



ADHR response to the AFRODAD Public Debt Toolkit

Friday 22 July 2022

AFRODAD hosted a webinar on Friday, 22nd July 2022 inviting Lyla Latif, the Chair of CFS -ADHR to give comments on its Public Debt Toolkit. The webinar was also attended by Bosire Nyamori and ADHR researchers: Winnie Gloria Nkatha and Winnie Kemunto. The ADHR response was towards facilitating debt transparency. During the webinar, ADHR highlighted the following legal issues and suggested some recommendations:

Legal Issues & recommendations:

At the point of debt negotiations with private lenders, it is not always possible to provide all information to the public - firstly because of the privity of contract - a legal principle that the contractual terms are only for the parties to a contract and secondly, there may be material adverse clauses (MAC) that are being addressed between states - it is important for non-state actors to be involved at each phase of the debt contracting process- in so far as transparency relating to the debt process is concerned, AFRODAD should reflect on the need to have a minimum mandatory disclosure requirement for debt transactions with private lenders and reporting obligations at each stage of the debt contracting process.

For ADHR this fosters accountability to ensure that the contract that delivers the debt proceeds are not subject to assignment to another party in the event the debt is at risk. ADHR thinks it is very important to have minimum mandatory disclosure requirements to prevent hedging the debt. Having this will mitigate the challenges that the toolkit already identifies.

ADHR proposes the following specific indicators to be part of mandatory minimum disclosure and reporting requirements:

1. Clarity on the complete range of actors involved -esp. when borrowing from private lenders - you may have a contract with a private lender who is a subsidiary to related hedge funds and may include assignment clauses. There can be IFF risks here as well as vulture activity.
2. Incentives should be clear, where given - esp. where the contractual provisions allow for debt-to-equity swaps since these can be abused.
3. The restructuring process that is envisaged. This is very helpful to mitigate against risk and ensuring all parties are treated fairly and equitably.

4. Other than the amount owed - the collateral or other security arrangement offered to secure the debt must be disclosed.
5. The identity of the guarantor and its relationship to the sovereign debtor must be disclosed.
6. The terms of subordination must be disclosed
7. Any collective action clauses that are contemplated must be disclosed.

The Committee of Fiscal Studies (CFS) is University of Nairobi's premier research think tank. Its objective is to influence a fair, sustainable and equitable social and economic future supported by a responsive fiscal system. CFS backs a people first political vision related to informing fiscal law and policy. In 2022, OSIEA funded CFS to set up the African Debt and Human Rights (ADHR) research cluster to support research, clarity and participation in fiscal policy making on debt and human rights. These observations are shared as part of ADHR's broader aims.