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TERMS OF REFERENCE

DEVELOPMENT OF POSITION PAPER: AMIDST THE DEBT CRISIS CAN THE ARBITRATION PROCESS HELP?

1.0 BACKGROUND

1.1 Introduction

Today, Zambia is classified as a "high risk" case based on the Debt Sustainability Analysis (DSA) models espoused by the Bretton woods institutions. This means that Zambia's debts have once again reached "unsustainable" levels. Unsustainability entails that (a) the country is not able to meet its obligations when they fall due and (b) when it does, this obligation is undertaken as the expense of critical social, economic and financial national public obligations – "compromising national development." For instance, almost a hundred percent (100%) of locally mobilized resources are used to service debts while the ratio of Debt-to-GDP by the end of 2020 stood at 104% instead of the standard threshold of thirty-five percent (35%) as set for Zambia by the International Monetary Fund (IMF)[1].

In addition, the country has failed consistently to accumulate national reserves that meet a six (6) months cover as stipulated internationally. Instead, national reserves have been swinging between two (2) to less than four (4) in the last four (4) years. To make matters worse, economic growth has been hovering in the ranges of two (2) to three (3) percent instead of the expected eight percent (8%) to ten percent (10%) in the last five (5) years. Inflation has now reached two digits at 21.5% while the value of the kwacha has continued to deteriorate at a fast rate. Zambia's precarious debt, financial and economic situation has been worsened by the outbreak of the coronavirus pandemic. For example, the outbreak has created a financing gap of at least US$1.09b in 2020 - equivalent to as much as forty (40) percent of planned revenue.

By November 2020, Zambia joined the list of countries that defaulted on debts – the others being - Ecuador, Lebanon, Belize, Suriname and Argentina. As a result of this condition and the purpose to restore debt sustainability and fiscal stability, the Government of Zambia embarked upon a process of national debt restructuring process in May 2020 – A process understood as a "liability management exercise" which led the country to a point where the Government can request for relief and cancellation.

[1] MOF. 2020. "Presentation to Creditors", Ministry of Finance (MOF) of the Republic of Zambia, September

1.2 Background Information

The basic purpose of arbitration processes associated with indebtedness especially of national nature is premised on the essentiality of an independent international arbitration tribunal or a “Sovereign Debt Tribunal” required for the resolution of sovereign debt restructuring disputes. This type of tribunal has been used as a quicker mechanism to debt restructuring than those provided under the restructuring approaches. Briefly put, mechanisms of fair arbitration on sovereign debt have mainly been concerned with “the need to balance the interests of creditors and sovereign debtors fairly.”

The core parties in such a tribunal are; the “sovereign” or state (creditors) and lenders. The two major features of such a Tribunal are (a) should be an independent, standing body (b) should spearheaded by experts in sovereign finance and related matters to serve the role of arbitration and (c) the importance of ensuring that this expertise is independent, neutral, certain and predictable to the parties

Other basic prerequisite include’

- Agreement between the sovereign and the lender on the relevant documentation to resolve any restricting disputes
- Clarity and specificity of the types of issues of disputes; these might include for example, verification of claims to broader issues such as debt, sustainability and feasibility of proposed restricting plan to be arbitrated over
- Development of restructuring plan jointly by Creditors and Debtors

2.0 PROBLEM STATEMENT

History shows that Zambia’s debt soared to an extent that in the late 1990s, it became almost impossible for Zambia to pay back the loans. This led to the classification of the country as a Highly Indebted Poor Country (HIPC) with a fragile state of the economy. It was during this period that the Jesuit Centre for Theological reflection working together with the Catholic Commission for Justice and Peace (CCJP) hosted a nationwide Jubilee Debt Campaign for Zambia’s debt cancellation, which resulted in Zambia reaching the HIPC completion point. Zambia’s debt significantly reduced from over US$7.1 billion in 2004 to US$502 million in 2006. Subsequently, Zambia returned to an upward growth trajectory that saw the nation classified by the World Bank as a lower middle-income country in 2011 after years of robust growth in the early 2000s. Despite having benefited from the HIPC debt relief in 2005 Zambia has borrowed heavily since 2012 and is now in high risk of debt distress. In the years leading to the build-up of Zambia’s debt crisis, it was very clear that the international financial system created more space that provided greater incentives or put pressure on developing countries such as Zambia to borrow from commercial markets and private financial sources rather than the conventional bilateral and multilateral lending institutions. This meant that the space for such countries to borrow from sources that allowed for greater breathing space, debt restructuring and debt relief was reduced.

During this period, there was more emphasis placed on developing countries to borrow more. Borrowing needs apart from space created by the international financial markets, included a desire by government to embark on infrastructure development including a new terminal for the Lusaka airport, roads, energy and telecommunications. The basic thinking is that infrastructure development is necessary for countries as it makes trade and travel easier, and consequently sound economic growth that would enable the repayment of such loans. For Zambia however, this became problematic given the lack of corresponding emphasis on the need to put in place sufficient interventions to prevent the worsening or collapse of their fragile economies. Unsurprisingly, the debt crisis has emerged perilously largely because it is anchored on failing and fragile economies and compounded by the COVID-19 pandemic. Such a case demands that national debt “restructuring” processes are founded on principles of equal and broad participation, answerability, fairness and justice.

3.0 JUSTIFICATION OF FAIR ARBITRATION FOR ZAMBIA

The relevance of this process to Zambia springs from the need to advocate for a necessary reform of the international financial system. There is an urgent need to ensure that this system embodies a fair arbitration process for debt relief and debt restructuring. In particular, it is important to ensure that future debt relations are rearranged in the interests of those who will carry the main burden of indebtedness: the poor and impoverished people of the debtor countries. Compliance to these imperatives would ultimately lead to;

- Moderation of conditionality to support national development aspirations including economic growth.
- Accountability on the part of the lenders and sovereign states in cases of unsustainable debt situations.
- Adoption and use of ‘Responsible Rules” in the Creditor-debtor relations

4.0 RESTRUCTURING DEBT FOR ZAMBIA – FOR WHO? BY WHO?

The Government of Zambia, described the process of debt restructuring” as a “liability management exercise” of all Zambia external debt standing at almost US$12billion and that this process will entail “engaging with all lenders with the view to restructure the loans.” The restructuring will involve contracted debt but not yet received the money (pipe loans), re-scoping through cancelling or reducing the extent of some projects especially non-priority projects. It is hoped that this process will result in cutting off future debt by as much as $3.1 billion, reducing the total $7 billion of contracted but undisbursed debt by about $5 billion. Based on this, the following are the key concerns worthy of note with relation to subjecting Zambia’s current debt crisis to the arbitration discourse in general:

- ***Current and new loans will worsen the debt crisis:*** There is a need for a proper balance among the following - new resources, debt standstills, debt relief, debt servicing and debt restructuring. It is particularly essential that the following development challenges are put at the centre of restructuring processes – fragility and low economic performance/outcomes, poverty, inequality and social deprivation on one hand and debt service obligations on the other. Failure to secure a healthy imbalance will fuel the pressure for more borrowing by debtor Countries such as Zambia

- ***Questions on governance factor:*** regarding national debt management on one hand and debt relief and restructuring process on the other - the key role of debt relief and debt restructuring is to liberate resources for economic development
- ***The participation of private creditors***: More efforts are needed to guarantee fair treatment between creditors and debtors. This is especially important because Zambia's debts will be difficult to restructure given the dominance of private commercial loans from China and the Eurobonds. It is very important to recognize the debtors at the same level as and equal to creditors if restructuring processes are to score success in debtor Countries.
- ***Insufficiency of the Current International Financial Architecture:*** The arena is still characterized by the absence of enhanced approaches to debt restructuring mechanisms, although Zambia has embarked upon a debt restructuring exercise and called for debt relief and cancellation. The international financial mechanisms are still characterized by asymmetrical relations participation from the debtors' side. Overcoming creditor dominance and lack of transparency of debt negotiations remains imperative in providing debtor governments a say in the decision making processes concerning debts.

Further to the aforementioned JCTR, seek to engage a consultant to conduct tasks as specified in section 5) below:

5.0 SCOPE OF WORK

The consultant is addressing key items around a fair arbitration process to feed into follow on actions centred around two main sub activities i.e.:

a) Produce a well- researched and comprehensive position paper on fair arbitration on behalf of the Zambia CSO Debt Alliance arbitration mechanism.

b) Support the Zambia CSO Debt Alliance to engage with international creditors (bilateral and multilateral) on the adoption of fair international arbitration processes; lobby meetings with Zambia's creditors at national level and design sensitisation activities on the importance of the fair arbitration processes.

The Consultant will in addition to the desk review need to conduct Key Informant Interviews (KIIs) with stakeholders such as legal experts, Budget Office, Cabinet Office as well as international organisations among others with considerable experience in the debt discourse.

c) The Fair Arbitration Position Paper will therefore focus on an analysis that addresses the following research areas and questions:

1. The Consultant is to provide a fair understanding of what arbitration is, presenting the history of fair arbitration at the national, regional and international levels with regards developing country debt. Specifically, there will be need to document Zambia's experiences in the past with regards to debt restructuring especially that linked to or related to fair arbitration
2. Highlighting in sufficient detail why this focus on fair arbitration becomes timely and establish its linkage to the current national, regional and global debt discourse. Analysis to be considered under the context of Zambia's application for an IMF Extended Credit Facility programme and subsequent application for treatment under the G20 common framework that is designed to ensure the participation of creditors with fair burden sharing.
3. Ascertain and map key CSO advocacy avenues and challenges (successes and hurdles) over the years taking cognizance of work that has been undertaken by international CSOs like Jubilee USA UK, Germany among others.
4. Conduct a mapping of key networks that the CSO Debt Alliance can target to leverage quick wins in fair arbitration advocacy by leveraging on international CSOs as an information resource.
5. Outline recommendation of advocacy messages around fair arbitration with clear messaging targeting engagement with international creditors (bilateral and multilateral) as well as national level authorities.
6. Lastly, the consultant will be expected to provide general policy recommendations that can be made to enhance Zambia's sustainable debt management in the context of debt restructuring and debt payment defaults.

6.0 AUDIENCE AND USE

The position paper will inform project objectives but additionally it is anticipated that the position paper will be used for wider public consumption through advocacy to create an impetus for fair debt arbitration as an option in the restructuring process.

7.0 DELIVERABLES AND PROPOSED TIMELINES

- The consultant will work under the supervision of the Social and Economic Development Programme Manager.
- The consultancy is for a duration of fifteen (15) working days, to run through the period **12th July to 30th July 2021.**
- Submit the first draft for review and the draft will address itself to points 1 to 6 of clause 5 c) above.
- Submit final draft position paper (with clear recommendations on the targets for advocacy, advocacy messages as well as the advocacy strategies to undertake in demanding for a fair debt arbitration process at national and international level) after incorporating comments.
- Availability to participate in further follow-on activities if need arises .

- Support to commence the process of creating a repository with key reference documents on Analysis on Fair Arbitration - Theory and Practice, Best Practices and Challenges of undertaking the Process among other things.

8.0 CONSULTANT REQUIREMENTS

The Consultant will need to demonstrate:

- At least 10 years of experience working in the public financial management and debt spectrum.
- Demonstrate how legal expertise will be incorporated in strengthening the position paper on fair arbitration
- At least a university master's degree in relevant educational background such as Economics, Policy Analysis, International Development, Statistics, Public Sector Economics, Governance and/or Law, Development Studies, in other related fields. A PhD degree is an added advantage.
- Deep understanding of issues pertaining to government finance (revenue collection and expenditures) and legal benchmarks.
- Understanding of the role of communication in sensitisation and advocacy work with strong speaking, and applied training skills.
- Demonstrated strong writing skills and ability to produce high quality research work as evidenced by publications of relevant studies, reports and/or articles. Proven track record of previous development of achievements with the Government, NGOs and Donor Agencies is desirable.

9.0 EXPRESSION OF INTEREST

All expressions of interest (of no more than eight pages) should include:

1. **Technical Proposal:** This should include a brief profile about the consultant with particular emphasis on previous experience in this kind of work; the consultants understanding of the Terms of Reference, proposed work plan (timelines) and tasks to be accomplished etc.
2. **Financial Proposal**: This should provide cost estimates for the consultancy (fees based on person's days for the assignment). **Tax obligations should be included**.

10.0 SUBMISSION OF EXPRESSION OF INTEREST

- All expressions of interest should be addressed to:

  The Executive Director
  Jesuit Centre for Theological Reflection
  P.O. Box 37774
  Lusaka

- The deadline for submission of the expressions of interest is **Friday 2nd July, 2021.** In view of COVID-19 health concerns, all expressions of interest should be submitted electronically to

jctr.office@gmail.com and admin@jctr.org.zm (there is need to ensure that both email addresses are included to the expression of interest correspondence)

For further details, contact us on (+260 211 290 410 or +260 955 290 410)