant to the needs of the borrowing country.

Legal aspects of external debt management should be considered seriously. It has been pointed out that in developing countries lawyers play only a marginal role in development financing and debt management.²⁰ Further, the appraisal and implementation of projects and programmes have generally been placed in the hands of financial experts and political actors. In the recent times, the debt management process has evolved into a highly specialised and complex practice. In view of this, the sovereign debtors should consider the necessity for employing expert legal counsels to assist in the debt renegotiation and management plan.

As indicated earlier, the AALCC study submitted to the Kampala Session (1993) examined recent proposals such as Toronto Terms, the Netherlands Initiative, Trinidad Terms and the US Initiative.²¹ Subsequently, the UNCTAD Secretariat had made a preliminary assessment of the impact of enhanced concessional treatment on the debt service burden of Less Developed Countries analysing the effect of the new initiatives and terms on different countries according to their specific debt profiles.²² This study had noted in its conclusions: "It appears that implementation of enhanced concessional treatment would not by itself remove the debt overhang of all debt-distressed LDCs, even if applied to all of them. Additional measures are needed, in particular for those countries whose debt is mainly to non-OECD countries (and which do not as a rule participate in the Paris Club) or to multilateral institutions. Moreover, although most LDCs with IMF-sponsored adjustment programmes appear to be eligible for special concessional terms within the Paris Club, not all of them have in the past sought such debt relief. In spite of their large debt burdens and high costs involved, some have made special efforts to meet their debt servicing obligations and avoid rescheduling. The debt problems of those countries also deserve attention."²³

In view of these initiatives some recent developments are noteworthy :²⁴
(a) The agreement of December 1992 between Argentina and its Commercial

20. UNITAR: Rolf Knieper, "Legal Aspects of External Debt Management", 1993, p.25.

21. *Debt Burden of Developing Countries: Guidelines for Rescheduling*, AALCC/XXXII/Kampala/93/5, p.10.

22. UNCTAD: *The Least Developed Countries Report, 1992* Sales No. E.93.II.D.3. P.93.

23. *Ibid.*, p.96.

24. U.N. ESC E/CN.17/1993/11. 7 June 1993.

Bank creditor, supported by World Bank loans commitments of \$750 million, that will help achieve a commercial debt reduction in the amount of about \$11 billion; (b) The agreement between Philippines and its commercial bank creditors arrived at in December 1992 on the second phase of the commercial bank part of its overall external debt reduction strategy. About \$4.4 billion was eliminated or converted; (c) The International Development Association in four agreements totalling about \$35 million has concluded with Guyana, Mozambique, the Niger and Uganda at an average cost of US \$ 0.12 per dollar of debt. These agreements have extinguished 89 per cent of the commercial debt of these countries. Similar agreements have been negotiated with Brazil and Peru also.

Conclusions

The AALCC welcomes the new initiatives taken by both debtor and creditor countries in order to reduce the burden of debt. As indicated in the study, the initiatives have shown only marginal success. Despite this, the fears of the international financial system facing a crisis have almost disappeared. It is to be noted that after a decade of crisis, stagnation and difficult economic and political sacrifices, some of the most heavily indebted developing countries seem to have resumed some measure of economic and social development. Nevertheless, for many Asian and African developing countries the debt issue remains a major bottleneck, threatening their development process. A large proportion of scarce foreign exchange earnings has to be earmarked by many developing countries to service debt at an enormous economic, social and political cost.

The view of majority of the developing, countries, particularly in Africa, is that the debt problem is a multi-dimensional problem which requires an integrated and comprehensive rather than a piece-meal approach.²⁵ A comprehensive solution would invariably have to include: a significant reduction in the external debt stock, a reduction in the original contracted interest rates, lengthening of the maturity spread, net real resource flows and measures to improve general terms of trade. In addition, some concrete measures have been suggested specifically to Africa.²⁶ First, more efforts should be devoted to strengthen Africa's human resources. Second, there is a need for transfer of technology and managerial know-how through concerted policy efforts. Third, international trade barriers to Africa's trade should be reduced or eliminated. In our view, the Asian-African countries, must undertake realistic economic restructuring as well as creating the necessary and stable political climate so as to achieve success in debt relief negotiations.

25. *The African Debt Problem*; n.4, p.12.

26. *Ibid.*, p.14.

C. Legislative Activities of the U.N. and other International Organizations in the field of International Trade Law

(i) Introduction

The AALCC Secretariat presents a report on the recent legislative developments in the field of International Trade Law at every session. The purpose of such reports is to keep member states abreast with the recent developments in this field. The Organizations covered include the UNCTAD, UNCITRAL, UNIDO, UNIDROIT and the Hague Conference on Private International Law.

Thirty-third Session : Discussions

The Deputy Secretary-General, Mr Essam introduced the agenda item "Progress Report concerning the Legislative Activities of the UN and other International Organisations in the field of International Trade Law", and stated that this study outlined the legislative activities of the five international organizations, namely, the United Nations Commission on International Trade Law (UNCITRAL), International Institute for the Unification of Private Law (UNIDROIT), United Nations Conference on Trade and Development (UNCTAD) and the Hague Conference on Private International Law. He referred to the Twenty-sixth Session of the UNCITRAL and the substantive topics before that session namely, (a) New International Economic Order: Procurement; (b) Electronic Data Inter-change (EDI); and (c) International Contract Practices; Draft Convention on International Guaranty Letters. He pointed out that the substantive discussions were mainly confined to the adoption of the UNCITRAL Model Law on Procurement of goods and construction and a Guide to Enactment of the Model Law. Further, he also referred to the work of UNIDROIT as considered by its Governing Council at the 71st Session. While referring to the UNIDO's work programme he pointed out that its major areas of work related to its preparation of guidelines so as to assist countries in their industrial development. He referred briefly to the topics presently considered by the Hague Conference, such as (a) Negotiable instruments; (b) Convention on Civil Procedure and on International Judicial and Administrative cooperation and (c) Law applicable to Civil Liability for Environmental Dangers. He noted that the legislative activities undertaken by these organisations in the field of International Trade Law contributed meaningfully towards the realization of objectives set forth in the UN

Decade of International Law, especially in the context of proposed Congress on Public International Law in 1995. Finally, he extended his gratitude to all these organizations for their cooperation in sharing information.

(ii) Decisions of the Thirty-third Session (1994)

Agenda item: "Progress Report covering the Legislative Activities of the United Nations and other International Organizations concerned with International Trade Law"

(Adopted on January, 21, 1994)

The Asian-African Legal Consultative Committee at its Thirty-third Session

Taking note of the Progress Report covering the Legislative Activities of the United Nations and other International Organisations concerned with International Trade Law, Doc. No. AALCC/XXXIII/Tokyo/94/15.

Expresses its appreciation for the report prepared by the Secretariat on the recent developments in the field of International Trade Law.

Expresses appreciation for the continued cooperation with the various international organisations active in the field of international trade law and hope that this cooperation will be intensified in the future;

Requests the Secretary-General to continue to monitor the developments in the area of international trade law and present the same to the thirty-fourth session.

(iii) Secretariat Brief

Progress Report Concerning the Legislative Activities of the UN and other International Organisations in the field of International Trade Law

(i) Report on the Work Done by the United Nations Commission on International Trade Law at its Twenty-Sixth Session (1993)

The Twenty-sixth Session of the United Nations Commission on International Trade Law (UNCITRAL) was held in Vienna from 5 to 23 July 1993. The substantive topics before this session were: (i) New International Economic Order: procurement; (ii) Electronic Data Interchange (EDI); and International Contract Practices: Draft Convention on International Guaranty Letters. Substantive discussions were, however, principally confined to the first item which has culminated in the adoption of the UNCITRAL Model Law on Procurement of Goods and Construction and a Guide to Enactment of the Model Law, the primary purpose of which is to assist legislatures in preparing legislation based on the Model Law. It has also been agreed to commence the preparation of a Model Law on Procurement of Services as an essential complement to the Model Law on Procurement of Goods and Construction. On the other items, the Commission took note of the progress reports submitted by the Working Groups. The Working Group on Electronic Data Interchange is engaged in preparing the content of a uniform law on EDI while the Working Group on International Contract Practices is preparing a draft Convention on International Guaranty Letters. While the work in respect of a uniform law on EDI is in a formative stage, some substantive progress has been made in the preparation of a draft Convention on International Guaranty Letters.

Since the major accomplishment of the twenty-sixth session was the adoption of the Model Law on Procurement of Goods and Construction, this note focusses only on this legislative work.

UNCITRAL Model Law on Procurement of Goods and Construction

Background

The work on this project was first undertaken by UNCITRAL in 1986 and had been entrusted to its Working Group on NIEO. Between 1986 and 1993, the Working Group on NIEO devoted six sessions to the elaboration of the draft text of the Model Law on Procurement. The Working Group completed its mandate at the close of its fifteenth session by adopting the draft text. Concurrently, the Secretariat had been entrusted with the task of preparing the draft of a Guide which would provide assistance to legislatures enacting the Model Law on Procurement.

The Draft of the Model Law as finalized by the Working Group was then circulated to Governments and interested international organisations for comment. At the twenty-sixth session, the draft of the Model Law was examined in the light of the comments received. At the end of its deliberations, the Commission formally adopted the draft text as "UNCITRAL Model Law on Procurement of Goods and Construction". The Commission also formally approved the draft of the Guide to Enactment of Model Law subject to the incorporation of modifications which had become necessary on account of the changes effected in the text of the Model Law. The Commission, in a resolution adopted by it, has requested the UN Secretary General to transmit the text of the Model Law together with the Guide to Enactment of the Model Law to Governments and interested bodies and to recommend to States to give consideration to the Model Law when they enact or revise their laws on procurement in view of the desirability of improvement and uniformity of the laws of procurement and the specific needs of procurement practice.

An Overview of the Model Law on Procurement

The Model Law on Procurement consists of a Preamble and 47 articles arranged under five chapters. Chapter I sets forth the general provisions. Chapter II lists out the various methods of procurement and conditions for their use. Chapter III deals with Tendering Proceedings. Chapter IV sets out the provisions relative to procurement methods other than tendering. Finally, Chapter V sets

forth provisions establishing a right of review of acts and decisions of the procuring entity and setting forth provisions governing its exercise.

The Preamble sets out a statement of objectives aimed at providing guidance in the interpretation and application of the Model Law. In States where preambles are not included in Statutes, this statement of objectives will have to be incorporated into the body of the law itself.

Chapter I, made up of Articles 1 to 15, sets out general provisions. Article 1 delineates the scope of application of the Model Law. The Model Law applies to all types of procurement, but recognises that States may wish to exclude certain types of procurement from its ambit. However, such exclusions are limited to the cases provided by the Model Law itself, such as procurements involving national defence or national security, or by regulation. Even for these excluded sectors, Article 1(3) provides for partial or complete application of the Model Law.

Article 2 sets forth the definitions of 'procurement', 'procuring entity', 'goods', 'construction', 'supplier or contractor', 'procurement contract', 'tender security' and 'currency'. The definition of 'procuring entity' has three options. This is because the Model Law covers primarily procurement by government departments and public sector enterprises, and which are those entities would differ from one State to another. Option I brings within the scope of the Model Law all government departments, agencies, organs and other units within the enacting State. Option II is intended for those States that enact the Model Law only with respect to organs of the national Government. Under Option III, the enacting State may extend application of the Model Law to certain entities or enterprises that are not considered part of the Government of the enacting State if it has an interest in requiring those entities to conduct procurement in accordance with the Model Law.

Article 3 on International obligations of the State relating to procurement clarifies that the obligations of the State relating to procurement clarities that the obligations of the enacting State under an international agreement or at an intergovernmental level with respect to procurement take precedence over the Model Law. It also permits a federal State enacting the Model Law to give precedence over the Model Law to intergovernmental agreements concerning matters covered by the Model Law concluded between the federal Government and one or more subdivisions of that State, or between any two or more of such subdivisions.

Article 4 on Procurement regulations empowers the organ or authority designated by the enacting State to promulgate procurement regulations to fulfil the objectives and to carry out the provisions of the Model Law. The Model Law