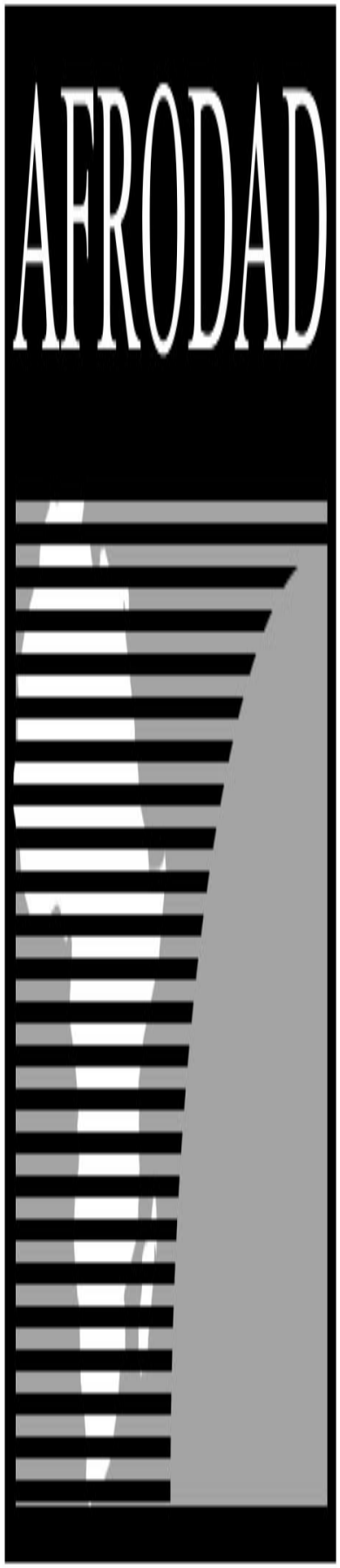

THE EFFICACY OF ESTABLISHING AN INTERNATIONAL ARBITRATION COURT FOR DEBT

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Preface

The United Nations Charter on Human Rights, the African Charter on Human and People's and the Arusha Charter on Popular Participation compels us claim that during this century, human development should not be compromised by international power imbalances in favour of the rich creditor nations and institutions on the one hand against the severely indebted low income countries, their governments and peoples on the other.

The persistence of the current debt crisis which compromises human development in the debt burdened countries is a reflection of the power imbalance and lack of political will on the part of the rich nations and their institutions. It also reflects the lack of fair and democratic global governance that would of necessity draw the conclusion for Debt cancellation and tangible debt relief against dubious, unpayable, odious and illegitimate Debts.

This technical paper presents the efficacy of establishing an International Arbitration Court to deal specifically with the special case of the Debt crisis. It is our sincere hope and trust that it provides some ground for action to be undertaken under the auspices of the United Nations

We take the opportunity to thank the World Council of Churches for enabling us to do this work. We are most indebted to George Kunda for his work on this paper. AFRODAD takes full responsibility for this product.

Opa Kapijimpanga.
AFRODAD Coordinator.

EFFICACY OF INTRODUCING AN INTERNATIONAL ARBITRATION COURT FOR DEBT

INTRODUCTION

It is common knowledge that many least developed countries are overburdened with foreign debts, which they are unable to pay. The debt crisis has in fact compromised human development especially in Africa and other less developed regions.

While Creditor Governments and Institutions continue to claim that adequate relief will be secured through the Highly Indebted Poor Countries (HIPC) initiative, the Debtor nations on the other hand feel that Creditors are not meeting their international obligations and commitments to resolve the debt crisis.

The Paris Club for example is an undemocratic institution, which can be equated to a gang of Creditors acting against one Debtor.

It is also recognised that the many low income countries have accumulated debts and now face servicing obligations that constrain their ability to support poverty reduction programmes including those aimed at fulfilling basic human needs and finance critical growth oriented investments.

The United Nations Secretary General's December 2000 Report on the Financing for Development Process noted that while the need remains for clearer principles and more transparent mechanisms for working out debt problems under the Paris Club, (a Creditor Organisation) new and complementary approaches may be required. The basic fact broadly remains internationally that existing mechanisms do not adequately and satisfactorily address debt issues. In particular there are no neutral, fair and transparent globally binding arbitration mechanisms between Debtors and Creditors that would enable Debtors seek redress in cases of unpayable or illegitimate debts. The Creditors prescribe initiatives and make rules designed to serve their own interests. They also make all the decisions, define the rules of borrowing and repayment and impose their own tailor made measures through the Bretton Woods Institutions etc. The Paris Club for example is an undemocratic institution, which can be equated to a gang of Creditors acting against one Debtor. These undemocratic practices ought to be replaced with structures, which respect human rights, democracy and the right of Debtor countries and their people to be heard. Institutions should be put in place, which are based on global consensus and aimed at safeguarding the interest of all as well as building consensus based on respect for Human Rights and other aspirations enshrined in the United Nations Charter.

It is submitted that the real workable option for tackling the debt crisis and the problems highlighted above is the introduction of an

international legal process of arbitration that will enable the debt crisis to be resolved in a way that preserves the integrity of Debtor countries and ensures that Creditors share the responsibility for failure of the development process and the rise of the debt crisis. Such solutions should also not undermine long-term development prospects of the Debtor countries. The arbitration process should introduce a more neutral approach to an on going process of resolving the debt burden. This approach would be a departure from the existing debt relief process, which is based on favouritism or the strategic importance of the Debtor country in terms of the military, foreign policy or economic interests of the Creditor countries. The introduction of the International Arbitration Court on debt has been proposed as a way of tackling the problem.

The efficacy of introducing an International Arbitration Court on debt is thus examined and analysed in this paper, with the above background to the problem of debt, in mind. This paper also examines the possibility of recovery of money stolen by leaders and put in foreign banks and the return of such money to countries entitled thereto.

INTERNATIONAL COMMERCIAL ARBITRATION GENERALLY

The Arbitral Process

In order to establish an independent International Arbitration Court to preside over and solve debt payment problems between Sovereign Debtors and Creditors, as well as preside and make decisions on unpayable, dubious and illegitimate debts, a suitable legal framework should be put in place for this type of Institution. The question is, "what type of legal framework would be appropriate for such an Institution"? To understand the legal framework and answer this question, it is important firstly to define and examine the concept of International Commercial Arbitration, which is at the core of this paper. Other related concepts like negotiation, mediation and conciliation are also explained.

Issues of lending, borrowing and debt generally fall within the realm of International Commercial Arbitration.[1] Arbitration is one of the alternative methods of resolving disputes outside the traditional court system. According to Halsbury's Laws of England Vol. 2, 4th Edition, Para 601 on pages 332 to 333:

"Arbitration is the process by which a dispute or difference between two or more parties as to their mutual rights and liabilities are referred to and determined judicially and with binding effect by the application of law by one or more persons (the arbitral tribunal), instead of by a Court of law. The decision of the arbitral tribunal is usually called an award. The reference to arbitration may arise from the agreement of the parties (private arbitration) or from statute. The agreement of the parties is in practice almost invariably in writing….".

The term "award" refers to the decision of the arbitrator as opposed to the term "judgment" used in the Court. In this context an arbitrator can even deliver an interim or partial award. This definition of arbitration summarises the elements of arbitration, as it is understood at common law.

[1] For materials on International Commercial Arbitration, see Streng & Salacuse, International Business Planning: Law and Taxation, Vol 6, 1986

Arbitration is the favoured method for settling international business disputes. Agreements to arbitrate are commonly found in international contracts for the sale of goods, the transfer of technology, and the undertaking of foreign investments. Arbitration is an ancient method of dispute resolution common to most cultures. Today, international arbitration is widespread, numerous arbitration centres have emerged. While it has numerous variations, arbitration is basically a method of dispute resolution whereby the parties to a dispute submit their conflict to a third person and agree to be bound by that person's decision. The arbitrator is to decide the matter in a rational and principled way and to give each party an opportunity to be heard. The jurisdictional basis of arbitration resides in the agreement by the parties to submit their disputes to the arbitral process. Without such agreement, the parties cannot be compelled to submit to arbitration, and any resulting arbitral award can be successfully attacked by showing that an agreement to arbitrate was absent or defective. In international business, agreements to arbitrate take one of two forms:

1 a provision – usually referred to an "arbitration clause" – in a contract, stipulating that future disputes arising under or in connection with the contract are to be submitted to arbitration; and

2 an agreement – usually called a "submission agreement" – by which the parties to a specific existing dispute agree to submit that dispute to arbitration.

Arbitration is the favoured method for settling international business disputes. Arbitration is an ancient method of dispute resolution common to most cultures.

The subject of International Commercial Arbitration is highly complex because numerous arbitral systems for international business disputes exist throughout the world.

Arbitration Procedure

It must be stressed that arbitration is a principled and rational method of dispute resolution which seeks to arrive at a result on the basis of the evidence and the arguments presented to the arbitral panel. It is by no means a form of conciliation, mediation, or negotiation. Although an arbitral proceeding may not exhibit the procedural technicalities common to judicial hearings, it must nevertheless conform to minimal standards of justice common to most of the world's legal systems. Indeed, the failure to respect minimal requirements of justice may mean that a court of law will refuse to enforce any resulting arbitral award. Thus, the parties must be given an opportunity to be heard, the arbitrator must be impartial, and the decision-making process must be fair.

The arbitral process, like a court case, proceeds in a series of definite procedural stages. Thus, the aggrieved party must initiate the process by filing a demand for arbitration, which the respondent must answer. The arbitrator or arbitrators must then be selected and their powers defined. The time and place of the arbitration hearing must be determined, along with the appropriate procedure. At the hearing, each side submits its evidence, and the parties have the opportunity to argue their individual cases. Based on the evidence, the argument of the parties, and the applicable rules and principles, the arbitrators decide the dispute and prepare an award embodying their decision.

Although the stages of arbitration are fairly uniform throughout the world, the requirements and rules applicable to each stage may differ significantly among the various arbitration systems. The procedural rules applicable to a given arbitration depend essentially on the will of the parties. Most commonly, the arbitration agreement will contain a provision adopting an entire body of rules promulgated by an institution such as the International Chamber of Commerce (ICC), the American Arbitration Association (AAA), the United Nations Commission on International Trade Law (UNCITRAL) rules. To supplement or to replace these rules, the parties may also define special rules to apply to their arbitration. Most legal systems will respect such procedures unless they are fundamentally unfair or are the product of fraud or overreaching. Indeed, failure of the arbitral tribunal to follow the procedures stipulated by the parties may be grounds for invalidating any eventual award.

If the parties have not specified a particular rule or if the adopted set of rules is silent on the matter, the arbitral tribunal is normally competent to establish the procedures for the arbitration. Generally speaking, arbitration rules are not as well defined and detailed as a court's procedural rules. Moreover, little precedent exists to assist arbitrators in understanding and applying existing rules such as those promulgated by the ICC or UNCITRAL. The arbitrator therefore has significant discretion to shape the procedure applicable to the arbitration.

The arbitration agreement may also specify the law applicable to the arbitration. International law may also be applied in settling disputes through arbitration.

The Appointment or Selection of Arbitrators[2]

In International Commercial Arbitration, the appointment of an arbitral tribunal, panel of arbitrators or a single arbitrator is a matter for negotiation between the parties, with each side generally appointing one or more "national" arbitrators and the remaining "neutral" members being agreed between them. If the parties can settle the composition of the tribunal at an early stage it will be possible to name the members in the arbitration agreement. Frequently however, the identity of the members is left to be settled later. Here the agreement will simply define the membership of the tribunal and lay down the procedure to be followed in setting it up.

For obvious reasons the result of a panel of arbitrators often turns on the decisions of the neutral member or members. Deciding who they shall be is therefore extremely important to the parties concerned, who may sometimes find it difficult to agree on suitable candidates. To take account of this arbitration agreements or treaties often provide that in the event of disagreement the neutral members may be appointed by the President of an international arbitral institution such as the Permanent Court of Arbitration or by some other disinterested party.

[2] For appointment and selection of arbitrators, see J.G. Merrills, "International Dispute Settlement", 2nd Edition, Cambridge, P83 - 86

Effect of An Award[3]

An arbitral award is binding, but not necessarily final in certain instances, for it may be open to parties to take further proceedings to interpret, revise, rectify, appeal from or nullify the decision. Whether such steps are permissible, and if so, whether the new case can be heard by the original tribunal, or must be brought before another tribunal or body, depends partly on general international law, but mainly on the terms of the arbitration agreement.

The power to interpret an award, or to appeal against it, must normally be the subject of an express agreement. Since the object of the parties in going to arbitration is to end the dispute, provisions for appeal are relatively rare. Interpretation on the other hand, which concerns the clarification of an award, not its correctness, is easier to justify and more commonly allowed.

An award may also be set aside on some restricted grounds. Grounds for setting aside are restricted because parties take cases to arbitration with the intention of obtaining a decision which both parties will be bound to carry out and which will put an end to the dispute. But a decision is only binding in international law if the tribunal has been properly constituted, has carried out its instructions and has produced an adequate award. It is therefore possible for a party to deny that an award is effective by invoking the doctrine of nullity.

Again an arbitrator has no jurisdiction to give an award if the instrument from which he claims to derive his authority is invalid, not yet in force or has terminated. It is also possible to dispute an award on the basis that the arbitrator's appointment was not in accordance with the agreement.

An award may also be set aside on grounds of fraud or if it is contrary to public policy.

Enforcement of the Arbitral Award

Once the arbitrator had rendered an award, the winning party then faces the problem of securing its enforcement. Unlike the judge in a court of law, an arbitrator does not have the power to compel a party to obey the award. In order to obtain respect for the award in the face of opposition by the losing side, the winning party must bring into play the coercive power of the state through its legal and judicial systems. In many cases, of course, enforcement problems do not arise because the parties, having agreed to arbitration in the first place, are willing to abide by the arbitrator's decision. Indeed, it has been claimed that 90% of awards made by the ICC are respected by the parties without the need for judicial enforcement measures. Numerous business reasons may lead a losing party to obey the

arbitral award despite the fact that no court has compelled him to do so. For example, if confidentiality was an important factor in selecting arbitration as a means of dispute resolution in the first place, the losing

[3] J.G. Merrills , International Dispute Settlement (Supra) at PP95 - 100

party might not wish to become embroiled in a judicial enforcement proceeding that would make the dispute a matter of public record. Also, if arbitration is a normal procedure in a particular trade or business, a losing party's lack of respect for the award might be viewed negatively by other persons in the trade and thus damage that party's business reputation.

Despite the high percentage of awards that are respected by the parties without recourse to judicial enforcement, the attorney planning for international business dispute resolution must nonetheless take into account the eventuality of being required to seek judicial enforcement of an arbitral award. Indeed, planning for future arbitration requires the attorney to seek two competing goals:

1 quick and efficacious enforcement of the award should his client win the arbitration; and

2 protection in the courts from the results of an unfair arbitral proceeding should he lose.

First, it his client wins the arbitration, the attorney will naturally wish to enforce the resulting award as quickly and efficiently as possible, either in the country in which the award was rendered or in any other country in which the losing party has property that may be used to satisfy the award. The enforcement of an arbitral award in any country depends on the domestic law of that country. The law on the enforcement of arbitral awards is therefore specific to each country; however, as will be seen below, significant progress toward the establishment of commonly accepted legal principles on this subject has been made in the last few decades and incorporated into the legal systems of many countries through international treaties providing for the enforcement of foreign arbitral awards.

Since the purpose of selecting arbitration in the first place was to avoid the use of the courts and the resulting expense and delay, it would defeat the purpose of that choice, if, after obtaining an award, the winning party had to spend considerable time and resources in the courts to enforce it so as to obtain a meaningful satisfaction of his claim.

Obviously, the ideal situation for any winning party is that any court in the world will recognise and enforce an award as final and binding with a minimum of procedural technicalities. Since the purpose of selecting arbitration in the first place was to avoid the use of the courts and the resulting expense and delay, it would defeat the purpose of that choice, if, after obtaining an award, the winning party had to spend considerable time and resources in the courts to enforce it so as to obtain a meaningful satisfaction of his claim. Clearly, what the winning party in an arbitration wishes to avoid at all costs is the necessity of relitigating de novo the claim before a judge. Thus, in planning for arbitration, it is important that the attorney bear in mind enforcement problems.

On the other hand, parties planning for arbitration also want assurance that they will receive fair treatment in the arbitral proceeding and that, if they do not, they will have the possibility of protecting their legal rights in the courts. Some treaties have sought to facilitate the enforcement of arbitral awards. The lack of an appropriate treaty will mean that the winning party must rely purely on the vagaries of local law, which may or may not favour the recognition and enforcement of foreign awards.

In an effort to facilitate the enforcement of international commercial arbitral awards, various nations of the world have concluded treaties whose purpose is to create binding legal obligations to recognise and enforce such awards. One of the earliest such multi-lateral treaties was

the Geneva Convention For the Execution of Foreign Arbitral Awards[4] signed in 1927. The approximately twenty countries that ratified the Geneva Convention did not include the United States. After World War II, the expansion of international business gave a new impetus to efforts to create a global framework for the enforcement of international commercial arbitration awards. This effort culminated in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, concluded in 1958.[5] The next part is devoted principally to a consideration of the Convention's provisions, for it has become the legal basis for award enforcement throughout much of the world. Certain other relevant treaties affecting the enforcement of arbitral awards are also mentioned.

ENFORCEMENT UNDER THE UNITED NATIONS CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

The United Nations Convention on the Recognition and Enforcement of Arbitral Awards, commonly known as the "New York Convention ", was the result of a diplomatic conference held at the United Nations between May 20 and June 10, 1958, when the representatives of 45 nations met to establish a basic international framework for the recognition of arbitral agreements and the enforcement of arbitral awards. Although the United States attended the Conference, it did not ratify the Convention immediately because of fears of possible conflict between the provisions of the Convention and certain United States Laws.[6] Ultimately, under pressure from the American business community and adherence to the Convention by major U.S.treaty partners, the United States ratified the Convention, and Congress amended the U.S. Arbitration Act to provide for its enforcement. The New York Convention became effective in the United States on December 29, 1970.

The ability of a party to obtain the benefit of the U.N. Convention for purposes of enforcing an arbitral award in the courts of a particular country will depend on whether that country is a party to the Convention. As of 21st May, 1996, 108 countries had ratified the New York Convention.[7] While the parties to the Convention include major U.S. trading partners, as well as the Soviet Union and many Eastern European

countries, it should be noted that most Latin American states have refused to participate. It should also be noted that many countries have adhered to the Convention with specific reservations and that the existence of such reservations may affect an attorney's ability to invoke the treaty provisions

[4] Convention for the Execution of Foreign Arbitral Awards, signed at Geneva, 26 September, 1927. This Convention is incorporated in Zambian Arbitration Act No. 19 of 2000.

[5] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done June 10, 1958. Article VII(2) provides that "the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting states on their becoming bound and to the extent that they become bound, by this Convention". The Convention is incorporated in the Zambian Arbitration Act No. 19 of 2000.

[6] See Quigley, Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 70 YALE L.J. 1049, 1051-55(1961)

[7] See I.A.. Donovan, A R McMillan, SC and M.A, Masunda, Source book of Arbitration Materials, Commercial Arbitration Centre, in Harare, Zimbabwe, Appendix 11

in a particular case. Article 1(3) of the convention provides that any ratifying state may establish either or both of the following two reservations:

1 that the ratifying State will apply the Convention to the recognition and enforcement or awards made only in the territory of another contracting state, and

2 that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such reservation. In acceding to the Convention, the United States specifically adopted both reservations.

Although the goal of the Convention has been to develop a globally uniform law on the enforcement of arbitral awards and although it has succeeded in this regard to a remarkable extent, it must be noted that the provisions of the Convention, as part of local law, have been subject to interpretation and application by national courts and that such interpretations may vary on certain points from country to country. A useful publication which follows the judicial decisions under the Convention is Yearbook Commercial Arbitration (Deventer, the Netherlands), published by the International Council for Commercial Arbitration. This annual publication, which begun in 1976, reports on judicial decisions from numerous jurisdictions.

Since procedural rules governing the enforcement of arbitral awards remain within the discretion of individual states, such rules, in addition to divergent interpretations of the Convention's provisions, may also influence the practical application of the Convention in a given country.

Defences to the Enforcement of an Award under the Convention

The fundamental objective of the Convention is to facilitate the recognition and enforcement of awards, and it therefore imposes an affirmative obligation upon the contracting state parties to recognise and enforce such awards. The Convention itself makes no provision whatsoever for the setting aside of awards; however, it does recognise that the arbitral process may have been so tainted or abusive as to make any resulting award invalid and therefore unenforceable. In order to protect parties from illegal and abusive arbitral processes, the Convention establishes a specific list of defences, which the defendant may raise in an enforcement action in order to prevent the enforcement of an award. In this regard, the Convention defines seven grounds, which, if established, will justify a court in refusing to enforce and award. The first five grounds, set out in Article V(1), place the burden of proof upon the party opposing enforcement. The last two grounds, defined in Article V(2) may be raised by the Court on its own motion. Each of these seven defences are considered in turn below. It should be noted that the seven grounds listed

in the Convention are exhaustive, and that a court may not refuse to enforce an arbitral award for other reasons.[8]

Invalidity of the Arbitration Agreement

Article V(1) states that recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

> a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.

Violation of Due Process

The second ground specified in Article 5 relates generally to a violation of due process or fairness in the arbitral proceedings. According to its terms, recognition may be refused if "the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case. Clearly the purpose of this provision is to provide sufficient notice to the opposing party so as to enable him to participate meaningfully in the arbitration proceeding.

Excess Authority by the Arbitrator

Under Article V(1) (c), a court may refuse to enforce an award which decides issues outside the scope of the arbitrator's authority. Thus, the Convention provides that if

> *"the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitrate,……."*

then it can not be enforced. If the arbitrator exceeds the authority on certain issues and not on others, such action does not nullify the entire award. Article V(1)(c) contains the provison

> *"that, if the decision on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on maters submitted to arbitration may be recognised and enforced."*

[8] Ipitrade International, S.A. V Federal Republic of Nigeria, 465 F.Supp.824, 826 (D.C.D.C. 1978) (Article V of Convention specifies only grounds on which recognition and enforcement may be refused).

Irregularity in the Composition of the Arbitral Tribunal or the Arbitral Procedure

Under this defence, the court may refuse enforcement of the award if

"the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, or failing such

agreement, was not in accordance with the law of the country where the arbitration took place;……."

For example, if the arbitration agreement provided for a three-person arbitral panel but the award was rendered by a sole arbitrator, such an award could be challenged under Article V of the Convention. Similarly, if the parties agreed to the application of UNCITRAL rules, and the arbitrator applied ICC rules, such action would also constitute a reason for refusing enforcement of an award.

Award Not Binding or Set Aside or Suspended

The final ground stipulated in paragraph 1 of Article V provides that a court may refuse to enforce an award if

"the award has not yet become binding on the parties, or had been set aside or suspended by the competent authority in the country in which, or under the law of which, that award was made."

Thus, if a court in a country in which the award is made sets the award aside, the courts in other countries are not obligated to enforce it.

Other Treaties

Since most of the world's principal trading countries are parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, that Convention constitutes the most important legal basis for the enforcement of arbitration awards in international business today. Many countries, particularly in Latin America, are not yet parties. In dealing with such countries, other international agreements relating to the enforcement of arbitration awards may exist as aids to enforcement, and the international business attorney ought to be aware of them for they may have applicability where the New York Convention does not apply or cannot apply. Moreover, in certain situations, even where the New York Convention does apply, such other treaty may offer more favourable conditions for enforcing an ward; consequently, a winning party may prefer to invoke its provisions rather than those of the New York Convention. Such bilateral and multilateral treaties are mentioned briefly.

In order to provide a basis for enforcement of arbitration awards among European countries, the European Convention on International Commercial Arbitration, was concluded at Geneva on April 21, 1961. It was subsequently modified by the Paris Agreement of December 17, 1962 relating to the application of the European Convention on International Commercial Arbitration. As of 1984, eighteen countries, including France, Germany, Italy and the U.S.S.R., had ratified the European Convention.

As we noted earlier, relatively few Latin American states have ratified the New York Convention. Their opposition to the Convention is based largely on the Calvo doctrine and their unwillingness to yield the jurisdiction of their own courts to that of international tribunals. In an effort, nonetheless, to provide a workable system of international arbitration, the Latin American states have drafted the Inter-American Convention on International Commercial Arbitration of 1975.

Although many of this convention's provisions are similar to those of the New York convention, there are certain important differences. For example, whereas the New York Convention requires that a court seized of an action subject to an arbitration agreement refer the dispute, at the request of one of the parties to arbitration, the Inter-American Convention on International Commercial Arbitration is silent on this specific question. As a result, the issue of whether or not a court must refer the parties to arbitration would presumably be determined under the local law of each contracting party. In addition, whereas the New York Convention does not provide for rules of arbitral procedure, the Inter-American Convention requires that in the absence of an express agreement between the parties, the Inter-American Commercial Arbitration rules of procedure are to apply to the proceedings.

Bilateral treaties on economic and commercial relations sometimes contain references to arbitration and the enforcement of arbitral awards. The United States has entered into bilateral economic and commercial treaties with over forty different countries, and many of them specifically deal with the enforcement in one country of an arbitral award issued in another. The precise nature of such provision is subject to variation among U.S. bilateral treaties.

Enforcement in the Absence of Treaty Provisions

Despite the absence of a relevant treaty, enforcement in one country of an arbitral award made in another may still be possible. In such case, enforcement will depend exclusively on the law of the jurisdiction in which enforcement is sought. Some legal systems may allow enforcement of foreign awards without significant difficulties, while others may impose conditions, such as reciprocity with the awarding state, a de novo review by the enforcing courts, or the satisfaction of burdensome procedural requirements. Some countries, such as West Germany, have enacted specific legislative provisions governing the enforcement of foreign arbitral awards not subject to treaties or conventions. Others, like the United States, have no specific legislation on this topic. In the U.S., principles of comity govern the enforcement of arbitral awards.

NEGOTIATION, MEDIATION AND CONCILIATION[9]

Negotiation

Disputes are inevitable in international relations. They are also inevitable in commercial, investment transactions. When a government or institution anticipates that a decision or a proposed course of action may harm another state or institution, discussions with the affected party can provide a way of heading off a dispute by creating an opportunity for adjustment and accommodation. Consultations, discussions and negotiations are a valuable way of avoiding international disputes generally.

Negotiations between states are usually conducted through normal diplomatic channels, that is by the respective foreign offices, or diplomatic representatives, who in the case of complex negotiations may lead delegations including representatives of several interested departments of the governments concerned.

As an alternative, if the subject matter is appropriate, negotiations may be carried out by what are termed the 'competent authorities' of each party, that is by representatives of the particular ministry or department responsible for the matter in question – between trade departments in the case of a commercial agreement, for example, or between defence ministries in negotiations concerning weapons procurement. Where the competent authorities are subordinate bodies, they may be authorised to take negotiations as far as possible and to refer disagreements to a higher governmental level.

Mediation

When the parties to an international dispute or domestic dispute are unable to resolve it by negotiation, the intervention of a third party is a possible means of breaking the impasse and producing an acceptable solution. Such intervention can take a number of different forms. The third party may simply encourage the disputing states to resume negotiations, or do nothing more than provide them with an additional channel of communication. In these situations he is said to be contributing his good offices. On the other hand, his job may be to investigate the dispute and to present the parties with a set of formal proposals for its solution. This form of intervention is called conciliation. Between good offices and conciliation lies the form of third party activity known as mediation.

Like good offices, mediation is essentially an adjunct of negotiation, but with the mediator as an active participant, authorised and indeed expected, to advance his own proposals and to interpret, as well as to transmit, each party's proposals to the other. What distinguishes this kind of assistance from conciliation is that a mediator generally makes his proposals informally and on the basis of information supplied by the parties, rather than his own investigations, although in practice such distinctions tend to be blurred. In a given case it may therefore be difficult

[9] See J.G. Merrills, International Dispute Settlement, 2nd Edition, Cambridge PP1 to 79 for the subjects of negotiation, mediation, conciliation.

to draw the line between mediation and conciliation, or to say exactly when good offices ended and mediation began.

Mediation may be performed by international organisations, by states or by individuals. For the United Nations and a number of regional organisations, the settlement of disputes is a basic institutional objective and as a result the Secretary-General and his regional counterparts are often engaged in providing good offices and mediation. In certain situations non-governmental organisations can act as mediators. The International Committee of the Red Cross (ICRC), for example, avoids involvement in political disputes, but regularly intervenes where armed conflict or the treatment of detainees raise humanitarian issues. Since it offers the opportunity to become involved in a dispute and to influence its outcome, the role of mediator also has attractions for states concerned to see a dispute resolved peacefully or amicably or with an interest in a particular solution. Thus it is not unusual to find the course of an international dispute punctuated by offers of mediation from one or more outside parties.

Mediation cannot be forced on the parties to an international dispute, but only takes place if they consent. So unless they have taken the initiative and appointed a mediator already, their unwillingness to consider this form of assistance may prove a major stumbling block. This is because although a mediator's proposals are not binding, the very act of mediation has implications, which may be unacceptable to either or both of the governments concerned.

If mediation becomes possible when the parties suspect that a settlement on their own terms may no longer be achievable at an acceptable cost, then the mediator's task is to devise or promote a solution from which both can devise a measure of satisfaction. This may, of course, be impossible, in which case mediation will fail. But a resourceful mediator has a variety of means at his disposal to avoid this result. He can do much by simply providing good offices and facilitating communication between the parties. If a dispute is serious enough to call for the services of a mediator, it is possible that events have already had the effect of restricting the parties' contact, or have made it difficult for them to deal with each other openly.

Conciliation

Conciliation has been defined as:

"A method for the settlement of international disputes of any nature according to which a Commission set up by the Parties, either on a permanent basis or an ad hoc basis to deal with a dispute, proceeds to the impartial examination of the dispute and attempts to define the terms of a settlement susceptible of being accepted by them or of affording the Parties, with a view to its settlement, such aid as they may have requested."[10]

[10] The quotation is from Article 1 of the Regulations on the Procedure of International Conciliation adopted by the Institute of International Law in1961. See (1961) 49 (ii) Annuaire pp.385-91.

The eclectic character of the method is at once apparent. If mediation is essentially an extension of negotiation, conciliation puts third party intervention on a formal legal footing and institutionalises it in a way comparable, but not identical, to inquiry or arbitration. For the fact finding exercise that is the essence of inquiry may or may not be an important element in conciliation, while the search for terms susceptible of being accepted by the parties, but not binding or them, provides a sharp contrast with arbitration and a reminder of the link between conciliation and mediation.

All conciliation commissions have the same functions: to investigate the dispute and to suggest the terms of a possible settlement. However, within this broad mandate, conciliation commissions have performed a variety of different tasks. What a commission does and how it goes about its work depend in the first place on the instrument setting it up. But much also depends on how the parties choose to present the particular case, and how the members of the commission exhibits many common features, significant differences of approach to the most basic matters are also to be found.

What sort of process is conciliation? One view is that it is to be regarded as a kind of institutionalised negotiation. The task of the commission is to encourage and structure the parties' dialogue, while providing them with whatever assistance may be necessary to bring it to a successful conclusion. This approach, which proceeds from the premise that the resolution of disputes depends on securing the parties' agreement, finds an affinity between conciliation and mediation. Another view is that conciliation is close to inquiry or arbitration; that the commission's function is to provide information and advice as to the merits of the parties' position and to suggest a settlement that corresponds to what they deserve, not what they claim.

ESTABLISHMENT OF INTERNATIONAL ARBITRATION COURT ON DEBT

Justification for such a Court

The unique problems of debt calls for establishment of a special court.

Having examined the various alternative mechanisms of settling disputes, there is no doubt that arbitration stands out as the most appropriate mode of resolving commercial disputes. As seen above arbitration has been popularised and extensively used in the settlement of Commercial disputes. The same mode of resolving disputes can be utilised for resolving commercial disputes concerning debt.

The other modes of dispute resolution that is to say negotiation, mediation and conciliation, which are also entrenched in international dispute resolution, may also be fused in the courts legal framework for resolving disputes, depending on the nature and complexity of each dispute.

The unique problems of debt calls for establishment of a special court. Many arbitral institutions in the world do not restrict their modes of settling disputes to one mode. They employ methods and processes, which are appropriate for each particular dispute.

It would not be appropriate to enhance current mechanisms such as the Paris Club by introducing arbitration panels to hear possible disputes between Debtors and Creditors because such a club which is in fact a cartel can still intimidate Debtors under the guise of debt negotiation. The imbalances in bargaining power between the Creditors and Debtors calls for the establishment of a neutral and impartial arbitral institution.

The imbalances in bargaining power between the Creditors and Debtors calls for the establishment of a neutral and impartial arbitral institution..

Similar Institutions set up to deal with particular problems

The establishment of a unique arbitral institution to deal with the problem of debt is further justified by the fact that similar institutions have been set up before to deal with unique problems. Some of these similar institutions, which we may emulate, are:

a) The International Centre for Settlement of Investment Disputes (ICSID).

b) The Permanent Court of Arbitration.

These institutions are analysed in the following paragraphs.

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTE (ICSID)[11]

Background

Foreign investment disputes between foreign investors and host country governments, raise special problems; consequently, the normal mechanisms of international business dispute settlement may not be appropriate. A foreign investment dispute usually involves the government of the host country and is invariably highly political. Governments who have nationalised or otherwise interfered with a foreign investment project usually assert that their actions have been taken in the national interest and are a legitimate exercise of national sovereignty. As a result, foreign governments may be reluctant to conclude an arbitration agreement to submit future disputes concerning an investment project to normal international commercial arbitration, such as the ICC, which are, after all, institutions of private law. Indeed, the host government may argue that disputes arising out of expropriation or nationalisation are not "commercial" in nature and, therefore, are clearly outside the ambit of international commercial arbitration. Moreover, it may fear that institutions such as the ICC, have a bias or an orientation toward private enterprise and are therefore unable to view the claims of a government with total neutrality. In addition, even if a government should agree to submit future disputes to arbitration, experience has shown that it is difficult to enforce such agreements against a government and even more difficult to enforce any resulting arbitration award.[12]

At the same time, a foreign investor may be unwilling to rely solely on host country courts for protection in the event of a dispute with the

[11] Streng & Salacuse, International Business Planning: Law and Taxation, Vol. 6, 1986

[12] See John T. Schmidt, Arbitration Under the Auspices of the International Centre for Settlement of Investment Disputes (ICSID): Implications of the Decision on Jurisdiction in Alcoa Minerals of Jamaica, Inc. v Government of Jamaica, 17 HARV. INT'L L.J. 90 (1976).

government, since they may be subject to local political pressures. Normally, the investor would prefer an independent, neutral tribunal to secure enforcement of commitments and obligations made by a foreign government. The lack of such assurance may, of course inhibit the investment from taking place and thus reduce the international flow of capital, particularly to less developed countries.

In the early 1960's, the staff of the World Bank concluded that an institution designed to take account of the special problems of settling investment disputes between foreign private investors and host country governments would encourage the flow of needed capital to the developing world. In 1962, the Board of Governors of the Bank requested the Executive Directors to study the mater. After a series of discussions within the Bank, as well as meetings with legal experts in various parts of the world, the staff recommended that an international convention be prepared to establish an institution which would provide arbitration and conciliation facilities to settle such investment disputes. In 1964, the Board of Governors of the world Bank directed the Executive Directors to "formulate a convention establishing facilities and procedures which would be available on a voluntary basis for the settlement of investment disputes between contracting States and Nationals of other contracting States through conciliation and arbitration.[13]

By 1965, the Executive Directors and the staff had completed their work in the form of the Convention on the Settlement of Investment Disputes between States and Nationals of other States, which was then submitted for approval to the Member States of the World Bank. The Convention has steadily gained approval since that time. As of August 2001, 134 countries had ratified the Convention. Thus, it has received broader acceptance by the world community. It should be noted that only two Latin American States, Paraguay and El Salvador, have ratified the Convention, a situation which is no doubt due to the Calvo doctrine and Latin America's traditional reluctance to accept international arbitration. Zambia is a signatory to the Convention and has incorporated the Convention into its domestic laws by virtue of the Investment Disputes Convention Act, Chapter 42 of the Laws of Zambia. The United States ratified the Convention in 1966, and it entered into force in the United States as of October 14, 1966.[14]

The Centre

The Convention on the settlement of Investment Disputes between States and Nationals of other States (sometimes referred to as the "Washington Convention") creates an international institution in the form of the International Centre for the Settlement of Investment Disputes to provide facilities for conciliation and arbitration of investment disputes. Located in Washington, D.C. at the Headquarters of the World Bank, from which it receives administrative and financial support, the Centre itself

[13] See, IBRD, Report of the Executive Directors on the Convention for the Settlement of Investment Disputes Between States and the Nationals of Other States (1965)
[14] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, done March 18, 1965, Washington, D.C. 575 UNTS 159, 17 U.S.T. 1270, T.I.A.S. No. 6090

does not engage in conciliation or arbitration, but rather it facilitates the establishment of arbitral tribunals and conciliation commissions in accordance with the provisions of the Convention. The Centre's governing body, known as the Administrative Council, is composed of one representative of each contracting state. The ex-officio chairman of the Administrative Council is the President of the World Bank.[15] The Centre's principal executive officer, responsible for its day –to-day administration, is the Secretary-General. He is appointed by a two-thirds majority of the members of the Administrative Council and serves for a renewable term not exceeding six years.

One of the principal tasks of the Centre is to maintain a panel of conciliators and a panel of arbitrators. Under Article 13 of the Convention, each contracting party may designate four persons to each panel. Such persons may, but need not be, nationals of the contracting State, which nominates them. In addition, the Chairman may designate ten persons to each panel, provided that such persons each have a different nationality. Under Article 14, persons designated to serve on the panels are to have high moral character and recognised competence in the fields of law, commerce, industry or finance. They must also be relied upon to exercise independent judgment. Conciliators and arbitrators for actual investment disputes are to be drawn from these panels. The membership of the panels is a matter of public record and is normally published in ICSID's annual report.

Jurisdiction of the Centre

The Convention was specifically designed to take account of the special characteristics of foreign investment disputes, as well as the special nature of the parties involved. It also seeks to maintain a careful balance between the interests of host states and the interests of investors. The precise nature of the balance is best illustrated in its jurisdictional provisions.

Article 25 (1) of the Convention sets down the basic principle with respect to jurisdiction:

> *"The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a National of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally."*

Consent of the parties, as the report of the Executive Directors states, is the cornerstone of the Centre's jurisdiction. Mere ratification of the Convention does not constitute sufficient consent to subject a Contracting State to the jurisdiction of the Centre for any and all future disputes. Rather, both the contracting state and the national of another contracting state must give their consent. Except to state that the Consent must be in writing, the Convention does not specify the time at which

[15] Convention, Arts. 4 & 5.

consent should be given nor the form it must take. Consent may be given, for example, in a clause included in an investment agreement, providing for the submission to the Centre of future disputes arising out of that agreement, or in a compromise regarding a dispute which has already arisen.

The Convention gives no definition of the term "investment". Today, the concept of investment is, of course, very broad and may include arrangements beyond mere equity ownership, including management contracts, contracts for the sale and erection of industrial plants, turnkey contracts, and technology transfer agreements. Moreover, there is some indication that international loans to foreign sovereigns are beginning to include reference to ICSID arbitration as a way of meeting the opposition of certain powerful state borrowers to the standard loan provisions referring all disputes to the courts of the lenders home country.

It is important to note that once the parties have given consent, the Convention specifically provides that such consent may not be unilaterally withdrawn. If a party, having consented to ICSID arbitration, refuses to participate in the arbitral proceedings, the arbitration may proceed on an ex parte basis, and any resulting award will be enforceable as though the party had participated fully.

Arbitral Proceedings under ICSID

The procedures and rules applicable to an ICSID arbitration are contained in its regulations and Rules, which were first adopted by the ICSID Administrative Council in 1967, pursuant to Article 6 of the Convention.

A party may institute an arbitral proceeding by addressing a request to ICSID 's Secretary General, who then sends a copy to the other side. The request is to contain information concerning the issues in dispute, the identity of the parties, and their consent to arbitration in accordance with the Rules of Procedure for the Institution of Arbitration Proceedings. The Secretary-General is then to register the request, unless he finds, on the basis of the information contained in the request that the dispute is manifestly outside the jurisdiction of the Centre. For example, if it is clear that the state in question is not a party to the Convention, the Secretary-General could refuse to register the dispute.

Once the request for arbitration has been registered, the arbitral tribunal is constituted as soon thereafter as possible. The tribunal consists of a sole arbitrator or any uneven number of arbitrators appointed in accordance with the parties' agreement. If the parties have not agreed upon the number of arbitrators and the method of their appointment, the Convention provides that the tribunal is to consist of three arbitrators, one appointed by each part and the third, who shall be the president of the tribunal, appointed by agreement of the parties. Under article 30 of the Convention, the majority of the members of an arbitral tribunal should not ordinarily be nationals of either the State party to the dispute or the State whose national is a party to the dispute; however, this rule is not applicable if each and every arbitrator on the tribunal has been appointed by agreement of the parties. The Convention gives the parties flexibility in

appointing arbitrators. They may appoint arbitrators from outside the panels of arbitrators maintained by the Centre, but their appointees must possess the qualities, stated in Article 14, necessary for appointment to the Centre's own panels. If the parties cannot agree upon the appointment of the arbitrator or if one party refuses to proceed, the Chairman of ICSID, at the request of either party and after consulting both parties as far as possible, has the power to appoint the arbitrator or arbitrators not yet appointed. In making such selection the Chairman must choose arbitrators from the panels maintained by the Centre, and he must make such appointment within ninety days after notice of registration of the request.

ICSID arbitrations are to be conducted according to such rules as the parties have agreed upon; however, to the extent that they have not so agreed, the tribunal is to apply ICSID's own rules. In arriving at its decision, the arbitral tribunal is required to apply the law agreed by the parties. Failing such agreement, the tribunal must apply the law of the State party to the dispute (unless that law calls for the application of some other law), as well as such rules of international law as may be applicable. The Convention also aims to create a system of dispute settlement, which excludes control or scrutiny by the domestic courts of any state party. Thus if a party who has agreed to ICSID arbitration nonetheless begins a suit in a domestic court, the court must stay the proceedings and refer the parties to ICSID arbitration. Similarly, if a party against whom a claim is brought in ICSID arbitration seeks to involve a court in reviewing ICSID procedure, such court ought to refrain from involving itself in that decision.

Within sixty days after the arbitral tribunal has been constituted, or such other period as the parties may agree, the tribunal meets for its first session. The arbitration proceedings are to be held at the seat of the Centre-Washington, D.C.-unless the parties have agreed to hold the proceedings at another place in accordance with Article 63 of the Convention. Moreover, the arbitration is to take place in private and remain secret. The arbitral proceedings consists of two distinct phases: a written procedure, followed by an oral one. During the written procedure, the parties file various pleadings, including a memorial by the requesting party, and a counter memorial by the other party.

The oral procedure consists of the hearing by the tribunal of the parties, their agents, witnesses, and experts. In hearing evidence, the tribunal is the judge of admissibility of any evidence adduced and of its probative value. If it deems necessary, the tribunal may at any stage of the proceeding call upon the parties to produce documents, witnesses and experts, and it may visit or conduct inquiries at any place connected with the dispute. The parties are obligated to co-operate with the tribunal in the production of evidence, and the tribunal may take formal note of the failure of a party to comply with such obligations.

The Award and Its Enforcement

When the parties have completed the presentation of their respective cases, the tribunal may declare the proceedings closed. Within thirty days after the closure of the proceedings, the tribunal should issue an

award; however, it may extend this period by an additional 30 days. In making its award, the tribunal decides questions by a majority vote of all of its members. The award must be in writing and must be signed by all members of the tribunal who voted for it. In addition to the names of the parties, the award contains a summary of the proceedings, a statement of the facts as found by the tribunal, the submissions of the parties, the decision of the tribunal on every question submitted to it, together with the reasons upon which the decision is based, and any decision of the tribunal regarding the costs of the proceedings.

An award of an ICSID arbitral tribunal is binding between the parties and is not subject to any appeal or any remedy. Under Article 54 of the Convention, each Contracting State is to recognize an ICSID award as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court of that state. It should be noted that the enforcement provisions of the ICSID Convention are stronger than those of the 1958 New York Convention on the Recognition and Enforcement of International Arbitral awards. Whereas the New York Convention contains certain specified defences to the enforcement of an arbitral award, including the defence of public policy, the Convention on settlement of Investment Disputes Between States and the Nationals of Other States makes no provision for such defences. An ICSID award by the terms of the Convention is to be recognised and enforced as if it were a final judgment of a court in the enforcing state.[16] In the event that a Contracting State fails to abide by or to comply with an ICSID award, the Convention specifically provides that the contracting state whose national is a party to that award has the right to seek diplomatic protection[17] and ultimately to bring an action against the offending state in the International Court of Justice.[18]

ICSID is important in that many international investment agreements include provision for submission to ICSID of investment disputes. In addition, many bilateral investment treaties also refer to ICSID in the event of an investment dispute. Generally speaking, such treaty provisions are of four types:

1) The first is a general statement that if the parties to the dispute so agree the dispute shall be referred to ICSID resolution. Such a provision, of course, requires that the necessary jurisdictional agreement be reached prior to submission to ICSID. The provision itself does not constitute such an agreement;

2) Certain treaties are somewhat stronger by stipulating that in the event of a dispute the state party will be receptive to a request by an injured investor to refer the dispute to ICSID;

3) Some treaties specifically contain an obligation by the host state to give its consent to ICSID arbitration at the request of the investor; and

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[16] Convention, at Art. 54.

[17] Convention , at Art. 27. See supra on 27.07

[18] Convention, at Art. 64

4) Several investment treaties include provisions, which expressly stipulate that the host state thereby agrees to ICSID conciliation or arbitration.

THE PERMANENT COURT OF ARBITRATION

The Permanent Court of Arbitration (PCA) is an international organisation offering a broad range of services for resolving disputes between States as well as disputes between States and private parties. These services include good offices and mediation, commissions of inquiry (fact-finding), conciliation and arbitration. Established at The Hague by intergovernmental agreement in 1899 (revised in 1907), the PCA is the oldest institution dedicated to resolving international disputes. It has its offices in the Peace Palace in The Hague, the Netherlands. The same building accommodates the International Court of Justice, The Hague Academy of International Law, and one of the most comprehensive and up-to-date international law libraries in the world.

The PCA has the status of a Permanent Observer at the United Nations General Assembly, and has a strong history of collaboration with the UN, reflecting the commitment of both organisations to the peaceful settlement of all types of international disputes.

For more information see the PCA website:
http://www.undp.org/missions/netherlands/c-arbitration.htm.

The Permanent Court of Arbitration was established by the Convention for the Pacific Settlement of International Disputes, concluded at the Hague in 1899 during the first Hague Peace Conference. The most important achievement of this Conference was the establishment of the Permanent Court of Arbitration: the first global mechanism for the settlement of inter-State disputes. The 1899 Convention was revised at the second Hague Peace Conference in 1907.

Members of the Court

The Court consists of a panel of international jurists designated by the States Parties to the Hague Convention of 1899 and/or 1907. From this panel the parties to a dispute may, if they so desire, select the members of a tribunal or commission to carry out the agreed-upon forum of dispute resolution. The "Members of the Court" consist of over 260 potential arbitrators, all distinguished lawyers appointed by States Parties to the Hague Conventions. The List of Members of the Court is published in the Annual Report of the Administrative Council.

International Bureau

The backbone of the PCA is its secretariat, which is known as the International Bureau. The International Bureau, headed by the Secretary-General, is responsible for the day to-day operations of the PCA, and serves as a registry in arbitrations conducted under its auspices. It also serves as its channel of communication (including communication between parties to

proceedings administered by the Bureau) and maintains custody of its archives. It has an international staff, and conducts business in English and French.

Pursuant to the rules on international commercial arbitration adopted by the United Nations Commission on International Trade Law (UNCITRAL) in 1976, the Secretary-General of the PCA is empowered to designate an "appointing authority" to break certain deadlocks that may arise in connection with the appointment and challenge of arbitrators in certain cases.

The International Bureau of the Court is available at all times to provide information and advice helpful to parties in resolving their disputes, even if the government of one or both of them is not a party to the Conventions of 1899 or 1907.

Administrative Council

The administrative affairs of the PCA are supervised by the Administrative Council, which consists of the diplomatic representatives of the States Parties to the Conventions accredited to the Netherlands. States continue to accede to the Convention of 1907, and are actively encouraged to do so, in order to strengthen the PCA and ensure that the largest possible number of States participate in determining its future course.

Diplomatic immunity

Arbitrators and Commissioners in the exercise of their duties outside their own countries, enjoy diplomatic privileges and immunities.

Procedural Rules

As it prepares to enter its second century, the PCA continues to welcome new challenges in meeting the changing needs of the international community. Originally established to deal only with disputes between States, the PCA responded as early as 1935 to the need for dispute resolution in disputes involving States and private parties. New optional rules, adopted in 1993 and 1994, provide a modern procedural framework for both types of arbitration. These rules are based closely on the UNCITRAL Arbitration Rules, thereby ensuring that they reflect modern arbitration practice and international consensus.

Optional Rules

In 1992, the Administrative Council authorised the Secretary-General to establish rules of procedure to be known as the 'Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between two States', including model clauses on submission of disputes to arbitration. These rules of procedure were patterned after the UNCITRAL Arbitration Rules, with the assistance of a panel of experts convened by the Secretary-General.

Optional Rules for Arbitrating Disputes between Two Parties of which only One is a State were adopted in 1993.

Comment

As can be seen from the above similar arbitral institutions, it is desirable to set up an arbitral institution specifically tailored to deal with the unique problem of debt. The rationale behind the setting up of the International Centre for the Settlement of Investment Disputes (ICSID) can be adopted in setting up the International Arbitration Court. The debt crisis can be better resolved by institutions specifically committed to such problems. In other words, the proposed International Arbitration Court will be a specialised court in matters of debt.

Apart from the above observations, it should be acknowledged that there are several other types of Arbitral institutions existing in the world today, such as the famous International Chamber of Commerce (ICC), the American Arbitration Association (AAA), the International Court of Arbitration (ICA), London Court of International Arbitration (LCIA), the Arab Chamber of Commerce (ACC), etc., all set up to satisfy particular needs. There is no reason why the proposed International Arbitration Court on debt can not be set up.

MODE OF ESTABLISHING THE COURT

It is desirable that the proposed International Arbitration Court be set up under the United Nations and by International Treaty. Members of the United Nations in Article 3 of the United Nations Charter have agreed to

> *"settle their international disputes by peaceful means in such a manner that international peace and security, and justice are not endangered."*

Again a General Assembly Resolution of 1970, after quoting Article 2 (3), of the UN Charter proclaim that:

> *"States shall accordingly seek early and just settlement of their international disputes by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their choice."*[19]

Establishing the proposed Court under the auspices of the United Nations, would be the most logical step. In this regard, many Conventions relating to arbitration have been enacted under the auspices of the United Nations. Some examples are:

a) The Protocol on Arbitration Clauses of 1923 (24-09-1923)

b) The Convention on the Execution of Foreign Arbitral Award of 1927 (26-09-1927)

c) The Convention on the Recognition and Enforcement of Foreign Arbitral (New York), 1958 (10-06-1958)

[19] General Assembly Declaration on principles of International Law Concerning Friendly Relations and Cooperation among states in accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), October 24, 1970. The resolution was adopted by the General Assembly without a vote. See also J.G. Merrills, International Dispute Settlement, 2nd Ed. Cambridge (Supra), at P2

d) The United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules (15-12-1976)

e) UNCITRAL Conciliation Rules (4-12-1980)

f) UNCITRAL Model Law on International Arbitration (21-06-1987)

g) UNCITRAL Notes on Organising Arbitral Proceedings (14-06-1996).

The following preamble to the UNCITRAL Arbitration Rules[20] embodied in Resolution 31/98 adopted by the General Assembly of the United Nations on 15 December, 1976 is clear testimony that the United Nations really encourages arbitration as a method of settling disputes:

"The General Assembly Recognising the value of arbitration as a method of settling disputes arising in the context of international commercial relations, Being convinced that the establishment of rules for ad hoc arbitration that are acceptable in countries with different legal, social and economic systems would significantly contribute to the development of harmonious international economic relations, Bearing in mind that the Arbitration Rules of the United Nations Commission on International Trade Law have been prepared after extensive consultation with arbitral institutions and centres of international commercial arbitration, Noting that the Arbitration Rules were adopted by the United Nations Commission on International Trade Law at its ninth session after due deliberation,

1 Recommends the use of the Arbitration Rules of the United Nations Commission on International Trade Law in the settlement of disputes arising in the context of international commercial relations, particularly by reference to the Arbitration Rules in commercial contracts,

2 Requests the Secretary-General to arrange for the widest possible distribution of the Arbitration Rules."

Having recommended the establishment of the court by International Treaty, it is essential to explain the meaning of a Treaty[21] and how it operates in international law. Treaties, are a more direct and formal method of international law creation. States transact a vast amount of work by using the device of the treaty, in circumstances which underline the paucity of international law procedures when compared with the many ways in which a person within a state's internal order may set up binding rights and obligations. For instance, wars will be terminated, disputes settled, territory acquired, special interests determined, alliances established and international organisations created all by means of treaties. No simpler method of reflecting the agreed objectives of states really exists and the international convention has to suffice both for straightforward bilateral agreements and complicated multilateral expressions of opinions. Thus, the concept of the treaty and how it operates becomes of paramount importance to the evolution of international law.

A treaty is basically an agreement between parties on the international scene. Although treaties may be concluded, or made, between states and international organisations, they are in essence concerned with

[20] 20 (Official Records of the General Assembly, Thirty-first Sessions, Supplement No. 17 (A)/31/17), Chap. V, sect. C.)
[21] See Malcolm N. shaw, International Law, 3rd Ed., Cambridge, at P560-562

relations between states. An International Convention on the Law of Treaties was signed in 1969 and came into force in 1980, while a Convention on Treaties between States and International Organisations was signed in 1986.

The 1969 Vienna Convention on the Law of Treaties partly reflects customary law and constitutes the basic framework for any discussion of the nature and characteristics of treaties.

The fundamental principle of treaty law is undoubtedly the proposition that treaties are binding upon the parties to them and must be performed in good faith. This rule is known in legal terms as *pacta sunt servanda* and is arguably the oldest principle of international law. It was re-affirmed in Article 26 of the 1969 Convention, and underlies every international agreement. It is not hard to see why this is so. In the absence of a certain minimum belief that states will perform their treaty obligations in good faith, there is no reason for countries to enter into such obligations with each other.

The term "treaty" itself is the one most used in the context of international agreements but there are a variety of names which can be, and sometimes are, used to express the same concept, such as protocol, act, charter, covenant, pact and concordat. They each refer to the same basic activity and the use of one term rather than another often signifies little more than a desire for variety of expression.

A treaty is defined in Article 2 (for the purpose of the Convention) as:

> *"an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."*

In other words, in addition to excluding agreements involving international organisations, the Convention does not cover agreements between states, which are to be governed by municipal law, such as a large number of commercial accords. This does not mean that such arrangements cannot be characterised as international agreements, or that they are invalid, merely because they are not within the purview of the 1969 Convention. Indeed, Article 3 stresses that international agreements between states and other subjects of international law or between two or more subjects of international law, or oral agreements do not lose their validity by being excluded from the framework of the Convention. One important requirement is that the parties to the treaty intend to create legal relations as between themselves by means of their agreement. This is logical since many agreements between states are merely statements of commonly held principles or objectives and are not intended to establish binding obligations.

There is no doubt that international commercial arbitration has gained worldwide acceptance as the normal means of resolving international commercial disputes and that international treaties on arbitration have been signed or adhered to with impressive success. A treaty establishing the proposed International Arbitration Court on debt would fit in this kind of scenario very well.

STRUCTURE OF THE COURT

As per the terms of reference for establishing such a court, there is no harm in the court being composed of not more than five arbitrators from both the Debtor and Creditor sides with an independent arbitrator to ensure impartiality. This kind of composition has been used in other arbitral tribunals already referred to above. In fact it is universally accepted that a tribunal should be composed of an uneven number of arbitrators to make it possible for decisions to be reached. However, such a court can also maintain a panel of arbitrators from which parties can choose from.

Like any other arbitral institution, the proposed court should have a secretariat to provide the necessary organisational support. Facilities such as court rooms, a library, consultation rooms etc., should also be provided. Supporting staff to provide technical support to arbitrators and parties as well as organise hearings and provide administrative support, should be employed.

JURISDICTION, PROCEDURE PARTIES, RULES AND SOURCES OF LAW

There are a lot of arbitration rules in existence which can be adopted for use by the Court with regard to procedural matters. The UNCITRAL Arbitration Rules for example, have been widely adopted by arbitral institutions worldwide. These rules regulate the procedure that may be used in arbitral proceedings. Parties to arbitral proceedings are also at liberty to agree on the rules to apply to the arbitration. Arbitration depends a lot on the agreement or consent of parties.

The proposed International Arbitration Court may also make its own rules for the conduct of proceedings before it. Some arbitral institutions formulate their own rules for use in proceedings. Like the UNCITRAL Rules, such rules may cover a variety of aspects including the mode of instituting proceedings, how to make applications before the court, time limits, filing of documents, mode of hearing matters etc.

Above all the main instrument to constitute the court, define its functions, structure and prescribe the jurisdiction, would be the enabling International Treaty. The International Treaty should be the primary source of law to define the jurisdiction and type of matters that may be adjudicated upon, the type of loans covered e.g. government loans or private loans guaranteed by the government, as well as parties who may institute legal proceedings. The treaty may be supplemented by rules of procedure adopted or made by the Court as aforesaid. Parties should however, remain free to decide on the type of law to apply to the dispute. International law will also generally apply to the proceedings.

It must also be emphasised that the treaty is the only document that can make it possible for debtors to get relief from the debt burden. Thus the treaty should be signed and ratified by as many Creditors as possible and especially those in the Paris Club. The treaty will only bind those Creditors who will sign the Treaty. This is why it is important to have such a treaty enacted under the auspices of the United Nations.

The treaty should be prepared in such a way that it takes care of the interests of both Creditors and Debtors. The treaty will inevitably also recognise the importance of giving effect to Loan Agreements made between Creditors and Debtors. It will also address issues of enforcement of such agreements, as well as recovery of doubtful or dubious debts, the writing off of some debts, rescheduling etc. The treaty and the rules should also give latitude to parties to negotiate, employ mediation or conciliation in the settlement of disputes.

The treaty and the rules may also provide for arbitration proceedings to be instituted by States, Non-Governmental organisations or even individuals. The idea of allowing both states and individuals to file claims or actions is justified from the human rights point of view. The government of a country and its peoples should be able to seek redress in this type of Court. After all, issues of debt directly affect the people of a country. Thus persons with a legitimate interest should have a right to institute proceedings in this court. As an example, the African Charter on Human and Peoples Rights[22] promulgated by the Organisation of African Unity (the predecessor to the African Union, provided for an African Commission comprised of 11 members whose aim was to monitor the implementation of the Charter. The Commission was made up of 11 members nominated by states parties to the Charter and then elected by the entire OAU Assembly. The Commission had inter alia the following main areas of responsibility:

a) ensuring the protection of the rights and duties covered under the African Charter,

b) examining complaints made by one state party against another, and

c) examining complaints submitted by individuals and non governmental organisations against states which have ratified the Charter.

Thus there is no harm in allowing States, Non-Governmental Organisations and individuals to file actions.

The treaty and the Court Rules should also address issues of legal costs for such proceedings especially where individuals are concerned. Such costs should be borne by States parties to the treaty who are finally adjudged to be at fault. Some individuals especially from poor countries may not afford high legal fees. Hence there must be provision for Legal Aid or financial assistance from a fund created by states parties to the Treaty.

To save costs the court should also be at liberty to sit at venues convenient to parties to litigation. However, parties should also be given the latitude to decide on the venue, as is usual in arbitration.

Like in any other type of arbitral proceedings, the parties to an action should be heard and should be given chance to adduce evidence and advance arguments concerning non-payment or unpayable dubious or illegitimate loans. Parties (Creditors or Debtors) could be represented by Advocates, Attorneys or lay representatives of their choice. Arbitrators would decide (render an award) if parties fail to reach agreement. The award should depend on evidence adduced, the agreement between the parties and rules of equity and fairness as well as International Law. The court should be

[22] See A Guide to the African Charter on Human & Peoples' Rights, An Amnesty International Publication (1991) at P13.

required to hear all the parties before it and should be informal in its procedure and should not adhere to legal technicalities like in the traditional court system.

The court would also be required to examine technical details and information relating to accounts, economics, budgets, availability of resources and impact of the debt on the nation and then make a decision also taking into account the concerns and interests of the Creditor country. The court should not assume the character of a lopsided and biased institution meant only to serve the interests of debtors as it will lose legitimacy, credibility and respect. It should be impartial, fair and resolve disputes according to the rule of law and respect for human rights.

STAY OF PROCEEDINGS

It is a common feature of court and arbitral proceedings for parties to apply for stay of proceedings pending disposal of arbitral proceedings. Under this power, repayment of a particular disputed loan may be frozen, stayed or suspended until the Court makes a decision. This power may be vested in the court by treaty and the Rules of the court. The idea is to maintain the status quo until an action is disposed of.

REMEDIES AND ENFORCEMENT OF AN AWARD

The court as an arbitral institution should be able to make decisions according to internationally accepted norms of justice, taking into account the interests of the parties and the agreement between the parties. The decision or award may include where appropriate debt rescheduling or cancellation in case of illegitimate, dubious debt. The court may also award compensation (reparations) to the parties depending on the facts of each particular case. However, these issues which are related to jurisdiction and the functions of the court should be specifically vested by the enabling treaty. State parties must agree by treaty to give such powers to this court.

The enforcement of any award or decision of the court should be done in accordance with the enabling treaty or existing treaties on the enforcement of arbitral awards. In particular enforcement mechanisms and powers available under the International Centre for Settlement of Investment Disputes (ICSID) constituted under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, may be adopted and embodied in the treaty. Articles *53* to *55* of the said Convention which are on Recognition and Enforcement of Awards provide as follows:

"Article 53

1 The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.

2 For the purposes of this Section, "award" shall include any decision interpreting, revising or annulling such award pursuant to Articles 50, 51 or 52.

Article 54

1 Each Contracting State shall recognise an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.

2 A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General. Each Contracting State shall notify the Secretary-General of the designation of the competent court or other authority for this purpose and of any subsequent change in such designation.

3 Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.

Article 55

Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution."

For ease of reference, the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, is attached hereto. The proposed court can only succeed if the state parties to it are ready and willing to respect it and utilise it.

IMPLICATION OF THE PROPOSED ARBITRATION MECHANISM

At the moment there is no alternative dispute settlement mechanism, which addresses the complex issues of debt. All the existing arbitral institutions may only resolve disputes according to the agreement between parties and rules relating to International Commercial Arbitration. An institution created by treaty can be clothed with special powers to deal with any new situation.

This kind of institution would continue to be neutral depending on the calibre of arbitrators, their skills and their backgrounds. The treaty should provide for appointment of arbitrators who are impartial and professionally competent. The parties should also have a say in the type of arbitrators appointed. If there is any doubt as to the partiality of any arbitrator the parties should challenge his appointment and there must be provision in the Treaty and the Court Rules for such a challenge against an arbitrator. It must be emphasised that the neutrality and impartiality of any arbitral tribunal depends on the calibre and integrity of arbitrators who constitute it. Arbitrators who are properly trained and have judicial capacity

will only decide cases according to the law and accepted norms of justice. They will not be swayed by the financial standing of parties.

Since international arbitration thrives on the will and consent of parties, which may be enshrined in the treaty, there is no reason why development co-operation between North and South should be effected. This is particularly so, if a fair treaty is put in place through a forum like the United Nations. However, if the treaty is ratified only by a few States, then there will certainly be apprehension in the lending market. Naturally, Lenders or Creditors who prefer to dictate terms will view the treaty and powers of the court suspiciously and may want to operate outside treaty. This may have a negative impact on the flow of capital and resources to the less developed countries.

Since arbitration, mediation and conciliation depend on the consent of parties, the position of civil Society Organisations and third parties need to be properly defined, in the enabling treaty. The role of third parties in this context need to be properly debated during the treaty making process.

Creditors lend money to poor countries on terms which ensure some returns to the Creditors. The Creditors have their own business interests to protect as well and this is a fact. Thus any over-politicisation of what may be considered as commercial debts may alienate the Creditors from those who badly need resources (Debtors). Be that as it may, confidence may be instilled by the setting up of credible institutions for the settlement of disputes, which are acceptable to all. This is how institutions like ICSID and the Permanent Court of Arbitration have come to be accepted. Member states of the United Nations have come to accept these institutions. In other words it is important that states have confidence in institutions they are going to use. Certainly Member States of the United Nations can not have confidence in biased institutions which deliver purely political judgments. There must be respect for the rule of law and norms of justice.

Once state parties to the treaty gain confidence in the performance of the Court, they will respect its decisions, whether or not they win or lose cases. Again the States, which will sign and ratify the treaty will bind themselves to accept as final and binding decisions or awards rendered by the court. This is the practice adopted in respect of other international treaties. State Parties to treaties must bind themselves to respect provisions of the treaty and institutions created under it. To give an example, members of the United Nations have bound themselves to accept decisions of the International Court of Justice (ICJ) as binding and final. Under Article 60 of the Statute of the ICJ, decisions or Judgments of the Court are final and not subject to appeal. By virtue of Article 2 of the Statute of the ICJ, the ICJ is composed of 15 members:

"elected regardless of their nationality, from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognised competence in international law."

The appointment of competent jurists to sit either as Judges or arbitrators can instil confidence in the parties.

Of course if the suggested arbitration mechanisms are undermined or inoperative and Creditors feel that the money they lend is insecure, they will

withdraw lending facilities or even apply sanctions to force Debtors to pay. Since Creditors operate in cartels, they can easily do this. Creditors can only enter into what they consider to be fair from their own point of view. If they are suspicious of the suggested mechanisms, debt cancellation, rescheduling and fair treatment of Debtors will be a pipe dream.

The United Nations depends on the will and consent of state parties to its Charter. Thus if a Treaty introducing the International Arbitration Court on Debt is enacted under the UN, the role of the UN as a key player in the amicable settlement of disputes and democratic global governance will be enhanced. Such a Treaty will be an addition to the many Conventions that have been enacted in the area of arbitration. Arbitration is not a new concept to the United Nations.

The establishment of a unique and specialised court in issues of debt will ensure that debt problems are given due attention, and addressed in a professional, technical and fair manner. There will also be proper understanding of the problem. The issue of debt can only be properly dealt with by experts through an orderly process and forum. The issue of debt is so serious that there must be concerted efforts to solve it. With proper attention hopes for debt cancellation, rescheduling or reduction in favour of the south countries, are there.

RECOVERY OF MONEY STOLEN BY LEADERS AND PUT IN FOREIGN BANKS

As pointed out earlier, arbitration thrives on the consent and agreement of parties. Again rules of natural justice which entail hearing of parties to arbitral proceedings apply. Thus an arbitral decision or award which excludes parties from a hearing or is deliberately made in the absence of a party is a nullity. Thus according to accepted norms of justice an order can only be made against a person only if, such a person is a party to the proceedings and he has been heard. Parties who are affected by proceedings should be joined to these legal proceedings and should be afforded an opportunity to present their cases or defend themselves either by themselves in person or through their legal representatives.

To make an order against a politician or leader who has stolen money, the arbitral institution must conduct a trial and even hear the politician or leader concerned. A problem however, may arise if the leader or politician can not be found. Thus it is better to leave these problems to the criminal law courts.

It is submitted that there are adequate criminal laws for the arrest and recovery of property of fugitive Political Leaders. Stealing money and banking the same in a foreign bank is a serious criminal offence (felony) which is also subject to extradition laws. What should instead be encouraged is for States to enter into extradition treaties with other States and such treaties should include provisions for recovering property feloniously obtained. Such property can be returned to countries where it was stolen. This position is accepted internationally.

The United Nations in fact encourages states to enter into extradition treaties as a way of fighting crime. A copy of the United Nations

Model Extradition Treaty which includes provisions for recovery of stolen property is attached hereto. (see Article 13 thereof)

Parties must be encouraged to utilise the existing criminal laws rather than resort to arbitration which is a civil process and thus not ideal for such a purpose. The ultimate recovery of stolen money should depend on the application of the criminal laws relating e.g. to money laundering, theft, fraud and unlawful externalisation of money etc. Thus conventional arbitration being a civil process may not be used to enforce criminal laws. The most ideal way is therefore to deal with the recovery of stolen money through existing criminal laws. Organisations like International Police (Interpol), can be strengthened for this purpose.

CONCLUSION

The establishment of an International Criminal Court on debt is long over due. The problem of debt need innovative ways of tackling. Existing mechanisms do not adequately address the problem debt. The court should however, be used strictly for the settlement of civil disputes and not for enforcement of criminal laws.