The African Debt Crisis and the Perils of International Arbitration

By:

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In 2013 and 2014, three Mozambican state entities borrowed over two billion US dollars to finance a fishing and maritime project. Over one billion of the loans, however, were kept secret – both from the public and from the Parliament, which under Mozambique's law was required to approve such borrowing. When the secret loans were eventually revealed, an independent audit found that hundreds of millions of dollars were unaccounted for; United States prosecutors alleged that Mozambican officials conspired with bankers to steal the cash; and the International Monetary Fund (IMF) cut off support to the African nation, sending its currency and economy into collapse.

In a pair of decisions issued in 2019 and 2020, Mozambique's constitutional council declared the secret debt illegal. This might have been a boon to the country's effort to restructure its debt and reset its economy. But the debt contracts at issue were not governed by Mozambican law or subject to Mozambique's judicial system. They were instead subject to English law and English courts. Moreover, the supply contracts for the supposed maritime

project – which according to Mozambique were central to the fraudulent scheme – were subject to Swiss law and a dispute settlement procedure known as international arbitration. The international tribunals constituted according to this procedure will play a key role in determining Mozambique's liability in the secret debt scandal. This raises the broader question: *What role, if any, should the largely private procedure of international arbitration have in resolving public debt disputes?*

This article applies a cost-benefit analysis and concludes that international arbitration has little to no role to play in such disputes, even assuming completely legal and legitimate debt. Notably, this conclusion is not predicated on the criticism that is commonly directed toward international investment arbitration – including that it is biased against States or impedes regulation in the public interest. Instead, it assesses international arbitration on its own terms. It accepts that international arbitration may present certain benefits with respect to other transactions – including strengthened enforcement, confidentiality, and finality. But it concludes that those same benefits become liabilities in the context of sovereign debt.

The import of this conclusion extends beyond Mozambique's present dispute. Even before the COVID-19 pandemic, several countries in sub-Saharan Africa were in a state of debt distress, including Eritrea, the Gambia, Mozambique, the Republic of Congo, Somalia, Sudan, South Sudan, and Zimbabwe. The pandemic has "dramatically" worsened that condition. On the continent, only Botswana has a credit rating above junk status. Annual interest payments now surpass public health expenditures in Angola, Ghana, Gabon and Zambia – the latter of which has already defaulted on its debt. An abundance of liquidity generated by central banks, together with interventions by the IMF and the G20 Nations, have to-date staved off further defaults. But there is growing concern that the tide could change quickly, and that a new wave of debt crises could be on the horizon.

It may be too late for States to avoid international arbitration proceedings that they have already agreed to regarding existing debt. But they may still avoid international arbitration with respect to future debt issued as part of a restructuring or refinancing. This article explains why and how they should do so.

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